

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 814 CD 2016

CORNWALL-LEBANON SCHOOL DISTRICT,
Appellee,

v.

CORNWALL-LEBANON EDUCATION ASSOCIATION,
Appellant.

BRIEF OF *AMICUS CURIAE*
THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION
In Support of Appellee

**On Appeal from the Order of the Honorable John C. Tylwalk, Dated April 21, 2016,
in the Court of Common Pleas of Lebanon County at Civil Division No. 2015-01556**

Katherine M. Fitz-Patrick, Esquire
Attorney I.D. No. 208863
Pennsylvania School Boards Association
400 Bent Creek Boulevard
Mechanicsburg, Pennsylvania 17050
(717) 506-2450, ext. 3414
katherine.fitz-patrick@psba.org
Counsel for *Amicus Curiae*
Pennsylvania School Boards Association

Dated: September 22, 2016

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF CITATIONSii

I. STATEMENT OF INTEREST1

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS ..4

III. SUMMARY OF ARGUMENT5

IV. ARGUMENT7

THE LOWER COURT CORRECTLY CONCLUDED THAT THE ARBITRATOR’S AWARD REINSTATING A TEACHER DISCHARGED FOR SEXUAL MISCONDUCT VIOLATED A WELL-DEFINED AND DOMINANT PUBLIC POLICY.7

A. A TEACHER’S INAPPROPRIATE RELATIONSHIP WITH A STUDENT UNDERMINES THE TEACHER’S DUTY TO ACT IN THE BEST INTERESTS OF THE STUDENT AND TO MAINTAIN A SAFE ENVIRONMENT FOR THE STUDENT.9

B. THE DUTY TO PROTECT STUDENTS FROM SEXUAL HARASSMENT, INCLUDING SEXUAL ABUSE AND SEXUAL MISCONDUCT, IS A WELL-DEFINED AND DOMINANT PUBLIC POLICY DERIVED FROM AND GROUNDED FIRMLY IN STATE AND FEDERAL LAW.18

C. THE ARBITRATOR’S AWARD REINSTATING THE TEACHER UNDERMINES THE SCHOOL DISTRICT’S LEGAL DUTY TO COMPLY WITH STATE AND FEDERAL LAWS AIMED AT PROTECTING STUDENTS FROM SEXUAL HARASSMENT AND VIOLATES THE PUBLIC POLICY THAT IS THE SOURCE OF THIS DUTY.22

V. CONCLUSION25

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Barnett v. Penn Hills School District</i> , No. 1412 CD 2014 (Pa. Cmwlth. 2015)	17
<i>City of Bradford v. Teamsters Local Union No. 110</i> , 25 A.3d 408 (Pa. Cmwlth. 2011)	7, 8
<i>Dohanic v. Commonwealth of Pennsylvania</i> , 533 A.d 812 (Pa. Cmwlth. 1987)	16
<i>E.N. v. Susquehanna Township School District</i> , 2011 WL 3608544 (M.D. Pa. 2011)	22
<i>Gebser v. Lago Vista Independent School District</i> , 524 U.S. 274 (1998)	18, 22
<i>Horosko v. School District of Mount Pleasant Township</i> , 6 A.2d 866 (Pa. 1939)	10
<i>McFerren v. Farrell Area School District</i> , 993 A.2d 344 (Pa. Cmwlth. 2010)	14
<i>Penn-Delco School District v. Urso</i> , 382 A.2d 162 (Pa. Cmwlth. 1978)	14, 15
<i>Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees, District Council 33, Local 934</i> , 52 A.3d 1117 (Pa. 2012)	8, 23, 24
<i>Riverview School District v. Riverview Education Association, PSEA-NEA</i> , 639 A.2d 974 (Pa. Cmwlth. 1994)	17
<i>Sertik v. School District of Pittsburgh</i> , 584 A.2d 390 (Pa. Cmwlth. 1990)	14

<i>Slippery Rock University of Pennsylvania, Pennsylvania State System of Higher Education v. Association of Pennsylvania State College and University Faculty,</i> 71 A.3d 353 (Pa. Cmwlth. 2013)	passim
<i>Stoneking v. Bradford Area School District,</i> 882 F.2d 720 (3d Cir. 1989)	23
<i>Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters,</i> 969 F.2d 1436 (3d Cir. 1992)	8
<i>Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA,</i> 72 A.3d 755 (Pa. Cmwlth. 2013)	8
<i>Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA,</i> 939 A.2d 855 (Pa. 2007)	7
<i>Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA,</i> 977 A.2d 1205 (Pa. Cmwlth. 2009)	21

Federal Statutes

20 U.S.C. § 1681	18
20 U.S.C. § 1682	18

Federal Regulations

34 C.F.R. Part 106	18
--------------------------	----

Pennsylvania Statutes

18 Pa.C.S.A. § 3124.2	21
23 Pa. C.S. § 6301	20
23 Pa. C.S. § 6368(i)	20

24 P.S. § 12-1205.6	13
24 P.S. § 13-1317	21
24 P.S. § 2070.1b	13
24 P.S. § 2070.9a	20

Pennsylvania Regulations

22 Pa. Code § 235.4	17
22 Pa. Code § 235.4(b)(4)	20
22 Pa. Code § 235.4(b)(6)	20
22 Pa. Code § 235.4(b)(7)	20
22 Pa. Code § 235.4(b)(10)	20
22 Pa. Code § 235.10 (3)	20
22 Pa. Code § 235.10 (4)	20
22 Pa. Code § 237.3	14

Administrative Adjudications

<i>Department of Education v. Bergen,</i> Docket No. DI-11-26 (PSPC July 19, 2011)	17
<i>Department of Education v. Corrado,</i> Docket No. DI-00-21 (PSPC July 9, 2002)	9
<i>Department of Education v. Hurst,</i> Docket No. DI-10-29 (PSPC December 29, 2010)	11, 12

<i>Department of Education v. Tomeo</i> , Docket No. DI-08-33 (PSPC February 24, 2009)	15, 17
<i>Sertik v. School District of Pittsburgh</i> , Teacher Tenure Appeal No. 12-89, 353 (April 23, 1990)	14

Secondary Sources

Danny Robbins, <i>Out of bounds: Sexual Misconduct by Educators in Texas</i> , Houston Chronicle, April 22, 2001, http://www.chron.com/news/article/Sexual-misconduct-by-Texas-coaches-investigated-2009243.php	11
Pennsylvania Standards and Practices Commission, <i>Recognizing and Reporting Sexual Misconduct</i> , http://www.education.pa.gov/Documents/Teachers-Administrators/Curriculum/Driver%20and%20Safety%20Education/Recognizing%20and%20Reporting%20Sexual%20Misconduct.pdf	11
Pennsylvania Standards and Practices Commission, <i>Educator Ethics and Conduct Toolkit</i> , http://www.pspc.education.pa.gov/Promoting-Ethical-Practices-Resources/Ethics Toolkit/The-Commission-Professional-Discipline-and-the-code/Pages/default.aspx	20
U.S. Department of Education Office for Civil Rights, <i>Dear Colleague Letter: Sexual Violence</i> (April 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf	18, 19, 22
U.S. Department of Education, <i>Doc # 2004-09, Educator Misconduct: A Synthesis of Existing Literature</i> (2004), https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf	11, 12
U.S. Government Accountability Office, <i>GAO-14-42, CHILD WELFARE: Federal Agencies Can Better Support State Efforts to Prevent and Respond to Sexual Abuse by School Personnel</i> (2014), http://www.gao.gov/assets/670/660375.pdf	10, 11

I. STATEMENT OF INTEREST

The Pennsylvania School Boards Association ("PSBA") is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this commonwealth, numerous area vocational technical schools and community colleges, and the members of the boards of directors of those public school entities. The mission of the Pennsylvania School Boards Association, organized in 1895 and the first such association in the nation, is to promote excellence in school board governance through leadership, service and advocacy. The efforts of PSBA in assisting public school entities by promoting the interests of effective and efficient governance also benefit taxpayers and further the general public interest in the education of our youth.

In that capacity, PSBA endeavors to assist state and federal courts in selected cases presenting important legal issues of statewide or national significance by offering the benefit of the Association's statewide and national perspective, experience, and analysis relative to the legal, policy, management, liability, fiscal, ethical and other considerations, ramifications and consequences that should inform any resolution of the particular disputed issues in such cases. For decades, PSBA's informed insight, thorough research, and careful legal analysis have made the Association a respected and valued participant in state and federal appellate proceedings involving public schools.

PSBA files this brief pursuant to Pa.R.A.P. 531, in order to offer this Honorable Court PSBA's perspective on how the result of this case might impact local school districts across the commonwealth. This case involves the important issue of whether an arbitration award that reinstates a teacher terminated for sexual misconduct violates a well-defined and dominant public policy. In this case, a male high school teacher formed a close, inappropriate relationship with a female high school student ("grooming"). In the months before the student's graduation from high school, they made plans together to consummate the relationship sexually upon her graduation ("sexual misconduct"), and in fact engaged in sexual activity just hours after the student graduated.

Schools have a legal duty to prohibit and remedy sexual harassment in the school setting, and to prevent the recurrence of such conduct. Moreover, teachers have a responsibility to model ethical principles, act as a fiduciary in their students' best interests, and maintain a safe environment for their students. An award that forces a school district to continue to employ a teacher found to have engaged in this kind of conduct violates the public policy of this commonwealth.

PSBA supports the position of Appellee, Cornwall-Lebanon School District, and requests that this Honorable Court affirm the lower court's decision because an arbitration award which reinstates a teacher discharged for sexual misconduct

violates the well-defined and dominant public policy of protecting students from sexual harassment in the school setting.

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS

Your *Amicus Curiae*, PSBA, concurs in such statements that are made by Appellant, Cornwall-Lebanon School District, regarding the Counterstatement of the Standard of Review, the Counterstatement of the Question Involved, and the Counterstatement of the Case.

III. SUMMARY OF ARGUMENT

The reinstatement of a teacher discharged for sexual misconduct is an issue of grave concern for public schools across the commonwealth. The lower court properly concluded that an arbitration award reinstating a teacher terminated for sexual misconduct with a student violates the deeply rooted state and federal public policy against sex discrimination in any form in the school setting.

In the case *sub judice*, the Board of School Directors terminated the employment of Luke Todd Scipioni (teacher) for sexual misconduct, inappropriate emails/images on his work computer, and lying during an investigation into his relationship with a student. The arbitrator reinstated the teacher, in part, because the relationship between the teacher and the student did not become physical until a few hours after the student graduated from high school, despite the evidence of pre-graduation “grooming” behaviors and sexual misconduct. This type of inappropriate conduct, “grooming” and sexual misconduct, is prohibited and poses a risk to the health and safety of students.

In order to provide a safe environment for students to learn, schools have a duty to prohibit sex discrimination, including sexual harassment, sexual misconduct, and sexual abuse; and when schools investigate complaints of sexual harassment and the complaint is substantiated, schools must remedy the situation in order to protect students from future injury.

An arbitration award requiring a school district to reinstate a teacher it terminated for sexual misconduct, especially in light of the fact that the teacher lied about the nature of his relationship with the student, undermines the ability of the school district to implement the duties public policy imposes on the school district to ensure that other students will not become victims of that teacher's inappropriate conduct in the future.

It blatantly defies this firmly established public policy for an arbitration award to force a school district to continue to employ a teacher found to have engaged in such predatory conduct. Accordingly, PSBA urges this Honorable Court to affirm the decision of the lower court.

IV. ARGUMENT

THE LOWER COURT CORRECTLY CONCLUDED THAT THE ARBITRATOR'S AWARD REINSTATING A TEACHER DISCHARGED FOR SEXUAL MISCONDUCT VIOLATED A WELL-DEFINED AND DOMINANT PUBLIC POLICY.

This Court has consistently held “that an arbitration award will not be upheld if it contravenes public policy.” *Slippery Rock University of Pennsylvania, Pennsylvania State System of Higher Education v. Association of Pennsylvania State College and University Faculty*, 71 A.3d 353 (Pa. Cmwlth. 2013) (citing *City of Bradford v. Teamsters Local Union No. 110*, 25 A.3d 408 (Pa. Cmwlth. 2011)).

In ascertaining whether a violation of public policy has occurred, a court must look to the policy implications of the arbitration award. *City of Bradford*, 25 A.3d at 413-14. To determine whether an arbitration award violates public policy, this Court in the *City of Bradford* case “held that an application of the public policy exception requires a three-step analysis.” *Slippery Rock*, 71 A.3d at 364.

1. First, the nature of the conduct leading to the discipline must be identified.
2. Second, we must determine if that conduct implicates a public policy which is “well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA*, 939 A.2d 855, 866 (Pa. 2007) (*Westmoreland I*).

3. Third, we must determine if the arbitrator's award poses an unacceptable risk that it will undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty, given the particular circumstances at hand and the factual findings of the arbitrator.

City of Bradford, 25 A.3d at 414.

For the reasons that follow, PSBA urges this Honorable Court to affirm the decision of the lower court, since the arbitrator's award reinstating a teacher terminated for sexual misconduct undermines a well-defined and dominant public policy that school districts have a duty to protect students and staff from such conduct. *Slippery Rock*, 71 A.3d 353 (reinstatement award that violates Title IX is against public policy and cannot be enforced); *Cf. Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (well-defined dominant public policy against sexual harassment in the workplace); *Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees, District Council 33, Local 934*, 52 A.3d 1117 (Pa. 2012) (reinstatement award makes a mockery of the dominant public policy against sexual harassment in the workplace); *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA*, 72 A.3d 755 (Pa. Cmwlth. 2013) (reinstatement violated well-defined public policy of protecting school children from illegal drugs and drug use).

A. A TEACHER’S INAPPROPRIATE RELATIONSHIP WITH A STUDENT UNDERMINES THE TEACHER’S DUTY TO ACT IN THE BEST INTERESTS OF THE STUDENT AND TO MAINTAIN A SAFE ENVIRONMENT FOR THE STUDENT.

“Teachers occupy positions of trust and confidence and are uniquely situated to exert considerable influence over their students. The hallmark of this fiduciary relationship is that the teacher, who has superior power and responsibility, will exercise that power only in the best interests of the student.” *Department of Education v. Corrado*, Docket No. DI-00-21 (PSPC July 9, 2002)¹ (fourth grade teacher engaged in inappropriate conduct toward female student, teaching certificate revoked after found guilty of immorality).² The maintenance of appropriate adult-student relationships in the school setting is necessary for healthy, professional relationships with students.³ Moreover, “[i]t has always been the recognized duty of

¹ The Pennsylvania Standards and Practices Commission’s educator discipline adjudications and opinions are available at: <http://www.pspc.education.pa.gov/Educator-Discipline-System-and-Reporting/Searching-Adjudications-Orders/Pages/default.aspx> (last visited Sept. 16, 2016).

² The teacher’s inappropriate conduct toward the student in *Corrado* included, but was not limited to the following: showed favoritism toward the student by letting her win classroom contests; frequently told the student she looked pretty; gave the student his home telephone number; gave the student a ride home from school; put food, stuffed animals, and other gifts in the student’s locker.

³ In October of 2014, in response to increased incidents of inappropriate adult-student relationships arising in school settings, PSBA developed Policy 824 Maintaining Professional Adult/Student Boundaries. The Policy includes prohibited conduct related to: romantic or sexual relationships, social interactions, and electronic communications. The prohibited conduct includes a range of behaviors that include not only obviously unlawful or improper interactions with students, but also precursor grooming and other boundary-blurring behaviors that can lead to more egregious misconduct.

the teacher to conduct himself in such way as to command the respect and good will of the community ...” *Horosko v. School District of Mount Pleasant Township*, 6 A.2d 866, 868 (Pa. 1939).

Unfortunately, a day seldom goes by when the news does not include a story about boundary violations in the school setting. This is a troubling issue for schools because of the trust and responsibility placed with schools to ensure a safe and productive learning environment. In order to protect the health and safety of students, awareness of “grooming” behaviors is “key to identifying and preventing the criminal act of sexual abuse.” U.S. Government Accountability Office, *GAO-14-42, CHILD WELFARE: Federal Agencies Can Better Support State Efforts to Prevent and Respond to Sexual Abuse by School Personnel 2* (2014).⁴

“Grooming” behaviors are “intended to establish trust with a student to facilitate future sexual activity.” *Id.* at 21. “The purpose of ‘grooming’ is to test the child’s ability to maintain secrecy, to desensitize the child through progressive sexual behaviors, to provide the child with experiences that are valuable and that the child won’t want to lose, to learn information that will discredit the child, and to gain approval from parents.” U.S. Department of Education, *Doc # 2004-09, Educator*

⁴ Available at: <http://www.gao.gov/assets/670/660375.pdf> (last visited Sept. 16, 2016).

Misconduct: A Synthesis of Existing Literature 32 (2004)⁵ (citing Danny Robbins, *Out of bounds: Sexual Misconduct by Educators in Texas*, Houston Chronicle, April 22, 2001.).⁶ Examples of “grooming” behaviors include: singling students out for special attention or privileges, e.g., special tutoring or rides home; giving gifts to students; giving gifts to or doing favors for a student’s family; engaging in peer-like behavior with students; oversharing personal information with students; and exchanging personal notes, texts, emails, or other communications with students. *Id.* at 5; Pennsylvania Standards and Practices Commission, *Recognizing and Reporting Sexual Misconduct*.⁷ These “grooming” behaviors can eventually lead to “sexual misconduct,” including unwelcome or sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature. *GAO-14-42* at 2. In *Department of Education v. Hurst*, Docket No. DI-10-29, 2-3 (PSPC December 29, 2010), a vice-principal “befriended a 14-year old student, as well as the student’s family, and routinely purchased gifts for the student, took him on outings and provided the student with an allowance. The [vice-principal] also engaged the

⁵ Available at: <https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf> (last visited Sept. 16, 2016).

⁶ Available at: <http://www.chron.com/news/article/Sexual-misconduct-by-Texas-coaches-investigated-2009243.php> (last visited Sept. 16, 2016).

⁷ Available at: <http://www.education.pa.gov/Documents/Teachers-Administrators/Curriculum/Driver%20and%20Safety%20Education/Recognizing%20and%20Reporting%20Sexual%20Misconduct.pdf> (last visited Sept. 16, 2016).

student in discussion about masturbation ... and is accused of requesting to see the student's genitalia." The Pennsylvania Standards and Practices Commission (PSPC) suspended the vice-principal's professional educator certification immediately, noting that he "stands accused of systematically grooming a minor student to satisfy his own prurient interests," and "[s]uch conduct is exploitive and predatory and poses a threat to the health, safety or welfare of a student or other individual in a school." *Id.* at 3.

Pennsylvania's Educator Discipline Act defines "sexual misconduct" as "any act, including, but not limited to, any verbal, nonverbal, written or electronic communication or physical activity, directed toward or with a child or a student regardless of the age of the child or student that is designed to establish a romantic or sexual relationship with the child or student. Such prohibited acts include, but are not limited to, the following:

1. *sexual or romantic invitations;*
2. dating or soliciting dates;
3. engaging in sexualized or romantic dialogue;
4. making sexually suggestive comments;
5. self-disclosure or physical exposure of a sexual, romantic or erotic nature; or
6. any sexual, indecent, romantic or erotic contact with the child or student."

24 P.S. § 2070.1b (emphasis added).⁸ It is this conduct, grooming and sexual misconduct, which can ultimately lead to sexual abuse. Therefore, in order to protect the health and safety of students who are required by the compulsory school attendance requirements to attend school, schools have a duty to be watchful for and respond to this inappropriate and harmful conduct.

In the case *sub judice*, the teacher, who also coached the girls' basketball team, developed a close personal relationship with the student, a senior who played on the basketball team. (Trial Ct. Op. 6). During the last semester of student's senior year, they exchanged a significant number of phone and text message communications. *Id.* These communications included the pre-planning of a sexual encounter, an encounter that in fact took place a few hours after the student's high school graduation. *Id.* at 17. The sexual relationship continued throughout the summer months. *Id.* at 7.

As outlined above, the inappropriate relationship here progressed along the continuum of behaviors exhibited by perpetrators of child abuse, from "grooming" to "sexual misconduct." The teacher established a relationship with the student via communications and interactions ("grooming") and planned to consummate the relationship in the months before the student's graduation from high school ("sexual

⁸ Section 1205.6 of the Pennsylvania Public School Code, effective July 5, 2012, related to mandated training of school employees and independent contractors on child abuse and sexual misconduct recognition, includes this same definition. 24 P.S. § 12-1205.6.

misconduct”). The fact that the sexual contact did not occur until after the student graduated is of no consequence here. The pre-graduation communications and interactions “is exactly the type of activity which tends to foster an improper relationship with students and may have encouraged” the sexual relationship. *Sertik v. School District of Pittsburgh*, Teacher Tenure Appeal No. 12-89, 353 (April 23, 1990), *affirmed*, 584 A.2d 390 (Pa. Cmwlth. 1990) (School Board dismissed a teacher for immorality, after the teacher was caught in a parked car with a student who had recently graduated. Before graduation, the teacher allowed the student to call his home and frequently transported the student in his private car for school-sponsored and non-school sponsored ski club trips.). Like the trial court in the present case, in *Sertik*, the Secretary of Education found it unbelievable that a student would engage in a sexual relationship shortly after graduation without the prior existence of some type of emotional or amorous relationship. *Id.* at 353; (Trial Ct. Op. 17).

In *Penn-Delco School District v. Urso*, 382 A.2d 162 (Pa. Cmwlth. 1978), the Board of School Directors terminated a teacher on grounds of immorality,⁹ after he proposed to spank two female high school students – the students perceived the

⁹ Immorality has been defined as conduct which “offends the morals of the community and is a bad example to the youth whose ideals a teacher has a duty to foster and elevate.” *McFerren v. Farrell Area School District*, 993 A.2d 344, 353 (Pa. Cmwlth. 2010); 22 Pa. Code § 237.3.

conduct as sexual in nature. In rendering its decision upholding the Board's decision to terminate the teacher, the court noted:

Discussion of sexual subjects is a matter of particular sensitivity in society in general and when such discussion becomes a part of a course of conduct by an individual such conduct may be perceived by others as either amoral or immoral. When such matters are discussed with school age children, society, and particularly the parents of such children, become more acutely concerned both because such discussions can cause psychological harm and because children may view such conduct as a desirable example to follow. Where teachers engage in such discussions with children the problem is exacerbated because of the significant influence teachers exert over the intellectual, moral and psychological development of children. Where a teacher engages in such discussions outside the context of a classroom or a pedagogical setting, a school board, viewing these actions against the moral standards of the community, might well conclude that such conduct exceeds the bounds of propriety and fails to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students. Such a finding is all that is necessary to deprive a teacher of the privilege of teaching children on the grounds that his conduct offended the moral standards of the community and set a bad example to the youth under his charge.

Id. at 512-513. The teacher's conduct in the case *sub judice* was amply sufficient to justify discharge for immorality.¹⁰

¹⁰ Even before the addition of "sexual misconduct" to the Educator Discipline Act in February 2014, the PSPC disciplined educators for "grooming" and predatory sexual conduct, finding the conduct constitutes immorality. See *Department of Education v. Tomeo*, Docket No. DI-08-33 (PSPC February 24, 2009) (Teacher "attempted to foster sexual relationship with 16 year-old female student by telling her she was the most attractive girl in school, by arranging private meetings with the student, physically embracing her and offering to help her improve her grades." PSPC found the teacher's conduct constitutes immorality, stating that there "can be no question that predatory sexual conduct of a teacher towards any student offends the morals of this Commonwealth and sets the requisite bad example.").

Moreover, two of the teacher's other behaviors, the inappropriate emails and images stored on his work computer and lying to school officials about the nature of his relationship with the student during the investigation, which are enough by themselves to justify termination, are behaviors frequently associated with teacher-student relationships/boundary violations and are part of the overall predatory pattern. *See also Dohanic v. Commonwealth of Pennsylvania*, 533 A.d 812 (Pa. Cmwlth. 1987) (Teacher dismissed for sending numerous personal notes to female students and for lying to his supervisor – said parents requested that their daughters be placed in his homeroom.).

The teacher's emails depicting young women likely of high school age are particularly concerning in light of the circumstances:

1. One of those is of a girl leaning over an instructor's desk with the caption "Booty. The difference between getting an A and just barely passing."
2. A second shows a young woman in a roadway with the caption "Play Dumb. If she looks TOO young ... just assume she is 18."
3. And the third shows what looks like a high school girl in a micro mini skirt in a hallway lined with lockers with the caption "Every Male Teacher That Day contemplated the consequences."

(Trial Ct. Op. 10). These emails “made light of taking advantage of and engaging in sexual conduct with young females.” *Id.* at 18. In possessing emails of this nature, which portray activity prohibited by law and absolutely unacceptable in the school setting, the teacher failed to conduct himself in a way as to command the respect and

good will of the community and failed to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students.

Lying and/or making false statements to school district staff is conduct that offends the morals of every community. *Barnett v. Penn Hills School District*, No. 1412 CD 2014, 15 (Pa. Cmwlth. 2015); *Riverview School District v. Riverview Education Association, PSEA-NEA*, 639 A.2d 974 (Pa. Cmwlth. 1994). Not only did the teacher's conduct in lying to school officials about his relationship with the student in this case offend the morals of the community, it also interfered with the school's duty to investigate and protect students from future injury.

The duty to ensure that a teacher-student relationship remains professional rests with the teacher. *Department of Education v. Bergen*, Docket No. DI-11-26 (PSPC July 19, 2011) (A teacher developed a close personal relationship with one of her students, discussing personal issues with the student and allowing the student to move in with her after she dropped out of school.); *See also Department of Education v. Tomeo*, Docket No. DI-08-33, 3 (“Certainly an educator stands as a fiduciary to his students and owes them the duty to protect them from conditions that are harmful. 22 Pa. Code § 235.4 In this case, the harm emanated from the educator's own conduct in attempting to seduce the student.”). In the case *sub judice*, the teacher breached his duty to the profession, to the public, and to the student, when he

engaged in “grooming” and sexual misconduct, possessed inappropriate emails/images that left no doubt about his inclinations to objectify female students as sexual targets, and lied to school officials about the nature of his relationship with the student during the investigation.

B. THE DUTY TO PROTECT STUDENTS FROM SEXUAL HARASSMENT, INCLUDING SEXUAL ABUSE AND SEXUAL MISCONDUCT, IS A WELL-DEFINED AND DOMINANT PUBLIC POLICY DERIVED FROM AND GROUNDED FIRMLY IN STATE AND FEDERAL LAW.

The clearly established public policy and duty to protect students from sex discrimination in any form is firmly rooted in state and federal law. *Slippery Rock*, 71 A.3d at 363. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in federally funded education programs and activities. Schools that receive federal financial assistance, such as Cornwall-Lebanon School District, must comply with Title IX. Failure to comply with Title IX can result in compliance monitoring, loss of federal funds, and liability for money damages in private litigation. 20 U.S.C. §§ 1681-1682; 34 C.F.R. Part 106; *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

Sexual harassment is a form of sex discrimination prohibited by Title IX, and it includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” U.S. Department of

Education Office for Civil Rights, *Dear Colleague Letter: Sexual Violence 3* (April 4, 2011).¹¹ Recognizing that sexual harassment can interfere with a student's academic performance and physical and emotional well-being, guidance issued by the U.S. Department of Education has stressed the importance of preventing and remedying sexual harassment in schools. This requires schools to conduct an investigation to determine what happened and take appropriate steps to resolve the situation.

Pennsylvania's Code of Professional Practice and Conduct for Educators (Code), "created by the Professional Standards and Practices Commission (PSPC) and its stakeholders reflects the codification of the shared beliefs of the teaching profession in Pennsylvania. The Code is designed to identify the ethical responsibilities of teachers as well as to serve as a guide for decision-making for teachers. Intrinsic to the ethical standards set forth in the Code are the values of trust and fair mindedness; honoring human dignity, emotional well-being and cognitive development; respect for spiritual and cultural values and integrity in professional

¹¹ For over a decade, the U.S. Department of Education's Office for Civil Rights has published a number of significant guidance documents on sex discrimination, sexual harassment, and sexual violence in the school setting in order to remind schools of their responsibility to comply with the requirements of Title IX. Their Dear Colleague Letter on Sexual Violence is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (last visited Sept. 16, 2016).

commitments and responsibilities.” PSPC, *Educator Ethics and Conduct Toolkit*.¹²

Pursuant to this Code, professional educators are expected to: respect the civil rights of all and not discriminate on the basis of sex, impart to their students principles of good citizenship and societal responsibility, exhibit acceptable and professional language and communication skills, and exert reasonable effort to protect the student from conditions which interfere with learning or are harmful to the student’s health and safety. 22 Pa. Code § 235.4(b)(4), (6), (7) and (10). Furthermore, professional educators may not sexually harass or engage in sexual relationships, or knowingly and intentionally withhold evidence from the proper authorities about violations of the legal obligations as defined within this section. 22 Pa. Code § 235.10 (3), (4).

The Child Protective Services Law (CPSL), 23 Pa. C.S. § 6301 *et seq.*, which requires school employees to report suspected child abuse in order to protect children from further abuse,¹³ and the Educator Discipline Act, 24 P.S. § 2070.9a, which requires school administrators and educators who know of any action, inaction or conduct which may constitute sexual abuse or exploitation or sexual misconduct to file a report, also present evidence of the commonwealth’s desire to protect students

¹² Available at: <http://www.pspc.education.pa.gov/Promoting-Ethical-Practices-Resources/Ethics-Toolkit/The-Commission-Professional-Discipline-and-the-code/Pages/default.aspx> (last visited Sept. 16, 2016).

¹³ It is also worth noting that pursuant to Section 6368(i) of the CPSL, a school is required to implement a plan of supervision or alternate arrangement for a school employee who is under investigation for suspected child abuse in order to ensure the safety of the child and other children who are in the care of the school. 23 Pa. C.S. § 6368(i).

from sexual abuse and sexual misconduct through action on the part of school officials. Section 1317 of the School Code, 24 P.S. § 13-1317, which vests school officials with *in loco parentis* authority over students, provides further support for this duty to protect students. In *Westmoreland*, a case involving the public policy to protect students from illegal drugs and drug use, the court noted that “a school system has an unmistakable duty to create and maintain a safe environment for its students.” *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA*, 977 A.2d 1205, 1209 (Pa. Cmwlth. 2009), *vacated and remanded on other grounds*, 66 A.3d 250 (Pa. 2013), *affirmed* 72 A.3d 755 (Pa. Cmwlth. 2013). The importance of this public policy is further illustrated by the fact that it is a felony per se, regardless of consent, for an employee of a school to engage in sexual intercourse, deviate sexual intercourse or indecent contact with a student of the school. 18 Pa.C.S.A. § 3124.2. A course of conduct aimed at orchestrating a sexual encounter shortly after a student’s graduation is wholly offensive to public policy and the goals to protect students from being taken advantage of by school employees.

The above sources of law outline a public policy making sexual harassment, including sexual misconduct and sexual abuse, prohibited in the school setting. This public policy is premised on ensuring a safe environment so students can learn, and

requires schools to investigate and take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.

C. THE ARBITRATOR’S AWARD REINSTATING THE TEACHER UNDERMINES THE SCHOOL DISTRICT’S LEGAL DUTY TO COMPLY WITH STATE AND FEDERAL LAWS AIMED AT PROTECTING STUDENTS FROM SEXUAL HARASSMENT AND VIOLATES THE PUBLIC POLICY THAT IS THE SOURCE OF THIS DUTY.

The arbitrator’s reinstatement of a teacher terminated for sexual misconduct and for lying about the sexual misconduct would elevate the decision of the arbitrator above the public policy objectives of Title IX and state law by eviscerating the employer’s role in protecting its students from sexual harassment in the school setting. Schools have a responsibility to respond promptly and effectively to sexual harassment, and a school’s failure to proactively respond can result in injury to other students, and litigation that can be shattering to a school community. *Gebser*, 524 U.S. 274; *E.N. v. Susquehanna Township School District*, 2011 WL 3608544 (M.D. Pa. 2011).

Although Title IX does not require a particular form of disciplinary action, a school must respond in a way that prevents the recurrence of any prohibited conduct and corrects the conduct’s effects on the student and others. *Dear Colleague Letter: Sexual Violence* 9. Furthermore, schools that fail to take action with respect to complaints of sexual misconduct, which causes a student constitutional harm, are

subject to liability when inadequate response to sexual misconduct results in the victimization of other students. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989).

Here, in order to prevent the recurrence of the conduct and future liability, the school district terminated the teacher. To deny the school the ability to appropriately discipline the teacher for his conduct would place the school in violation of Title IX and leave other students exposed to harm. *Slippery Rock*, 71 A.3d at 366; *Cf. Philadelphia Housing Authority*, 52 A.3d at 1123 (arbitration award that violated Title VII was against public policy and could not be enforced).

In *Slippery Rock*, the university terminated a professor for making inappropriate sexual comments to and about female college students and the arbitrator reinstated the professor. 71 A.3d at 357. On appeal, the university “argued that the arbitrator’s award violates an established public policy prohibiting sexual harassment or discrimination in educational institutions.” *Id.* at 358. Acknowledging the long-standing and well-defined public policy against discrimination on the basis of sex (Title IX), this Court concluded that the arbitrator’s award poses a substantial risk of undermining this public policy and cannot be enforced. *Id.* at 356-57. PSBA urges that just as the court did in *Slippery Rock*, this Honorable Court should conclude that the arbitrator’s award reinstating the teacher violates public policy and cannot be enforced.

Moreover, the reinstatement of the teacher in the case *sub judice* is particularly concerning because the teacher lied to school officials on more than one occasion about the nature of his inappropriate relationship with the student. Getting caught, but getting away with it anyway merely encourages more careful and thorough deception in the future, making the school district's task of detecting and preventing further victimization of students that much more difficult. As observed by the Pennsylvania Supreme Court on this point: "The award in this case encourages individuals who are so inclined to feel free to misbehave in egregious ways, without fear of any meaningful consequence." *Philadelphia Housing Authority*, 52 A.3d at 1128.

In closing, the court in *Slippery Rock* noted the following: "The public places its confidence and trust in Commonwealth educators, and an educator violates this trust when he engages in discriminatory behavior with students who are placed in his care." 71 A.3d at 365. Since the teacher in this case violated the public trust given to him to protect students from harmful behavior, particularly sexual misconduct, the reinstatement of the teacher now would effectively eviscerate the ability of the school to continue to protect its students from similar behavior in the future. This consequence of the arbitration award is something that public policy will not tolerate, and that this Court must not abide.

V. CONCLUSION

Wherefore, your *Amicus Curiae*, the Pennsylvania School Boards Association respectfully urges that this Honorable Court affirm the decision of the Court of Common Pleas.

Respectfully Submitted,

/s/ Katherine M. Fitz-Patrick

Katherine M. Fitz-Patrick, Esquire
Attorney I.D. No. 208863
Counsel for *Amicus Curiae*
Pennsylvania School Boards Association
400 Bent Creek Boulevard
Mechanicsburg, Pennsylvania 17050
(717) 506-2450, ext. 3414
katherine.fitz-patrick@psba.org

Dated: September 22, 2016