

## Third Circuit Upholds Constitutionality Of Home School Law

In a recent decision, handled by Andrews and Beard at the Federal District Court, the United States Third Circuit Court of Appeals ruled that the United States Constitution does not provide any religious exemption or other protection to parents who choose to educate their children at home without complying with Pennsylvania's Home Schooling Law. The case involved individual families from a handful of School Districts throughout the State. In each of the instances, the parents had alleged to their local School Districts that their sincerely held religious beliefs prohibited them from complying with the requirements of the home education section of the Pennsylvania School Code.

Specifically, they challenged the home school law's requirement that a parent notify the District, at the beginning of the year, that the child would not be in school because he or she is being educated at home, as well as the statutory requirement that the parent submit to the School District, at the end of the year, a portfolio of work completed during that year. The parents alleged that their sincerely held religious beliefs taught them that the education of the children was a responsibility given to them by God alone and that any governmental oversight was inconsistent with or interfered with that religious belief.

The parents relied on two main theories to support their claim that this alleged burden on their religious beliefs was unlawful. First, the parents alleged that the free exercise clause of the First Amendment to the United States Constitution guaranteed them the right to be free from such governmental intrusion into

their exercise of religion. Second, the parents alleged that the Pennsylvania Religious Freedom Protection Act ("RFPA") also provided a statutory protection for their religious beliefs. The RFPA is a relatively new statute, adopted by Pennsylvania just a few years ago. Essentially, the RFPA provides that no governmental entity in Pennsylvania may place a "substantial burden" on a person's free exercise of religion, unless there is a "compelling interest" on the part of the governmental entity to do so, and unless the entity uses the "least restrictive means" of accomplishing that interest.

The Third Circuit affirmed a lower court ruling that the parents' Constitutional claims were without merit. The Court held that the home school law is a neutral law of general applicability that "neither targets religious practice nor selectively imposes burdens on religiously motivated conduct." In other words, the requirements of the law are the same for parents who home school for religious reasons or include a religious component to their home education, as they are for those parents who home school their children for any other reason.

The Third Circuit held that the state's longstanding interest in public education, and in making sure that home schooled children are receiving some particular level of education, was a rational basis that supported the conclusion that the home school law was constitutional.

Interestingly, the parents also argued that this case involved more than just religious liberties and instead involved what is known as a "hybrid right." (*Home School Law continued on page 2*)

## Suspension Over Student Essay About Murder and Suicide Upheld by Federal Court

The suspension of a student over his essay depicting a student's murder of a teacher and suicide was upheld by the United States Court of Appeals for the Eighth Circuit, and was found to constitute a "true threat." In the case of *Riehm v. Engelking*, the Court found that the student essay was not protected speech under the First Amendment. In this case, a student at Cook County High School had written three essays that were objectionable. The most objectionable essay depicted the shooting of an English teacher by a student expelled from her class, and the student's subsequent suicide. The essay also included references to the shootings at Columbine High School. The reference to the English teacher disturbed the English teacher for the student, and the teacher turned the essays over to the School Administration, which turned the essays over to the law enforcement authorities.

### *Home School Law continued from page one*

A "hybrid right" is one that involves two fundamental rights. In considering hybrid rights, Courts have held that a neutral law of general applicability must not only meet the rational basis test described earlier, but it must pass a stricter judicial scrutiny.

In this case, for example, the parents alleged not only that their religious liberties were at issue but also the right to control the education of one's children. The Third Circuit held that this case did not present a hybrid right. Although the parents argued that the right to control the education of their children was at stake here, the Court found that nothing in the state's portfolio requirement took any real control from the parents. In many situations, the parents had included religious components in their home education programs and none had received any complaint from their respective districts or had their portfolios rejected on the basis of the presence of any religious component to the education. As a result, since the parents were found to have as much control over the education of their children as they otherwise would have without the portfolio requirement, the Court found that this

In this case, a Psychiatrist evaluated the student and found that he was not mentally ill or dangerous, and returned the student to his mother's care.

The Court, in ruling for the School District, found that the First Amendment does not protect a "true threat," which the Court defined as a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another. In this case, the essay of the student described hatred for his English teacher with a similar name, who had been critical of his prior essays, with a surprise attack at the high school and specific details of the teacher's murder.

This decision supports the rights of School Districts to regulate student speech in the classroom, when that student speech in the classroom constitutes a "true threat" against a School District employee.

case did not involve a hybrid rights claim and that the statute, therefore, only needed to have a rational basis.

Interestingly, the Third Circuit Court of Appeals did not answer the second question – whether or not the Pennsylvania RFPA would provide any religious exemption from the home school law. Instead, the Third Circuit held that, because the RFPA is a Pennsylvania State statute that is relatively new and has not yet been fully considered by Pennsylvania State Courts, it would send the question back to the State Courts to answer it.

The parents appear to be appealing this decision to the United States Supreme Court. Statistically speaking, the Supreme Court agrees to hear only a very small number of cases. It remains to be seen, however, whether this is a question they will want to address. Unless the United States Supreme Court agrees to consider these Federal constitutional claims, this will be the final answer with respect to the issue. We will have to wait and see, however, how the Pennsylvania State Courts address the RFPA claim.

## *Commonwealth Court Upholds Arbitrator Moving Teachers On Salary Schedule Under Expired Teacher Contract*

The Commonwealth Court of Pennsylvania has upheld an Arbitrator's decision that ordered a School District to move teachers a step on the Salary Schedule despite the fact that the contract had expired and the School District was operating under the "status quo." In this case, the collective bargaining agreement provided that step and column raises went into effect on the first day of the school year. The Arbitrator noted that the step and column raises had always gone into effect in the past at the beginning of the school year.

In this case, the collective bargaining agreement expired a few days after the school year began, so the School District did not proceed to give raises, on the basis that there were no more years in the contract.

However, the Arbitrator sustained the Teachers Association's grievance and awarded the raises. The Commonwealth Court found that the District's reading of the collective bargaining agreement was a reasonable one, but found that it must defer to the Arbitrator under the limited scope of review of

an Arbitrator's decision. The Court found that the Arbitrator's decision was based upon the practice of awarding raises as of the first day of the school year, and was therefore, reasonable, and taken from the essence of the collective bargaining agreement.

This case further illustrates the limited review of arbitration decisions by the Appellate Courts of Pennsylvania in light of the recent Supreme Court decision in *Westmoreland Intermediate Unit*. Since the Supreme Court stated that it would only overturn an Arbitrator's decision if it were in violation of public policy, the Appellate Courts in Pennsylvania are making it clear to School Districts that it will not overturn Arbitrator awards, even if there is a more reasonable decision to the contrary. This case further demonstrates the necessity for School Districts to take arbitration hearings seriously and make the presentation of evidence at an arbitration hearing a high priority.

## *Teacher Permitted to Sue for Discrimination for Non-participation in "Libations" Ceremony at School*

A school employee who alleged that her termination was due to her non-participation in a "libations" school banquet ceremony, was permitted to pursue her claim of religious discrimination and retaliation, under a Third Circuit decision in *Wilkerson v. New Media Technology Charter School*.

The teacher in this case alleged that she was fired because of her religious beliefs and her objections to what she termed a "libations" ceremony where drink was given at a School function. The teacher alleged that she had disclosed to the School regarding her "Christian ministry activities" and the School was aware of her "Christian faith." The teacher alleged that the School's ceremony violated her religious beliefs because it required participants to engage in what the teacher perceived as "religious worship of their ancestors rather than the Christian God." The teacher did stay for the

ceremony, although she chose not to participate in it.

Later, the teacher complained about the "libations" ceremony, objecting to it on religious grounds.

At the conclusion of the school year, she received a termination letter from the School and the termination letter did not make any reference to performance based reasons for the discharge.

The Third Circuit Court stated that the teacher could proceed on her discrimination complaint based on the fact that her complaints after the ceremony were based upon her Christian religious beliefs, and there were no other documented reasons given for the termination of employment.

This case demonstrates potential liability for School functions outside of the School setting where teachers are invited and there may be "libations" (*Libations continued on page 4*)

## *Coach Has No Constitutional Protection to Take Knee With Team in Prayers*

**A** high school football coach was not entitled to bow his head and take a knee during his team's pre-game prayer, according to the Third Circuit Court of Appeals. In the case of *Borden v. School District of Township of East Brunswick*, the Court found that there was no Constitutional right for the football coach to bow his head and take a knee while his football players were engaged in a student-initiated prayer. The coach had commented that if the players felt uncomfortable during the prayer, they could wait in the restroom until it was over.

The Federal Court found that this action of the coach was an endorsement of religion and violated the Establishment Clause of the Constitution. The Court noted that if a School official is engaging in student prayer to the extent that they are leading it, initiating it, or requiring it, the School official, and thus the School District, is violating the Establishment Clause.

The Court dismissed the argument of the football coach that refusing to permit him to bow his head and take a knee were in violation of his free speech rights. The Court noted that the coach's actions in this case were not a matter of "public concern" that therefore did not rise to the level of receiving any free speech protections under the Constitution.

In addition, the coach attempted to justify his actions based upon his right to academic freedom. However, the Court dismissed this argument in noting that a teacher's in-class conduct is not protected speech.

### *Libations continued from page 3*

served. More importantly, the case demonstrates the fact that the School failed to give reasons for the termination of employment that could have avoided this claim. If the School had documented reasons for the termination, it may have been able to avoid a discrimination charge in this matter.

The football coach in this case had admitted that his coaching methods were pedagogic and as a result, he was acting as a proxy for the School District with his coaching.

Further, the coach attempted to justify his actions on the basis of a protected relationship between a high school football coach and his team, in that such a relationship requires a special type of closeness. The Court also dismissed this argument noting that prohibiting a coach from participating in the players' prayer activities did not interfere with the coach's freedom of association rights, particularly since he was violating the Establishment Clause of the Constitution while doing so.

Thus, once again, the Federal Court for this region has come down with a strict interpretation of the Establishment Clause, even where the participation of the students was of a voluntary nature.

### *School Closing continued from page 5*

a resolution on closing the school.

While the case in question cannot be cited as controlling in other school closing cases, it does contain an excellent analysis of the issues that schools need to be cognizant of when undertaking a contemplated closing of a school building within the district. In this particular case, Commonwealth Court was satisfied that the Board of School Directors complied with Section 780 of the School Code, and other proper steps prior to voting to close the elementary school pursuant to Section 1311 of the School Code.

We are pleased to announce we were involved in representation of the Everett Area School District in the six day trial that preceded the appeal to Commonwealth Court. Copies of the decision are available on line at the Commonwealth Court website [<http://www.courts.state.pa.us/Index/Cwealth/indexCwealth.asp>], by contacting this office, or in the Pennsylvania School Board's Association School Law Information Exchange at Vol. 45, No. 28 (2008).

## Commonwealth Court Upholds School Closing

On August 11, 2008, in an unreported Commonwealth Court decision, a Commonwealth Court Panel of Judges reversed a Common Pleas decision which held that the Everett Area School District Board of School Directors could not close an elementary school due to the small number of pupils in attendance.

Back in the 2006-2007 school year, the Board of School Directors had looked at several issues surrounding a small rural elementary school located in Chaneyville-Cove. The Board was looking at the overall cost implications of operating the school with approximately 7 teachers and 51 students.

After conducting the required Section 780 hearing under the Public School Code of 1949, as amended, a Motion was passed on February 15, 2007, outlining the reasons why the school should be closed.

Parents and other community members in Chaneyville-Cove created an unincorporated association and filed a Complaint and Injunction attempting to halt the District's decision to close the school. In its Complaint, Save Small Schools argued that the Board of School Directors acted in an arbitrary and capricious manner in closing the school by not making proper inquiry into certain issues surrounding the school to include among other things transportation over a mountain that separated the small elementary school from the other elementary school and the building to which students were going to be transported.

After a six day trial that included testimony from experts for both the District and Save Small Schools on the transportation of students as well as the cost of operating the school and other considerations, the local Court of Common Pleas held that the Board of School Directors committed an abuse of discretion in passing a Resolution closing the elementary school for the following reasons:

1. By lack of inquiry into the safety of transporting students over State Route 3005 prior to passing the resolution.
2. By lack of inquiry, prior to passing the resolution, as to the length of the bus ride which would result from the closing and any impact academically and physically of such a bus ride on the students.
3. By conducting the mandatory proceedings in a manner such that a deliberative process discussing any safety, academic, economic or community impact never occurred.
4. by either misunderstanding or being unaware of consequences of making Priority One repairs [to the building].

The Court went on to hold that the Board of School Directors failed to inquire into facts necessary to form an intelligent judgment prior to passing the resolution and thus the resolution was a result of arbitrary will.

Although Save Small Schools had also alleged that the Board of School Directors had violated the Sunshine Law in their deliberative process as regarding the closing of the school, the Court of Common Pleas found in favor of the School District noting that there was not a Sunshine Law violation.

Both the Board of School Directors and Save Small Schools filed an appeal to Commonwealth Court. Less than four months after the case was argued to Commonwealth Court, the Court reversed the decision of the Common Pleas Court finding that the local court misapplied the "abuse of discretion" standard as outlined in prior Commonwealth Court decisions to the facts of this particular case. In so doing, Commonwealth Court noted that the Board of School Directors inquired into the details, including the safety and wellbeing concerns of the busing issues that can result from the closing of a school. As well as citing other court cases regarding an "abuse of discretion" standard, Commonwealth Court did, in fact, find that the Board of School Directors did engage in sufficient inquiry into the information prior to passing (*School Closing continued on previous page*)

## Act 61 of 2008

**P**ursuant to the Omnibus bill that accompanied the passage of the School Budget in July 2008 several new requirements have been placed on Pennsylvania School Districts. Act 61 will revise the School Code to create a new section (Section 1303.1-A.). Buried in Act 61 is a new requirement for school districts to develop and adopt policy regarding bullying.

According to Act 61, by January 1, 2009, each school district is required to adopt policy or amend existing policy related to bullying. A close reading of the law indicates no school entity shall be required to establish a new policy if one currently exists and reasonably fulfills the requirements of the law.

Besides requiring school districts to develop and implement policy, the policy and procedures must also be incorporated into the school's Code of Student Conduct pursuant to 22 Pa.Code §12.3(c) relating to school rules. According to the new law, the policy itself must delineate disciplinary consequences for bullying. The school district's policy must also identify the appropriate school staff person to receive reports of incidents of alleged bullying.

School districts should already have in place existing policy and procedures for dealing with acts of unlawful harassment in the school setting; however, this is a new expanded requirement.

According to the new requirement, the school entity must make the policy available on its website, if it has such a website, in addition to posting it in every classroom. The law also requires the school to post the policy in a prominent location within each school building where notices are usually posted.

There is a strict requirement that the new policy and procedures for reporting bullying be reviewed with students within 90 days after adoption by the Board.

The law also mandates that each school entity shall review its policy every three years and annually provide the Pennsylvania Department of Education with a copy of its policy regarding bullying to include information relative to the development and implementation of bullying prevention and intervention education programs.

According to the law, the Legislature has defined "bullying" to mean "An intentional electronic, written, verbal or physical act, or a series of acts:

- 1) directed at another student or students
- 2) which occurs in a school setting
- 3) that is severe, persistent or pervasive
- 4) that has the effect of doing any of the following:
  - i. substantially interfering with a student's education
  - ii. creating a threatening environment; or
  - iii. substantially disrupting the orderly operation of the school.

The law also requires a definition of "school setting" as follows: "School setting" shall mean in the school, on school grounds, in school vehicles, at a designated bus stop or at any activity sponsored, supervised or sanctioned by the school."

School districts need to be aware that bullying as defined in policy may also include "cyber bullying." Cyber bullying may include but is not limited to a communication or image transmitted by means of electronic device, telephone, wireless phone, or other wireless communication devices, computer or pagers.

Several years ago efforts were made to address bullying in schools; however the Legislature was reluctant to do so due to the uncertainty as to the legal implications that may be placed on schools to police this type of activity. It appears at this point that the Legislature has taken that leap and passed the law.

School districts must be vigilant to timely develop and implement such policy and to insure that their policy and procedures are enforced. Failure to properly carry out the requirements of Act 61 could potentially expose districts to liability if they do not take steps to comply with the Act's requirements.

## *Districts Must Prepare for New Right-To-Know Law for January 1, 2009*

The effective date of the new Right-to-Know Law is fast approaching with an effective date of January 1, 2009.

School Districts must prepare for the new appeal procedures that accompany this law. If a written request for access to a record is denied or deemed denied by any public school, the Requester may file an appeal with the Office of Open Records within fifteen (15) business days of the public school entity's response. The Office of Open Records will assign an Appeals Officer to review the denial. The Appeals Officer will establish a schedule for the Requester and the public school to submit documents in support of their positions. The Appeals Officer may hold a hearing, but is not required to hold a hearing. The Appeals Officer has 30 days to make a decision unless the Requester agrees to a longer time for the decision.

Once a decision is made by the Appeals Officer, an appeal may be also filed at that point with the Court of Common Pleas within 30 days of the mailing date of the final determination of the Appeals Officer.

Importantly, the Court may award attorney's fees and costs to a Requester of records if the Court finds that the public school entity willfully or with wanton disregard deprived the Requester of access to a public record, or that the exemptions, exclusions or defenses asserted by the public school were not based upon a reasonable interpretation of the law.

Further, a Court may impose a civil penalty of not more than \$1,500 if a public school entity denied access to a public record in bad faith.

In addition, a public school entity or public school official who does not comply promptly with a court order under the Right-to-Know Law is subject to a civil penalty of not more than \$500 per day until the public record is provided.

Although the media has proclaimed that the new Right-to-Know Law greatly expands the scope of documents subject to mandatory disclosure, it is our opinion that there is not a significant difference

in what must be disclosed under the new law. The exempt records are detailed in more specificity under this law. For example, it is clear that medical information need not be disclosed, as well as personal identification information, such as a social security number, driver's license number or other personal and financial information.

Further, information from employee files, such as reference letters, performance ratings and reviews, and grievance materials do not have to be revealed. However, a final award or order of arbitration will need to be disclosed, although the exhibits presented at arbitration do not need to be disclosed.

Additionally, draft minutes of a meeting of a School District are exempt until the next regularly scheduled meeting. However, minutes of an Executive Session and any record of discussion held in Executive Session are exempt from disclosure.

Districts should be assuring compliance with the new law in these few upcoming months prior to January 1, 2009.

## Andrews and Beard Education Law Focus

**A**s solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 school districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the school district.

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- Teacher and student discipline hearings
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**T**he Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, [www.ed.psu.edu/pssc/](http://www.ed.psu.edu/pssc/) or contact the Executive Director Paul T. Begley, at 814-863-1838.

### *Subsequent Issues*

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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