

**PENNSYLVANIA ASSOCIATION OF ELEMENTARY AND
SECONDARY
SCHOOL PRINCIPALS**

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**SELECTED ISSUES IN
EDUCATION LAW**

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Email Correspondence and Electronic Communications

1. Email

- a. Communications with students and parents should only be coming from the District email address
- b. Do not share, nor should faculty share, personal email accounts with students or parents
- c. Administration and faculty should not be emailing from personal accounts, instant messaging, texting students and parents under any circumstances
- d. Electronic communications are not necessarily private and may be subject to discovery in litigation
- e. Administrator emails may even be subject to right to know requests in some circumstances

2. Text messages

- a. District employees at all levels should not be text messaging students
- b. If a District employee receives a text message from a student or their parents the employee should not respond
- c. The employee should know that they are to inform an administrator if they have any concerns about how a student is contacting them

3. Cell Phone Policies

- a. 24 P.S. § 5-510
- b. District can set and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, appointees or employees, and students
- c. Must balance policies and actions with student's 4th Amendment rights
 - i. New Jersey v. T.L.O., 469 U.S. 325 (1984)
 - ii. Klump v. Nazareth Area Sch. Dist., 425 F.Supp.2d 622 (E.D.Pa. 2006)
- d. Districts have a great deal of latitude in determining policies regarding cell phone use and presence in the school
- e. Seizure of a cell phone used in violation of District policy is not an unreasonable search and seizure
- f. Searching of the phone, such as scrolling through the messages, could expose the District to liability if the 4th Amendment and Pennsylvania Constitutional standards are not met
- g. Must have a constitutionally permissible justification for the search, simply having the phone out in class is not justification for a search
- h. Searches of individual students require reasonable suspicion

4. Sexting

- a. If a District employee discovers an inappropriate text message it should be brought to the Administration's attention
- b. The image or message should not be forwarded to any members of administration or the faculty
- c. The District should report these incidents to the Police

- d. No employee should retain a copy of the image or message
- e. If it is an image, several prosecutors have treated these images as child pornography
- f. No one wants to risk such a charge
- g. This issue has not been fully litigated, although the ACLU has obtained a temporary injunction against a Wyoming County District Attorney preventing him from filing charges against three girls;
 - i. Miller, et. al. v. Skumanick, Jr., 2009 WL 838233 (M.D. Pa. 2009)
 - ii. Attempted to prosecute minors for violations of 18 Pa.C.S. § 6312 and § 7512
- h. However, in other parts of the state several students have pled to minor charges

5. Blogging and Social Networking

- a. Common sense and responsibility
- b. First Amendment only protects the speech of public employees to the extent that they are speaking as private citizens on matters of public concern
- c. Speech regarding private and personal matters, or speech which is unlawful, untrue, or spoken within the employee's job duties will not be protected
- d. ON THE INTERNET, NOTHING IS EVER TRULY DELETED, IT IS OUT THERE SOMEWHERE
- e. If you blog or use social networking sites:

- i. Make sure that the subject is not one that will come under employer scrutiny or be counter to the mission of the District
 - ii. Do not post about subordinate employees, your job duties, any personnel actions, other administrators, or your supervisors
 - iii. Check your photos and the photos posted by other users with images of you, remove any inappropriate images
 - iv. Limit access to your site or blog—this will not prevent as many people from seeing it as you might think, so you must still use care
 - v. Monitor comments and remove any that are inappropriate
 - vi. *City of San Diego v. Roe*, 543 U.S. 77 (2004) (discharge of police officer upheld where the officer used the internet to sell homemade video of himself stripping and masturbating)
- f. Imposter blogs and sites
- i. Report these to the site and the Superintendent at once
 - ii. Disciplinary action may not be permissible against the creator of the site if it was a student—First Amendment concerns
 - iii. It is not the role of the District to punish or resolve tort claims, District needs to be sure that it is addressing the issue within the bounds of the law with respect for the rights of the student
 - iv. Do not let hurt feelings cause liability for the District
 - v. *J.S. v. Bethlehem Area School District*, 807 A.2d 847
 - 1. Landmark case before the Pennsylvania Supreme Court regarding the validity of punishment for conduct that occurred in Cyberspace

2. A junior high school student created a website from his home computer—the website was entitled “Teacher Sux”
3. The site contained web pages with profane comments regarding one of the student’s teachers, such as
 - a. One page was about “Why [the teacher] should be fired” and explained, in degrading terms, why the student felt that the teacher should have been fired based upon her physical appearance
 - b. Another page showed the teacher with her head morphing into a picture of Hitler
 - c. Another page was titled, “Why should she die?” The page requested the reader to take a look at the diagram and the listed reasons and asked the reader to donate “\$20 to help pay for the hitman.”
 - d. The page concluded with a section entitled “Some words from the writer,” then listed 136 times “F____ you Mrs. [teacher]. You are a B____. You are a Stupid B____.”
 - e. Another page showed a drawing of the teacher with her head cut off and blood dripping from her neck
 - f. Other pages were directed at the junior high school principal, stating that he had a sexual relationship with the principal at another school
4. The student accessed the site from a school computer and showed it to friends, the site was eventually seen by administration

5. When the student's teacher viewed the website, she suffered from stress, anxiety, weight loss, loss of appetite and had trouble leaving her house because of her fear. She had to take anti-depressants to treat her condition
6. Students at the school were demoralized after the website became public
7. The principal said that the reaction from the school community was the worst he had seen in 40 years as an administrator. He likened the reaction to the kind of effect that news of the death of a student might create
8. The student was eventually suspended for 10 days and ultimately expelled
9. The parents sued asserting a violation of the student's First Amendment rights—but the District's action was upheld

vi. Lessons of *J.S. v. Bethlehem Area School District*

1. For a student to be punished for off-campus speech, there must be a sufficient nexus between the student's misconduct and the school
2. For example, a school had cause to discipline a student for calling a teacher a profane name in public, even though it had taken place off school grounds, *Fenton v. Stear*, 423 F.Supp. 767 (Pa. W.D. 1976)
3. In *Bethlehem Area Sch. Dist.* there was sufficient nexus to the school because the student had accessed the website at school and showed it to a fellow student. Where speech "is aimed at a specific school and/or its personnel is brought

onto the school campus or accessed by its originator, the speech will be considered on-campus speech."

4. The speech here was not "pure speech"—it carried no political message and was simply lewd, vulgar, and offensive
5. There was an actual disruption
 - a. Students exhibited anxiety
 - b. Lowered morale
 - c. Lots of discussion of the site at school
 - d. Impact on the teacher
6. This site was not a true threat
7. Lessons:
 - a. Issues like this will inevitably find their way into the District
 - b. Even the student accessing the site from school will be enough to bring the material into the school so as to form sufficient nexus
 - c. DOCUMENT, DOCUMENT, DOCUMENT!
 - i. Be able to demonstrate disruption
 - ii. Effect on students?
 - iii. Effect on faculty?
 - iv. Student discussion?
 - v. Accessed at school?

vi. Any way that the incident manifests itself in the school and the school atmosphere should be documented

vii. Just because speech occurs off-campus does not mean that it is untouchable, just have to follow the requirements of the law

vii. True threats

1. Not entitled to First Amendment protections
2. True threat is a "serious expression of an intent to commit an act of unlawful violence to an individual or group of individuals
3. If the District feels that a statement is a "true threat" they need to be investigating the statement in a timely fashion or it will undermine any argument that the District actually believes the statement to be a true threat

viii. Contrast: *Layshock v. Hermitage*, 412 F.Supp.2d 502 (Pa. W.D. 2006)

1. Here a high school student created a fake MySpace.com profile of a principal
2. Student accused principal of smoking marijuana, keeping a keg of beer behind his desk, and that the principal was "too drunk" to remember his birthday
3. Profile was created from his grandmother's computer during non-school hours, he did not access the website at school
4. No school equipment was involved except for the picture of the principal on the website

5. Student was suspended for 10 days, placed in alternative education, and was banned from graduation
6. Ultimately the Court found in favor of the student—held that the disruption was minimal even though classes were cancelled because computer labs had to be shut down and the IT coordinator and the Principal spent about 25% of their time dealing with the disruption caused by the profile
7. The Court was not convinced that the disruption was caused by the profile rather than by the administration's reaction to the profile

g. Lessons for Student Discipline

- i. A school should be able to discipline a student for a violation of its Internet use policy where a student violates the policy at school, just as it would with any other violation of school rules that occur on school grounds
- ii. Schools can discipline a student for a true threat against another student or faculty member, whether it is made online or in person
 1. But courts will look at the context of the communication to find a "true threat"
 2. Courts are willing to examine the content of websites as a whole to determine if statements made on the site are real threats or simply sophomoric humor and seem willing to give students the benefit of the doubt
- iii. A school may be able to discipline a student for off-campus conduct occurring on the Internet where the conduct leads to a substantial disruption of the educational process

1. Must be something more than mere curiosity but less than complete chaos
 2. *Layshock* suggests that a student can be punished even if he is not directly responsible for introducing the disruptive material into the school environment where other students access it at school
- iv. If a student posts material on the Internet that is not threatening and which does not disrupt school activities, the school probably cannot discipline the student even if the posted material is offensive
- v. Text Message Searches?
1. This is an impending battlefield
 2. Currently, a school official only needs to have a “reasonable suspicion” of wrongdoing by a student to justify a search of the student’s belongings while at school
 3. This is a “common sense conclusion about human behavior” upon which “practical people” may rely
 4. Presumably this same standard would apply to a search of a student’s cell phone while at school, but it remains to be seen whether the Courts will craft a different standard
 5. The ACLU is challenging school district text message searches in Colorado, with a ruling expected soon

Code of Conduct for Professionals--22 Pa. Code 235.4

1. Professional educators shall exhibit consistent and equitable treatment of students, fellow educators, and parents

2. They shall respect the civil rights of all and not discriminate on the basis of
 - a. race,
 - b. national or ethnic origin,
 - c. culture,
 - d. religion,
 - e. sex or sexual orientation,
 - f. marital status,
 - g. age,
 - h. political beliefs,
 - i. socioeconomic status,
 - j. disabling condition or
 - k. vocational interest
3. Must exhibit acceptable and professional language and communication skills
4. Verbal and written communications with parents, students, and staff shall reflect sensitivity to the fundamental human rights of dignity, privacy, and respect

Removal of Employees

1. 24 P.S. § 5-514
 - a. Applies to any of the District's officers, employees, or appointees for
 - i. Incompetency
 - ii. Intemperance

- iii. Neglect of duty
- iv. Violation of any of the school laws
- v. Other improper conduct

- b. Applies to most District employees
- c. Gives the employee certain due process rights
- d. Employee must receive due notice containing the reasons for the termination
- e. Employee must also be given the option to receive a hearing
- f. District's power to terminate under this portion of the Code is broad

2. 24 P.S. § 11-1122

- a. Governs dismissal of teachers
- b. Professional employees may only be terminated for
 - i. Immorality;
 - 1. Conduct claimed to be immorality must have actually occurred;
 - 2. Such conduct must offend the morals of the community; and
 - 3. The conduct is a bad example to the youth whose ideals the teacher is supposed to foster and elevate
 - ii. Incompetency;
 - 1. Not limited to lack of substantive knowledge of the subjects to be taught;
 - 2. Also includes a disqualification, an incapacity, or want of physical ability

- iii. Unsatisfactory teaching performance based on
 - 1. two (2) consecutive ratings of the employee's teaching performance
 - 2. that are to include classroom observations,
 - 3. not less than four (4) months apart,
 - 4. in which the employee's teaching performance is rated as unsatisfactory;
- iv. Intemperance, i.e. loss of self-control;
- v. Cruelty
- vi. Persistent negligence in the performance of duties;
- vii. willful neglect of duties;
- viii. physical or mental disability
 - 1. as documented by competent medical evidence,
 - 2. which after reasonable accommodation of such disability as required by law
 - 3. substantially interferes with the employee's ability to perform the essential functions of his employment;
- ix. advocating of or participating in un-American or subversive doctrines;
- x. conviction of a felony or acceptance of a guilty plea or nolo contendere;
- xi. persistent and willful violation of or failure to comply with school laws, including official directives and established policy of the board of directors

- c. Often thought that it is impossible to terminate tenured teachers, but this is not true
- d. Document, document, document
- e. *Reifer v. Williamsport Area Sch. Dist.*, (Pa. Cmwlth 2008) — teacher termination for immorality upheld where teacher lied on application regarding termination from prior employment
- f. *Flikinger v. Lebanon Sch. Dist.*, 898 A.2d 62 (Pa. Cmwlth 2006) — principal's failure to immediately respond to the report of a gun in school was a choice made and constituted a "willful neglect of duty" so as to warrant his dismissal

3. Layoffs

- a. In reality, there is no such thing as layoffs
- b. Strict rules on the reasons for suspending professional employees but not for non-professional employees
- c. First step: Identify the employee's classification
 - i. Non-professional v. Professional
 - ii. Differing levels of protection
- d. Non-Professionals
 - i. Examine the applicable collective bargaining agreement and board policies, these have an impact on the ability of the District to furlough employees
 - ii. For instance, in absence of C.B.A. language to the contrary, generally a non-professional employee's position can be eliminated simply by a board motion eliminating the position and providing an effective date for the elimination

- iii. If there is C.B.A. language, it must be STRICTLY observed
- iv. C.B.A.'s and unions also offer the non-professional employee other protections from demotion or furlough; for instance, if a bargaining unit position is eliminated and that position is filled by subcontracting to a non-bargaining unit member, this is problematic for the District

e. Professional Employees

- i. Is there proper grounds to furlough and is the right employee being furloughed?
- ii. Cost savings are not permissible as the sole reason for a furlough, but the board may be motivated by financial considerations provided that a reason permitted under the code for a furlough is applicable
- iii. Cost savings will be impacted by possible appeals under a C.B.A. and any unemployment compensation implications
- iv. 24 P.S. § 11-1124
 - 1. Board may suspend the necessary number of employees for any cause in this section
 - 2. Decrease in enrollment
 - 3. Curtailment or alteration of the educational program on recommendation of the Superintendent, concurred in by the Board, and approved by PDE, resulting from substantial decline in class or course enrollment or to conform with the standards of organization or educational activities required by law or recommended by PDE

4. Consolidation of schools whether within a single district, through a merger of districts, or as a result of joint board agreements, when such consolidation makes it unnecessary to retain the full staff of professional employees
 5. Establishment of a new district which causes the retention of the District's full staff of professional employees to be unnecessary
- v. Attempts to furlough beyond these reasons will be generally unsuccessful and the Pennsylvania Supreme Court has held that 24 P.S. § 11-1124 should be read to be a listing of all possible reasons for furlough
 - vi. Suspensions may be proper even if motivated by financial considerations
 - vii. For instance, Districts are left to determine what constitutes a substantial decrease in enrollment
 - viii. *Phillippi v. School District of Springfield Twp.*, 367 A.2d 1133 (1977)(School boards must exercise sound discretion when furloughing employees and board action will not be disturbed absent a showing that discretion was abused, or that the action was arbitrary, based on a misconception of law or ignorance of facts
 - ix. A broad variety of definitions of substantial decreases have been upheld
 - x. Districts can furlough for financial reasons provided they can also find justification under 11-1124
 - xi. Substantial decrease can be proven by (*Colonial Ed. Ass'n v. Colonial Sch. Dist.*, 645 A.2d 336 (1995))

1. Evidence of a general, cumulative decline over a reasonable time
 2. Evidence of a decrease from one year to the next that is so prominent as to not require the other years as part of the analysis
- xii. Curtailment or alteration of educational programming must satisfy the following criteria
1. Recommendation of curtailment or alteration by the Superintendent
 2. Concurrence by the Board
 3. Approval of such action by PDE
 4. Must be the result of substantial decline in class or course enrollment; or to conform with the standards of organization or educational activities required by law or PDE
- xiii. Curtailment or alteration of educational programming is addressed by BEC § 1124
1. Enrollment in the class or course must decrease by at least 20% from the school year five years prior; or
 2. Enrollment for the class must be less than ten students
- xiv. Curtailment or alteration must be focused on the permissible prongs and will be unlikely to be approved if actually based upon financial motivations
- f. 24 P.S. 11-1125.1—sets forth the rules pertaining to the selection of employees to be suspended

- i. Suspended in inverse order of seniority within the school entity of school employment
 - 1. Approved leaves of absence do not count as a break in service
 - 2. Seniority continues to accrue during suspension
 - ii. Where there is a consolidation of schools, departments, or programs, all professional employees retain their seniority rights as they existed prior to the consolidation or reorganization
 - iii. Realignment must be accomplished to ensure that more senior employees are provided with the opportunity to fill positions for which they are certified and which are being filled by less senior employees
- g. Prohibited actions regarding suspended employees
- i. No suspended employee may be prevented from engaging in another occupation during suspension
 - ii. Suspended or demoted employees shall be reinstated on the basis of seniority within the school entity
 - iii. No new appointments shall be made while there are suspended or demoted employees available who are properly certified
 - iv. To be considered available a suspended employee must annually report in writing his current address and his intent to accept the same or a similar position when offered
- h. Suspended employees have a right to a hearing if they so desire and are entitled to reasonable notice
- i. ARRA and COBRA

- i. Employees who have been terminated are eligible for COBRA benefits
- ii. Until the end of the year, 65% subsidy on COBRA benefits for 9 months

Act 93

1. Compensation plan for school administrators
 - a. Provides the means by which compensation matters for District administration may be resolved
 - b. Upon written request of a majority of the school administrators in the district, the District shall be required to meet and discuss in good faith with the school administrators on administrator compensation prior to adoption of the compensation plan
2. Districts must adopt written administrator compensation plans which apply to eligible school administrators upon request by a majority of the administrators
3. Act 93 plans are optional; where a majority of administrators do not want to meet and discuss with the school board the board may pass policy on compensation without the input of the administrators
4. These plans continue into effect until a time specified in the plan, but not for less than one school year
5. An administrator compensation plan shall include, but not be limited to:
 - a. A description of the program determining administrative salaries
 - b. Salary amounts or a salary schedule
 - c. A listing of fringe benefits
6. School administrators are subject to the Public Employees Anti-Strike Law

7. Administrator Rights

- a. Right to meet and discuss in good faith with the school board
 - i. Requires that 50% or more of the administration support Meet and Discuss sessions
 - ii. Any decisions reached will apply to all administrators
 - iii. Prevents any special deals for individuals
 - iv. Allows administrators to present arguments and data in support of requests for salary increases and benefits
 - v. It is up to the District to determine what benefits are included in the Act 93 compensation plan
 - vi. Does not have to be an agreement, but the parties can create one if they so choose
 - vii. Right to the Anti-Strike Act Grievance Procedures where the board refuses to meet with the administrators
- b. Right to a written compensation plan
- c. Right to use the grievance procedure of the Anti-Strike Act

8. Act 93 is in place to strengthen the management team's cohesiveness by providing a mechanism to deal with salaries and benefits—it does not provide administrators with collective bargaining rights

9. Limitations on Administrator Rights

- a. District can adopt the administrator compensation plan without the concurrence of the administrators
- b. No strict time limits similar to those in negotiations for professional employees

- c. Can only require a meet and discuss with the Board where a majority of the administrators want to initiate these sessions

10. Good Faith Meet and Discuss

- a. Not defined and not easy to prove or disprove
- b. Act 93's Meet and Discuss meeting is not the same as the Meet and Discuss for employees under a collective bargaining agreement
- c. Courts make this determination based on the demonstrated intent of the parties—for instance, was there discussion in the sessions?
 - i. Scheduling meetings and canceling them can also infer the lack of good faith
 - ii. Did the board convey rationale and reasons for their decisions?
 - iii. Did the board meet with the administrators and provide the plan to them before passing the document?
 - iv. Is the board decision and action contrary to law, board policy, or fact?
 - v. Is there evidence of intimidation or coercion?
 - vi. Did the parties make a serious effort to resolve their differences?
 - vii. Is the final plan complete?

11. Both parties, the board and the administrators should be engaging in a mutual problem-solving type of approach, not one that is similar to contract negotiations

12. Administrators are management employees and the Act treats them according to that standard

13. The board cannot:

- a. Refuse to meet and discuss after a request of a majority of the administrators
- b. Unilaterally change the terms and conditions of the administrator compensation plan during its term
- c. Refuse to implement or breach terms of the administrator compensation plan
- d. Refuse to participate in the meet and discuss in good faith
- e. Refuse to include an appropriate administrator in the Act 93 plan

14. The board can

- a. Approve a compensation plan without the approval of the administrators provided they have engaged in a good faith meet and discuss
- b. Adopt a position supported only by the minority of administrators after a meet and discuss, does not need to have the support of a majority of the administrators
- c. Agree to make the Act 93 plan into a contract approved by both sides if it so desires

15. Meet and Discuss best practices

- a. Meet early
 - i. Provides opportunity for a full hearing and response time for both employer and employees
 - ii. This is a cooperative process
 - iii. Proactive approaches provide the best opportunity for both sides to address their interests and concerns before the expiration of the prior compensation plan

- b. Establish the number and dates of meetings up front
- c. Be able to respond to board presentations rationally with facts and data in support of the administrator's position
- d. Present the board with information
 - i. Inform them of Act 93 and how it works if there are new members who are unfamiliar with the process
 - ii. Explain the importance of good pay and benefits for administrative staff—how does this benefit the District and its students
 - iii. Meet and Discuss sessions are not an opportunity to gripe at the board
 - iv. Should be treated as an opportunity to educate the board on the role of administrators and compensation issues
- e. Be clear on the language prior to the board's adoption of the ACP
 - i. Ask questions
 - ii. Make suggestions
 - iii. Cooperate