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Pennsylvania Passes New Open Records Law

Pennsylvania has revised its Right to Know Law extensively by passage of the new Open Records Law. Fortunately, most of this Law will not become effective until January 1, 2009. However, Districts will need to be ready for this substantial revision of the Law.

Perhaps the most significant change is the fact that all records of the School District are presumed to be public unless exempted under the Act, or unless otherwise privileged. The definition of a "Record" under the Law now specifically includes information stored or maintained electronically, film or sound recordings, and a data-processed or image-processed document. The new Law specifically lists exemptions from the definition of a Public Record, and the most noteworthy to School Districts are the following:

1) Draft minutes of any meeting and minutes of any Executive Session;

2) Medical and psychiatric records or records of a disability;

3) Confidential identification numbers, like Social Security numbers, driver's license numbers, a spouse's name, beneficiary or dependent information;

4) Employee records that would include letters of reference or recommendation, performance ratings and reviews; employment applications of persons not hired by the Agency, written criticisms of the employee, academic transcripts, and grievance material, including documents related to sexual harassment allegations.

Further, the Law specifically exempts records pertaining to strategy or negotiations related to labor relations or collective bargaining, except for final collective bargaining agreements. In fact, the Law specifically exempts exhibits entered into evidence at an arbitration hearing, transcripts of arbitration proceedings, and the Arbitrator's written opinion, but not the final Award.

Moreover, the Law exempts real estate appraisals, engineering or feasibility estimates, environmental reviews, or evaluations made in connection with leasing, buying, or selling real estate, up to the point that the Agency has decided to proceed with the lease or purchase or sale of the real estate, at which time the records can then become public.

Furthermore, the Law protects student records to the extent that it exempts any record identifying the name, home address, or date of birth of a child 17 years old or younger.

This new Law also changes who is able to request public records. Previously, the Law limited an individual who could request such public records to a resident of the Commonwealth of Pennsylvania. Under the new Law, any person who is a legal resident of the United States is able to request public records under this Law.

Every School District will need to designate an "Open Records Officer" for the purposes of receiving these requests for information and issuing responses to the requests for information. The Open Records Officer must note the date of receipt on a written request for information, and make a notation as to the date that the five-day period will end for issuing a decision.

In general, timelines under the prior Law are maintained in that the Agency still has five business days to respond to requests for information, and that the time period for a response may be extended for

Ban on Anti-Gay T-Shirt Upheld by Federal Court

A school's prohibition of a student wearing a t-shirt expressing a religious objection to homosexuality was upheld by the Federal District Court in the case of *Harper v. Poway Unified School District.*

The student claimed that the ban on wearing the t-shirt to school violated her free speech rights. However, the Federal Court relied upon the old free speech case of *Tinker v. Des Moines School District,* which provides that a school may prohibit speech that intrudes upon the rights of other students. In this case, the Court found that the ban on the messages on the t-shirt was justified because harassment on the basis of sexual orientation adversely affects the rights of public high school students. The Court also found that the t-shirt worn by the student fell under the category of t-shirts that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students that may cause them significant injury.

The Federal Court also relied upon the recent U.S. Supreme Court decision in *Morse v. Frederick,* which held that schools could restrict speech that promotes drug use on the basis that it was harmful to the students. The Court, in this case, found that speech at issue was also harmful to students and could be properly restricted.

The Federal Court concluded that a school's interest in protecting homosexual students from harassment is a legitimate pedagogical concern that allows a school district to restrict speech expressing damaging statements about sexual orientation and limiting students to expressing their views in a positive manner.

In addition, the student in this case claimed a breach of free exercise of religion. However, the Court also dismissed this claim of the student, in finding that there was no evidence that the school compelled affirmation of a repugnant belief or discriminated against the student because of her religious views abhorrent to the authorities, or conditioned the availability of benefits upon her willingness to violate a cardinal principle of her religious faith.

This Court decision reflects the continuing trend of the Federal Courts to give wide discretion to schools in banning speech that is disruptive and harmful to other students. This case, along with *Morse v. Frederick,* also stands for the proposition that a student will not be able to claim the interference of exercise with religion unless there is a clear, demonstrated religious belief at issue.

New Records Law

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the same reasons as currently listed in the public Right to Know Law.

However, the Law has revised the procedure to appeal a decision of a School District with regard to a records request. The State will maintain an Office of Open Records, and will assign Appeal Officers to handle appeals to requests for records, which will be done by region. It will be the decision of the Appeals Officers that will be appealable to the Court of Common Pleas.

Also, Courts are now authorized to award attorneys fees if a Court reverses a final determination of the School District's Appeals Officer, and School Districts can now be fined $1500 if the Court finds the District's wrongful denial of a request to have been in bad faith.

Thus, Districts can expect that there will be substantial requests for records with the implementation of this new Law. Districts will need to formalize their processes and designate the Appeals Officers in advance of the effective date of this Act.

Teacher Who Sought Quiet As Accommodation Caught Attending Professional Football Game

A teacher who had received a head injury at work asserted that he had "post concussion syndrome" causing "extreme fatigue." He asked his School District for a number of accommodations for his disability, including a noise-free work area, a limit of 40 hours of work a week, and because of his sensitivity to loud noises, no attendance at after-school events, such as basketball games or school dances.

When the School District refused his accommodations, the teacher sued the School District under the Americans with Disabilities Act. The School District was successful in having the case dismissed because of the surveillance it had done on the teacher. The teacher was caught on videotape at a New York Giants football game, tailgating in the parking lot with the fans, attending the entire game with over 60,000 fans and exiting the game after midnight.

The Court found the videotapes credible and denied the Americans With Disabilities Act claim. In fact, when questioned about his actions on the Monday night of the football game, the teacher stated that he watched the Giants game at home alone. When confronted with the videotapes, the teacher stated that he suffered from "false memory syndrome."

The Court dismissed the claim of "false memory syndrome" and summarily dismissed the claim of the teacher, noting that the teacher's excuse strained credulity.

This case, a Third Circuit decision of *Weisberg v. Riverside Board of Education,* demonstrates that school districts do have the right to conduct videotape surveillance on employees whenever an alleged disability may be in question. Under the Pennsylvania School Code, the giving of false information of this nature would give a School District grounds to proceed with termination of employment.

Board Policy Restricting Use of Teacher Mailboxes Upheld

The Third Circuit has ruled that a School Board's policy restricting the use of teacher mailboxes to school business did not violate a teacher's free speech rights. In this case of *Policastro v. Tenafly School District,* a teacher had signed a memorandum and distributed it to all school-provided mailboxes of the teachers addressing a labor dispute over a proposed collective bargaining agreement contract. The Principal had all of the copies removed from the mailboxes after receiving a complaint. Thereafter, the teacher reinserted copies of the memorandum, and the Principal again ordered the memorandum removed and the mailroom door locked. The teacher sued the Principal and the School Board, alleging that the removal violated his First Amendment right to free speech and that the Board policy restricting the use of mailboxes was unconstitutional.

In a ruling for the School District, the Third Circuit Court of Appeals found that the policy was valid, and had no actual or potential chilling effect on the teacher's speech. The teachers, including Mr. Policastro, continued to distribute personal documents through the teachers' mailboxes after the incident. The Court also noted that Administrators had never denied pre-approval of a mass distribution, and with this one exception, never removed materials from the mailboxes.

Importantly, the Appeals Court found that the Principal had expressed a legitimate government interest in keeping the mailboxes clear of clutter to prevent documents involving school business from being missed or lost.

In addition, the Court found that the teacher failed to show he had suffered any injury under the policy, or that the policy had been applied discriminatorily to him.

This decision gives support for a School District regulating the use of teacher mailboxes and internal communications being restricted to school business. Regulation of communications within the District can be restricted to school business without infringing on any free speech rights.

Videotaping of Student Locker Rooms A Violation of Privacy Rights

A Federal Court has ruled that the use of video surveillance equipment in a middle school boys' and girls' locker rooms violated the students' Fourth Amendment right to privacy. In the case of *Brannum v. Oberton County School Board,* the Sixth Circuit Court of Appeals upheld the students' privacy claim that the videotaping violated their Fourth Amendment right to be free from unreasonable searches.

In this case, in an effort to improve security at the School, the Administration approved video surveillance equipment in the boys' and girls' locker rooms. The Court found that the purpose of setting up video surveillance to improve security was appropriate and not subject to judicial veto. However, the Court found that the "scope and manner" in which the video surveillance was conducted was subject to Fourth Amendment limitations.

The Court acknowledged that students have a lower expectation of privacy in the School environment, but the Court concluded that students using their school locker rooms could reasonably expect that no one, especially school administrators, would video tape, without their knowledge, in various states of undress while they change their clothes for an athletic activity. The Court noted that although schools have legitimate concerns in protecting security and using videotape cameras to accomplish this concern, there was no history of any threat to security in the locker rooms at this school.

Further, the Court found that a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instructions from a Federal Court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room.

Thus, the Court found a Constitutional violation of the Fourth Amendment by the activities of the School District in this case. However, the Court did confirm that a School District can videotape students without their knowledge, as long as it does not intrude upon their personal dignity in places such as locker rooms.

Special Education Legislative Alert

For two and one half years the law of the land has been that the burden of proof in special education due process hearings is on the party seeking relief.

Most recently Dennis M. O'Brien, Speaker of the House of Representatives Commonwealth of Pennsylvania issued a Memorandum to all House Members requesting cosponsorship on a bill in regard to burden of proof in special education hearings. The bill he intends to sponsor would shift the burden of proof back to school districts in special education due process hearings except where the parents unilaterally select a private school placement, then the burden of proof and persuasion shall rest with the student, the student's parents or student's guardian.

Back on November 14, 2005, the United States Supreme Court in the case of *Schaffer v. Weast,* 126 S. Ct. 528 (Nov. 14, 2005) upheld a Fourth Circuit decision placing the burden of proof in special education due process hearings on the party seeking relief. Justice Sandra Day O'Connor writing for the majority stated:

> *"We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this*

New Chapter 14 Special Education Regulations to Go into Effect Soon

The new Chapter 14 Special Education Regulations will be going into effect in the near future. Everyone is encouraged to review and become familiar with the new revisions. Readers are encouraged to particularly review changes in Section 14.133 entitled "Positive Behavior Support" and those provisions addressing the use of restraints to control aggressive behavior. The new changes require Districts to notify parents when restraints are used and to convene an IEP team meeting within 10 school days of the inappropriate behavior causing the use of restraints. Districts are encouraged to review these requirements and share this information with staff who are responsible for working with students with behavior plans.

As we are all aware, when the State Board of Education revised the Chapter 12 Regulations in December 2005, corporal punishment, defined as "physically punishing a student for an infraction of a discipline policy" was banned. (Section 12.5).

It is important for School Districts to educate staff in light of these changes to the law. Failure to exercise proper judgment can sometimes lead to legal complications for Districts and their employees as is evidenced by the following recent cases:

Special Education Legislative Alert

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> *case, the party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed."*

If this legislation were to come to fruition, it could escalate the number of due process hearings.

W.E.T. by Tabb v. Mitchell, (M.D.N.C. 2008)

The U.S. District in North Carolina denied a request of a physical therapist to have a Section 1983 Civil Rights Action dismissed for her alleged conduct in taping a student's mouth shut as a disciplinary measure. In this particular case the student maintained that the therapist forcefully and maliciously taped his mouth shut when he was seen talking in the class. The attorney for the student maintained that the therapist cannot claim she was unaware her alleged conduct was illegal inasmuch as the student had breathing problems and mental difficulties as a result of diagnosis of asthma and cerebral palsy. In refusing to dismiss the Section 1983 action, the Court concluded that the student suffered mental and emotional injuries as a result of the therapist taping his mouth shut and the student sufficiently pled a violation of his constitutional rights. Although the Court concluded the student would have to prove his allegations in order to obtain relief, the District Court judge commented that students have a long-established right to be free from unreasonable restraint and mistreatment. The Court commented that a reasonable educator would know that forcefully taping the mouth of a child with asthma amounted to a constitutional violation.

H.H. Chesterfield County Sch. Bd., (E.D. Va.2007)

In this case, a District Court permitted a parent to proceed with their Section 504, Section 1983 and ADA claims against a special education teacher and a teacher's aid who allegedly kept a 6-year-old girl with cerebral palsy and seizure disorder restrained in a wheelchair for long periods during the school day. In permitting the case to move forward, U.S. District Court Judge Richard L. Williams stated as follows: *The Court finds that in this case [the child's] right to be free from unnecessary bodily restraint in her wheelchair falls within the core constitutional right to not be deprived of liberty without due process of law.*

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

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 Paul T. Begley, at 814-863-1838.

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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