CHILDS & HALLIGAN
A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

The Tower at 1301 Gervais, Suite 900,
Columbia, SC 29201
Post Office Box 11367,
Columbia, SC 29211-1367

Telephone (803) 254-4035
Facsimile (803) 771-4422

http://www.childs–halligan.com

School Law Newsletter

Vol. 28, No. 1 Summer 2013

IN THIS ISSUE:

New Concussion Law

The South Carolina Legislature passed a new law, effective July 1, 2013, that requires school districts to educate athletes, parents, and coaches on concussion symptoms; requires the removal of a student athlete with a suspected concussion from the game or practice; and necessitates medical clearance before the student is allowed to return to play. Specifically, this law requires school districts to provide written information regarding concussions to every coach, volunteer, student athlete, and parent or guardian of a student athlete. The written information sheet should advise of the nature and risk of concussion and brain injury, including the risks associated with continuing to play after a concussion or brain injury. A student athlete's parent or guardian must either sign or acknowledge receipt of this information before the student may practice or participate in a school sport. Therefore, prompt compliance with this law is necessary given the start of the fall sports season.

In addition to the education requirements, this statute further requires the immediate removal of any player from a practice or game if a coach, athletic trainer, official, or physician suspects that the student athlete has sustained a concussion or brain injury. If a physician, physician's assistant, nurse practitioner, or athletic trainer evaluates the student athlete on site and finds no signs or symptoms of a concussion or brain injury, the athlete may return to play or practice that day. Conversely, a student who has been removed from a game or practice and is suspected of having a concussion or brain injury must have a physician's written approval before returning to play.

Further, the new law requires the Department of Health and Environmental Control (DHEC), in consultation with the South Carolina Department of Education (SDE), to post nationally-recognized guidelines and procedures regarding the identification and management of suspected concussions in student athletes, as well as model policies that incorporate best practices guidelines for the identification, management, and return to play decisions for student athletes with concussions.

Finally, the new legislation directs school districts to develop guidelines and procedures based on the model guidelines and procedures posted on DHEC's website. To date, DHEC has not finalized and posted these guidelines. However, the Centers for Disease Control (CDC) and the National Athletic Training Association are good sources of information for coaches, trainers, and parents. As such, district policies and procedures regarding the management of concussions sustained by student athletes may require further refinement.

Safe Access to Vital Epinephrine (SAVE) Act

Signed by Governor Nikki Haley on June 7, 2013, the "Safe Access to Vital Epinephrine (SAVE) Act"

allows the state's public and private schools to keep supplies of epinephrine auto-injectors, commonly known as EpiPens, in stock. The law also affords schools greater authority to administer this potentially life-saving medication to those who are experiencing severe allergic reactions. The new law clarifies prior confusing guidance by DHEC and the South Carolina Board of Nursing.

In the past, school boards were permitted to authorize school nurses or other designated school personnel to administer an EpiPen, or provide an EpiPen to a student to self-administer, in accordance with the student's medical prescription. While this remains true, the SAVE Act also permits governing authorities of school districts to authorize school nurses or other designated school personnel to administer an EpiPen to a student or other individual on school premises if s/he believes in good faith the person is experiencing anaphylaxis, regardless of whether the student or other individual has a prescription for an EpiPen.

Under the SAVE Act, school boards, in consultation with the SDE, will be required to implement a plan for the management of students with life-threatening allergies. The plan must include education and training for school personnel on the management of students with life-threatening allergies, including how to administer an EpiPen, how to recognize symptoms of severe allergic reactions, and the standards and procedures for the storage and administration of an EpiPen. In addition, the plan must include procedures for responding to a life-threatening allergic reaction, including emergency follow-up procedures, and a process for the development of individualized health care and allergy action plans for every student with a known life-threatening allergy. Districts will be required to post the plan on their websites.

School districts, including employees, volunteers, school nurses, and other designated school personnel who administer or provide an EpiPen to a student or another person in accordance with the SAVE Act will not be liable for injuries to a student or another person resulting from the administration or self-administration of an EpiPen. The immunity granted, however, does not apply to acts or omissions constituting gross negligence or willful, wanton, or reckless conduct. Under the law, the administration of an EpiPen does not constitute the practice of medicine or nursing.

In conclusion, each school board will need to decide whether it will authorize the use of EpiPens as contemplated under the SAVE Act, and if so, promptly develop an appropriate plan and adopt or revise the necessary policies.

Public School Districts and Schools Now Exempt from Filing Registration Statements Under the Solicitation of Charitable Funds Act

In June 2013, the South Carolina Legislature amended the Solicitation of Charitable Funds Act to exempt public school districts and public schools from the requirement to file registration statements with the Secretary of State's Office. Under the amended statute, the term "public school" includes any student organization within the school that does not maintain separate financial accounts or a separate Federal Employer Identification Number from the school and whose fundraising revenues are deposited in the school's student activity fund.

The statute relieves public school districts, public schools, and certain student organizations from preparing and submitting detailed annual financial reports to the Secretary of State's office. It also eliminates other administrative burdens that could impede public school districts and public schools from soliciting charitable contributions. However, separately organized foundations and booster organizations with separate accounts must continue to file. In sum, the new law helps promote charitable fundraising by public school districts and public schools.

Affordable Care Act Implementation Begins but Penalties Delayed

Since the Patient Protection and Affordable Care Act (ACA) was signed into law in March 2010, most school districts in South Carolina and around the country have been wrestling with the unanticipated impact certain provisions of the proposed rules have presented. Of particular concern, those portions of the ACA, which require "Large Employers" (those that employ over 50 full-time employees) to offer affordable health insurance coverage to full-time employees and their dependents (children under the age of 26) or be subject to paying certain penalties if an eligible employee obtains a subsidy or premium tax credit from the government. All South Carolina School Districts are considered separate "Large Employers."

These significant portions of the ACA were scheduled to go into effect beginning January 1, 2014. On July 2, 2013, however, the Obama Administration announced that the reporting and implementation requirements of some parts of the ACA will be delayed from 2014 until 2015 in order to allow the government to consider simplifying the reporting requirements while permitting employers to develop action plans.

The ACA defines the term "full-time employee" to mean, with respect to any month, an employee who is employed on average at least 30 hours of service per week during a described "measurement period." Significantly, in addition to permanent full-time employees, this definition could include temporary employees and variable-hour employees (employees who work irregular hours) who average at least thirty hours per week. Since school districts already offer permanent full-time employees health insurance, the main issue of concern is determining whether certain cafeteria workers, short-term substitutes, long-term substitutes, bus drivers, tutors, coaches, monitors/aides, custodians, maintenance workers, dual position employees, and other temporary or variable-hour employees in a school setting will be afforded "full-time" status and will be eligible for coverage.

If a Large Employer school district fails to comply with the ACA's mandate to offer full-time employees the opportunity to enroll in an affordable, employer sponsored group health plan or health insurance coverage that qualifies for minimal essential coverage, the school district could be subject to substantial financial penalties.

Despite the delay of certain provisions of the ACA, school districts are encouraged to make preparations in anticipation of implementation in 2015. We encourage school districts to do the following: (1) verify that the school district is offering the required health insurance to all current full-time employees and their dependents and continue to do so; (2) identify those employees who become eligible for coverage based on hours worked; and (3) implement and refine procedures to accurately record and track the number of hours worked by temporary and variable-hour employees.

We will provide district administrators with more detailed guidance on the implementation of the ACA in the near future.

Youth Suicide Awareness and Prevention Act Requires Teacher Training

In May 2012, the South Carolina Legislature enacted the "Jason Flatt Act" (Act). Beginning this school year, the Act requires all middle and high school teachers to receive two hours of training in youth suicide awareness and prevention as a requirement for certification renewal. The two hours of training will count towards the one hundred twenty hours teachers must acquire for re-certification every five years and is only required once during each five-year certificate period. The SDE has listed resources that are available to districts to meet the requirements of the Act at: http://ed.sc.gov/agency/se/schoolleadership/documents/JasonFlatt_ImplementationPlan.pdf.

School districts are not required to use the materials listed by the SDE, but rather may select the materials to be used when training employees. However, the training required under this Act must be accomplished through suitable suicide prevention materials that meet guidelines developed by the SDE, including the self-review of suitable materials.

Joint Resolution Regarding Teacher Contracts and Salaries

On April 15, 2013, a Joint Resolution was passed, consistent with prior school years, to address several issues regarding teacher contracts and salaries. Consistent with prior years, the resolution applies only to the 2013-14 school year. Specifically, the joint resolution extended the date for contract issuance through May 5, 2013. The resolution also authorized school districts to uniformly negotiate salaries below the school district's salary schedule for the 2013-14 school year for retired teachers who are not participating in the Teacher and Employee Retention Incentive (TERI) Program.

A new provision contained in the resolution provides that "a continuing-contract teacher who is being recommended for formal evaluation the following school year must be notified in writing on or before the date the school district issues the written offer of employment or re-employment." The existing SDE Regulation 43-205.1 provides that teachers must be notified that they will be placed on formal evaluation on or before April 15.

School Bus Advertising

Budget Proviso 1.49, which prohibits advertisements on school buses, was amended to apply to only state-owned buses. Now, a new budget proviso, Proviso 1.79, allows districts to sell commercial advertising space on the outside or inside of district-owned activity buses. Importantly, a school district may not sell such commercial advertising if the advertisement promotes a political candidate, ideology, or cause, a product that could be harmful to children, or a product that "appeals to the prurient interest," or, in plain English, a product that is unwholesome or sexually oriented. A district should also ensure that any activity bus advertisements comply with district policy, including those addressing advertising.

Social Media: When Good People Do Bad Things

Social media is an ever-increasing part of daily life. As a result, school districts routinely are called upon to address situations that arise via social media, including Facebook, Twitter, Instagram, Snapchat, and text message, with both employees and students alike. Addressing these types of issues is a difficult process that requires administrators to examine situations on a case-by-case basis. However, following are several tips designed to make handling these situations less stressful and more manageable.

First, school districts should ensure that their policies state that both on- and off-campus behavior conducted via electronic means may be cause for a school-based sanction. This information should be included in student and employee handbooks and expectations for the responsible use of electronic media should be shared in discussions with employees and students. Information about cyber-bullying – what it is, how to report it, and how allegations will be investigated - should be included in any materials and discussions.

Second, employees and students should be notified that any messages, photographs, videos, etc. they create or send with district-issued equipment are subject to monitoring and are not private. Schools are required by federal law to have in place filters and other tracking devices on computer systems in order to minimize student exposure to inappropriate topics and images on the internet and via emails, which means that all emails and messages sent through district systems are subject to review if flagged by the filtering system. As a result of these filtering systems, the school district also is able to track individual searches, or attempted searches. Employees also should be made aware that in most instances, with only limited exceptions, his or her written communications can be subject to public disclosure through the South Carolina Freedom of Information Act.

Third, when determining the appropriateness of disciplining a student or employee for misconduct that occurs in the electronic realm, schools must consider a variety of factors, including the content of the information posted or conveyed, how the content was published, and who viewed the content. In general, a school may not discipline a student for creating and posting electronic content that does not cause a disruption to the school or school operations, though discipline may be an option when the content indicates illegal behavior or cyber-bullying is involved. As it relates to school employees, a district will want to consider whether electronic communication or misconduct has impaired the ability of the employee to be effective in a school setting.

This area of the law is both complex, as the First Amendment rights of both students and employees compete with right of schools to maintain order and discipline, and ever-changing as social media continues to evolve at breakneck speed. We will continue to provide guidance to administrators as situations arise.

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

Kenneth L. Childs
William F. Halligan
Kathryn Long Mahoney
Allen D. Smith
Shirley M. Fawley
John M. Reagle
Vernie L. Williams
Thomas K. Barlow
Allison Aiken Hanna
Keith R. Powell
Connie P. Jackson
Kimberly Kelley Blackburn
Jasmine R. Drain
Dwayne T. Mazyck
Tyler R. Turner