



## PDE Guidance on Recent Commonwealth Court Rulings Concerning Act 24 of 2011 (Section 111(e) of the School Code)

On Dec. 13, 2012, Commonwealth Court issued opinions in three cases, each of which held that the lifetime criminal history background hire prohibitions contained in Section 111(e) of the School Code (24 P.S. § 1-111(e)) violated the Pennsylvania Constitution *as applied* to the individual plaintiffs involved.<sup>1</sup> The lifetime ban provision was added to Section 111(e) of the Pennsylvania School Code by Act 24 of 2012 (Act 24), extending what had been previously a ban of five years for certain offenses.

Because these three cases involved *as applied* challenges to Section 111(e), and not facial challenges, the court has not declared Section 111(e) of the Pennsylvania School Code to be unconstitutional or enjoined its enforcement. Accordingly, Section 111(e) of the School

Code remains generally in force, and school administrators must adhere to the law to the extent they are able to do so constitutionally.

The Pennsylvania Department of Education (PDE) issues the following guidance to school administrators concerning their continuing obligations under Section 111(e) of the School Code in light of these cases:

- The cases are only relevant to the employment prohibitions contained in Section 111 of the Pennsylvania School Code.<sup>2</sup> The cases do not disturb the other requirements of Section 111, including those concerning pre-employment school background checks, providing for mandatory reporting by employees of arrests or convictions of certain offenses (pursuant to the PDE-6004 form), and providing for background checks when a school administrator has a reasonable belief that a school employee has not notified school administration of a reportable offense. Accordingly, school administrators' practices with respect to mandated school background checks and the collection of PDE-6004 forms must remain unchanged.

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<sup>1</sup> The cases are: *Johnson v. Allegheny Intermediate Unit*, No. 789 C.D.2012, 2012 Pa. Commw. LEXIS 329; *Jones v. Penn Delco Sch. Dist.*, No. 294 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 955; and *Croll v. Harrisburg Sch. Dist.*, No. 210 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 957.

<sup>2</sup> Although these cases involved challenges by current employees to the background provisions of Section 111(e), PDE believes that the reasoning of these cases applies equally to current and prospective employees. Similarly, although the challenges in these cases involved the lifetime ban provisions of Section 111(e) of the Pennsylvania School Code, PDE believes that the reasoning of these cases may apply to the 10-year, 5-year and 3-year bans provided by Section 111(f.1) (24 P.S. § 1-111(f.1)), depending on the facts and circumstances. Accordingly, this guidance should be construed as pertaining to all employment restrictions contained in Section 111 of the Pennsylvania School Code.

- Similarly, these cases do not restrict a school’s ability to terminate or deny employment to an employee who willfully fails to properly report to a school an arrest or conviction that is required to be reported pursuant to Section 111.<sup>3</sup>
- These cases do not disturb any other appropriate legal basis for denial or termination of employment by a school.<sup>4</sup>
- School entities should continue to apply the employment prohibitions contained in Section 111 of the Pennsylvania School Code on a case-by-case basis, with student safety serving as the paramount consideration. If a school official, after a due diligence investigation of the facts surrounding an offense and in consultation with its legal counsel, concludes in good faith that the application of Section 111 to an individual would violate the Pennsylvania Constitution as interpreted by a Pennsylvania court, PDE would not sanction the school official for employing the individual.<sup>5</sup> In making this determination, it is critical that a school official carefully consider the nature of the offense as it relates to student safety and the person’s suitability for school employment, when the offense occurred, and the person’s current position.
- It is also of utmost importance that school officials document their determination not to apply the statute to the employee or candidate. Documentation must describe the process employed by school officials, their findings, and their analysis as to the constitutionality of applying Section 111 to the employee or candidate. A determination that the application of Section 111 would be unconstitutional as applied to a particular individual must be supported by a written opinion from the school’s legal counsel.
- In considering the constitutionality of the application of Section 111 to a particular individual, PDE would expect school officials and their legal counsel to consider several important factors:
  - Primary among the factors is the nature of the particular offense. In particular, school officials should consider whether the nature of the particular crime is such that the individual poses a danger specifically to school students or is otherwise unsuitable for school employment. This factor would be most paramount as to an employee or candidate convicted of a sexual offense,<sup>6</sup> especially an offense involving sexual, physical or verbal abuse against a child.

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<sup>3</sup> See 24 P.S. § 1-111(j)(6) (“A current or prospective employe who willfully fails to disclose a conviction or an arrest for an offense enumerated under this section shall be subject to discipline up to and including termination or denial of employment....”).

<sup>4</sup> For example, Section 527 of the Pennsylvania School Code (24 P.S. § 5-527) requires that school employees be terminated from employment for conviction of certain drug related offenses and be terminated for any conviction of Section 111(e) offenses while employed at a school. In addition, the Child Protective Services Law prohibits the employment of any person with a founded report of child abuse in the prior five years. 23 Pa.C.S. § 6344. See generally 18 Pa.C.S. § 9125 (permitting the use of criminal history information for employment purposes, but stating that “[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied.”).

<sup>5</sup> Any previous guidance by PDE to the contrary, including that guidance contained in PDE’s Dec. 12, 2011, Basic Education Circular (BEC), entitled “Background Checks,” is hereby superseded.

<sup>6</sup> We include here, for example, those offenses under Section 111 that would trigger registration obligations under Pennsylvania’s Megan’s Law.

## Additional Factors

In addition, PDE would expect school officials to consider the following additional factors:

- The time period that has elapsed since the offense.
- Whether the offense was an isolated single event or was repeated.
- The presence or absence of a subsequent criminal history.
- The nature of the person's current position and whether the offense bears a relationship to the current position.
- Whether the person was employed at a school when the crime occurred.
- Whether the conduct occurred on the property of a school.
- The employee's employment record with the school.
- Any evidence of rehabilitation provided by the employee or prospective employee since the conviction for the applicable offense.

NOTE: In considering the nature of the offense, PDE believes that offenses that implicate the safety of children (e.g., sexual, physical or verbal abuse or violence against children) would presumptively necessitate a ban on employment regardless of when the offense occurred.<sup>7</sup>

School administrators are required to report to PDE all instances of certificated employees or charter school staff members (as such term is defined in the Professional Educator Discipline Act) reporting an arrest<sup>8</sup> or conviction for offenses listed under Section 111(e) of the Pennsylvania School Code and crimes involving moral turpitude<sup>9</sup> that have been disclosed on the revised PDE-6004 form or that are otherwise known to them as the result of background checks or otherwise. Such reports must be made regardless of the date of the offense and regardless of any conclusion that a Section 111 employment ban may not be constitutionally applied. The report form is required to be filed within 30 days of the receipt of information concerning the arrest or conviction and must include all available information concerning the arrest or conviction.<sup>10</sup>

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<sup>7</sup> We note that none of the offenses committed by the plaintiffs in the three cases above involved any alleged form of sexual conduct. Also, none of the cases (except for Croll) included allegations involving children. Croll's misdemeanor conviction (when he was 20) allegedly was the result of him convincing a 17-year old friend to break into an unoccupied barn.

<sup>8</sup> Note: arrests must be reported regardless of disposition.

<sup>9</sup> [A non-exclusive list of such crimes.](#)

<sup>10</sup> The report should be made on a [mandatory report form](#). The completed mandatory report form with supporting documentation should be sent to: Pennsylvania Department of Education, Office of Chief Counsel, 607 South Drive, 3rd Floor Harrisburg, PA 17120.