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FBI CRIMINAL HISTORY CHECKS NOW REQUIRED FOR NEW EMPLOYEES

Effective April 1, 2007, all School Districts are require by the School Code to obtain a FBI Federal Criminal History Records check for all new employees, as well as other individuals working in the School setting.

Under this Amendment to Section 111 of the School Code, not only are all prospective employees required to provide these FBI Criminal Checks but the law also includes all student teachers as well as any individual participating in classroom teaching such as internships or clinical or field experience. Furthermore, this law provides that independent contractors and their employees, as well as bus drivers, who have direct contact with children must also provide their Employer with a copy of their Federal Criminal History Record.

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This law applies to all employees hired on or after April 1, 2007. In addition, the law would apply to any student teacher and intern that would start with a School District after that date.

For employees hired prior to April 1, 2007, they are only required to provide their Federal Criminal History Record if they have lived outside of Pennsylvania for at least two years immediately preceding their application for employment.

The Pennsylvania Department of Education has provided a description of the detailed processes necessary for this registration. An applicant must register, then proceed to a fingerprint site and pay a $40 fee for the fingerprint service to secure the Criminal History Record.

This new law does provide a basis to employee applicants on a provisional basis for a period not to exceed 90 days, except for during a lawful strike, provided the applicant has applied for the FBI Federal Criminal History Check, and the administrator of the school has no knowledge or information pertaining to the applicant which would disqualify that individual from employment based upon any criminal history.

School Districts must immediately amend their hiring procedures to comply with this law. In addition, Districts must be careful to make sure compliance is made with all student teachers and interns participating in the school setting.

PDE has contracted with Cogent Systems to manage this program for the State, and they will have information available as of March 30, 2007, for processing of these Criminal History Checks.

Court Upholds Right of District to Require Teacher to Wear Photo ID Badge

The Federal District Court for the Western District of Pennsylvania has upheld the right of the Habor Creek School District to require a teacher to refuse a photo identification badge, when the teacher claimed it violated his religious beliefs.

In this case of *Sidelinger v. Habor Creek School District,* the teacher stated that he should not be required to wear a photo identification badge because of his religious beliefs.

The Federal Court found that there was no basis to even show that Sidelinger could equate the refusal to have a personal identification badge with a particular tenant of his faith. The Court explained that Mr. Sidelinger as a Roman Catholic did not present any evidence from a priest, employer, or member of his church linking his religious faith to the practice of the School District. Sidelinger explained that his belief stemmed from the Catholic Church teaching that sin is determined by one's own conscience and that sin is a matter between one's own conscious and God. The Court, in rejecting the claim of the teacher, noting that it was possible that by wearing an identification badge a person may, as a result, feel pride. However, the Court stated that it was difficult to "understand how this becomes undue pride, rising to the level of a sin, especially in light of the fact that the badge was merely an identification of the person, not an honor or merit."

In addition, the Court stated that they did not find the claims of Mr. Sidelinger to be credible, particularly, when the testimony showed that he had posted on an internet dating site. The Court concluded that "publicly posting a photograph of himself on an internet dating website accompanied by a detailed profile is contrary to Mr. Sindelinger's religious belief and undermines his claim that he sincerely holds this belief."

This decision demonstrates that the Federal Courts will uphold reasonable rules of a District relating to photo identification calls, particularly when such rules are related to security issues at a school site.

U.S. Supreme Court to Decide Significant Student Free Speech Case

The United States Supreme Court is hearing arguments this term to be decided before the end of June on what could be a landmark student free speech case. In the case of *Morse v. Frederick,* the United States Supreme Court is revisiting its landmark *Tinker v. Des Moines* 1969 ruling that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

This case revolves around a slogan written on a banner by a high school senior in Juneau, Alaska, that stated "bong hits 4 Jesus." The principal of the school confiscated this banner which was unfurled across the street from the high school. The principal also suspended the student for ten days.

The student admitted he hung the banner in order to "get under the skin" of his disciplinarian principal since he had been disciplined previously for turning his chair around and putting his back to the flag during the pledge of allegiance.

The School District has maintained that the student's slogan encouraged smoking marijuana, but the student has received support from the American Civil Liberties Union, and other Christian and constitutional rights organizations who have protested the discipline on the basis of censorship of religion. In the lower Court the Ninth Circuit Court of Appeals found in favor of the student and found that it was a violation of the student's free speech rights. In addition, the Ninth Circuit Court of Appeals also held the principal personally liable for violating the student's rights, a finding that has caused concern among administrators nationally.

School Officials will want to watch the decision of the Supreme Court in May and June for the results of this decision, which will have far reaching implications for School Districts across the country regarding student free speech rights.

Third Circuit Rules No Age Discrimination Against Vo-Tech School

The Third Circuit Court of Appeals found that the Admiral Perry Area Vocational-Technical School did not commit any age discrimination when it demoted a Maintenance Supervisor. In this case, which was defended by Andrews & Beard, Admiral Perry Area Vo-Tech demoted Grove and reduced his salary. However, the School did not fill this position and had his Supervisory duties distributed among various employees.

The Third Circuit ruled that Grove had failed to prove a prima facie case of a discrimination since Admiral Perry never filled the position of Maintenance Supervisor following Grove's demotion.

Grove had also alleged that he felt a remaining employee was acting as a new Maintenance Supervisor. However, the individual alleged to have been exercising the Supervisory responsibilities was a mere two years younger than Grove. The Third Circuit followed its prior law noting that an inference of age discrimination cannot be drawn from the replacement of one worker with another worker insignificantly younger, even though both workers are in the protected class for age discrimination. Thus, the Third Circuit Court of Appeals upheld the summary judgment granted by the Federal District Court dismissing Grove's suit.

This case reminds schools that a school must be cognizant of the age of the replacement worker that may be filling a position. In this case, Admiral Perry acted prudent in not filling the position, and even the individual who exercised some de facto Supervisory responsibilities, was not significantly younger than the Plaintiff in the case.

Federal Court Upholds Right of Schools to Regulate T-Shirts

A Federal Appeals Court has ruled that a group of students disciplined for wearing a band T-shirt as part of a protest of the outcome of a School's official T-shirt contest were not engaged in freedom of expression protected by the First Amendment. In the Seventh Circuit case of *Brandt v. Board of Education of City of Chicago*, the Court upheld discipline given by the School that directed a group of gifted students to refrain from wearing T-shirts as part of a protest statement.

In this case, the 8th grade class sponsored a T-shirt contest with the winning design to be selected by a popular vote. In this particular case, the members of the gifted program voted as a block in order that their design would win. The teacher ordered a revote after this group of gifted students were successful and the gifted students protested the election by wearing T-shirts with their design. The principal informed the students in advance that they would not be permitted to wear this T-shirt in protest and after the T-shirts were worn by the gifted students, the principal administered in-school suspensions for the students involved.

The Seventh Circuit found there was no First Amendment protection at issue in this case, and found that the right to an explanation by the school for how the election to pick and 8th grade T-shirt was conducted was not a legal right.

Importantly, the Seventh Circuit gave language in its decision that is helpful to School District administrators across this country when in it pointed out that the time honored constitution of concept of "academic freedom" includes not only the freedom teachers, school authorities and students to express ideas and opinions, but also the right of public schools to manage their affairs and shape their destiny free of minute supervision by federal judges and juries.

Further, the Appeals Court found that even if the T-shirt constituted speech, it would be subject to restriction, since school officials may restrict speech if it interferes with the school's educational mission. This decision supports the right of administrators to regulate the school setting and follow policy that might cause an educational disruption. However, the decision may have been different in this case if a slogan on the T-shirt had involved some clear First Amendment right that was not inflammatory or disrupted the educational process.

Prevailing Party Status:

Outlined below are two cases addressing requests for attorneys fees as a result of administrative hearings.

In the first case, out of Texas *(ES by RS and SS v. Skidmore Tynan Indep. Sch.Dist.,* 47 IDELR 40 (S.D. Tex. 2007), the parents took the District to due process seeking as relief that the District provide a single designated aide to handle their son's toileting needs. As a result of that hearing, the relief granted was the frequency of her son's diaper changes. The parent subsequently went to federal court seeking reimbursement of attorneys fees she incurred in the administrative due process hearing. Pursuant to the U.S. District Judge, the parent was not a prevailing party under the IDEA because in her original complaint she did not specifically request the type of relief that was ultimately awarded in the administrative hearing. Although this case comes out of the Fifth U.S. Circuit Court of Appeals and has no precedential value for schools in the Third Circuit Court of Appeals, the fact remains that it provides practical advice for school districts as they embark on the due process path. For this specific reason, both districts and parents must be cognizant of the need to clearly identify the requested relief in order that it does not become a bone of contention somewhere down the line.

The second case rises out of the Federal District Court for the Eastern District of Pennsylvania. In this particular case *(McAndrews Law Offices v. School Dist. Of Philadelphia,* 47 IDELR 93 (E.D.Pa.2007), there was a settlement agreement between the parents of a child with a disability and the School District of Philadelphia. The settlement agreement developed and agreed to between the parties contained a provision that the District would reimburse the parent for reasonable attorneys fees. Subsequently, when the parent's attorneys sought a greater amount than what the District thought was reasonable and willing to pay, the parent's attorney went to court to enforce the settlement provision. When the case was presented to the Federal Court, the parent's attorneys sought additional fees for attempting to enforce the award. Although the Court denied the parent's attorney's claim for additional legal fees explaining the attorney did not have an independent claim under the IDEA's fee shifting provision for the additional monies, the parent's attorney was able to enforce the award.

As practical advice to schools, whenever they are undertaking a cost-benefit analysis as to pursue and/or defend against a due process claim and subsequently make a tactical decision that it would be best for all parties to resolve the matter when agreeing to reimburse the parents' attorneys for fees, the best approach is to secure a set dollar amount prior to signing off and approving the agreement rather than allowing the attorney fees to remain open ended and subject to interpretation.

Loose Lips:
Often times in the employment setting districts and/or other employers are cautioned about the impact of what stray remarks may have on a case that is pending in court or going of to trial. School district officials need to be mindful of the impact that stray remarks may have in regard to providing educational services.

As we are all aware, one of the important changes with the 2004 amendments surrounded the limitation period for filing claims. In a case out of Hawaii *(RM and DM ex rel. J.Y.M. v. Hamamoto,* 47 IDELR 99 (D.Hawaii 2007), a vice principal in the course of a meeting with the parent made a comment that the special education laws remained "basically the same" after the IDEA's reauthorization. They were discussing a potential claim of the parents seeking a tuition reimbursement claim against the school district in regard to their child with ADHD. While the federal judge hearing the case did not make a decision on the merits (remanding it for further proceedings), the case provides some practical advice for schools that they need to be mindful of making off-hand or uninformed comments as to the meaning of the law. By making such comments it could otherwise provide the parent or student with an additional bite of the apple in regard to tolling of the filing period.
(Continued next page - Prevailing Party Status).

School District Institutes Policy to Search Student Cell Phone Text Messages

Some Denver, Colorado high schools have begun searching students' cell phone text messages when they have "reasonable suspicion" of students involved in cheating, drug abuse or other school violations. School District officials have taken the position that policies that allow then to search lockers, backpacks and cars parked on school grounds also authorize searches of cell phones when there is a reasonable suspicion of wrongdoing. The American Civil Liberties Union has denounced these actions as being an invasion of students' privacy. The ACLU has taken the position while a Court would uphold the search of a student's purse, if she were found in possession of cigarettes, the Court would not authorize school officials to search her diary to discover if she had written about violating the school's smoking ban.

On the other hand, the attorneys for the School Districts have cited the effectiveness of the policy when the texts have revealed both drug transactions as well as pornographic materials stored in the pictures.

The School Districts performing the searches have followed the "reasonable suspicion" standard closely to date. For example, Jefferson County School District near Denver has given the example that if a cell phone search will lead to evidence that a policy has been violated, it will perform the search. The School District gives the example that if you are texting somebody else in class during the exam in violation of a testing policy it would be permissible to view the text messages in that sort of situation; whereas, if you see a student playing a game on a cell phone in a class, it would not give reasonable suspicion for a violation of a policy.

A School District in Massachusetts, Framingham, initially planned to adopt a text message searching policy, but abandoned the policy when there was strong community opposition over the loss of a student's privacy.

These situations represent the newest wave of technical challenging the ability of school administrators to draw the line on searches for students.

Prevailing Party Status:
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In another case in regard to stray comments *(Lee County Sch. Dist.,* 47 IDELR 18 (OCRIV, Atlanta (FL) 2006)), the Office of Civil Rights Compliance found that a school district in Florida discriminated against a female student in failing to properly train its staff on the girl's medical condition (diabetes) or respond t her complaints regarding care and treatment. The OCR decision in part was predicated upon inappropriate comments about the student's medical condition. According to OCR, staff comments regarding the student's medical condition coupled with the district's actions amounted to a potentially hostile environment. This case offers practical advice relative to confidentiality issues but more importantly demonstrates the need to have staff properly trained to address medical conditions of students. From a preventative standpoint, districts who can properly document the manner in which they coordinated and directed school personnel in overseeing a student's treatment and communication back to the parent, can avoid potential 504 and/or ADA claims.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 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.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes:

* Negotiation of teacher and support staff contracts
* Employment Discrimination
* Special Education Litigation
* Veterans' Preference Litigation
* Teacher and student discipline hearings
* Leaders in Timed Mediation contract negotiations

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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