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Legislative Update

Act 114 of 2006, which provided for education subsidy distribution under the 2006-07 state budget, also amended the School Code as follows:

- Effective April 1, 2007, amended Act 34 (Section 1-111 of the Code) to require both a state and federal criminal history record for all prospective employees;
- Effective immediately, adds a new Section 5-504.1 to impose new limitations on exclusive competitive food or beverage contracts, including requiring reasonable public notice; and
- Effective immediately, expands transportation requirements for Charter School students under Section 17-1726-A.

For more information on these important amendments to the School Code, log onto www.mbm-law.net.



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AMENDMENTS TO THE FEDERAL RULES FOR E-DISCOVERY IMPOSE NEW OBLIGATIONS ON SCHOOL DISTRICTS

An amendment to federal law recently took effect which will have a direct impact on how your school district treats electronic data and communications. The Federal Rules of Civil Procedure govern civil litigation in the federal courts. The Rules apply to any parties involved in litigation, whether plaintiff or defendant and whether the party involved is an individual, a private business or a public entity such as a school district. The Rules address the kinds of documents and information that must be exchanged by parties in litigation and which must be kept by parties in the course of doing business or maintaining archives. Some recent amendments to the Rules which took effect on December 1, 2006 will increase the burden which must be met by all entities, including school districts, in collecting and storing information which may eventually be sought in litigation.

For some time, there has been an uncertainty as to whether the same obligations that apply to archiving and producing written documents apply to electronic information. In short, the new revisions to the Federal Rules of Civil Procedure require that the parties pay greater attention to "electronically stored information" during the process of "discovery," which is that period of time after a lawsuit has been filed and before it goes to trial, where the parties exchange information and witnesses are deposed. The amendment was necessary because the Federal Rules were written with actual paper documents in mind, and before electronically stored information became so prevalent.

Parties must now discuss early in any litigation whether there are any specific issues related to electronic discovery. Parties must make provision for

disclosing or discovering electronically stored information, and must disclose the location of any "electronically stored information." They must also discuss whether there are any anticipated issues related to the preservation or form of electronically stored information, and whether any privilege or confidentiality can be asserted. Other changes relate to the shifting of costs between parties for the burdens imposed by electronic discovery, the scope of any privilege or work product protections, and the impact on interrogatories, requests for production of documents, or subpoenas as they relate to electronically stored information.

Districts must now be concerned with how these new changes will affect its data collection and storage processes. In short, the unfortunate reality is that the amendments to the Federal Rules impose very significant requirements on all parties to retain and store electronic information so that it may later be produced if it is discoverable in litigation. Unfortunately, the Rules do not differentiate between the parties to a litigation, and thus a school district is subject to the same electronic data retention requirements as a Fortune 500 company.

How long must you keep electronically-stored information? In all likelihood, only for as long as you would keep written information pertaining to the same topics. The general standards vary depending on what the subject information involves. Specifically, in response to the amendments, you should revisit your computer and information preservation policy, both as it is written and enacted by your school board and as it is implemented by your technology department, to ensure that you are properly storing electronic infor-

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mation. You may also want to consider taking the following steps:

- Amending existing board policy or drafting a board policy to address the requirements to save and archive electronically stored information to the same degree as written information.
- Informing employees, consultants and contractors that the district will be archiving all electronically-stored information, such as computer records, e-mails and instant messages, providing a copy of the district's policy and having affected individuals sign a document indicating understanding of the district's policy concerning archiving communication. Employees, consultants and contractors should also be reminded to adhere to standards of professionalism and truthfulness in all electronic communications, just as they are expected to do so in other written documents.
- Determine your school district's archiving capabilities and assess what will be required to store electronic information. You may need to increase your on-site storage or to retain a private storage file.
- Apart from determining your storage capacity, you also need to determine the type of electronic information that can be stored. Can you archive e-mails, instant and text messages, and contents of zip drives and memory sticks?
- Pay significant attention now to what will be required to retrieve that information that you are storing. For example, if in two years you are required to produce all e-mails or other electronic information related to a certain construction project, apart from the cost and effort required to store that information, how much cost and effort will be necessary to sort and retrieve the relevant information?

Unfortunately, failure to put in place policies and practices which comply with the amendments to the Federal Rules of Civil Procedure can have very significant negative consequences. To begin, a party who has destroyed information, inadvertently or not, which would be otherwise subject to the discovery process can be charged with spoliation of evidence. A spoliation charge suggests that a party to a litigation acted in bad faith by attempting to destroy evidence which was relevant to or otherwise discoverable by another party in the litigation. The irony is that even if the party that destroyed evidence did not have anything to hide, a spoliation charge makes it appear the party had something to hide. Further, a party who fails to comply with the Federal Rules regarding electronic discovery may be assessed monetary sanctions or otherwise limited in their ability and opportunity to put on a defense to an underlying case, or to advance a claim in an underlying case.

To that end, we recommend that you consult with your solicitor and information technology department, as well as existing Board Policy Committees, to determine how to comply with these amendments with the Federal Rules in the least burdensome way.

STUDENT FREE SPEECH ISSUES - UPDATE

The Fall 2006 issue of MB&M Education News addressed student free speech rights for off-campus conduct. In general, students retain freedom of speech unless such speech substantially disrupts the educational process. Since that writing, there have been recent developments. The 2006 article discussed the Latour case, in which a Riverside Beaver County student was expelled for posting rap lyrics on the internet which referred to another student. The student filed a federal action seeking to set aside the expulsion. He had also been subjected to arrest and juvenile detention by the local police and so he sought damages against the District and the police. The Pittsburgh Post-Gazette reported on December 29, 2006 that the various police departments agreed to settle with the student and his family in exchange for \$60,000.00, while the School District previously agreed to settle for \$90,000.00.

On December 20, 2006 local news media also reported a lawsuit filed by a former student of New Brighton Area High School who had been suspended out-of-school for ten days and forbidden to attend his senior prom following a remark that he made on school property. During a school assembly that involved the Harlem Globetrotters, the student was chosen to participate in the presentation. One of the Globetrotters gave the student the nickname "Osama," presumably because the student is part Lebanese and had a goatee. The Globetrotter called the student by that name several times during the assembly, and the nickname was used by other students and a teacher on subsequent school days. At one point, according to news accounts, the student became tired of the remark and stated to a friend "If I were Osama, I would already have pulled a Columbine." A Librarian overheard this and relayed it to the Principal, who issued a ten day suspension and loss of privileges for terroristic threats. The ACLU filed a lawsuit on the student's behalf alleging abridgement of free speech rights, arguing that the remark did not constitute a true threat or otherwise disrupt the school environment.

Regardless of the merits of the free speech claims in these court actions, they illustrate that student speech issues will continue to be a front-burner concern for many districts. To that end, if your district is required to address student speech, and you are contemplating significant disciplinary consequences such as a lengthy suspension, expulsion or other loss of school privileges, the safest course is to consult with your Solicitor to determine how your situation compares with others, and to err on the side of caution.

PDE ISSUES NEW TRUANCY GUIDELINES

The Commonwealth's Department of Education recently issued a Basic Education Circular (BEC) on the topic of compulsory attendance and truancy elimination plans. The new guidance comes at a time when pupil attendance rates are being subjected to greater scrutiny. The No Child Left Behind Act requires school districts to measurably increase student achievement, but also requires districts to show that they are making significant progress in increasing pupil attendance rates because of the links between regular student attendance and achievement.

PDE's recent BEC was issued on August 8, 2006 and will expire on June 20, 2011 unless renewed by the Department. It was produced in response to the work of the State-wide Task Force on School Attendance Truancy Reduction. In summary, the BEC restates the state law requirements for enforcing pupil attendance, provides guidance in reducing truancy, and outlines a proposed truancy policy and program which PDE recommends that districts adopt. The full language of the BEC, as well as attachments referred to therein, can be found at the Department's website (www.PDE.state.pa.us).

The BEC reiterates that the School Code mandates that all children of beginner age through the age of 17 must regularly attend school, with the exception of homeschooled students, trade school students and other students who meet certain work or employment criteria. School boards must adopt written policies governing pupil absences, and absences should be treated as unlawful until a district receives a written excuse explaining the reason for any absence. Schools may excuse a maximum of ten cumulative days of absence each school year, with any absences beyond that number requiring written excuse from a physician. After any child has accumulated three or more unexcused absences, a teacher or school official is required to report such child to the district's central administration so that the matter may be dealt with appropriately.

The BEC acknowledges that parents and families are the first and best resources for a district in eliminating truancy and recommends that families be provided a copy of the district's attendance policy at the beginning of each school year or upon enrollment for any new enrollees. The BEC stresses that a district's attendance policy should be easily readable and, if necessary, translated so that non-English speaking parents can understand its provisions. PDE recommends having parents sign a sheet indicating their receipt and understanding of the district's attendance policy.

The BEC also recites PDE's recommended policy for school districts in curtailing truancy. While the BEC recommends that legal proceedings with magistrates not be held until after more than three unlawful absences have been accumulated, it also stresses that action should be taken early with the student and parents. After either a first or second unlawful absence, PDE recommends a written notice be sent to parents which states that an unlawful absence has occurred and sets forth the legal penalties for truancy while offering specific contact personnel for parents who wish to seek aid in increasing student attendance. Upon a child's third unlawful absence, PDE recommends that a notice be sent to parents or guardians by certified

mail providing official notice of the third illegal absence. This notice should also reiterate the legal consequences of truancy and should prompt the scheduling of a conference with school officials to discuss a Truancy Elimination Plan (TEP). The BEC contemplates such a conference being convened between school officials, the parent or guardian and student to discuss issues such as "the appropriateness of the child's educational environment, current academic difficulties, physical or behavioral health issues, and family/environment concerns." If the conference is able to successfully address those issues, it is contemplated that the parties draft and sign a Truancy Elimination Plan agreeable to the school representative, the child and the parents or guardian. Such a Plan might include "accessing academic and social/health supports from the school and community organizations, and outline family/parent and student responsibilities, and levels of performance monitoring that include awards and consequences."

The BEC goes on to state that after a TEP is signed, or if one cannot be reached between the parties, any further illegal absences by the student should be met with an official notice of unlawful absence from the school notifying the parent and child of the additional unlawful absence and the district's intention to file a citation with the Magistrate. The BEC recommends that for children under the age of thirteen who are habitually truant (i.e., those who are absent for more than three school days following a first notice of truancy given after a child's third unlawful absence), they should not only be referred to the local magistrate, but also referred to the local County Children and Youth Agency for services, which may include adjudication of dependency or other family issues. The BEC recommends that children who have attained the age of thirteen or over and who are habitually truant may, but need not be, referred to the local county agency or juvenile court along with the filing of any magisterial proceedings.

The Department has included at its website PDF documents containing a sample Truancy Elimination Plan (TEP) and directions to complete such Plan. The form Plan lists the accumulated dates of unlawful absences, the reasons for the absences, and the actions that were taken. It calls on the parties to assess the reasons why the absences occurred to determine the solutions for the absences, the consequences for non-compliance and the benefits for compliance. PDE's on-line guidance also includes sample letters which school districts can send to parents following the first, second and third unlawful absence.

In short, the BEC represents an effort to put in place a standardized process followed by school districts in addressing attendance issues. Given the increased importance in maintaining student attendance rates, it may be that at some point, apart from the benchmarks contained in the No Child Left Behind Act, a district's efforts to increase student attendance may be measured by reference to PDE's recommended guidelines. To that end, we would recommend that you review the BEC to see whether or not your district is presently in compliance, or to determine what would be necessary to comply with the Department's recommendations regarding notices and truancy elimination plans. In the event that you have any additional questions about any of the matters raised in the BEC, please feel free to contact one of our school attorneys for further clarification.