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The Pennsylvania Department of Education Makes Announcement Regarding Statewide Exams

Recently, the Pennsylvania Department of Education presented a notice to all School Districts as it relates to cell phone use during the Keystone and other Statewide Exams. Specifically, PDE directed that students are prohibited from possessing cell phones when taking the PSSA or Keystone Exams. Just released, the Pennsylvania Department of Education (PDE) issued a Penn*Link with guidance on this issue. It included instructions on what to do if a student is found in possession of a cell phone during a state assessment. This raised concerns with most solicitors and particularly with the Pennsylvania School Boards Association. It required that schools inform parents that if a student possesses a cell phone during an assessment, it would be confiscated until such time as a parent or guardian comes to school. It also explains that once the parent reached the District then the device would be searched in the presence of the parent or guardian.

However, the searching of a cell phone carries risks for an administrator, particularly in the absence of express consent to the search. Depending on the extent and nature of the search, it could violate provisions of Pennsylvania's Wiretap Act or violate a student's Constitutional Rights to be free from unreasonable searches and seizures. In 2006, a court allowed a student's case to proceed in court when he dropped his cell phone during class and administrators searched it after it was confiscated. *Klump v. Nazareth Area School District*, 425 F. SUPP. 2D 622 (E.D. PA. 2006) did not involve possession of a cell phone during a PDE assessment test, but the basis for the suit against the District and its administrators could well apply to cell phone searches in other contexts.

Why has PDE put out such guidelines as it relates to school testing? Students have taken photographs of test questions and posted them on sites like Instagram and Facebook. Getting them down is difficult and in most cases the process is so time consuming that the answers will be up on the site for an extend period of time, essentially allowing students to review the question regardless. While the test forms are changed each year, field test questions are repeated and questions can be and may be reused. Meanwhile, PDE acknowledged the concerns raised by PSBA concerning the aspect of their instructions calling for an administrator to search a phone, which could risk personal and school district liability for a suit and that parents and guardians might not (continued page 4)

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New Truancy Case Sets Kindergarten Attendance

A ruling in February set the record straight once and for all as it relates to kindergarten attendance. In the case of the *Commonwealth v. Kerstetter*, 2013 WL 599891 (Pa. Cmwlth., 2013) the Commonwealth Court upheld a lower court order allowing for a truancy charge to be filed by a School District against a parent of a kindergarten student.

The parent of the kindergarten student appealed an order of the Court of Common Pleas of the 17th Judicial District (Snyder County Branch) (trial court) who denied her motion to dismiss the charges filed against her by the Mid-West School District for alleged violations of Section 1327 of the Public School Code of 1949 regarding compulsory school attendance. The parent contended that her children were not of compulsory school age and, therefore, not subject to the compulsory school attendance laws. The sole issue before the Commonwealth Court involved the statutory interpretation of the phrase “compulsory school age.”

The case is a result of the parent’s enrollment of her twin daughters in the kindergarten program at the West Beaver Elementary School. The School District issued three non-traffic citations against the parent for alleged violations of Pennsylvania’s compulsory school attendance law citing alleged unlawful absences of her children from school on three days in November and December.

At the first hearing, the parent testified that she had difficulty getting the children out of bed in the morning to attend school. Next, she also testified that she relied on information garnered from a website that students enrolled in kindergarten are not of compulsory school age and, therefore, not subject to compulsory school attendance. *Id.* The Commonwealth recognized a potential inconsistency between the definition of “compulsory school age” in the Code and the attendance regulations promulgated by the Pennsylvania Department of Education. Specifically, Section 1326 of the Code defines “compulsory school age” as “the period of a child’s life from the time the child’s parents elect to have the child enter school, which shall be not later than at the

age of eight (8) years.” 24 P.S. § 13–1326. However, Section 11.13 of the Department’s regulations provides: “Compulsory school age refers to the period of a child’s life from the time the child enters school as a beginner which may be no later than at the age of 8 years, until the age of 17 or graduation from a high school, whichever occurs first. A beginner is a child who enters a school district’s lowest elementary school grade that is above kindergarten.”

In response, the Commonwealth Court, despite the inconsistency in the regulations, stated that the controlling statutory definition in the Code compels school attendance for two categories of students: (1) children who have attained the age of eight years old, and (2) children whose parents elect to enroll them in school. The Code does not distinguish between children enrolled in kindergarten and children enrolled in grades above kindergarten. The Commonwealth argued the compulsory school attendance provisions apply to the parent’s children because they are enrolled in school. The compulsory school attendance provision of the Code uses the term “compulsory school age” as defined by the Code, not by the regulations. The Code plainly defines the term as “the period of a child’s life from the time the child’s parents elect to have the child enter school.” 24 P.S. § 13–1326. As the Commonwealth pointed out, the statutory definition of “compulsory school age” does not mention “beginner” or distinguish between children enrolled in kindergarten and those enrolled in higher grades. The regulations’ definition of “compulsory school age” is clearly inconsistent with the Code’s definition due to the insertion of the term “beginner.” The Code’s definition of “compulsory school age” takes precedence over the inconsistent regulation as well as any other inconsistent material circulated by the Department.

Although a school district is not required to provide kindergarten and parents are not required to enroll their child in kindergarten, once the election to enroll a child in school is made, the child is subject to the Code’s compulsory attendance requirements. (continued page 4)

Recent Court Decisions Concerning Lifetime Bans Under Section 111(e)

Recently, the Commonwealth Court issued opinions in three cases, each of which held that the lifetime ban on employing individuals convicted of certain crimes listed in the Pennsylvania School Code Section (24 P.S. § 1-111(e)) violated the Pennsylvania Constitution as applied to the individual plaintiffs involved. These cases created several important impacts on school employers; however, the decisions rendered were very fact-based oriented and background driven.

In light of the decisions made in these cases, the Pennsylvania Department of Education and the PAESSP provided guidance in the way of administration and implementation of 111(e). The following is a list of these guidelines. It is important to understand that Commonwealth Court did not declare Section 111(e) of the Pennsylvania School Code to be unconstitutional in all cases. Accordingly, Section 111(e) of the Pennsylvania School Code, for the most part, remains intact and in full force, and school administrators, staff, and boards must adhere to the law to the extent they are able to do so constitutionally.

As a result of these cases, school entities should continue to apply the employment prohibitions contained in Section 111 of the Pennsylvania School Code on a case-by-case basis, with student safety serving as the paramount consideration. Districts should continue to be cautious and investigate any violations dealing with corruption of minors, child endangerment, and child abuse, which are just a few of the enumerated offenses found in this section. School entities are advised to consult with their legal counsel in addressing the application of the provisions of Section 111 to particular individuals in the light of these cases. It is critically important that administrators understand that, if they deviate from the express terms of Section 111 in making a retention or hiring decision, they must carefully analyze and evaluate that matter. The crucial

consideration should always be given to the safety of students; however, provisions found in Section 111 also hold the administration liable if they refuse or neglect to follow up on a 111(e) violation. Each determination that the application of Section 111 would be unconstitutional as applied to a particular individual must be supported by a written opinion from the school's legal counsel.

These decisions do not impact other requirements of Section 111, including those concerning pre-employment school background checks, providing for mandatory reporting by employees of arrests or convictions of certain offenses and providing for background checks when a school administrator has a reasonable belief that a school employee has not notified school administration of a reportable offense. Each of those provisions remains intact. Most importantly the 72-hour notification requirement remains constitutional.

School District administrators are also reminded that they are required to report to PDE all instances of certificated employees or charter school staff members (as such term is defined in the Professional Educator Discipline Act): (a) who report an arrest or conviction for offenses listed under Section 111(e) of the Pennsylvania School Code and crimes involving moral turpitude that have been disclosed on the revised PDE-6004 form; or (b) that are otherwise known to the administrators as the result of background checks or otherwise. Such reports must be made regardless of the date of the offense and regardless of any conclusion that a Section 111 employment ban may not be constitutionally applied. The report form is required to be filed within 30 days of the receipt of information concerning the arrest or conviction and must include all available information concerning the arrest or conviction.

Districts must keep in mind that the aforementioned recommendations are only guidelines issued by PDE, and due to the required case-by-case analysis the District's solicitor should be consulted prior to any hiring and/or termination of employees regarding 111(e) violations.

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cooperate by consenting to a search of the student's cell phone.

As a result of the issues that were being raised, it has been reported that PDE's General Counsel's Office is agreeable to the following:

All cell phones, smart phones, and other prohibited electronic devices are to be collected as students enter the testing site. Thus, school districts and schools should do the following:

- Inform parents and students before testing that cell phones are not allowed during the test administration;
- Make every attempt to advise students not to bring cell phones and other recording devices to a statewide assessment;
- Advise students once in the assessment room to turn over any cell phones or other recording devices they still have in their possession;
- Inform parents and students that, if the student possesses a cell phone or electronic device in any manner during the administration of the test, the phone or electronic device will be confiscated;
- Immediately confiscate any cell phone or other recording device that a student takes out during the testing;
- Inform parents and students that violation of the no cell phone or other electronic device rule will result in discipline and that discipline will vary depending on whether test material has been compromised;
- Administer discipline to any student who possesses a cell phone or other recording device during the examination;
- Inform parents and students that if the District believes a student has used a cell phone or other recording device in a manner that potentially violates copyright law, confiscate the cell phone and turn it over to the police as contraband.

If the District believes a student has used a cell phone or other recording device in a manner that

potentially violates copyright law, confiscate the cell phone and turn it over to the police as contraband. This will preserve evidence when the phone is confiscated. It has been recommended by the PDE that proctors in the testing rooms use the sealable envelopes which are large enough to hold a cell phone. When the phone is confiscated, place it in the envelope, seal it and have the student write his/her name across the seal. Make sure proctors know to turn in the sealed envelope immediately after the test concludes.

School Districts should keep attentive on the decisions rendered regarding these protocols moving forward as this will have a significant impact on testing procedures. Districts should be cognizant to follow the protocols listed and when in doubt contact their solicitor to ensure the administrators and staff are fully protected.

New Truancy Case Continued from page 2

In other words, the compulsory school attendance provisions apply to any student enrolled in public school, regardless of whether they are enrolled in kindergarten. At the time the School District issued the citations, the parent's children were younger than eight years old and enrolled in kindergarten in public school. Therefore, the Commonwealth Court concluded that if a School District elects to offer kindergarten as part of the District's curriculum, and a parent chooses to elect to enroll their child/children in such a program, then the student which is enrolled must meet the compulsory school attendance provisions of the Code.

In summary, the Court concluded that if a student enrolls, the District must know how many supplies to buy, how many desks are needed for each classroom, and how many teachers are needed to educate the kindergarten students. If a parent elects to enroll their child in kindergarten at a School District, those students must meet the compulsory school attendance provisions of the Public School Code or face a truancy charge by the District.

The Pa. Board of Education Finalizes Adoption of Common Core State Academic Standards

In a recent update provided by Governor Corbett's Office, the State Board of Education voted to adopt final-form regulations to amend Chapter 4, Academic Standards and Assessment, of Title 22, of the Pennsylvania Education Code. Specifically, the Secretary of Education stated that the Board's action put into place the Pennsylvania Common Core Standards and requires students to demonstrate proficiency on Keystone Exams. The adoption of these common core standards is a way for the state administrators to assure parents that the changes in place for those students graduating from the Pennsylvania public schools will have the skills and knowledge needed to be successful.

As required by the new regulations, the Pennsylvania Common Core Standards in English language arts and mathematics must be implemented in all public schools across the state by July 1, 2013. Similar to the nationwide Common Core State Standards initiative, which is under way in 45 states, Pennsylvania tailored these standards to meet the needs of Pennsylvania's students and adopted its own assessments.

The Board also adopted the final implementation schedule for the Keystone Exams, which are rigorous, end-of-course assessments designed to ensure a student's mastery of specific academic content. These exams are required to graduate from a Pennsylvania high school. Beginning with the Class of 2017 (this year's 8th-grade class) students will be required to pass three Keystone Exams — Algebra I, biology and literature — or a comparable assessment to obtain a high school diploma. The Class of 2019 (this year's 6th-grade class) will be required to pass four Keystone Exams — Algebra I, biology, literature and composition. The Class of 2020 (this year's 5th-grade class) and beyond will be required to pass five Keystone Exams — Algebra I, biology, literature, composition, and civics and government. Additionally, subject to available funding, five additional Keystone Exams would be made available to school districts for voluntary use based on the following schedule:

geometry in 2016-17, U.S. history in 2017-18, Algebra II in 2018-19, chemistry in 2019-20 and world history in 2020-21.

Interestingly enough, it was reported that the State Board of Education voted to repeal the required culminating graduation project, and the Keystone Exams, from counting as one-third of a student's course grade. Specifically, the Board felt that the Keystone Exams will ensure that students are graduating high school with the necessary skills and academic credentials that are needed to be successful in college and the workforce.

The Standards Aligned System (SAS) was created as a web-based system that provides educators access to Pennsylvania Common Core-aligned curriculum framework; materials and resources for classroom instruction, including a classroom diagnostic tool that provides details of each student's strengths, weaknesses, knowledge and skills in specific content areas; voluntary model curriculum; and learning progressions that indicate how students progress toward mastery of the skills needed for postsecondary success.

School Districts must understand clearly that now that the Board has taken final action to amend the regulations, these regulations will now go to the House and Senate Education committees and the Independent Regulatory Review Commission for consideration.

School Districts must take into account that these standards and the assessments that accompany them are intended to be rigorous. Teachers will have to create lessons that include higher level thinking skills and writing components in order to prepare students for the Common Core Standards. Administrators will have to supervise the implementation of such common core teaching guidelines and guarantee that teachers follow through on the District's implementation. Essentially, School Districts will have to work as one fluid operation from Administration to student in order to achieve the goals set out by this new wave of teaching.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

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Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Lawrence Wess at ljw@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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