

## House Bill 1352: Changes to Background Checks and Criminal History Reporting

In June, 2011, the Pennsylvania State Legislature passed House Bill 1352 which imposes new requirements related to background checks and criminal history reporting under the School Code applicable to public, private, intermediate unit or area vocational technical school employment.

There are a number of changes to the law with respect to the enumerated offenses in Section 1-111(e) of the School Code. Specifically, the report of criminal history record required for prospective employees is no longer limited to the “within the last five (5) years” immediately preceding the date of the criminal history report. Now, if an individual is convicted of any of the enumerated offenses **ever**, they are permanently banned from employment.

Further, if a criminal history report indicates an individual was convicted of a felony for a crime other than those enumerated in Section 1-111(e), they are not eligible for employment until ten years after the date of the expiration of their sentence for that crime. If they have been convicted of a misdemeanor of the first degree other than those enumerated in Section 1-111(e), they are not eligible for employment until five years after the date of the expiration of their sentence for that crime.

There is also a section in the statute that has been specifically added to address driving under the influence charges. If a person has been convicted more than once for an offense relating to driving under the influence of alcohol or controlled substance and the offense is graded as a misdemeanor of the first degree, the person shall be eligible for prospective employment only if a period of three years has elapsed from the date of expiration of their sentence for the most recent offense.

Additionally, Section 1-111(e) has added a number of enumerated offenses for which there is a lifetime ban from employment. Therefore, if criminal history report

indicates a conviction for:

- Luring a child into a motor vehicle or structure
- Relating to institutional sexual assault
- Sexual intercourse with an animal
- Unlawful contact with a minor
- Solicitation of minors to traffic drugs
- Sexual exploitation of children

then they are not eligible for employment. Further, any offense similar in nature to those enumerated in Section 1-111(e) convicted under the laws or former laws of the United States or any of its territories, another state, the District of Columbia, Puerto Rico or a foreign nation will also result in a permanent employment ban.

The other significant portion of the House Bill adds additional requirements that will affect School Districts significantly in the Fall of 2011. By the end of September, 2011, the Pennsylvania Department of Education (“PDE”) will develop a standardized form to be used by both current and prospective employees of public, private, intermediate and area vocational-technical schools for the written reporting by employees of any arrest or conviction for an enumerated offense in Section 1-111(e) of the School Code.

While the substance of the form will be determined by PDE, it will provide a space for which a current or prospective employee who has not been convicted of, or arrested for, any enumerated offense to respond “no conviction” and “no arrest.” Failure to accurately report any arrest or conviction for an offense enumerated will subject the current or prospective employee to criminal prosecution for unsworn falsifications to authorities.

This form needs to be completed within ninety days of September 28, 2011, meaning Districts will have until December 27, 2011 to have all employees fill out the PDE (continued next page)

## Third Circuit calls into Question Opening School Board Meetings with Prayer

The Third Circuit decided the case of *Doe v. Indian River School District* on August 5, 2011, and found that the School District violated the First Amendment when it opened Board Meetings with a prayer.

This case involved the long-standing policy of the Indian River School District of praying at its regularly-scheduled meetings, which are routinely attended by students from the School District. The Plaintiffs were parents of students who attended the School District and attended Board Meetings where they felt uncomfortable and compelled to participate in the prayer in violation of the First Amendment's Establishment Clause.

In support of its practice, the District argued that its policy was legal under the Supreme Court's holding that legislative sessions may open with a prayer without violating the First Amendment's Establishment Clause. The Plaintiffs argued that because students regularly attended the Board meetings, the Board's prayer policy was unconstitutional in that it unlawfully compelled and forced students to participate in a religious practice at a school function.

Since its inception, the Indian River School Board has had a prayer at the beginning of every regularly scheduled public action meeting, but not at executive session or

committee meetings. The Board adopted and finalized this practice with a policy in 2004 after some complaints from citizens regarding their opening public meetings with a prayer.

This policy provided that "in order to solemnify its proceedings" the Board may "choose to open its meetings with a prayer or a moment of silence, all in accordance with the freedom of conscience of the individual adult Board member." The policy provided that on a rotating basis, one individual adult Board member would be given the opportunity to offer a prayer or request a moment of silence. If a Board member selected not to open with a prayer, the next Board member in line would take the responsibility, ensuring that at every meeting, there was either a moment of silence or prayer. The policy also provided that the prayers were to be sectarian, non-sectarian, denominational or non-denominational and in the name of any God or entity.

However, in practice, the prayers recited at the meetings were nearly always, and exclusively, in reference to Christian concepts. Many of the prayers exclusively referred to Jesus, and some Board members testified that they could not recall a time when the opening prayer had failed to invoke the name of Jesus Christ. While the policy

### House Bill 1352 *Continued from page 1*

developed form.

If an employee refuses to submit the form, an administrator or other person responsible for employment decisions in the school or institution must immediately require the employee to submit a current report of criminal history record information.

In addition to this form, from this point forward, if an arrest or conviction for an offense enumerated in Section 1-111(e) occurs, the employee has seventy-two (72) hours to provide written notice utilizing the PDE form to report the same to the school.

Commonly, schools will hear rumors of, or unfortunately, read reports in the newspaper of, employees being arrested or convicted of a crime. In the event the school has a reasonable belief that an employee was arrested or has a conviction for an offense under Section 1-111(e), and that employee has not notified the

school, the administrator or other person responsible for employment decisions must immediately require the employee to submit a current report of criminal history record; however, the school has to pay for the cost of the criminal background check. It is suggested that contact with your solicitor should be made when the decision of whether the school has "reasonable belief" arises.

Accordingly, it is recommended that schools amend their applicable policies with the new statutory criminal information. They should also designate the appropriate "administrator or other person responsible for employment decisions" because the new provisions to the Statute identify this person as responsible for implementation. Additionally, the HR department and administrators responsible need to be trained and employees need to be notified of these new requirements both in writing and through postings in the school.

permitted moments of silence to be offered in place of spoken prayer, this happened infrequently, with only three out of thirty-six meetings opening with only a moment of silence.

District students attend every board meeting, and the number of students range from a few, to more than fifty, with on average, a couple of dozen students attending each meeting. Students attended the meetings as student government representatives; as Junior ROTC members in order to present the colors to the Board; to perform music, plays, or other activities for the Board; and to be recognized for individual or team achievement, among others.

The Third Circuit decided that the argument put forth by the District that the opening prayer was constitutional because it amounted to an “opening prayer at a legislative session” was not applicable because the Board meetings were akin to other District events where prayer is not permitted, such as a graduation or a football game.

The Court stated that because student accomplishments are recognized, student representatives speak, and students are otherwise involved in the Board meetings, they are similar to other School functions where prayer is not permitted because students would unlawfully feel pressure to participate, and thus would have to unlawfully participate in a religious practice at a state public school.

The Court reasoned that if a student did not attend a Board Meeting in order to avoid the pressure to participate in the opening prayer, they would be forfeiting an intangible benefit by giving up acknowledgment by the School Board for their achievement, sacrifice participation in an extracurricular for which they are a member, or likely, would surrender their opportunity to be able to address the Board, as students must attend Board meetings in order to make a public comment. The Court further reasoned participation in a Board meeting, depending on the reason, was like a graduation event that was celebrated both in the school and with a student’s family, and as such, a student could not be made to feel constrained to attend because of the pressure to participate in a religious ceremony. Essentially, because of the activities that took place at the Indian River School Board meetings, students would be giving up a benefit by not attending in order to avoid the compulsion to take part in a religious practice they otherwise would not take part in.

The Court also stated that additional contextual elements of the Board meetings heighten the possibility that students will feel coerced into participating in the prayer practice because the meetings take place on school

property, the Board retains complete control over the meeting, sets the agenda and the schedule. The Court further reasoned that this certainly would apply in a case where a student is attending the Board Meeting for a disciplinary purpose.

After deciding that the Board Meeting was not akin to a legislative meeting, and was more like other school functions and activities wherein prayer is not permitted, the Third Circuit looked closely at the policy and the practice of the School Board to determine whether or not it violated the Establishment Clause.

The Court found that in practice the Prayer Policy had the incidental effect of advancing religion because the prayers had a religious content, and were overwhelmingly Christian. Further, the Court recognized that only occasionally the Board used their prayer moment to propose a moment of silence. Therefore, the opening prayers constituted “religious activity” and that a reasonable person would find the primary effect of the Prayer Policy was to advance religion in a public school setting, an unlawful practice under the Establishment Clause.

The Court stated that although their policy permitted any type of prayer, or moment of silence, to occur, this was rarely the reality, and thus, the actions of the Indian River Board rose above the level of interaction between church and state that the Establishment Clause would permit.

This decision reflects the long-standing requirement of the First Amendment that there must be an appropriate separation between the church and the state.

It is worth noting that this case involved a District that had a practice of reciting a prayer at the beginning of their Board meeting. The Court did not explicitly discuss the implementation of a moment of silence. Thus, it is important for all School Districts to be aware of this important decision and understand that the Third Circuit has held prayer is not appropriate at a School Board Meeting as the same is violative of the Establishment Clause of the First Amendment. However, this decision does not mean that moments of silence are prohibited from the School Board public meeting setting.

If you have a question or a concern about your District’s policies or practice in light of this decision, solicitor involvement may be necessary—as this case shows, the facts and circumstances may largely dictate the outcome of the impermissibility of the practice.

# The Third Circuit Court of Appeals Decides *Layshock* and *Blue Mountain* Cases

After much anticipation, the Third Circuit decided both the *Layshock* and *Blue Mountain* decisions on Monday, June 13, 2011. *Layshock* and *Blue Mountain* tested the bounds of student free speech and stemmed from incidents in two separate Pennsylvania School Districts where students were disciplined for online speech about school administrators. Ultimately, in both cases, the Third Circuit found for the students, stating that without a substantial disruption within the schools, off-campus speech cannot be punished by a School District.

In *Layshock*, the student used his grandmother's computer to access a social networking website where he created a fake "profile" of his high school Principal. The student took the Principal's photo from the school website and made references to the Principal's weight, alleged drug use, drinking and steroid use. The student allowed other high school students to online access to the profile. Other students also made fake profiles of the same Principal.

During school, the student used a computer in a Spanish class to access the profile and showed it to other classmates. Additionally, students in a computer lab congregated around a computer to view the profile. Administrators were not completely able to block the website so computer programming classes were cancelled and school computer use was limited.

School administrators gave the student a ten-day suspension, placed him in the alternative education program for the remainder of the school year and banned him from extracurricular activities and graduation. The student was the only one punished for any of the fake profiles of the principal.

Under the United States Supreme Court case of *Tinker v. Des Moines*, off-campus student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school."

In *Layshock*, the School District did not challenge the lack of a connection between the student's speech and a substantial disruption of the school environment. Rather, they argued that a "sufficient nexus existed between the student's creation and distribution of the vulgar and defamatory profile to permit the School District to regulate the conduct" and that it was "reasonably foreseeable that the profile would come to the attention of the School

District and Principal."

The Third Circuit held that the student's use of the Principal's photo from the District website was not a sufficient connection to the school for the school to be able to discipline the student. The Court stated that to hold otherwise would "be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his or her actions."

The Court decided that off-campus speech can *only* be regulated and responded to where it results in a substantial disruption of the school. Because the School District did not appeal the lower court finding that no substantial disruption occurred, and there wasn't a sufficient nexus to find that the use of the principals photo constituted "entering" the school, the School District had no authority to punish the student for the off-campus conduct.

Much like the student in *Layshock*, the student in *Blue Mountain* also created a fake profile of a Principal on a social networking website with her home computer. The profile contained adult language and sexually explicit content, and included a photograph of the Principal taken from the school website. The profile did not name the school administrator, but instead, presented a portrayal of a bisexual Alabama middle school principal named "M-Hoe."

The fake profile was initially made public, and then private, so that only those individuals the student wanted to see it, could. No student was ever able to view the profile from school. As a result of the profile, the student was suspended for ten days. The school was disrupted with "rumblings" regarding the profile, and students at various times talking out of turn in class, as well as causing a delay in class time of five or six minutes. Additionally, a school counselor had to cancel some pre-arranged appointments in order to deal with the situation.

In *Blue Mountain*, the Third Circuit noted that the School District's counsel conceded at oral argument that the students speech did not cause a substantial disruption in the school, rather, the School District argued that it was justified in punishing the student because of "facts which might have reasonably led school authorities to forecast substantial disruption of or material interference with school activities." Because the District conceded there was (continued next page)

## *Don't Get Into Hot Water: E-Discovery and School District Litigation*

**A** recent Federal Court decision in Florida permitted access of a personal computer of a non-party for discovery purposes in a gender and sexual orientation discrimination litigation action. This case is one of many across the Country whereby the Courts are expanding the scope of E-Discovery against parties in litigation.

Federal District Courts had already held that Employers have a duty to take reasonable steps to preserve relevant data when litigation is *anticipated*. An employer's willful violation of court orders to preserve electronically stored information can warrant imprisonment. In addition to possible imprisonment, a party is very often ordered to pay monetary sanctions for failing to timely preserve data, including e-mails, text messages and Skype messages.

In *Starbucks Corporation v. ADT Security Services*, the Defendant objected to the Plaintiff's request for e-mail, arguing that e-mails were archived on the Company's cumbersome old system and were not reasonably accessible. The Defendant even had an expert witness testify that the e-mail restoration could take nearly four years, yet the Court found a violation in that the Defendant failed to migrate the e-mails to a functional archival system, and determined that the e-mails were reasonably accessible, despite the laborious efforts it may take to have them recovered.

Implementing the E-Discovery requirements is an important first step in any litigation, whether actual or anticipated. School Districts need to take steps to preserve all electronic information, not only when a lawsuit is commenced, but whenever there is a threat of litigation. The obligation to preserve electronically stored information arises when you have a reasonable expectation that litigation will ensue. What "reasonable expectation" entails varies from case to case.

Implementation also includes taking steps to notify all employees to preserve electronic information they may have when there is a reasonable expectation of litigation, or when litigation has ensued. Additionally, it is important to make sure that the Information Technology staff takes the necessary steps to assure that no possible discoverable information is deleted from the School Districts electronic system.

E-mail is potentially the biggest component of any

school's electronically stored information, and is also the most fruitful area that both a Defendant and Plaintiff will want to look for evidence in litigation. Too many School Districts rely on backup tapes to serve as their e-mail archives and this will result in a high expense when having to restore those tapes to review the information in connection with a discovery request during litigation. As such, backup tapes should be reserved for disaster recovery only, and a (continued next page)

### *Layslock and Blue Mountain* *Continued from page 4*

no substantial disruption, and the facts of the case would not lead to authorities reasonably forecasting a substantial disruption, in that there were only "general rumblings," the School did not have the authority to discipline the student for her speech. The Third Circuit pointed out that the Principal's reaction to the speech probably exacerbated, rather than contained, any disruption that may have occurred within the school.

Schools may punish expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate" under certain very limited circumstances, including cases where substantial disruption occurs.

If the speech occurs off-campus, is not during a school-sponsored event, and it causes no substantial disruption, the School District may not discipline the student without violating that student's Free Speech rights.

What does this mean for School Districts? Where inappropriate off-campus speech occurs, any substantial disruption that speech causes to the District must be documented. For example, times when the speech interrupts class, causes teachers and administrators to detract from their ordinary duties, facilities are unable to be used, or school business is deterred in any way, should be documented accordingly.

The standard for off-campus speech remains the same, it must cause a substantial disruption in the school. School Districts would be wise to call our office as soon as such off-campus speech becomes known to administrators, but before any disciplinary steps are taken, and document in-school disruption as and when it occurs.

## E-Discovery *Continued from page 5*

searchable database should be in place whereby the e-mails can be searched by the user, the recipient, a date range, a keyword or other search parameters so it will be cost effective to retrieve e-mail information when necessary.

While e-mails are typically the largest component of the electronic discovery information requested, it is not the only information received in a discovery request. Another important aspect of electronically stored information is metadata. Metadata is the information associated with any given electronic file and contains the headers and attachments to an e-mail, and will show the date and time an e-mail was sent. Once an e-mail is deleted from a system, metadata will still contain the information surrounding the e-mail. This may include information such as the dates and times the e-mail was copied, when the e-mail was sent, the recipients, and may contain parts or pieces of the actual e-mail text. Metadata is attached to any document created on a computer, so any Word, Excel, PowerPoint or other files will have the same information contained in the system's Metadata.

Metadata, just as with e-mail, must be preserved and is potentially discoverable. Whether metadata will need to be produced in discovery is a concern that does not typically arise until later in a litigation process, however, steps still must be put into place to preserve metadata when the duty to preserve arises. If a metadata stripper is used as a part of the IT process, not only must you become aware of the stripping process, you must take steps to stop the process if and when there is reasonable anticipation of litigation. While there is nothing wrong with stripping metadata from documents, e-mail and its attachments as the practice significantly saves electronic store space, once the reasonable expectation of litigation arises, steps must be taken to suspend the use of metadata stripping.

It is important to have a written records retention and record destruction policy. If not already, solicitor involvement with creating and implementing such a policy is important, as a written policy to manage both paper and electronic information is a must. More importantly, the policy, when written, must also be followed and mechanisms must be put into place to ensure that the policies are actually followed. If this is done, you are far more likely to be able to avoid sanctions when information is destroyed as a part of the routine, good-faith operation of an electronic information system, than if no written policy is in place and otherwise discoverable information is not available because of the School District's destruction of the same.

For example, routine destruction of archived and older

e-mails in accordance with a proper records retention and destruction policy may not subject the School District to sanctions if litigation arises and the destroyed e-mails are requested by the Plaintiff.

It is also important that a written record retention and destruction policy ensures all critical legal and business records are retained appropriately, and that regulatory or legislative requirements are met, as such, solicitor involvement in preparing the policy is strongly suggested.

In addition to a records retention and destruction policy, a plan for responding to electronically stored information preservation and production obligations is also important to develop. This can be used with multiple cases if necessary, and can be fine-tuned to meet the needs of a particular case. This Litigation Response Plan is important as it minimizes operational disruptions when complying with a large E-Discovery request, and avoids the waste of large sums of money and time that would otherwise go into the retrieval of electronic information.

A Litigation Response Plan should be developed with input from key School District officials, including any internal Information Technology professionals, external Information Technology advisors or contractors as well as records management and human resources departments. This plan should really consider collection and documentation of all existing document management plans, a survey of the IT infrastructure, development and methodology for accessing, reviewing and producing electronically stored information and the documentation of all preservation plans such the preservation of backup tapes, e-mail archives, and the suspension of normal record retention plans.

In addition to the Litigation Response Plan, the School District should also develop written instructions to identify who is responsible in responding to requests for electronically stored information, and if necessary, a response team. This will assist with the determination of the need for forensic analysis, if any, at an early stage, to keep chain of custody uniform, and to assess simple determinations as to where there is data stored, such as employee issued laptops, CDs, flash drives, or external hard drives.

The arena of E-Discovery is becoming is large issue in today's litigation, and more and more employers are finding themselves in hot water because they failed to take the steps necessary to secure electronic data, prepare written policies regarding record retention and destruction, and otherwise, are not securing electronic information when litigation is anticipated.

## Wrestling with Cell Phone Usage in the School Workplace

**A** topic of great comment, concern and interest to all School Districts has been the policies and practices surrounding Employees' use of cell phones during the work day.

Many School Districts have recently seen a need to prohibit cell phone usage while employees are at work. This is because, in part, the employees are using their cell phones during instructional time. Whether it is to answer a text message or review what calls an employee has missed, many Districts are finding they need to establish a cell phone usage policy for employees because students' instructional time is starting to suffer.

Typically, a successful policy will address cell phones as a "wireless communication device" so that the policy can be applied to whatever device the employee is using, whether or not it is a cell phone, hand-held computer, or a device that technology may bring us in the future. Districts do not want to find themselves with an out of date policy mere months after its passage.

The substance of the policy should be central to the issue of usage during the work day. Specifically, it is recommended to allow employees to use cell phones or other wireless devices for personal use during lunch, break times, and before and after the student day. There is some question as to whether or not usage should be permitted during preparation time; however, because preparation time is typically separate and apart from instructional time, there is some leeway for personal wireless communication

device use despite the fact that the employee is to be working during those periods.

An appropriate policy should also address emergencies. It is recommended that personal "emergency" calls, such as a doctor's phone call or phone calls from a child's care provider, be limited to the facility's land line phone network. However, during building or district wide emergencies that arise unexpectedly, employees would be permitted to use a wireless communication device to address that specific emergency.

The policy should also address cell phone and wireless communication use in vehicles, whether driving a personal vehicle on school business or driving a school vehicle for school business. Typically, it is recommended that usage while operating a vehicle be completely banned. However, to allow for some leeway, a policy may provide for cell phone or wireless communication device use while a vehicle is in operation only where a hands-free device is available and may be safely used. Otherwise, cell phones and other devices may only be used in a vehicle if it is pulled off to the side of the road and parked in a safe position.

Finally, as with any policy, proper discipline must be determined for violations of the same. The typical progressive discipline policy is recommended, and while some employers may provide for the policy to confiscate cell phones and other wireless communication devices, we do not recommend confiscation because of the desire to treat our school employees unlike students.

Additionally, it is recommended that any wireless (continued next page)

## Legislature Enacts Changes to the Sunshine Law

**T**he Sunshine Law was amended this past summer when the legislature made changes to the penalties that could be assessed for a violation of the Law. Essentially, the amendments increase the penalties for non-compliance.

Specifically, if an official participates in a meeting with the intent and purpose of violating the open meeting requirements, and it is a first offense, they may be assessed a fine between \$100 and \$1,000. A second and subsequent offenses may be assessed the costs of prosecution and a fine between \$300 and \$2,000.

This increased penalty also comes with the proviso that the official who participates in a meeting with the intent and purpose to violate the law cannot be reimbursed by the School District for any fine or penalty they are assessed for violation of the same. Additionally, the School District cannot pay the fine or other penalty for the official.

The Sunshine Law requires that all official actions of a School District Board of Directors take place at an open meeting. Any executive session must be confined to the topics permissible under the law, namely, discussions concerning personnel or other employment matters, labor relations and arbitration, considerations for the purchase or lease of real property, to consult with an attorney or other professional advisor in connection with current or expected litigation, and, or, to review business which is otherwise privileged. All other topics must be discussed during an open meeting wherein the public can watch, and listen, to the Board deliberate and take official action.

## Cell Phone Usage *Continued from page 7*

communication device policy make reference to the District's Acceptable Use Policy. This way, if an employee is violating both the Acceptable Use Policy and the District's Wireless Communication Device policy at the same time, the District may reserve the right to institute discipline under one or both policies, depending on the severity and nature of the circumstances.

Solicitor involvement in drafting and implementing a wireless communication device policy is strongly encouraged so as to ensure the policy fits the needs of all employees, including professional staff, support staff, and the administration. Additionally, solicitor involvement will ensure that the policy is manageable and has reasonable disciplinary provisions should the need to discipline under the policy become necessary.

## About the Pennsylvania School Study Council

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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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