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New Volunteer Law Raises Many Questions

The new law in regards to volunteers in a school district, Act 153, is producing many challenging legal issues for districts to consider.

Act 153 defines a "volunteer" as any adult applying for an unpaid position as a volunteer responsible for the welfare of a child or having direct contact with children. "Direct contact" with children is defined in the Act as the care, supervision, guidance or control of children or routine interaction with children. A volunteer would thus include, not only individuals working in the school during school hours, but also athletic volunteers and any extracurricular activity volunteer.

Inside …

It is recommended that any person that might remotely be in contact with a student, under 18 years of age, be deemed a volunteer and be required to submit the necessary clearances. Beginning July 1, 2015, prospective volunteers must submit clearances prior to commencement of service in the district. Volunteers should complete all of their certifications prior to working with any students.

Under Act 153, all volunteers must now possess the following clearances:

- A criminal history report from the Pennsylvania State Police; and
- Child Abuse History Clearance from the Pennsylvania Department of Human Services.

Additionally, if the position of volunteer is a paid position and the volunteer has lived outside the Commonwealth of Pennsylvania in the last ten years, FBI Fingerprint clearances are required. Volunteers may be relieved of undergoing the FBI check if they have lived in Pennsylvania continuously for the last 10 years and sign an affidavit saying they did not commit crimes outside the state. Andrews and Beard has prepared such an affidavit that can be used as a form to satisfy this requirement of the law.

It is important to note that volunteers who are not required to obtain the FBI clearance mentioned above, must swear or affirm in writing that they are not disqualified from service based upon a conviction of an offense under Section 6344. In other words, volunteers that are applying for an unpaid position and have been a continuous resident of Pennsylvania

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for the preceding 10 years are exempt from obtaining the FBI clearance. However, districts need to ensure that these persons execute a document where they swear or affirm that they are not disqualified from volunteering based upon a prior conviction or offense.

Act 153 is silent as to who must pay for the cost of clearances, which can be substantial. Depending on the number of volunteers and employees a district has, the cost of obtaining the requisite clearances can run into tens of thousands of dollars. While generally, districts are not required to pay for Act 153 clearances for volunteers, they must if there is a reasonable belief that the volunteer was arrested or convicted of an offense that would deny participation or was named as a perpetrator in an indicated or founded report.

The total costs of the clearances are approximately $50.00. Presently, the Pennsylvania State Police Criminal Record Check costs $10.00, the FBI Criminal Background Check costs $27.50 through the Department of Human Services, and $28.75 through the Department of Education, and the Pennsylvania Child Abuse History Clearances cost $10.00.

Many districts have inquired on how they can help make the clearance process easier for their volunteers. There are many tactics that districts can employ to achieve this goal. We have recommended that schools:

1. Have access to applications or directions on where to retrieve them for volunteers.

2. Provide notice on the district's website on what is required for volunteers and provide links to websites where clearances can be obtained, as all clearances can all be applied and paid for electronically.

3. Send out notices to all groups using volunteers of the new changes in the law, or when new clearances are needed.

4. Provide information on how much clearances cost, or if the district will be paying for clearances for their volunteers.

Record keeping is also vital to track the status of volunteer clearances. It is necessary for districts to maintain a database of their volunteers' clearances and make sure all background checks are up to date. Schools need to maintain copies of the required information and require the individual to produce the original documents prior to volunteering. As with many laws passed by the General Assembly, this is yet another unfunded mandate with which schools will have to comply.

There have also been questions in regards to whether employees of businesses that host students in co-op programs or internships fall under the definition of a "volunteer" for purpose of Act 153. Some have suggested that, under the new law, these individuals would have to obtain clearances in order to comply with Act 153. One can easily see an end to these types of education programs if the Act did require such compliance. The expense and hassle of obtaining clearances for all employees a student might come into contact with would be an enormous burden on businesses that provide these opportunities to students.

The Pennsylvania School Board Association recently issued guidance stating that clearances are not required for employees in the workplaces hosting work experience opportunities. Andrews and Beard agrees with the Association's analysis in this regard, as the employees of hosting employers do not comport with the definition of volunteer under Act 153.

Battle Over Disclosure of School Employee Addresses Continues

The Pennsylvania Commonwealth Court decided a seminal Right-to-Know Law (RTKL) case, on February 17, 2015, which will greatly impact how school districts respond to RTKL requests in regards to the disclosure of their employees' home addresses. However, shortly after ruling that school employee addresses could be released in response to RTKL requests, the Court issued a stay of its own decision. Thus, for the time being, school districts are prohibited from releasing any employee home

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addresses in response to a RTKL request.

The Commonwealth Court's February 17th decision stemmed from the Pennsylvania State Education Association's (PSEA), the state's largest teachers' union, request that the home addresses of public school employees be exempt from disclosure under the RTKL and that the Office of Open Records (OOR) be enjoined from permitting such disclosure.

The opinion of the Court's majority stated that the "salient issue" before the Court was whether the RTKL deprived an individual, whose personal information may be exempt from disclosure pursuant to the "personal security exception" of the RTKL, "of procedural due process by not providing a mechanism to ensure that an affected individual has notice that his or her personal data has been requested and an opportunity to demonstrate that his or her personal security may be at risk if the requested information is disclosed." The personal security exception exempts a record from disclosure record if the disclosure of the record "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual."

The Commonwealth Court found the RTKL, as presently implemented by the OOR, does not provide public school employees with a reliable method to seek redress for action that they believe violates the RTKL or their constitutional rights. Put simply, the Court believed that the individuals, whose addresses were being requested, were not given proper procedural due process. The judges of the Court felt that this lack of procedural due process, prior to granting access to a record, essentially eviscerates the RTKL's "intent to protect an individual from the risk of personal harm or risk to his or her personal security that may occur by the disclosure of such a record."

Thus, based upon the above reasoning, the Court held that public school districts were *prohibited* from disclosing any records maintained by the districts, which contain the home addresses of public school employees, pursuant to a RTKL request, until the affected employee had **written notice** and a **meaningful opportunity to object** at the request stage to the disclosure of their home addresses based on, the personal security exception set forth in the RTKL. Under the "personal security exception" an employee would be required to show that producing the employee's address is reasonably likely to result in a substantial and demonstrable risk of physical harm to the employee or to the employee's personal security.

The Court also directed the OOR to permit any public school employees who choose to object to the disclosure of any record maintained by the public school district which contains their home addresses to intervene, as of right, in an appeal from the denial of the RTKL request for such information or to appeal as an aggrieved party from a grant by the public school district of the RTKL request for their personal address information.

Under majority's reasoning, once the school employee receives notice of a request, it is the employee's responsibility to provide evidence that his or her personal security will be at risk if the agency discloses the home address.

In a scathing dissent, President Judge Dan Pelligrini pointed out that the RTKL does not provide a right requiring that personal notice be given that a public record releasing personal information be given to that individual. Judge Pelligrini further penned that it is unlikely that release of home addresses would ever cause a substantial and demonstrable risk. He wrote that "[h]ome addresses are known or readily available so if they are released to the public, there can be no demonstrable risk because they are already known."

Judge Pelligrini felt that his fellow judges missed the point that the RTKL provides no such right by a private individual to impede the release of public records, preclude the release of public records, or appeal the release of public records.

As such, according to the Court's lone dissenter, the rules of procedural due process do not and should not apply in this context. Simply put, public records belong to the public.

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Are Transgender Students Protected Under Title IX?

In the case of *Tooley v. Van Buren Public Schools,* currently pending in the U.S. District Court for the Eastern District of Michigan, the federal government has filed a "Statement of Interest" arguing that Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits sex discrimination against transgender individuals.

Tooley is a lawsuit regarding a 14-year-old student who was allegedly bullied for his transgendered lifestyle while attending school. The plaintiff alleges that the school unlawfully denied him equal treatment and benefits based on his sex. The child was purportedly harassed and verbally abused by teachers because of his gender identification. The suit also asserts that administrators at the district refused to acknowledge the child's change in gender and contributed to making things difficult on the student.

Title IX was enacted to protect students from anything that stops them from taking part in educational opportunities on account of their gender. If schools that receive federal funding do not comply with Title IX, they can have their federal funding terminated or be subject to suit by the individual who has been discriminated against.

In short, the Statement of Interest filed by the federal government contends that Title IX and the Equal Protection Clause requires school districts, and other recipients of federal aid, to treat transgender students consistent with their gender identity in "all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." The federal government asked the Court to find that both Title IX and the Equal Protection Clause encompasses discrimination on the basis of transgender status, gender identity, and sex stereotyping.

The U.S. Education Department, which administers Title IX, has taken the position that Title IX entitles transgender students to use bathroom and locker room facilities consistent with their gender identity, and that the provision of "separate but equal" facilities constitutes illegal discrimination.

The Statement of Interest, signed jointly by the U.S. Department of Education, U.S. Attorney General and the U.S. Department of Justice's Civil Rights Division, is consistent with the Office for Civil Rights guidance issued December 1, 2014, entitled, *"Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities."* The Department of Education stated in its guidance that, under Title IX, recipients of federal funds, such as public schools, must generally treat transgender students consistent with their gender identity "in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."

Districts should be aware that, according to the Department of Education, schools that offer single-gender classes must allow students to attend based on their declared "gender identity". This directive also applies to sex-ed classes, where students often are separated by gender to help make them feel more comfortable.

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The Commonwealth Court's decision has been appealed to the Pennsylvania Supreme Court. Due to the appeal, as stated above, the Commonwealth Court issued a stay of its February 17th ruling. An injunction was also instituted which prohibits school districts from releasing any employee home addresses in response to a RTKL request.

Thus, for now, school districts should deny a RTKL request for employees' home addresses per the Commonwealth Court's Order of February 26, 2015. Unless the injunction is lifted, or the appeal is denied by the Supreme Court, home addresses of public school employees that districts maintain may not be disclosed. This is a matter that will be closely watched in the months and years to come as the case works its way through the courts.

EEOC Rules for Teacher Terminated for Distributing Bible to Student

The U.S. Equal Employment Opportunity Commission (EEOC) ruled on December 15, 2014, that a school district may have violated federal law when it fired a substitute teacher who gave a Bible to a student. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against an employee because of the person's religion. The EEOC determined there was reasonable cause to believe the Phillipsburg School District, located in New Jersey, discriminated against its former employee, Walt Tutka.

Mr. Tutka was working as a substitute teacher at the school when he told a student standing at the back of line that "The first shall be last and the last shall be first." After hearing this quote, the student asked from where the line came. Tutka informed him that it was from the Bible. When the pupil stated that he did not have a copy of the Bible, Tutka gave him a personal copy.

Tutka was thereafter summoned to an administrator's office, where he was accused of violating school policy, which prohibited the distribution of religious materials. The school also required that district teachers be neutral when having discussions on religion with students.

Mr. Tutka was fired by the school shortly thereafter. The district contended that Tutka was not discharged for distributing religious material, but was terminated for insubordination because he refused to meet with the school board.

In arriving at its determination, the EEOC stated that the district failed to proffer necessary documentation to support its defense against Mr. Tutka's claims. The EEOC stated that given the circumstances surrounding Tutka's termination and absent adequate documentation to support the school's position, the EEOC had to conclude that more credibility should be assigned to Tutka's contention that "religion and retaliation played a factor in his termination."

The EEOC will attempt to find a resolution with the school district through a conciliation process that is required by law. However, if that process does not achieve a "just resolution," the EEOC could file a lawsuit against the school.

Can Schools Punish Students for Speech Outside of the Classroom?

A U.S. Court of Appeals for the Fifth Circuit three-judge panel, in a 2-1 split, has ruled that a school board violated a student's free speech rights by disciplining him for off-campus speech. The Court's decision was issued December 12, 2014.

The Mississippi student, Taylor Bell, had written a song after several young women told him that two coaches at school were behaving in a sexually inappropriate manner towards them. Bell's recording criticized the two coaches he accused of misconduct towards the female students. School officials said they became aware of the song after it was posted on the internet.

Bell was suspended in January 2011 after administrators heard the song, believing the lyrics threatened the coaches. The song not only includes the names of the school employees, but also has the school's logo posted with it. Thereafter the county school board upheld the suspension. In response, Bell sued the school district and officials later that year.

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Speech Outside the Classroom

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A federal judge in Mississippi upheld the suspension, ruling in favor of the school district, finding that the song was a "substantial disruption" to the educational process. Bell appealed, stating that the decision permitted schools to punish students' speech made in their free time. A Fifth Circuit panel, in its 2-1 decision, agreed and overturned the lower court.

The Circuit Court judges found that the school system failed to prove Bell's song caused a substantial disruption of school work or discipline. The Court noted that Bell could not be subject to punishment because he wrote the song off-campus using a home computer and posted it online during non-school hours.

Disagreeing with his colleagues, and upholding the school's punishment, the dissenting judge found it important that Bell wanted the song to be heard by the school community. He said that the school was justified in its suspension of Bell, because he had caused "a severe disruption" by threatening, harassing, and intimidating the two coaches with the song.

The Fifth Circuit recently granted the school board's petition to have all the active judges on the bench rehear arguments after the three-judge panel issued its decision overturning Bell's suspension. Thus, the case will be reheard in the near future and will, of course, have a great impact on schools' abilities to restrict student speech outside of the classroom. It is an interesting case on the heightened constitutional rights students have when they speak off school grounds.

Senator Casey Seeks to Reduce School Suspensions

Pennsylvania Democrat, Senator Bob Casey, has introduced a bill in the U.S. Senate that seeks to reduce the rate of student suspension across the nation. The "Keep Kids in School Act" strives to reduce discrepancies in the nation's suspension rates, as students of color and students with disabilities are disproportionately suspended at much higher rates than Caucasian students. According to Casey nearly 3.5 million students nationwide were suspended from school in 2012, the most recent year for which data is available.

The bill encourages school districts to collect detailed information about disciplinary practices and will provide additional resources to school systems struggling with high suspension rates. In addition, the legislation would direct districts to initiate plans that would reduce suspensions and expulsions.

The law would also require schools to provide yearly reports on their disciplinary practices that would be broken down by grade, race, and disability. While the vast majority of this kind of data is already collected annually, because of the Individuals with Disabilities Education Act or through Office of Civil Rights regulation, the bill would codify the requirement. The bill would also codify the definition of what constitutes an expulsion and suspension.

Moreover, the bill clarifies that states and school districts can use their Title II federal resources for professional development to train and support teachers, principals, and other school staff on evidence based practices and support systems that improve school climate and reduce the number of suspensions and expulsions.

According to studies, African-American students are suspended and expelled at a rate three times higher than white students. Students with disabilities are about twice as likely to be suspended as those without. Research has also shown that higher

suspensions rates closely correlate to high dropout and delinquency rates. Congress is expected to act on Casey's proposed legislation later this year.

Senator Toomey Pushing New Background Check Legislation at Federal Level

Schools around the nation may soon have to be under similar laws as their Pennsylvania counterparts. Pennsylvania U.S. Senator Pat Toomey is calling on his senate colleagues to pass legislation that would require federal and state background checks for all school employees across the nation who have unsupervised contact with children.

His proposed legislation also would prevent schools from "passing the trash," or helping an employee they know has sexually preyed on children to get a job at different schools by supplying them with letters of recommendation. Toomey's bill would mirror Pennsylvania's Act 153, which is discussed in the present newsletter, and the recently enacted Act 168, known the "Pass the Trash" Bill.

Toomey's presented law, known as the "Protecting Students from Sexual and Violent Predators Act," would require schools receiving federal funds to perform background checks on all new and existing workers who have unsupervised access to children. If the law is passed, schools would have to perform background checks in order to continue to receive federal funding.

Senator Toomey says the death of a 12-year-old child in a neighboring state highlights the need for change at the federal level. He says the child was murdered by a principal, who had been previously dismissed as a teacher in Pennsylvania for sexual misconduct.

Governor Wolf Unveils 2015-2016 Budget Proposal

Governor Tom Wolf recently released his $34.47 billion state budget plan for 2015-2016. The governor campaigned on increasing state funding for education. Governor Wolf is adhering to his promise, as his plan focused on major increases in education funding. The 2015-2016 proposed budget for education would be the initial phase of a four-year goal to expand preK-12 funding by approximately $2 billion.

The budget plan includes the following increases to education spending:

- **Basic Education:** $400 million (7 percent);
- **Special Education:** $100 million (9.6 percent);
- **Early Childhood:** $120 million (88 percent);
- **Career & Technical Education:** $23 million (37.1 percent);
- C**ommunity Colleges:** $15 million (6.89 percent);
- **State System of Higher Education:** $45 million (10.98 percent); and
- **State-Related Universities:** $82 million (15.76 percent).

The spending plan would be paid for primarily through a 5 percent tax on natural gas extraction. The budget proposal would additionally raise the state sales tax rate and the personal income tax rate. The increases in said taxes would be used to offset the property taxes assessed by school districts, as Governor Wolf's plan would provide billions of dollars in relief from school property taxes.

In regards to Pennsylvania's pension system, Governor Wolf's plan would issue a $3 billion bond which would address the unfunded liability of the State Employees' Retirement System and the Public School Employees' Retirement System while also changing investment strategies to reduce management fees. Additionally, the proposal would divert $1.7 billion a year from the state's General Fund to a reserve

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account for pension payments. The plan does not call for any changes in pension benefits.

A recent study by the National Association of State Retirement Administrators found that Pennsylvania has the second most underfunded pension plan in the United States. The state currently has a $50 million pension debt.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Lawrence Wess at ljw11@psu.edu.

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Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

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

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

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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