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DAILY REPORT

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Rulings Conflict on Insurance for Teacher Accused of Abusing Special-Ed Students

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DIVERGENT RULINGS mean a disabled student who claims she was mistreated by a teacher will not be able to collect on the teacher's insurance policy, but other students bringing similar claims against the same teacher may get a chance.

A recent ruling by Fulton County Superior Court Judge Robert McBurney says that some claims against former Fulton special education teacher Melanie Pickens are covered under a policy issued to her as part of her membership in the Professional Association of Georgia Educators. McBurney's March 20 ruling is at odds with a federal district court judge's ruling, upheld by the U.S. Court of Appeals for the Eleventh Circuit last year, which said the claims wouldn't be covered by Pickens' insurance.

Michael Rust of Gray, Rust, St. Amand, Moffett & Brieske, who has been handling the insurance company's fight against covering the teacher, called the matter one of the "least boring" insurance coverage issues in which he's been involved. He said his client hadn't decided whether to appeal the part of McBurney's ruling allowing coverage. "I thought the judge wrestled with it," he said.

Michael Rust

McBurney didn't rule completely for the autistic student whose case was before him. The student's lawyer, Chris Vance of Atlanta, said, "What matters to us is there is insurance coverage."

A disabled student who lost on the coverage issue at the Eleventh Circuit, however, now must hope to prevail on her claims against the Fulton County School District, according to that student's lawyer, Craig Jones of The Orlando Firm in Decatur. "It's the only way we're going to recover," he said.

The former Fulton special ed teacher has faced criminal charges over her work at Hopewell Middle School in North Fulton, although another Fulton judge and an appellate panel has found her immune from criminal liability. While teaching a class of several children with various physical and mental disabilities, prosecutors say, Pickens confined students in a restrictive chair, either in the classroom or alone. They also accuse her of "slamming" a child against school walls and lockers.

According to McBurney's order in the insur-

ance coverage case, the evidence before him showed that Pickens would yell at Vance's client—who sometimes loudly giggled to himself or spontaneously sat on the floor—calling him "retard," "little shit" or "little fucker."

Criminal charges against Pickens included cruelty to children and false imprisonment. Pickens' criminal defense attorney, B.J. Bernstein, has said Pickens did the best she could "with a tough situation and a difficult situation."

After an evidentiary hearing, Fulton Superior Court Judge Henry Newkirk dismissed the criminal charges against Pickens under a state statute immunizing educators from criminal liability over discipline administered in good faith. A Georgia Court of Appeals panel upheld that ruling last month, rejecting District Attorney Paul Howard Jr.'s arguments that Pickens' actions were neither discipline nor taken in good faith. He has asked the Georgia Supreme Court to review the matter.

Meanwhile, families of several of Pickens' former students have sued her and other school personnel, raising claims such as denial of constitutional rights, assault and battery and intentional infliction of emotional distress.

A sticking point in some of the civil cases has been insurance coverage for Pickens under the policy issued to her by National Casualty Co. In multiple cases, the insurer has filed separate declaratory judgment actions against Pickens and the student plaintiffs, arguing that it does not have to defend Pickens or indemnify her for any judgment.

According to Rust, the insurance company's lawyer, the policy has a $1 million coverage limit. The policy contains several exclusions, including for criminal acts, intentional acts or sexual misconduct. But the criminal and intentional act exclusions contain exceptions for "corporal punishment," meaning claims over corporal punishment usually would be covered under the policy.

In April 2014, U.S. District Judge Thomas Thrash granted summary judgment to National Casualty in one of the insurance coverage cases. He said the insurance company was relieved of liability under the intentional acts exclusion because the student had alleged "deliberate" acts by Pickens. In a footnote, Thrash said neither the student nor Pickens had argued that Pickens' acts constituted "corporal punishment."

The student's attorney in a motion for reconsideration argued that part of the basis of the student's substantive due process claim was that Pickens violated the student's "right under the Fourteenth Amendment to be free from excessive corporal punishment," but Thrash denied that motion. The Eleventh Circuit panel of Judges Gerald Tjoflat, Charles Wilson and Robin Rosenbaum affirmed Thrash.

In Fulton County in March, following a bench trial in the case over insurance coverage for claims brought by another student, McBurney issued a final decision on coverage. McBurney said all of Pickens' alleged conduct was intentional and some may also have been criminal, but he said National Casualty must defend and indemnify Pickens to the extent claims are based on acts of corporal punishment. He distinguished between acts that met his definition of corporal punishment—"the physical punishment Pickens meted out on [the student] in immediate response to his perceived misconduct"—and the "many" instances of "abuse" of [the student] that were unprovoked by the boy's behavior or addressed behavior that Pickens herself instigated by "harassing" him.

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"Those times when Pickens would accost—verbally or physically—an otherwise tranquil [student] and incite him, so that Pickens could then further abuse him by 'punishing' him for a disruption that she fomented, were *not* instances of corporal punishment and are excluded from coverage," wrote McBurney. "Similarly, when Pickens would slap, grab or confine [the student] for no reason at all—i.e., when there was no arguable corrective purpose to her actions—she was engaging in abuse that garners no coverage under plaintiff's policy."

The student's civil lawsuit, which is pending before U.S. District Judge Timothy Batten Sr., has been stayed during the criminal appeal, but Vance said she will move to have the stay lifted because, "These witnesses are forgetting."

Rust, the insurance company's lawyer, said a key difference between the case decided by McBurney and that decided by the Eleventh Circuit is that McBurney was presented evidence by the student's lawyer that created a factual dispute over whether Pickens' actions were to punish the student or simply abuse him, while Thrash was not.

Jones, the lawyer who lost the coverage issue at the Eleventh Circuit, attributed the difference in the court opinions to busy federal judges not paying attention, noting declaratory judgment actions over insurance are generally "mind-numbingly boring."

Jones said the irony in the case is that Pickens was granted immunity from prosecution because the courts concluded she was engaged in discipline, which he equated with corporal punishment. "In order to win our case, we have to show that this was excessive corporal punishment," said Jones, "yet the court has said that we don't have coverage under a policy that covers corporal punishment."

Freeman Mathis & Gary lawyer Mary Ann Ackourey, who is representing Pickens in the civil cases under her insurance policy, declined to comment on the merits of the suits.