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### MB&M Attorneys in the News

MB&M Attorneys, Michael Brungo and Russ Lucas, participated in the March 23, 2006 National Business Institute Seminar on Avoiding School Liability Issues While Working with Students. Mr. Lucas presented current issues relating to NCLB while Mr. Brungo addressed developments in the special education field. Mr. Brungo also presented on special education issues on May 12, 2006 at Lehigh University sponsored by PBI.

Our school law attorneys are available to provide Board, staff and professional development targeted to current developments in school law areas affecting your District.



### Education News Volume VIII, Spring 2006

Act 48 - Where Do We Go from Here .....pg. 1

School Bus Surveillance: Audiotaping For Safety or Wiretapping? .....pg. 2

New Wellness Policy Requirements in Effect July 1 .....pg. 3

No Child Left Behind: What Happens in 2006 - 2007 .....pg. 3

Act 31 of 2006: Permits Students with Disabilities to Participate in High School Graduation Ceremonies .....pg. 3

### ACT 48 - WHERE DO WE GO FROM HERE

On April 30, 2006 the grace period extending the compliance requirements of Act 48 of 1999 expired. The full impact of Act 48 will take effect this summer, and careful attention must be given to the certification status of all professional employees. Failure to satisfy Act 48's requirements will result in the employee's Certificate being placed on "inactive status." This will disqualify an employee from employment with a public school as either a professional or temporary professional employee. Continued employment under an "inactive" Certificate will expose the District to a forfeiture of subsidy under Section 2518 of the School Code. The following is a brief summary of Act 48 and what steps to take if the District receives notice that a professional employee's Certificate becomes "inactive."

As of July 1, 2000, Act 48 required all persons holding Pennsylvania Professional Educator Certification to complete continuing education requirements in order to maintain active Certificates. Act 48 requires all certified educators, every five years, to earn six collegiate credits or six PDE approved in-service credits or 180 continuing education hours or any combination of the above. Failure to satisfy these requirements will result in the Certificate being placed on "inactive" status. Individuals with inactive certification may only be employed as Substitute Teachers, Principals, Superintendents or Assistant Superintendents, in accordance with the endorsement on the individual certificate or letter of eligibility, for no more than 90 days during a school year.

The grace period established by Act 46 has now passed. Professional development approved providers were required to submit their final records to the Department of Education by May 31, 2006. Beginning June 9, 2006, five year notification letters will be sent by

### NO MORE GRACE UNDER ACT 48

The grace period for Act 48 compliance expired on April 30, and its full impact will be felt this summer. Failure to satisfy Act 48's requirements will result in "inactive" Certificate status, disqualifying an employee from continued employment. Districts must pay careful attention to Certificate status. Continued employment under an "inactive" Certificate will expose the District to a forfeiture of subsidy.

PDE to all educators who have not met the Act 48 professional and development requirements and the public school entities by whom they are employed. In the absence of an extenuating circumstance (military duty, medical disability or absence from the country) notice of non-compliance will be issued, and the Certificate of non-compliant educators will become inactive, unless an appeal of the inactive status is filed within thirty days. If an educator files a timely and valid appeal, the educator's certificate will remain active until the appeal is resolved. While the appeal is pending, the educator will be able to continue employment as a professional educator. If the District has any doubts as to the status of the certification of any of its professional employees, information regarding the credits/hours earned and the continuing education status of all professional employees may be accessed through PDE's website at [www.pde.state.pa.us](http://www.pde.state.pa.us), Act 48 Reporting System.

Also, please note that Act 5 of 2006, which took effect on April 3, 2006, waived Act 48 requirements for retired Pennsylvania certified educators. In addition, Act 5 waived the professional development requirements for the first 180 days if the retiree returns to school

Cont'd. on page 2

Hot Education Topics



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Ceremonies Participate in High School Graduation Permits Students with Disabilities to Act 31 of 2006:

What Happens in 2006 - 2007

No Child Left Behind:

Requirements in Effect July 1

New Wellness Policy

Audiotaping For Safety or Wiretapping?

School Bus Surveillance:

Where Do We Go from Here

Act 48 -

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**Act 48 Where Do We Go, continued...**

service in a full-time position or returns to service due to an emergency or teacher shortage. Act 48 compliance requirements become applicable on the 181st day after the retiree returns to school service and continue in effect until that educator returns to full retirement status.

Since the grace period for Act 48 compliance has just expired, there are no decisions to provide guidance in addressing the employment status of an employee with an "inactive" certificate. The closest analogy would be to examine the Court decisions involving the rights of employees who have permitted their certification to lapse (see: *Occhipinti v. Old Forge School District* (Pa. Cmwlth. Ct., 1983; and *Moiles v. Marple Newtown School District* (E.D. Pa. 2002)). These cases support a conservative approach when addressing a professional or temporary professional employee whose Certificate has lapsed or, by analogy, has been placed on inactive status. An "inactive" Certificate does not, in itself, alter the employment relationship with the District. The District must first confirm whether the employee filed an appeal, as this will permit continued employment while the appeal is pending. Absent an appeal, the District must then determine whether it desires to retain the employee in a substitute capacity for 90 days to afford the employee the opportunity to comply with the Act 48 requirements and restore his/her Certificate to "active" status. If the District does not desire to retain the employee as a substitute and/or if the 90 day period passes and the Certificate is still "inactive," the District must decide whether to terminate the employment relationship. The District should then provide all of the procedural protections under Section 1127 of the School Code, including providing notice to the employee and conducting a Loudermill Hearing, issuing charges based upon incompetence and violation of the School Laws for failure to comply with Act 48 resulting in "inactive" status, and after the Board Hearing, terminate the employee. Although Act 48 provides for reinstatement to active status if the employee subsequently fulfills Act 48's requirements, there are no provisions in the Act which require the District to re-instate a terminated employee when this occurs. However, each District should consult with its solicitor to determine whether there are any provisions in the collective bargaining agreements which also must be followed.

**SCHOOL BUS SURVEILLANCE: AUDIOTAPING FOR SAFETY OR WIRETAPPING?**

In March 2006, the State Police, contending that recording audio on school buses could violate the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 et seq., executed a search warrant and confiscated sur-

**TO AUDIO OR NOT TO AUDIO... THAT IS THE QUESTION**

If a District desires to audiotape on school buses for student safety concerns, the DA requires three steps to be taken: (1) adopt a Board policy governing the audiotaping; (2) annually notify parents by letter of the audiotaping practice and provide a copy of the Board policy; and (3) post visible and understandable signs on the buses notifying the students that video and audiotaping is being used. The safest approach is always the most conservative approach - discontinue audiotaping until the Courts or legislature deal directly with the issue.

veillance cameras belonging to a local transit company servicing school districts. The Wiretap Act prohibits electronically intercepting someone's verbal statements if the person making the statements does not consent to the interception and makes the statements in such a place or manner as to reasonably expect that the statements are made in private.

Prior to this incident, it was presumed by some transportation companies that recording audio on a school bus would not violate the Wiretap Act for two reasons. First, signs are posted notifying passengers that video and audio recording is taking place. Second, passengers have no expectation of privacy in that setting, and thus the communication is not protected.

The State Police considered filing felony charges against the transit company based on the absence of proper notice. Allegheny County District Attorney Steven Zappala intervened and indicated that he would not file Wiretap Act charges against the transit company. District Attorney Zappala issued a letter in which he defined situations in which he will not consider audio surveillance on a school bus to violate the Wiretap Act. In brief, the D.A.'s position is that statements made on a public school bus do not constitute "oral communication" within the meaning of the Act because there is little or no expectation of privacy with such statements. Mr. Zappala further indicated that there was no intent to violate the Wiretap Act on the part of the School Districts, and declined to prosecute them on that basis.

The following guidelines were contained in Mr. Zappala's letter:

First, a school board should adopt or revise a policy to clarify (1) that the Board has authorized the recording of audio on school buses, (2) that students and parents shall be informed annually by letter of the District's policy and (3) that any audio recordings from school buses may be used in student discipline proceedings.

Second, districts who record audio must annually send a letter home to parents informing them of this practice and the Board's policy. For consistency, the District should also include a similar statement in Student Handbooks and Codes of Conduct. To be compliant with Mr. Zappala's guidelines, the District should send an individual

letter at the beginning of each school year, which should also include a copy of the new or revised Board policy.

Finally, a School District that continues the audio recording should require and confirm that its transportation employees or contractor have installed a conspicuous sign on every bus which announces that audio and video surveillance is in effect. School districts should insist that drivers and contractors routinely check that all buses are equipped with the signs and that they remain readable and are not defaced. The signs must communicate in clear and simple language, and the posting location should be the most noticeable to all passengers on the school bus.

It is important to note that counties other than Allegheny County may disagree with Mr. Zappala's position on this matter. As such, you must consult your local D.A.'s office for guidance. Regardless of Mr. Zappala's position, there is also the possibility that a Court will find that recording of audio on school buses is a violation of the Wiretap Act. This issue could also be addressed by the Legislature. Until the question is answered definitively, the only certain course with no risk is to discontinue the recording of audio until the Courts or legislature act.

We will continue to monitor this issue and provide further updates as necessary.

**NEW WELLNESS POLICY REQUIREMENTS IN EFFECT JULY 1**

Has your school district adopted the required student wellness policy? Don't forget that the Federal Child Nutrition and WIC Reauthorization Act requires that every district receiving federal funds for breakfast or lunch programs must have a policy in place by July 1, 2006. The state's Division of Food and Nutrition will be reviewing all adopted wellness policies.

In brief, the wellness policy is designed to ensure that a district is promoting student health issues and that it has designated certain individuals to be responsible for implementing the policy. Specific topics which should be included in a student wellness policy include the following: (1) the appointment of a wellness committee composed of a cross-section of the Board, Administration, food service personnel, students, parents and members of the public; (2) the promotion of integrated nutrition education; (3) the promotion of physical activity during the school day; (4) the creation of a rigorous physical education program aligned with state standards; (5) the promotion of other school-based activities which further the goals of student health and wellness; and (6) a statement of commitment to state nutritional standards.

In the event that you have any questions about this policy or are in need of creating or revising one in advance of the July 1 deadline, please do not hesitate to contact one of our school attorneys.

**NO CHILD LEFT BEHIND: WHAT HAPPENS IN 2006-2007?**

After administering the PSSA this spring, your district can look forward to receiving the preliminary results from PDE by August 15, 2006. At that time, you will know whether your school's grades and subgroups met adequate yearly progress (AYP) or whether some did

not. For the first time, the spring 2006 PSSA exam was given to grades 4, 6, and 7 for purposes of calculating AYP. However, PDE has clarified that because they calculate AYP on the basis of two years of information, the first year of data for grades 4, 6 and 7 will simply be reported to districts this year, with the AYP calculation not taking place until there are two years of data in 2007. The applicable AYP benchmark this year is to have 54% of the students scoring at proficient or above in reading, and 45% of students scoring at proficient or above in math.

If you decide to file an appeal on behalf of your district as to any of the AYP determinations reached by PDE, the tentative deadline is August 26, 2006, with final confirmation to be announced when PDE releases the preliminary data file. Keep in mind that there are two levels of appeal within PDE. First, there is an informal appeal level initiated by filing a form with PDE. A second appeal level can be made to the Secretary of Education if PDE denies your first level appeal. Districts should be aware that the Commonwealth Court held that PDE's process of narrowing the possible issues for an AYP appeal was held to be violative of due process in the *Reading School District* case. While the Supreme Court has taken the case for review, in the interim, PDE is not placing limitations on the kinds of issues which may be raised by school districts challenging a finding of non-achievement of AYP. We expect that the continued efforts of the nation's schools to meet the requirements of NCLBA will keep this matter in the news in the coming year.

**ACT 31 OF 2006: PERMITS STUDENTS WITH DISABILITIES TO PARTICIPATE IN HIGH SCHOOL GRADUATION CEREMONIES**

On May 1, 2006, Governor Rendell signed Act 31 which enacted a new Section 1614 of the School Code to permit participation in High School graduation ceremonies by non-graduating disabled students. The new law is to take effect immediately and School Districts should take steps to implement the law for graduation ceremonies in 2006 and into the future.

The new Section 1614 recognizes that there are students with disabilities whose IEP provides for continued special education programs beyond the fourth year of High School. That Section provides that as long as the student has attended four years of High School, regardless of whether they have completed the IEP program, they may still participate in graduation ceremonies with the student's graduating class and receive a Certificate of Attendance. The change in the law does not prevent a student with a disability from receiving a High School Diploma when the student satisfactorily completes his or her IEP, nor does it require a student to participate in graduation ceremonies based solely on four years of High School attendance. The General Assembly's discussion of Act 31 recognized that "the opportunity for classmates with disabilities to celebrate their accomplishments together occurs only once, and the opportunity to celebrate the receipt of a diploma several years after one's classmates have graduated diminishes the experience for students whose age peers have left high school several years earlier."

IEP teams should consider whether a student has attended four years of high school and is therefore entitled, if the student so desires, to participate in graduation ceremonies.