

Background Checks for Employees and Volunteers

Pennsylvania has again strengthened its child protection laws by passing additional legislation, which becomes effective at the end of this year. House Bill 435 would expand applicability to include persons responsible for employment decisions or selection of *volunteers*. The current law only requires employers, administrators or supervisors to assure that the background checks are conducted on any applicant for employment. House Bill 435, which has now been signed into law by the Governor, will affirmatively be called Act 153. Beginning December 31, 2014, this Section 6344 (information relating to prospective childcare personnel and/or employees having contact with children; adoptive and foster parents) applies to the following individuals:

- 1) An employee of Child Care Services,
- 2) A Foster Parent,
- 3) A prospective Adoptive Parent,
- 4) A self-employed family Day Care Provider,
- 5) An individual fourteen (14) years of age or

older applying for a paid position as an employee responsible for the welfare of a child or having direct contact with children,

6) An individual seeking to provide child care services under contract with a child care facility or program, and

7) An individual eighteen (18) years of age or older who resides in the home of Foster Parent for at least thirty (30) days in a calendar year or who resides in the home of prospective Adoptive Parent for at least thirty days in a calendar year.

School employees will continue to be governed by the Pennsylvania Public School Code and shall be subject to the provisions of Section 111 and 111(e) of the Public School Code. School employees not governed by the provisions of the Public School Code of 1949 shall be governed by Act 153. Any person who has obtained the information required under this Chapter may transfer or provide services to another subsidiary or branch established and supervised by the same organization, or serve in a volunteer capacity for any program, service or activity, during the length of time person's certification is current pursuant to Section 6344.4 (relating to Certification Compliance).

The most important provision that District Board of Directors and their Administrative Team must take into account is provided in Section 6344.4, Certification Compliance.

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New certification shall be obtained in accordance with the following:

1) *Effective December 31, 2014:*

- (I) A person identified in Section 6344 (relating to employees having contact with children) shall be required to obtain the certifications required by this Chapter *every thirty-six (36) months*.
- (II) School employees identified in Section 6344 (a.1)(1) shall be required to obtain reports under Section 111 of the Pennsylvania Public School Code, *every thirty-six (36) months*.
- (III) Any person identified in Section 6344 with a current certification issued prior to the effective date of this Section shall be required to obtain the certifications required by this Chapter *within thirty-six (36) months* from the date of their most recent certification, or, if the current certification is older than thirty-six (36) months, *within one (1) year* of the effective date of this Section.

2) *Effective July 1, 2015:*

- (I) A person identified in Section 6344.2 (relating to *volunteers* having contact with children) shall be required to obtain the certifications required by this Chapter *every thirty-six (36) months*.

In summary, based upon the language as administered under Act 153, it is safe to say that every current and new school district employee must obtain a new Child Abuse Certification *every thirty-six (36) months*. Current employees who possess a certificate have three (3) years to obtain a new certificate if their current certificate is less than three (3) years old. Employees who possess a certificate that is older than three (3) years have one (1) year to obtain a new certificate.

“Pass The Trash” Bill Approved

House Bill 1816, which has now been approved as Act 168 (also known as the “Pass The Trash” Bill), will go into effect on December 21, 2014. This Law will prevent schools from hiring teachers, coaches or staff who have sexually exploited, abused, or harassed students in their past employment. Broadly speaking, this new Law makes it a legal requirement for schools to investigate if a teacher, an administrator or staff member has been the subject of an abuse or sexual misconduct investigation. The Governor signed House Bill 1816 into Law on October 22, 2014. Specifically, Act 168 amends the Pennsylvania Public School Code of 1949, Section 111.1, Employment History Review to read as follows: “This Section shall apply to all positions for employment at school entities and independent contractors of school entities involving direct contact with children.

In addition to fulfilling the requirements of Section 111 and *23 Pa.C.S. §6344.2* (relating to other persons having contact with children), before a school entity or independent contractor may offer employment to an applicant who would be employed by or in a school entity in a position involving direct contact with children, the school entity or independent contractor shall:

1. Require the applicant to provide:
 - (I) A list, including name, address, telephone number and other relevant contact information, of the applicants:
 - (A) Current employer.
 - (B) All former employers that were school entities.
 - (C) All former employers where the applicant was employed in positions that involved direct contact with children.
 - (II) A written authorization that consents to and authorizes disclosure by the applicant’s current and former

employers under subparagraph (I) of the information requested under paragraph (2) and the release of related records and that releases those employers from liability that may arise from such disclosure or release of records pursuant to subsection (D) (5).

(III) A written statement of whether the applicant:

(A) Has been the subject of an abuse or sexual misconduct investigation by any employer, state licensing agency, law enforcement agency or child protective services agency, unless the investigation resulted in a finding that the allegations were false;

(B) Has ever been disciplined, discharged, non-renewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of abuse or sexual misconduct as described above were pending or under investigation, or due to an adjudication or findings of abuse or sexual misconduct as described above; or

(C) Has ever had a license, professional license or certificate suspended, surrendered or revoked while allegations of abuse or sexual misconduct as described above were pending or under investigation, or due to an adjudication or findings of abuse or sexual misconduct as described above.

There are multiple other provisions of Act 168 which require the employer to inquire whether the Department of Education has ever received notification of any pending criminal charges against
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the applicant. An applicant must also keep in mind that any applicant who provides false information or willfully fails to disclose information as required by the “Pass The Trash” Law will be subject to discipline up to, and including, termination or denial of employment and may be subject to criminal prosecution under *18 Pa.C.S. §4904*, and may be subject to civil penalties and professional discipline in accordance with the Education Misconduct Act.

Once the employer receives information, it falls upon the employer to be responsible in reviewing the information which has been disclosed in order to make an ultimate determination about the applicant’s eligibility to the position. Where the prospective school entity or contractor makes a determination to further consider the applicant for employment, the school entity or contractor shall request that former employers provide additional information about the matters disclosed and all related records. Former employers shall provide the additional information requested no later than sixty (60) days after the prospective employer’s request under this provision. Information received under this section shall not be deemed a public record for the purposes of the “The Right-To-Know Law.”

According to the “Pass The Trash” Law, a school entity that receives the information under this subsection may use the information for the purpose of evaluating an applicant’s fitness to be hired or for continued employment and may report the information as appropriate to the Department of Education, a state licensing agency, law enforcement agency, child protective services agency, and other school entity or prospective employer.

Further, employers and school districts must keep in mind that an employer, school entity, school administrator or independent contractor that provides information or records about a current or former employee or applicant shall be immune

from criminal liability under *23 Pa.C.S. Chapter 63* and the Educator Discipline Act and civil liability for the disclosure of the information, unless the information or records provided were knowingly false. Such immunity shall be in addition to and not in limitation of any other immunity provided by law, or any absolute or conditional privileges applicable to such disclosures by virtue of the circumstances or the applicant’s consent thereto.

Any provision of an employment contract or agreement for resignation or termination or severance agreement that is executed, amended or entered into after December 21, 2014, and that is contrary to this Act shall be void and unenforceable. Specifically for purposes of this section, the term “Educator” shall mean all of the following:

(1) Any person who holds a Commonwealth of Pennsylvania Certificate, Commission, Letter of Eligibility or Permit issued under this Act or under the Professional Educators Act, or under the Private Academic Schools Act, or who has applied for a Certificate, Commission, Letter of Eligibility or Permit;

(2) Any person who is a Charter or Cyber Charter School Staff Member or who is a Contracted Educational Provider or Contracted Educational Provider Staff Member as those terms are defined in the Educator Discipline Act; and

(3) Any person over whom the Professional Standards and Practices Commission has disciplinary authority pursuant to the Educator Discipline Act.

Essentially, the “Pass The Trash” Law has been designed to prevent abusive teachers from relocating to another school district. In a nutshell, the Law would bar schools from entering into contracts that suppress information about investigations of abuse and sexual misconduct, as well as prevent schools from transferring problem teachers from school district to school district, the practice commonly called, “Passing the Trash.”

As Act 168 goes into effect on December 21, 2014, school districts must take the necessary steps to review, evaluate, and request any additional information that would become necessary when hiring professional employees within their district. Districts should take steps to create an Administrative Evaluation Team which would be able to evaluate all résumés from prospective applicants and to request additional information if need be. Districts should also ensure that they work continuously with their Solicitors and/or Labor Counsel as they move forward in the hiring process and investigate any potential violations of the “Pass The Trash” Law.

Office for Civil Rights Takes a Stand on Bullying

October 21, 2014, the United States Department of Education Office for Civil Rights put out a Dear Colleague letter as it relates to harassment and bullying within the Public School System, both in the Commonwealth of Pennsylvania and throughout the Country. There is no question that cases have presented themselves before the Court System as it relates to bullying and in particular, as it relates to an ever-increasing number of complaints of harassment between students both online and within the School District setting. The Dear Colleague letter explains that bullying can involve overt physical behavior or verbal, emotional, or social behaviors and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

This October 21, 2014, letter specifically speaks to the issue of bullying students with disabilities

and explains that the bullying of a student with a disability on any basis can result in a denial of Free Appropriate Public Education (FAPE) under Section 504 that must be remedied. The letter also reiterates schools’ obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment. OCR released this Dear Colleague letter as they are the enforcement agency for Section 504 and Title II, both of which prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance. OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including all public schools and school districts as well as all public charter schools and magnet schools. Schools have an obligation under Section 504 to evaluate students who need or are believed to need special education or related services.

Further, schools have an obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. Schools often document these services in written plans, sometime referred to as Section 504 plans, or, if the child is receiving IDEA FAPE services, through the required Individualized Education Program (IEP).

This Dear Colleague letter directs that the school must take immediate and appropriate action to investigate or otherwise determine what occurred as it relates to when a school knows or should know of bullying conduct based on a student’s disability. OCR lists an example of such conduct stating that, “A school knows or should know about disability-based harassment when, for example, a teacher or other responsible employee of the school witnesses the conduct. If the school’s investigation reveals that bullying based on disability created a (continued next page)

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hostile environment which means the conduct was sufficiently serious to interfere with or limit a student's ability to participate and/or benefit from the services, activities, or opportunities offered by the school, then the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from reoccurring, and remedy its effects.

Below is an example of how the Office of Civil Rights would identify a disability-based harassment violation of Section 504 and Title II being when:

- a) A student is bullied based on a disability;
- b) The bullying is sufficiently serious to create a hostile environment;
- c) School officials know or should know about the bullying; and
- d) The school does not respond appropriately to this conduct.

Unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with the disability's receipt of Free Appropriate Public Education, the school should: (1) promptly convene the IEP Team or the Section 504 Team to determine whether and to what extent the student's educational needs have changed; (2) the bullying impact to the student's receipt of such services; (3) assess additional and/or different services, if any, which are needed; and 4) ensure any needed changes are made promptly. By doing so, the school will be in the best position to ensure the student's ongoing receipt of FAPE.

Specifically referenced in the Dear Colleague letter, OCR sets out considerations and factors that the Investigating Team will look for when investigating disability-based harassment. These factors include, but are not limited to:

- a) Was the student with the disability bullied by one or more students based on the student's disability?
- b) Was the bullying conduct sufficiently serious to create a hostile environment?

- c) Did the school know or should it have known of the conduct?

As stated by the Assistant Secretary for the Office of Civil Rights, OCR is committed to working with schools, students, families, community and advocacy organizations, and others to ensure that schools understand and meet their legal obligations under Section 504 and Title II to appropriately address disability-based harassment and to ensure that students with disabilities who are bullied continue to receive Free Appropriate Public Education. Districts are encouraged to work with their Solicitors and Local State Agencies in order to re-evaluate their policies and practices in light of OCR's guidance for bullying of students with disabilities.

Hazing Hits Hard

In October of 2014, the Commonwealth of Pennsylvania was struck with hazing allegations regarding athletic sports within public school districts. As was reported in both Local and National news, one Pennsylvania School District completely cancelled its high school football team's season in direct relation to allegations of hazing within its athletic program. Specifically this hazing allegation was in regard to waterboarding of individuals on the football team at Central Bucks School District.

Central Bucks School District announced the cancellation of all remaining Central Bucks High School West varsity and junior varsity games which included the homecoming game against an archrival and the season finale which was to take place on October 31, 2014. School officials released statements stating that the hazing had occurred during the preseason, and through the investigation, was uncovered during the season. Specifically the Superintendent released a statement stating that, "Based on all available, verified information gathered from an ongoing internal investigation into allegations of improper conduct by numerous Central Bucks West football team members, and the failure of the coaching staff to properly supervise activities, swift and firm action is absolutely necessary."

Furthermore, a New Jersey School District also suspended multiple coaches and players from the Sayreville football team and cancelled the season early due to a hazing scandal regarding the football team. NG.com reported that five Sayreville War Memorial High School coaches, who were also tenured teachers in the school district, were suspended with pay regarding the allegations. The suspensions were part of an ongoing hazing investigation which resulted in seven players being charged in connection with a series of alleged incidents that took place over several days from September to October. Regardless of the investigation, none of the coaches have been

criminally charged in connection with alleged hazing.

The questions that arise from these multiple incidents of hazing allegations is the policies and procedures that Districts should have in place as it relates to hazing and/or harassment of students whether it be within the school district or through extra-curricular participation. The Districts should ensure that all harassment and hazing policies are up to date and that all coaches and staff have received the Act 126 Mandatory Reporting training to ensure that any type of harassment which takes place is reported in compliance with the law. Furthermore, it is imperative that once an allegation of hazing and/or a complaint of hazing is made to the school district, that the administrative staff and solicitor is involved immediately to ensure that a proper, neutral and unbiased investigation occurs in order to get to the facts and circumstances surrounding the hazing allegation and any remedies they must take immediately.

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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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