

Education Newsletter, October 2018

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The Jury is In: Districts Note School Climate Benefits of Youth Courts

By: William J. Zee and Kalani E. Linnell

Related Practice Area: Education

Related Industry: Education

Youth courts offer an alternative to traditional school discipline and juvenile justice programs based on restorative justice principles. In contrast to the lasting negative effects of retributive and punitive discipline systems, evidence shows that restorative practices are more likely to strengthen communities by resolving conflict, reintegrating offenders and decreasing recidivism rates. Youth courts, in particular, replace adult-imposed discipline with peer-imposed solutions. They are designed to harness the power of positive peer pressure and social expectations to transform students from passive punishment recipients into active community members who are accountable to one another and the community itself. A youth court participant revealed in an anonymous survey at a Chester County middle school that youth court "helps me solve problems instead of punishing people."

The hallmark feature of a youth court is peer participation with varying levels of adult support, supervision and training. Most youth courts restrict participation to students who have admitted wrong-doing. Peer-imposed sanctions of youth courts are appropriate where the offense is a minor school-based infraction, such as cheating, tardiness, truancy, cell phone use or disrespecting authority, fellow students or property. Punishments range from apologies, research essays, and community service to counseling and jury duty. Youth courts typically are not utilized for violent offenses or unlawful behavior that requires referral to law enforcement.

The offenders in youth court have admitted guilt and are looking to their peers to help repair the harm. In many youth courts, the jurors and other student participants are past youth court offenders. Their training teaches them that the "law isn't as much argument as it is getting to the cause of why something happened." Students observe that the

disposition serves a complex purpose. According to participants in that Chester County survey, unlike traditional punishment, peer sanctions "don't hurt [the offender] more than they already are." The students have noted that dispositions decrease the potential for recidivism. One student in the survey observed that "without a disposition, the respondent would just do the same thing again."

In contrast, adults impose punitive punishments in an attempt to control student behavior in traditional school discipline and juvenile justice programs. These tactics involve a series of escalating exclusionary punishments that often fail to address underlying causes of misbehavior. Students who are subject to discipline are more likely to be truant, less likely to graduate, and highly likely to reoffend. In addition to negative outcomes for individual students, extreme punishments tend to disproportionately affect students of color and students with disabilities.

Traditional models of discipline are not designed to address the environmental and systemic issues underlying student misbehavior. As a result, some traditional school discipline and juvenile justice programs can negatively affect school climate and in extreme cases can stifle educational growth and perpetuate injustice and inequality.. Such toxic effects bleed into the community while restorative programs, including youth courts, offer an opportunity for positive growth.

Youth courts combat the problems associated with traditional disciplinary programs and the "school to prison pipeline" through strategies that treat, rebuild and empower the offender, the victim, and the community. Student offenders are given a voice and encouraged to tell their story to peers who better relate to their experience. Punishments are designed to restore damage inflicted to the community as well as any individual victims. Providing students with an opportunity to be heard helps repair relationships between teachers and students by allowing teachers and students to work together to understand the other party's perspective. The positive effects are measurable: graduation rates and academic outcomes improve for students exposed to youth courts while recidivism declines. An alumni from the surveyed Chester County youth court, who became involved with a youth court after fighting, described being on the same path as his older sibling who faced "jail time...then continued to live their life as if it was worth little." After going through youth court as a respondent and then a participant, he became a leader in his school and attended college. He credits youth court, a "program that is designed to help youth make better decisions in life."

Schools that create positive communities by incorporating restorative justice techniques can counteract the negative impacts associated with traditional disciplinary programs. Youth courts empower students by providing opportunities for meaningful participation in their community and training students how to be good citizens. Not only have such approaches proven more effective than traditional disciplinary programs at modifying student behavior, but they also provide valuable teaching opportunities through emphasis on civil discourse and effective communication.

Although no school discipline approach is a panacea, restorative practice initiatives like youth courts offer a promising alternative to addressing harm in the school setting through methods that reinforce rather than ignore the educational mission.

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Trauma-Informed and Restorative Practices Bolster Social and Emotional Learning Initiatives

By: William J. Zee

Related Practice Area: Education

Related Industry: Education

The prevalence of trauma and adverse childhood experiences has been at the forefront of a growing trend for school districts to gain a better understanding of children's behavior by becoming trauma-informed.

Trauma can compromise all areas of childhood development, including identity development, cognitive processing, body integrity, ability to manage behavior, affect tolerance, spiritual and moral development, and ability to trust self and others. The [Adverse Childhood Experiences \(ACEs\) Study](#) surveyed over 17,000 adults, asking 10 questions regarding their childhood experiences with abuse, neglect and household dysfunction. Roughly 70 percent of participants experienced at least one type of trauma, and more than one-in-five participants reported having three or more ACEs. It became clear through the study that trauma and traumatic-related events resonate with children and can influence their behaviors throughout their childhood and into their adult life.

To become trauma-informed, school districts focus on connecting and co-regulating, safety between students and staff, consistency, predictability and providing emotional space to students. According to the Substance Abuse and Mental Health Services administration, a [trauma-informed school district](#) "**realizes** the widespread impact of trauma and understands potential paths for recovery; **recognizes** the signs and symptoms of trauma in clients, families, staff, and others involved with the system; **responds** by fully integrating knowledge about trauma into policies, procedures, and practices; and seeks to actively **resist re-traumatization**."

In school, students who have experienced trauma may react to situations and stimulations in a non-conventional manner, such as portraying aggression, defiance, an inability to manage emotions, hyperactivity and bullying other students. Depending on the severity, these behaviors have often led to punitive disciplinary measures, such as suspension and expulsion, taken by school districts. Zero-tolerance policies and punitive disciplinary measures have often lead to students having a cycle of disengagement, increased classroom disruptions, absenteeism, truancy and drop-out rates. In December 2016, the U.S. Department of Education issued [The Continuing Need to Rethink Discipline report](#), which concluded that suspension and expulsion practices delay and interfere with the process of identifying root causes of behavior.

School districts have begun exploring a balance of disciplinary responses for non-violent offenses and behavioral supports, as well as engaging students in a more practical resolution designed to support the student's emotional and social needs. This is where restorative practices come in to play since they shift focus away from punitive disciplinary measures and place the focus on repairing and transforming conflict. Restorative practices build and maintain healthy interpersonal relationships, addressing restitution and creating a just, equitable and safe learning environment for all students.

Restorative practices can have an informal or a formal approach. An informal approach embraces a restorative mindset which puts relationships and trust at the center of communications and repairing harm, and conducting circles for the students to have an open dialogue with each other and encourages participants to work together for a solution. A formal approach may involve mediation, peer conferencing or participation in youth courts. Because restorative practices emphasize the importance of relationships in the context of a community, formal approaches are most effective when introduced alongside informal approaches. Informal practices set the stage by

strengthening relationships and promoting reflectiveness. Formal practices, which pre-suppose the existence of social relationships, show individuals the harmfulness of their behavior and provide avenues for repairing relationships and preventing future harm. Youth courts, which replace adult imposed discipline with peer imposed solutions, are one example of a formal approach to school-based restorative practice.

There are multiple benefits of school districts using restorative practices:

- An instructional component interwoven into all aspects of school culture to create supportive environment
- It doesn't eliminate consequences resulting from offenses but embeds procedures designed to repair conflict and heal relationships as the primary goal
- It helps improve safety by preventing future harm
- It offers alternatives to suspension and expulsion

Barley Snyder has worked with numerous school districts and entities on becoming more trauma-informed. For more information on how the firm can help your district or school, feel free to [reach out to us](#).

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Sexual Misconduct Allegations: Considerations in an Evolving Environment

By: David M. Walker

Related Practice Area: Education

Related Industry: Education

The national dialogue surrounding sexual harassment and sexual assault continues to expand. No longer is the conversation limited to disgraced Hollywood elites or privileged college students. Rather, the egregious conduct and failed responses has come to light in nearly every corner of our society - including education agencies.

In addition to moral obligations, education agencies in Pennsylvania surely have a legal obligation to appropriately investigate and effectively respond to any complaint or allegation of sexual misconduct. Whether it is an employee or student who makes such a complaint, a failure to investigate and respond can lead to significant liability.

A failure to investigate, remedy or protect against sexual misconduct could expose an education agency to a civil rights claim. Additional liability is possible if the student has a 504 Plan and the alleged sexual misconduct prevents them from accessing their education. And if the student has an individualized education program, it is possible that the alleged sexual misconduct could contribute to a denial of the federally mandated free appropriate public education.

When it comes to employees, educational agencies could face claims of employment discrimination under state and federal statutes, including civil rights claims.

What's changed?

In September 2017, the U.S. Department of Education Office for Civil Rights issued an interim document titled "[Q&A on Campus Sexual Misconduct](#)." This document rescinded Obama-era guidance for addressing sexual assault under Title IX and established new standards for education agencies when addressing and responding to complaints of sexual misconduct. The Q&A confirmed that when a school knows or reasonably

should know of an incident of sexual misconduct it "must take steps to understand what occurred and to respond appropriately." However, it also stated that an agency must engage in a prompt and "equitable" investigation. While the Q&A itself is significant, the U.S. Department of Education is moving forward with rulemaking to solidify the responsibilities of education agencies when investigating and responding to allegations of sexual misconduct.

Another change came this past February when the U.S. Department of Justice announced a [workplace enforcement initiative](#) aimed at eradicating sexual harassment and sexual misconduct occurring in state and local government workplaces. As part of this initiative, the department recently filed a [lawsuit against a school district in Michigan](#) alleging that the district did not take sufficient steps to prevent unlawful sexual harassment.

What should we do?

Now is the time to review all policies and procedures relating to the reporting and investigation of any allegation of sexual misconduct. This review should confirm proper and accessible reporting mechanisms, and education agencies should review their procedures for conducting investigations to ensure compliance with current guidance and best practices.

Providing updated and additional staff training is also advisable, especially for supervisors and any individual who could conduct an investigation. This training should review recent and pending legal developments. Educating staff on the potential sources of liability will help ensure that the proper administrators and stakeholders become involved.

Now is also the time to discuss prevention of sexual misconduct. Agencies should review current practices, expressed student concerns, employee morale and workplace culture for any warning signs of misconduct or unlawful harassment.

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Preparing for Collective Bargaining

By: Kim R. Smith

Related Practice Area: Education

Related Industry: Education

With apologies to Thomas Paine, when collective bargaining comes to mind it is sometimes accompanied with the thought of his words: "these are the times that try men's souls."

In the aftermath of the Supreme Court's 2018 ruling that "fair share" fees for unions are unconstitutional, many districts are seeing an uptick in union activity, including grievances over petty issues and abstract unfair labor practice charges. As districts contemplate contract negotiations beginning in January (or early bird discussions going on now), there are a few practical steps that might help facilitate the process.

Read and understand the existing collective bargaining agreement from beginning to end. Read the contract and identify any provisions that have generated questions or conflict. Ask administrators or supervisors for detailed input on provisions that they believe should be added, eliminated or clarified based

on their experience. Identify ambiguous language and consider whether contract language needs to be more straightforward and understandable. Don't forget to ask for all copies of memorandum of understandings or amendments to the contract and decide which, if any, should be eliminated or incorporated into the contract.

Understand the process. Train your team on the "give and take" nature of negotiations because there will be gains and losses for both sides. Despite the nature of bargaining, it is imperative that the board's team recognizes the board's top priorities - their "die-on-the-hill" issues - as well as the top range of an economic settlement. Then the team can develop specific proposals and anticipate strategically how to use key priorities as leverage against the union's top issues.

Gather demographic and financial data. Understanding the district's finances and the total cost of the contract, including compensation, contributions to Pennsylvania Public School Employees' Retirement System, cost of benefits, cost of personal time, tuition reimbursement and other financial commitments is critically important. Although the union does not like it, it is helpful to consistently present salary proposals in the context of full compensation, including retirement contributions, other mandatory contributions and benefits so that the union understands that a 3 percent salary increase costs the district far more than just the salary increase. Using comparative data from surrounding districts is also helpful in remaining competitive but fiscally responsible. Historic data is helpful and relevant, so consider asking for a chronology of wages and benefits (plus benefit changes) over the past two-to-three contracts.

Workforce demographics allow the district to contemplate future costs of the contract over time as well as the potential for savings due to attrition and changes in benefits. Creating a matrix before bargaining helps to identify:

- How many teachers will retire over the life of the contract
- How many teachers are working toward Instructional II certification or pursuing Master's degrees
- How many employees have family coverage for health care
- How many employees have working spouses who have insurance available to them
- Other important economic factors

Information like this helps identify both internal and external factors that influence negotiations.

Review prior negotiations notes. Reviewing the agenda and proposals from the past, as well as the arguments and responses by both sides, enables the team to predict or anticipate the issues, positions and future union behavior.

Prepare proposals. Mix in a few throw-away proposals, which would be nice to achieve but which are not critical to a final contract. Generate drafts of the proposed contract and ask the business manager to break down and itemize all of the economic and non-economic provisions of the contract, keeping in mind potential counter-proposals to each issue as the process unfolds.

Always remember that there may be times when you simply have to agree to disagree and move off of a proposal. A measure of civility and open discussion as to the rationale behind a proposal or counter-proposal can often go a long way toward reaching a workable solution and smoothing out those situations that try men's souls.

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"Fair Share" Union Dues are Unconstitutional ... For Now

By: Robert M. Frankhouser

Related Practice Area: Education

Related Industry: Education

The "fair share" union dues argument that has raged for decades seemed to have reached a controversial conclusion at the Supreme Court in 2018.

But with changing political climates and Supreme Court justice appointments left to the party in power, it likely won't be the last time these fair share fees are debated at the nation's highest court.

A conservative majority of the Supreme Court in June ruled that an Illinois statute requiring a public employee to pay an agency fee - sometimes referred to as a fair share fee - to a public sector union was unconstitutional. The Court ruled the law violated the employee's First Amendment right of free speech. It was the third time the Supreme Court visited the issue, this time in [*Janus v. AFSCME, Council 31*](#).

The conservative majority of the Court all agreed with the opinion of conservative Justice Samuel Alito.

The precise issue presented in the *Janus* case had previously been ruled upon by the Supreme Court more than 40 years ago. In [*Abood v. Detroit Board of Education*](#), the Supreme Court reviewed a similar statute that required non-members of a public sector union to pay an agency fee defined as a percentage of full union dues. The agency fee was intended to subsidize the expenditures attributable to the union's collective bargaining activities, as distinguished from the union's political and ideological projects. A unanimous Supreme Court concluded, in 1977, that because the agency fee was structured to compensate the union for only collective bargaining activities, and specifically excluded the union's political and ideological activities, the statute was constitutionally valid.

After the *Abood* decision, many states, including Pennsylvania, adopted similar statutes requiring public employees who did not become members of public employee unions to pay agency or fair share fees.

As the national political divide widened through the decades after *Abood*, and in an almost universal recognition that public employee unions provided substantial political support to liberal candidates, the *Abood* decision, and the agency as fair share fee statutes, were sharply criticized in some political circles.

In 2016, a more conservative Supreme Court considered another fair share case, but the sudden death of Justice Antonin Scalia deadlocked the court and *Abood* remained valid.

The more conservative members of the Court reached into the federal court system and found the *Janus* case challenging an Illinois statute obligating state employees to pay an agency fee.

In *Janus*, the now five conservative members of the Court concluded that the *Abood* case was inconsistent with the First Amendment's protections of a public employee's right of free speech. The majority concluded that a public employee cannot be compelled to financially support a public sector union where ideas advocated by that public sector union were unacceptable to the employees who chose not to join the union. The majority further concluded that the primary justification relied upon in the *Abood* decision for the agency fees was not constitutionally valid. The central position in *Abood* was that the agency fees promoted a state interest of "labor peace." The *Janus* majority concluded that the past 41 years of management labor

relationships made it undeniable that labor peace could be achieved through a less restrictive means than imposing an unconstitutional requirement upon individuals who did not wish to be a part of the union. In the four months since the *Janus* decision, it is our observation that it is far too early to see the long term results of the *Janus* decision. Our initial impressions is that public employee unions have focused their efforts more sharply upon member service to return its existing membership and acquire new members. Whether those efforts will be successful will largely depend upon whether younger employees can be convinced that their dues provide good value.

At a policy level, we believe that the legal issue over the constitutionality of an agency or fair share fees is not final. The increased politicization of the Supreme Court, by both sides of the political spectrum, ensures this issue is likely to resurface some point in the future. As political dynamics change, the *Janus* analysis is likely to be reexamined.

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FERPA and Videos: What You Need to Know

By: Kalani E. Linnell

Related Practice Areas: Education and Intellectual Property

Related Industry: Education

A thief in your school community has been targeting unattended backpacks in crowded common areas. As you and a school police officer review general surveillance footage looking for clues, you see a person rifling through another student's backpack in the cafeteria before the school day begins. But because of the camera angle, the thief's face is hidden. Students at a nearby table are using their cellphones to take selfies and you realize that they may have captured the thief's face. After following up with those students, you obtain a video which does indeed contain clear footage of the perpetrator in the background.

You have two videos: one from the school's surveillance system and one from the cellphone of a student not involved with the theft. You use these videos to discipline the culprit and thefts from backpacks cease. Can a parent of a theft victim review the videos?

Student privacy issues arise when a photo or a video qualifies as an education record under the Family Educational Rights and Privacy Act (FERPA). As a general principle, the personally identifiable student information FERPA protects from non-consensual disclosure is limited only to "education records" which are "records, files, documents, and other materials" that "contain information directly related to a student" and are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution."

Parents - and an eligible student if the child has turned 18 - are entitled to inspect and review their child's education records under FERPA. Additionally, FERPA prohibits disclosure of education records or personally identifiable information contained in those records to anyone other than the parents or eligible student unless the school obtains prior written consent or one of the few statutory exceptions applies. A tension arises when school officials are required to give the parents of one student access rights to an education record containing protected information of a different student.

The Family Policy Compliance Office of the U.S. Department of Education released guidance to help schools navigate the complex interaction between FERPA and video records. Schools are required to determine whether the

video qualifies as an education record and, if possible, redact or otherwise edit the footage to protect the privacy of other students. The office recommends a case-by-case determination and provides factors to consider.

In determining whether the video directly relates to the students it depicts, schools should consider whether the video:

- Was used for disciplinary action (or other official purpose) involving the student or the victim of the disciplinary incident
- Depicts an activity that resulted, is resulting, or would reasonably result in the use of the video for disciplinary action or other official purpose
- Shows a student violating a law
- Shows a student getting injured, attacked, victimized, ill, or having a health emergency
- Intentionally makes a specific student the focus of the video (i.e., recording of a student presentation)
- Includes audio or visual content that otherwise contains personally identifiable information found in a student's educational record

If none of those factors exist and if the student's image is incidental or captured as part of the background, the video is likely not directly related to a student. Similarly, a video that does not have a specific focus on any individual but that shows a student participating in school activities that are open to the public is likely not to be deemed directly related to a student.

The videos in the original scenario each have several context clues that suggest treatment as an education record. Both videos were used to discipline a student, so the videos are directly related to that student and to the theft victim. In the cell phone video provided to the administrator, the students in the foreground were the focus of the video. The cell phone video is not only directly related to the thief and the victim, but is also directly related to the students who were taking selfies.

The education record classification inquiry does not begin and end with the determination that a video is directly related to a student. The second requirement is that the school maintains the record. Thus, the cell phone video taken by a different student was not part of anyone's education record until a copy was provided to the school, which then maintained the video as part of a student's disciplinary record. Similarly, a video created and maintained by a law enforcement unit of the school for law enforcement purposes would not be considered an education record unless the school police provided a copy to the school for disciplinary purposes.

Assuming the video qualifies as an education record for more than one student, schools are required to protect the privacy of all the students to whom the video directly relates while also allowing individual parents to access the video as part of their child's education record. This requires the school to redact or otherwise edit the video to protect the identity of students to whom the video directly relates other than the student of the parent viewing the video. Schools are not required to redact prior to providing access if redaction would destroy the meaning of the record.

Given the ubiquity of recording devices, schools should be prepared to face questions about student privacy in video footage. When possible, a school should attempt to obtain consent from the parents of all students in a video prior to allowing individual parents to access it. If faced with a scenario involving non-consensual access, schools should attempt to protect the privacy of other students through redaction prior to releasing the record.

By taking reasonable steps to protect student privacy, schools can provide access and prevent unauthorized disclosure of videos that become part of a student's education record.

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#BarleyontheRoad

The [Barley Snyder Education Practice Group](#) has been on the road giving presentations at organizations and school districts in and around central Pennsylvania, as well as traveling for national audiences in Texas, Florida, Illinois and Maryland.

The presentation topics have included:

- Hot Topics & Litigation Update
- Close Encounters of the Labor Kind
- Citizenship Day Presentation
- The Power of Relationship: Responding to Adverse Childhood Experiences (ACEs) and Complex Trauma in School
- Getting Started with [Restorative](#) Practice
- Resolving Special Education Issues: Advocating Effectively
- Investigating and Responding to Student Sexualized Conduct
- Legal Issues in Addressing Trauma in Educational Programming
- Employment/Labor Law Trends - 2018
- Squash ACES
- Investigating and Responding to Student Sexualized Conduct
- Special Education Law 101
- Addressing Trauma-Informed Practices in Education Programming and GPS Issues in Schools
- School Board 101
- Fair Labor Standards Act Overview and Legal Updates
- Addressing and Responding to Inappropriate Sexual Behaviors & Behavior Related to Adverse Childhood Experiences: Beyond Student Discipline
- 2017 Superintendents' Advisory Council Legal Update
- Pennsylvania's New Truancy Law: Review and Implementation
- Beginning of the School Year Primer: Intersection of Family Law & The IDEA; Role of the LEA Representative; and Testimony 101
- The Impact of Childhood Trauma on Learning
- Leadership and Special Education

- ACA & Other Legislative Updates under the Current Federal Administration
- Sexual Harassment in the Workplace
- Outsourcing: Joint Employment Considerations
- Medical Marijuana: Legal and Practical Considerations to Navigate a Conflicting Legal Landscape
- The Impact of Childhood Trauma on Learning: Student Services Implications

The Education Practice Group is available for presenting and training on these topics and more. [Contact group chair William Zee](#) for more information.

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