

ANDREWS AND BEARD

EDUCATION LAW REPORT

Published in Cooperation with the Pennsylvania School Study Council, Inc.

Volume VII, Number 2

December 2011

Know Your Child Abuse Reporting Requirements

In November of 2011, Penn State University, Staff, Administration, Students, and residents of the Commonwealth of Pennsylvania, experienced one of the largest cases of child molestation allegations to ever unfold at a school of higher education. In the weeks following, there were a barrage of reports, media attacks and in particular a Grand Jury verdict that saw the indictment of former Penn State Assistant Coach Jerry Sandusky, as well as the firing of one of the most winning coaches in all of college football history, Joe Paterno. In light of the recent incidents at Penn State University, most were asking could more or should more have been done?

The following are rules and regulations that each school district should have an understanding of and ensure that all administration and employees of the district are fully aware of such statutory regulations.

Pennsylvania statute Title 23 Pa. C.S. §6301 *et seq.* is part of the domestic relations child protective

service provision which was created for the purpose “to encourage a more complete reporting of suspected child abuse; to the extent permitted by this chapter, to involve law enforcement agencies in responding to child abuse; and to establish in each county protective services for the purpose of investigating the reports swiftly and competently, providing protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child’s well-being and to preserve, stabilize and protect the integrity of family life wherever appropriate or to provide another alternative permanent family when the unity of the family cannot be maintained.” To understand the mandatory reporting requirements for child abuse, one must first understand how the statute defines child abuse. According to Pennsylvania statute, child abuse is a term meaning any of the following:

(i) A recent act or failure to act by a perpetrator which causes non-accidental serious physical injury to a child under 18 years of age; (ii) An act or failure to act by a perpetrator which causes non-accidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age; (iii) A recent act, a failure to act or series of acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age; (iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide the essentials of life, including adequate medical care, which endangers a child’s life or development or impairs the child’s functioning. *Id.* (continued next page)

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One must also note that according to the statutory language, a perpetrator is defined as a person who has committed child abuse and is a parent of the child, a person responsible for the welfare of a child, an individual residing in the same home as a child or a paramour of a child's parent.

Finally, the Pennsylvania statute defines sexual abuse or exploitation also as "The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another person to engage in sexually explicit conduct, or a simulation of sexually explicit conduct, for the purpose of producing a visual depiction, including photographing, videotaping, computer depicting or filming of sexually explicit conduct or the rape, sexual assault, involuntary deviate sexual intercourse, aggravated indecent assault, molestation, incest, indecent exposure, prostitution, statutory sexual assault or other form of sexual exploitation of children."

The persons required to report, based on a reasonable cause to suspect abuse on the basis of medical, professional or other training and experience, includes, but are not limited to, physician, medical examiner, dentist, podiatrist, registered nurse, SCHOOL ADMINISTRATOR, SCHOOL TEACHER, SCHOOL NURSE, etc..., in their capacity as a member of the staff of a public or private institution, school, facility or agency, that person shall immediately notify the person in charge of the institution, school, facility or agency or a designated agent of the person in charge. Upon notification, the person in charge or the designated agent, shall assume the responsibility and have the legal obligation to report or cause a report to be made in accordance with the reporting procedure requirements.

According to the reporting procedures for mandatory reporting, there are two methods by which a school district is able to report such incidents of child abuse. A report from the aforementioned persons can be made immediately by telephone. Oral reports shall be made to the department of child protective services and may be made to the appropriate county agency or police department.

A written report should be sent in writing

within 48 hours after an oral report. The following information shall be included in written reports, if available:

(1) The names and address of the child and the parents or other person responsible for the care of the child, if known; (2) Where the suspected abuse occurred; (3) The age and sex of the subjects of the report; (4) The nature and extent of the suspected child abuse including any evidence of prior abuse to the child or siblings of the child. (5) The name and relationship of the persons responsible for causing the suspected abuse, and any evidence of prior abuse by those persons; (6) Family composition; (7) Source of the report; (8) The person making the report and where that person can be reached; (9) The actions taken by the reporting source, including the taking of photographs and X-rays, removal or keeping of the child or notifying the medical examiner or coroner; (10) Any other information which the Department of Public Welfare, Police Department, or other County agency may require by regulation.

As a general rule, a person, institution, school, or agency employee that participates in good faith in the making of a report, whether required or not, cooperating with an investigation, including providing information to a child fatality or near fatality review team, testifying in a proceeding arising out of an instance of suspected child abuse who refers a report of suspected abuse to law enforcement authorities or provided services under this chapter, shall have immunity from civil and criminal liability that might otherwise result by reason of those actions. For the purpose of any civil or criminal proceeding, the good faith relating to persons required to report suspected child abuse and of any person required to make a referral to law enforcement officers under this chapter shall be presumed.

In light of recent circumstances surrounding the scandal at Pennsylvania State University, it is highly recommended that any school district faced with the potential allegation of suspected child abuse take each allegation seriously and make sure to contact their solicitor immediately to ensure a proper investigation is done in order to follow the requirements of the mandatory reporting statute.

Student Permission Slip Does Not Violate First Amendment Rights

Recently the Third Circuit Court affirmed a District Court's decision in the case of *John Doe v. Haddonfield Board of Education (BANOS)* establishing that the school district did not violate the father's First Amendment rights in regards to not accepting an altered Drug and Alcohol Consent Form.

The father of a high school student brought action, individually and on behalf of student, Jane Doe, against the board of education and school officials, alleging defendants violated his First Amendment right to freedom of speech and expression by preventing student from playing on high school's lacrosse team after father refused to sign unedited student activities permission form, which referenced board's anti-drug and anti-alcohol policy.

The United States District Court denied father's motion for preliminary injunction, and father appealed this decision. The controversy in question was created when the Haddonfield Board of Education, as part of an effort to educate its students in the process of making life choices, particularly in regard to respecting and obeying the law and coping with the pressures of drug and alcohol in our society, adopted a comprehensive 24/7 Drug and Alcohol Policy. The 24/7 Policy is a 24 hours a day, 7 days a week, 365 days a year Policy that governs any underage drinking or drug use. The Policy, with limited exception, essentially bans students from any contact with drugs or alcohol and students who violate the policy are subject to a series of escalating punishments.

In order for the Haddonfield student to participate in any extracurricular activity, including athletic teams, both the student and the student's parent must sign a Student Activities Permission Form. This form requires the student to acknowledge that he or she understands that drug and alcohol use is prohibited at all times and that any violations will be punished according to the 24/7 Policy. The student's parents must also sign the form. Jane Doe submitted a signed Student Activities Permission Form, but not until her

father modified the form by crossing certain language on the form that pertained to the 24/7 Policy.

The Board of Education informed Jane Doe's father that the form, as it was modified, would not be accepted. Subsequently, Jane Doe's father submitted an unmodified signed permission form, but accompanied that form with a cover letter stating that he had "filled out the form under duress." The Board determined that Jane Doe, having a right to disagree with the 24/7 Policy, would not be permitted to play lacrosse for that season.

Jane Doe alleged that Defendants, through their actions in preventing Jane Doe from participating in extracurricular activities on account of what her father asserted in a letter to the school accompanying an unedited permission form, violated Plaintiff's right to freedom of speech, an expression guaranteed under the First Amendment of the United States Constitution. Shortly after filing a complaint, Jane Doe's father moved for a preliminary injunction, seeking to enjoin the Board from excluding Jane Doe's participation on the school lacrosse team. District Court denied the motion.

The Court's decision did not touch upon the 24/7 Drug and Alcohol Policy, but the court did decide whether or not signing under "duress" was a violation of a right to free speech. The Court of Appeals for the Third Circuit held that Defendants' conduct in refusing to accept the father's signed but altered permission form, accompanied by a letter stating the form was signed under "duress," did not violate the First Amendment. The Court did note that signing the form did not necessarily constitute agreement with the 24/7 Policy and that debate continues today.

A Solicitor's involvement in drafting and implementing Drug and Alcohol Policies is strongly recommended so as to ensure the policy is not overbroad or overbearing in its use. Solicitor involvement will allow the School District the ability to avoid any unnecessary litigation and expense down the road.

Children's Internet Protection Act Issues

Final Rules

Recently, the Federal Communications Commission issued its final rules with regard to Internet filtering, policy requirements, and educational mandates from the Protecting Children in the 21st Century Act. Contained within this final ruling was a directive that school districts that receive E-rate funds must adopt specific internet filtering and policy requirements per the Children's Internet Protection Act (CIPA) in order to educate students about appropriate online behavior.

Specifically, the final rule contained in this order implements the statutory language verbatim stating, "This Internet safety policy must also include monitoring the online activities of minors and must provide for educating minors about appropriate online behavior, including interacting with other individuals on social networking Websites and in chat rooms, and cyberbullying awareness and response."

Although a school's Internet safety policy may include the development and use of educational materials, the policy itself does not have to include such materials. The FCC has declined to specifically define "social networking" or "cyberbullying."

As required by the Protecting Children in the 21st Century Act, a school, school board, school district, local education agency, or other Administrative Authority of a school receiving E-rate funding for Internet access and internal connections must certify on its FCC Form 486 or FCC Form 479, beginning with funding year 2012, that it has updated its Internet safety policy. Making this requirement effective for the 2012 funding year, which begins July 1, 2012, will give schools adequate time to amend their Internet safety policies and to implement procedures to comply with the new requirements after the completion of this rulemaking proceeding. Normally, schools will not need to issue an additional public notice and hold a hearing in order to update their Internet safety policies in accordance with the new Protecting Children in

the 21st Century Act requirements. However, the School District should contact their solicitor in order to ensure there is not a Local or County regulation that would require such notice.

It must be noted that §54.520(a)(4) of the Commission's rules were revised to add the existing statutory definitions of the terms "minor," "obscene," "child pornography," "harmful to minors," "sexual act," "sexual contact," and "technology protection measure," to be consistent with the statute. These statutory definitions which are referenced in §54.520 refers directly back to the Children's Internet Protection statute.

These new rules and regulations specifically decline to mandate specific methods for disabling technology protection measures, but rather codify in the rules the statutory language of Sections 254(h)(5) and (h)(6). This is done in order to make clear that the statutory permission to disable technology measures exists without imposing undue burdens on schools or libraries regarding how this provision should be applied. It was determined that this type of decision should be left to local communities and school boards in order to determine specific policies because they are the most knowledgeable about the varying circumstances of the schools or libraries within their communities. As required by the statute, the Federal Communications Commission also added a provision to require local determination of what matter is inappropriate for minors. The statute states that a determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination.

As this new requirement becomes effective on July 1, 2012, school districts should make sure to read and review their Internet safety policy with their District Solicitor to ensure that all policy requirements follow the new rules with regard to proper education for students under the Children's Internet Protection Act.

Pennsylvania Senate Bill 1 Closer To Approval

A new government program approved by the State Senate on October 26, 2011, providing tax-funded tuition vouchers to students is making major waves in the Pennsylvania Public School System. As the Bill currently stands, it would provide these taxpayer-funded grants to income eligible students in certain poor performing public schools to take to another public or private school where they are accepted. According to Governor Tom Corbett, vouchers, along with other education reforms, are a priority for the Fall legislation season and will remain a standing issue with the Governor's Office.

As the Bill moves through the legislative process, it would seem that most, if not all, School Boards as well as Education Associations are not in favor of such a program and at this point, no one can blame them.

In the first year, the program would affect only low income students who attend an elementary or middle high school that has combined math and reading scores on State tests that fall within the bottom five (5%) percent of all schools scores. Currently, that would include one-hundred-eleven (111) Pennsylvania elementary schools and thirty-two (32) Pennsylvania secondary schools. To be specific, a low-achieving school is defined in Senate Bill 1 as, "In the 2012-2013, and each school year thereafter, a public, elementary, or secondary school within this Commonwealth ranking in the lowest five (5%) percent of its designation as elementary or secondary, based on combined math and reading scores from the Assessment Administration in the most recent school year."

In the second year, the program would grow to include low income students who live in the attendance areas of one-hundred-forty-three (143) public schools who are already enrolled in private schools. Low income students has been defined under the Program as being a family whose income is at or below the Federal poverty limit, or approximately Forty-One Thousand, Three Hundred Forty-Eight (\$41,348.00) Dollars for a family of four (4). A family whose income is at this level would be eligible for a

voucher under this proposal.

As the voucher program would allow for students to be placed both in private and charter schools, there would be no inherent right for these schools to accept such students into their program if the school currently has a policy with specific acceptance requirements. A private school would rely on its admission criteria to determine which student it admits. A school district, whether private or public, would not be compelled to accept students with disabilities if they do not have a program or capable facilities to meet those students' special needs. It must be noted, however, the legislation would prohibit private schools from discriminating on the basis of achievement or aptitude, handicap, race, color, or any basis that is illegal under State or Federal law. Public school districts would have to do acceptance of voucher students by a lottery system; however, the legislation allows for priority to be given to students who have siblings at the school already, and if they come with a district-funded scholarship. School districts would only be required to transport a student to a public or private school within ten (10) miles of the district's borders if the voucher student has been accepted.

Due to the fact that Article III, Section 15, in the State Constitution, prohibits money from being given directly to non-public schools, under the voucher program, the Department, upon notification that a voucher-eligible student is planning to enroll in another public school, would transfer the money from the district where the student lives to the one where they will attend. If a student elects to enroll in a non-public school, a check for the voucher would be sent to the parents. One caveat is that the legislation calls for the check to be made payable to parents but can only be endorsed by the parents for deposit into the account of the non-public school. The check would carry a warning that if a parent uses the voucher other than as permitted, they face a fine equal to three hundred (300%) percent of the voucher, disqualification from future participation in the program, and criminal prosecution.

(continued next page)

EEOC Issues Final Regulations Under Americans with Disabilities Act Amendments Act of 2008 (ADAAA)

The EEOC has issued its final regulations as to the ADAAA. One of the central purposes of the Amendments Act is to expand the definition of disability, which Congress criticized as having been too narrowly construed by the Supreme Court. The practical effect of the Amendments Act and interpreting regulations is that more individuals will qualify as disabled and will be entitled to reasonable accommodations at the work place. Moreover, the broad coverage of the Amendments Act increases the number of employees protected under the ADA, thereby increasing the likelihood of litigation in Districts not complying with the statutory requirements.

An interpretive provision added to the regulations provides:

“(4) Broad Coverage. The purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases

brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of a disability. The question of whether an individual meets the definition of a disability under this part should not demand extensive analysis.” 29 C.F.R. §1630.1.

The Amendments Act and Regulations retain the basic definition of “disability,” but make clear that the interpretation of the term has changed. Disability is solidified in a three-pronged manner. Disability means:

1. A physical or mental impairment that substantially limits one or more major life activities of the individual;
2. A record of a physical or mental impairment that substantially limited a major life activity; or
3. When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not transitory and minor.

The ADAAA still defines a major life activity, such as function of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, (continued next page)

Pennsylvania Senate Bill *Continued from page 5*

Finally, what accountability provisions does the legislation require? It would require private schools to administer one (1) of at least eight (8) national Standardized Achievement Tests chosen by the Department of Education. Private schools would be required to share a voucher student’s results with their parents, as well as post aggregate scores of voucher students on the school’s website provided that doing so would not reveal any individual student’s scores and would provide confidentiality as required by law. Private schools would not report individual students’ scores to the Education Department, and in such would not be subject to the adequate yearly progress requirements that public schools face.

Senate Bill 1 is awaiting House action prior to being sent to Governor Corbett for execution. Only time will tell what the Commonwealth of Pennsylvania Legislators will decide and whether their constituents will support such a decision come election season.

musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, as well as reproductive functions. Additionally, the ADA asks employers to show challenged uncorrected vision qualification standards are job related and consistent with business necessity, regardless of whether the person challenging the standard has a disability.

These major body functions can be construed as limited in caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working.

In light of these new regulations, the following is recommended for School Districts. At a minimum, training should be given to the Human Resources Director, Section 504 Coordinator, ADA Coordinator, and perhaps the Superintendent and Business Manager of each School District. An opportunity to ensure that the School District has the foundations

in place to comply with the ADA should be strictly enforced and oversight established with respect to such activities including: designation of Section 504 and ADA Coordinators and written descriptions of their duties as the Coordinators, separate and locked personal sub-files with medical information, job descriptions properly framed in terms of functions, not just duties, and segregated into essential and other/or non-essential lists, and finally, familiarity with the interactive process and review of files to ensure that interactive process has been engaged in and properly documented.

Additionally, the Human Resource employees, as well as Administrators, need to be trained and employees need to be notified of these new requirements, both in writing and through postings in the school, to ensure that the new regulations are understood.

Tenured Teacher Dismissal Reversed

In the case of a dismissal of a tenured teacher, the Secretary of Education reversed the dismissal solely on the basis of alleged procedural errors. The Secretary found that: (1) the Statement of Charges was not signed by the Board Secretary as required by Section 1127 of the School Code, 24 P.S. §11-1127, and (2) that no action was taken by the School Reform Commission that it had sufficient evidence to issue the Statement of Charges.

More specifically the Secretary of Education stated: “There is no evidence in the record that the SRC...had seen or reviewed the charges prior to the hearing. There is no evidence that, prior to the hearing, the SRC had resolved to dismiss the teacher and had directed the Chairman and the Secretary of the SRC to serve notice on the teacher of this fact and to provide him the right to a hearing.”

In addition, the hearing was held before the Chairman of the SRC and not the entire School Reform Commission; thus not only did the Secretary decide that there was no evidence that the SRC reviewed the charges prior to the hearing and resolved to dismiss the teacher, there is no evidence that the SRC even knew about the charges or the hearing.” (*Jones v. The School District of Philadelphia*, TTA 1-11 (filed September 13, 2011))

The Pennsylvania School Boards Association believes that this decision is in error and that School Boards should not take any action to authorize the Statement of Charges as such action would be a prosecutorial function that would be violative of procedural due process. See *Lyness vs. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (1992). Currently, a Petition for Reconsideration is pending before the Secretary of Education and an appeal is pending before the Commonwealth Court.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 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; and Leaders in Timed Mediation Contract Negotiations.

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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. James P. Hartman at jph19@psu.edu.

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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Education Law Report is published by Andrews and Beard Law Offices.

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