

## In This Issue

Basketball Coach Fouls  
Out In Breach Of  
Contract Claim For  
Termination

School Districts Not  
Liable On Due Process  
Claims For Completion  
Of Act 168 Forms

The Interplay of FERPA  
& HIPAA: Updated  
Guidance Issued by  
Federal Government

Sale Of Unused Land  
By School District  
Subject To School  
Code Rather Than  
DDPA

## Tucker Arensberg PC

1500 One PPG Place  
Pittsburgh, PA 15222  
412.566.1212

2 Lemoyne Drive  
Lemoyne, PA 17043

[tuckerlaw.com](http://tuckerlaw.com)

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## BASKETBALL COACH FOULS OUT IN BREACH OF CONTRACT CLAIM FOR TERMINATION

*Galante v. Moniteau School District*, No. 1023 C.D. 2019 (Pa. Cmwlth. 2020)  
(Commonwealth Court affirms dismissal of coach's claim for breach of contract  
following termination for unsportsmanlike conduct).

### BACKGROUND

In August 2011, the Moniteau School District hired Jon Galante as an assistant high school basketball coach. The salary for this position was \$3,587. Additionally, the School District's regulations at that time provided for additional compensation for seasons extended by participation in playoffs. On February 15, 2012, Galante coached the boys' junior varsity basketball team during its final game of the season against Allegheny Clarion Valley. Galante was ejected from this game after repeated altercations with one of the game officials. *Id.* According to that referee:

[a]t the buzzer [signaling] the end of the first quarter[,] a shot was taken after the horn, [but this shot was waived off] by my partner[;] there was contact[,] but [he did not call a foul]. The Coach of Moniteau, Mr. Galante, charged onto the floor [and] crossed the center court line while yelling at my partner in disagreement with the call. I stepped in and called a

technical foul for [Galante's] actions on the court. We administered 2 free throws. [Galante] remained seated the rest of the game but his verbal abuse did not stop. At [a]bout the 2 minute mark[,] I gave him another warning about his actions and comments. With 4:30 left in the 4th period[,] a Moniteau player ran over an [Allegheny Clarion] Valley player in an obvious player control foul. After I made my initial preliminary mechanics [sic] the player cursed at me, at which time I gave him a technical foul. When I reported this to the [scorer's] table[,] I was informed that the offending player had now fouled out. I told [Galante] his player was done and had to be replaced, at which time he yelled an obscenity at me[,] so I immediately gave him his second technical of the game [and] eject[ed] him from the contest. [Galante] went out of control and violently charged at me at the table, making contact

*continued*

with me and unleashed an expletive[-]laced tirade[,] spitting and swearing at me challenging me to a physical confrontation that lasted at least 15 seconds to 20 seconds until he could be restrained. While still at the table he made a second attempt to... berate me at which time security ushered him into the locker room. After the free throws were administered, [Galante] made a third attempt to come at me [after he] exit[ed] the locker room, but he was stopped by the varsity coach. I would also like to note that the scorekeeper and time clock operator all felt threatened by the violent behavior of [Galante]. This violent[,] profanity[-]laced outburst of verbal and physical abuse was witnessed by the entire crowd of men[,] women[,] and children.

The following day, February 16, 2012, Galante was escorted out of basketball practice by the Assistant Principal and Superintendent who informed Galante that "he was fired immediately." On February 23, 2012, the basketball team played and lost its opening round playoff game which ended its season. The School District sent Galante a check for his base salary, but did not include additional compensation for his team's participation in the playoff game.

Galante filed suit against the School District claiming breach of contract, conversion, due process violations, loss of reputation, unjust enrichment, and wrongful termination. All claims were dismissed upon motions of the School District.

### DISCUSSION

On appeal, Galante contended that his termination by the Superintendent violated the terms of his supplemental contract. Further, Galante asserted that he could be terminated only by a majority vote of the School District's Board of School Directors.

In affirming the dismissal of Galante's claims, the Commonwealth Court reasoned that the terms of his employment contract "do not limit the School District's ability to fire Galante" and "say nothing whatsoever about a protocol for terminating Galante's employment and do not imbue Galante with any specific termination-related rights." The court noted that Galante's complaint never claimed "that he had any special protections, whether civil service, union or otherwise, outside of what was supposedly promised to him in his contract." Further, the court commented that Galante ignored the fact that the Superintendent was the individual who signed the contract and that it is pure conjecture to allege that the Superintendent fired him without the School District's assent.

### PRACTICAL ADVICE

It is surprising that this appellate court decision does not address the statutory and constitutional due process aspects of the dismissal of employees. Section 514 of the Public School Code provides that "[t]he board of school directors in any school district...shall, after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employees or appointees for...intemperance...or other improper conduct." In this instance, if the coach's employment term did not expire and he had an expectation of continued employment through completion of the team's season, entitlement to this statutory process would apply without its specific reference or incorporation in his employment agreement.

Also, the facts as described in the court's opinion do not reflect that the coach was afforded an informal hearing in satisfaction of due process principles as established by the U.S. Supreme Court opinion in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

While this coach certainly appears to have deserved his fate of termination, school districts should not

consider this decision as excusing fulfillment of the statutory and due process requirements for the dismissal of such an employee.



### SCHOOL DISTRICTS NOT LIABLE ON DUE PROCESS CLAIMS FOR COMPLETION OF ACT 168 FORMS

*Bosco v. Pittsburgh Bd. of Pub. Educ.*, 2:16CV1264, 2019 WL 4736959 (W.D. Pa. Sept. 27, 2019). District Court for the Western District of Pennsylvania grants summary judgment in school district's favor on plaintiff's Due Process claims because the Act 168 Form was not shared publically and it was accurate. *Razzano v. Sarandrea*, CV 17-1046, 2019 WL 7049994 (W.D. Pa. Dec. 23, 2019). District Court for the Western District of Pennsylvania grants summary judgment in school district's favor on plaintiff's Due Process claims because a false statement contained in the Act 168 Form was not shared publically and the former employer corrected the error.

#### BACKGROUND

Pennsylvania Sexual Misconduct/ Abuse Disclosure Forms ("Act 168 Forms") are standard forms developed by the Pennsylvania Department of Education. Under the School Code, a school entity must obtain a completed Form before it may offer employment to an applicant that will "be employed by or in a school entity in a position involving direct contact with children." 24 P.S. § 1-111.1(b)(1)(iii)(A)-(B). As part of this process the school entity seeking to hire the applicant is required to conduct a review that includes contacting former school employers regarding the information required. 24 P.S. § 1-111.1(b)(2)(ii)(A)-(B).

The Act 168 Form includes sections that must be completed by both the applicant and the applicant's

former school employers. The Act 168 Form requires the applicant and the former school employers to complete a form and to check either "Yes" or "No" in response to the questions regarding whether the applicant was either investigated or no longer employed because of allegations of an abuse or sexual misconduct investigation involving a student or child.

#### BOSCO

In the *Bosco* case, the plaintiff ("Bosco") was employed as a physical education teacher who was subject to disciplinary action as a result of two separate incidents involving his interaction with students under his supervision. The second incident involved Bosco, in an attempt to get a non-compliant student who was sitting on a bench to stand up, pulled or "yanked" the bench up. The student did not stand up as the plaintiff intended. Instead, the student fell backwards and hit his head on the wall. The student complained that his head was hurting and he was sent to the school nurse's office. This incident resulted in a five day suspension to be followed by a recommendation of termination. Following an investigation of this incident, Bosco was placed on unpaid leave of absence.

Thereafter, Bosco and defendant, the Pittsburgh Board of Public Education ("District"), entered into a settlement agreement and separated from his employment in 2012.

In 2015, Bosco applied for a position at another school district. He did not receive a job offer, but both he and the District were required to submit Act 168 Forms. In both instances, the parties answered "No" to the questions about abuse and sexual misconduct questions.

After being unable to obtain long term employment, Bosco came to believe that the District might be completing his form negatively. He submitted an

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Act 168 Form to the District and arranged for it to be returned to a friend on another school board. When the District responded this time, it answered “Yes” to the question as to whether Bosco had ever “been the subject of an abuse or sexual misconduct investigation by any employer...” or “been disciplined, discharged...resigned from or otherwise separated from employment while allegations of abuse or sexual misconduct were pending...”

The District explained that upon receiving the above-referenced Act 168 Form, it investigated the matter further and determined that the Second Incident constituted child abuse under the Child Protective Services Law, which was enacted in 2014 and did not exist at the time of the incidents.

#### RAZZANO

In the Razzano case, Plaintiff (“Razanno”) a junior high school principal, was placed on administrative leave, with pay, following allegations from other employees that he had engaged in sexual harassment towards adults. Plaintiff and his employer, the New Castle Area School District (“New Castle”), subsequently entered into a confidential settlement and release resulting, in part, in Plaintiff’s voluntary resignation from employment.

In 2017, Plaintiff applied for employment as a substitute teacher at another school district, Kennedy Catholic. Plaintiff was offered employment and Kennedy Catholic requested and received Act 168 Forms from Plaintiff and New Castle. However, New Castle’s form incorrectly indicated that Plaintiff had been subject to an abuse or sexual misconduct investigation involving a child. Moreover, deposition testimony indicated that the false information was provided knowingly by New Castle’s superintendent. Kennedy Catholic initially declined to hire Plaintiff because of this false information.

Plaintiff’s attorney contacted New Castle to rectify the incorrect information and New Castle’s superintendent changed his response and submitted a corrected Act 168 Form to Kennedy Catholic. Kennedy Catholic subsequently placed Plaintiff on its substitute teacher list.

#### DISCUSSION

In both *Bosco* and *Razzano*, the plaintiffs filed claims against their former school district employers premised on claims that alleged misrepresentations in the Act 168 Forms violated their substantive due process rights guaranteed by the Fourteenth Amendment.

It has long been recognized that an individual has a protectable interest in his or her reputation. Nevertheless, “reputation alone is not an interest protected by the Due Process Clause.” Thus, in order to state “a due process claim for a deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest.” Such claims are analyzed under the “stigma-plus” doctrine.

#### STIGMA PRONG

In order to satisfy the stigma prong, a public employee must be able to prove that the “stigmatizing statement(s) 1) were made publicly and 2) were false.” *Id.* Stated differently, it must be shown that there was a harm to one’s reputation consisting of the publication of a substantially and materially false statement that infringed upon the “reputation, honor, or integrity of the [individual].”

In *Bosco*, the court held that the plaintiff failed to satisfy the stigma requirement. First, the Act 168 Form was not published. To the contrary, the Act 168 Form was delivered to the proper recipient and Bosco sought to and purposely discussed the matter with others. Such a disclosure falls short

of the type of public dissemination for which the protections of the Constitution may be invoked.

In addition, the court found that the Act 168 Form did not contain any false or misleading information. To implicate Constitutional protections, the stigmatizing information must be false. The Court held that while Act 168 was not in effect until 2014, it does not contain any provisions limiting reporting requirements to acts that occurred after its passage. Moreover, the Court found that Bosco's conduct of pulling a bench and causing a child to fall and hit his head clearly constituted reportable abuse.

In *Razzano*, the Court also found that the plaintiff failed to satisfy the stigma requirement. The court found that while the statements on the Act 168 Form were false and defamatory on their face, they only temporarily precluded Razzano's employment at Kennedy Catholic. The court concluded that because there is no constitutionally recognized protected right to a specific job prospect as "state actions that exclude a person from one particular job are not actionable in due process claims," Razzano's claim failed.

Moreover, like the District in *Bosco*, New Castle did not publish or disseminate any false statements beyond the single Act 168 Form. As in the *Bosco* case, the Court found that the stigma prong is not met where the false statements are not publicly made.

### PLUS PRONG

Both courts also addressed the "plus" prong and found that the plaintiffs failed to meet this requirement. In the context of an employment relationship, the plus prong typically is satisfied by the stigma occurring as part of the termination of employment. In that scenario, the termination then satisfies the plus requirement. But in other settings, "reputational damage that occurs in the

course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution' [also] is actionable."

In *Bosco*, the court found that Bosco could not point to a single lost employment opportunity from having to complete the Act 168 Form and the fact that the District might complete and send an accurate form does not deprive him of a property right, license or credentialing accreditation and it does not preclude him from applying for or being hired by an education institution. While it may burden him by having to explain the circumstances of his separation, the court concluded that this burden is not an injury of constitutional concern.

In *Razzano*, the court also concluded that the plaintiff failed to meet the "plus" requirement because he failed to show that the false Act 168 Form had any impact on his ability to obtain other employment within his chosen field. The Court noted that he was able to find employment in positions that did not require Act 168 Forms and that the false Act 168 Form was subsequently corrected and Plaintiff was hired by Kennedy Catholic. Simply put, the false Act 168 Form did not "eclipse all of his future opportunities to secure employment in the educational field." To the contrary, Plaintiff retained his teaching certificate, his name was not placed in a central register, and the defamatory information was not, and would not be, generally published in a manner accessible to prospective educational employers, other than the single employer, Kennedy Catholic, in this case.

Based on the foregoing, both Courts concluded that the plaintiffs' due process claims were insufficient as a matter of law.

### PRACTICAL ADVICE

*Bosco* and *Razzano* confirm that school districts complying with their statutory mandated duties to complete and submit completed Act 168 Forms to

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prospective employers will not subject them to liability on Constitutional claims if the forms are submitted in good faith through the proper channels and to the proper recipients. Even if erroneous reports are given, it is unlikely that the District will be liable if the errors are promptly corrected.

Notwithstanding the foregoing, if administrative employees have any questions about how they should answer the questions on an Act 168 Form, they should contact their solicitors.



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## **THE INTERPLAY OF FERPA & HIPAA: UPDATED GUIDANCE ISSUED BY FEDERAL GOVERNMENT**

### **BACKGROUND**

On December 19, 2019, the U.S. Department of Health and Human Services and the U.S. Department of Education issued a publication entitled “Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records” (the “Guidance”). The Guidance updates initial joint guidance that was issued in November 2008.

As a refresher, FERPA is a Federal law that protects the privacy of students’ “education records.” FERPA affords parents certain rights with respect to their children’s education records maintained by educational agencies and institutions and their agents to which FERPA applies. By contrast, the HIPAA Privacy Rule requires covered entities to protect individuals’ health records and other personal health information the entities maintain

or transmit, known as protected health information (PHI), by requiring appropriate safeguards to protect privacy, and setting limits and conditions on the uses and disclosures that may be made of such information without patient authorization.

### **DISCUSSION**

The updated Guidance points out the circumstances under which FERPA and HIPAA can intersect. For instance, a school that provides health care to students in the normal course of business, such as through its health clinic, is also a “health care provider” under HIPAA. If a school that is a “health care provider” transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, it is then a covered entity under HIPAA. However, many schools that meet the definition of a HIPAA covered entity do not have to comply with the requirements of the HIPAA Rules because the school’s only health records are considered “education records” or “treatment records” under FERPA.

The updated Guidance clarifies for school administrators, health care professionals, and families how FERPA and HIPAA apply to education and health records maintained about students. It also contains twenty-seven “Frequently Asked Questions” regarding the sharing of records in different situations or scenarios. It addresses certain disclosures that are allowed without the written consent of the parent or eligible student under FERPA or without authorization under the HIPAA Privacy Rule, especially those related to emergency mental health or safety situations involving law enforcement or social services.

### **PRACTICAL ADVICE**

The updated Guidance is published online on both the Department of Education and Health and



Human Services websites. School administrators should review the Guidance to determine whether their institution's policies and procedures with respect to student health and education records are up-to-date and compliant.




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## SALE OF UNUSED LAND BY SCHOOL DISTRICT SUBJECT TO SCHOOL CODE RATHER THAN DDPA

*Ambler v. Bd. Of Sch. Dir's. of the Hatboro-Horsham Sch. Dist.*, 2019 WL 6754781 (Pa. Commw. Ct., Dec. 12, 2019): The Pennsylvania Commonwealth Court clarified that Section 707 of the Pennsylvania Public School Code specifies the procedure a school district must follow to sell unused and unnecessary land previously donated to the district, and that Section 707 supersedes the requirements generally applicable to political subdivisions under the Donated or Dedicated Property Act (DDPA).

### BACKGROUND

John and Peggy Ambler donated land to the Hatboro-Horsham School District (District), and the District used the land to build the Limekiln Simmons Elementary School. Later the District stopped using the elementary school and planned to sell it to Danny Jake Corporation, a private developer. The District followed the procedures specified in the Pennsylvania School Code for the private sale of unused and unnecessary land, at 24 P.S. § 7-707. The Amblers objected and argued that the District should have followed the procedures

for sale of donated public land under the DDPA. While Section 707 of the School Code applies to land owned by school districts, the DDPA applies to public facilities donated to any political subdivision.

### DISCUSSION

The Commonwealth Court noted that Section 707 and the DDPA required different procedures for the sale of land, and required different uses of funds generated from the sale. "To pick but one important example," the Court explained, "[Section 707 of the School Code] requires the use of proceeds from the sale of land and buildings to be used for debt service or capital expenditures, while the DDPA requires that proceeds from a sale be used to carry out the trust purposes or, if that is impracticable, impossible, or not in the public interest, be applied to another public purpose." The Amblers suggested that the District should be required to satisfy both statutes, by first applying to the trial court for approval under Section 707 and subsequently applying to the Orphan's Court for approval under the DDPA. The Commonwealth Court decided that this would be "overly cumbersome and confusing to administer," and would not address the conflict with regard to use of funds, as explained above. The Court ultimately determined that the requirements under Section 707 of the School Code superseded the requirements of the DDPA.

### PRACTICAL ADVICE

School districts should be aware of the special procedures required in order to sell district-owned real estate, and should contact their solicitor to ensure compliance with Section 707 of the Pennsylvania Public School Code and other applicable laws.



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TUCKER ARENSBERG Attorneys MUNICIPAL AND SCHOOL LAW GROUP

**Matthew M. Hoffman** *Co-chair*  
412.594.3910  
mhoffman@tuckerlaw.com

**John T. Vogel** *Co-chair*  
412.594.5622  
jvogel@tuckerlaw.com

**Frederick J. Wolfe**  
412.594.5573  
fwolfe@tuckerlaw.com

**Robert L. McTiernan**  
412.594.5528  
rmctiernan@tuckerlaw.com

**Steve R. Bovan**  
412.594.5607  
sbovan@tuckerlaw.com

**David Mongillo**  
412.594.5598  
dmongillo@tuckerlaw.com

**Irving S. Firman**  
412.594.5557  
ifirman@tuckerlaw.com

**Gavin A. Robb**  
412.594.5654  
grobb@tuckerlaw.com

**Kenneth G. Scholtz**  
412.594.3903  
kscholtz@tuckerlaw.com

**Katherine A. Janocsko**  
412.594.5564  
kjanocsko@tuckerlaw.com

**Thomas P. Peterson**  
412.594.3914  
tpeterson@tuckerlaw.com

**Richard B. Tucker, III**  
412.594.5562  
rtucker@tuckerlaw.com

**Christopher Voltz**  
412.594.5580  
cvoltz@tuckerlaw.com

**Weston P. Pesillo**  
412.594.5545  
wpesillo@tuckerlaw.com

**Daniel C. Conlon**  
412.594.3951  
dconlon@tuckerlaw.com

**William Campbell Ries**  
412.594.5646  
wries@tuckerlaw.com

TUCKER ARENSBERG Attorneys  
MUNICIPAL AND SCHOOL LAW GROUP

Tucker Arensberg, P.C. 1500 One PPG Place Pittsburgh, PA 15222 412.566.1212

[tuckerlaw.com](http://tuckerlaw.com)

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