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School Law Update—A Summary of Recent Legal Development and Pending Cases of Significance to Public School Education

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I. STATUTES, REGULATIONS and REGULATORY ACTIONS.

A. **Act 48 of 2003**. Act 48 of 2003 was enacted in connection with the education budget last year. However, in addition to containing numerous provisions pertaining to funding, Act 48 also contains other provisions that pertain to the operations of public school entities. Among those provisions are the following:

1. Districts are permitted to delay the adoption of their annual budget beyond June 30 in any year when legislation providing the appropriation for basic education funding has not been adopted by June 15. Where a district delays the adoption of its budget beyond June 15, it must adopt the budget within 15 days of the date that the General Assembly enacts basic education funding. Where the delay process is implemented, the usual 10 day notice requirement before adoption of the school district budget continues to apply.

2. The special education contingency fund has been reduced from 2% to 1% of the total special education appropriation.

3. Added many more definitions for purposes of the School Code in section 102 of the School Code, most of which deal with No Child Left Behind concepts.

4. Provisions have been added to the rules for admission of non-resident students who seek to attend school under the affidavit procedures. Section 1302 of the School Code generally allows a non-resident student who is living with a resident *gratis* to attend the school district in which the resident resides if the resident provides an affidavit stating that he is a resident of the district, that he is supporting the child gratis and will assume all personal obligations for the child relative to school requirements, and that he intends to so keep and support the child continuously and not merely through the school terms. The changes to this process are as follows: (i) the affidavit must include a notice in large print of the penalty for providing false information in the sworn statement; (ii) if it is found that the information contained in the affidavit is false, the child may be removed after notice and an opportunity to appeal to the school district (it is unclear whether that is to the school board or to the administration); (iii) criminal sanctions are imposed for submitting a knowingly false affidavit.

5. Firefighter and Emergency Service Training. School districts may offer firefighting and emergency service training as credit-earning courses to students 16 years old or older.

B. Changes to Chapter 12. Students Rights and Responsibilities.

The State Board of Education on March 17, 2004, has published proposed changes to Chapter 12, pertaining to Student Rights and Responsibilities. The noteworthy proposed changes include the followings:

1. Corporal punishment is prohibited. But school employees may use force to quell a disturbance, to obtain possession of weapons or other dangerous objects, for the purpose of self-defense, or for the protection of persons or property.

2. Where a formal school board hearing is going to be scheduled to consider an expulsion, the new rules provide that "in no case may a student be excluded from school for longer than 15 school days without a formal hearing unless mutually agreed upon by both parties." 22 Pa.Code §12.6(f).

3. If a student is of compulsory school age when expelled, the parents must submit to the school district within 30 days evidence that the required education is being provided or that they are unable to provide for such education. If the parents cannot provide such education, the school entity must make provision of such education within 10 days of receipt of the notice.

4. Students with disabilities must be provided with FAPE even if expelled.

5. At least 3 days notice of a formal expulsion hearing must be provided.

6. The hearing must be held within 15 school days of the notification of charges unless mutually agreed to by both parties, or unless one of the following conditions apply:
   a. Lab reports are needed from law enforcement;
   b. Evaluations or other court or administrative proceedings are pending due to student who has invoked his/her rights under IDEA;
   c. Cases involving juvenile or criminal court involving sexual assault or serious bodily injury, when delay is necessary due to the condition or best interest of the victim.

7. Notice of an expulsion must include the following:
   a. Notice that the student may be represented by counsel;
   b. A copy of the expulsion policy;
   c. Hearing procedures;

8. If a student is indigent, he/she has a right to a free copy of the transcript of the hearing.

9. The expulsion decision must include a notice of the student's right to appeal the results of the hearing.

10. School entities may adopt dress codes, either district wide, or in individual schools.

11. School boards must adopt reasonable policies and procedures regarding student searches and notify students and parents of same.

12. Prior to a locker search, schools must notify and give student opportunity to be present, but may search prior to such notice where school authorities have a reasonable suspicion that the locker contains materials that pose a threat to the health, welfare or safety of students.

13. Chapter 12 now contains provisions pertaining to student services, formerly generally contained in Chapter 7.

C. **Changes to Chapter 14**. **Special Education.** Special education is governed by both Federal and State regulations and statutes which provide a complex and many times impossibly incomprehensible set of "guidelines" for teachers, administrators and public school entities to navigate at their peril. In addition to the burdens placed upon public school entities by State and Federal statutes and regulations, the U.S. Department of Education, Office of Special Education Programs ("OSEP") issues opinion letters. Although they do not have the power of law, they are nonetheless given undue deference under threat of the loss of

federal funding.[1]

In September of 2001, Douglas Cox of the Virginia Department of Education wrote a letter to the OSEP, asking for an opinion on the issue of whether or not a public agency may establish an override provision that permits the agency to presume consent when a parent has been properly notified and withholds consent on an initial placement into a special education program. (See letter to Cox, dated 9/24/01, attached hereto). OSEP's response to this letter was to issue the opinion that "no", public agencies may not make an initial placement without parental consent. OSEP based its decision on its interpretation of the language of the IDEA, finding that while Congress had specifically given agencies the right to seek to override parental consent on the issue of an initial evaluation, Congress had not explicitly granted the same power to override initial placement. OSEP based its analysis entirely on 34 C.F.R. §300.505, which relates to parental consent, ignoring other provisions of the IDEA and its implementing regulations. What seemed like just another OSEP opinion letter, quickly took on a life of its own, and became a mandate by OSEP for all states whose special education statutes allowed for the public agency to override the lack of parental consent to revise their laws, or suffer retribution in the form of the loss of federal funding.

In Pennsylvania, like other states that were similarly threatened, the state regulations expressly gave public school entities the right to seek to override the lack of parental consent via a due process hearing. It was an invaluable tool to provide services to students whose parents for whatever reason would deny their children special education services.

In February of 2003, the Pennsylvania State Board of Education held an open hearing, purportedly to open discussion on this issue to the public. Approximately thirty people attended, including PSBA, several school law attorneys, PSEA representation, hearing officers, as well as members of the Office for Dispute Resolution and Pennsylvania's Mediation Office.

Although there was a pervasive feeling prior to the hearing that the decision had already been made, attendees largely hoped that Pennsylvania's Board of Education would stand up and fight OSEP's new interpretation of IDEA that allowed for students in this situation to be neglected. Instead of a discussion on what could be done to protect public school entities and student from such an erroneous decision, it was revealed by Fran Warcomski, who was at the time the Director of the Bureau of Special Education, that she had already acceded to the pressure, and had already committed Pennsylvania to changing its statutes and regulations regarding initial placement. Further, several members of the State Board of Education expressed various opinions such as "if public school entities would just teach children to read, there would be no need for special education" or "if Districts treated parents with sensitivity and compassion upon telling them their children needed special education, no parent would ever refuse." Lastly, upon the comment by a Board member that it would take some time to institute change, it was revealed (apparently to the State Board's surprise, but not Dr. Warcomski's) that PDE had already informed the Office for Dispute Resolution that it would be bound by the OSEP opinion, even though the controlling state regulations had not changed and still afforded public

school entities the right to request a hearing on an initial placement.[2] Even before the public hearing held by PDE, if a due process hearing request filed with ODR indicated that the issue was that of a public school entity attempted to make an initial placement, no hearing would be scheduled.

At a subsequent basic education committee meeting in March 2003, there was another opportunity to present comments about the proposed regulation changes. While the basic education committee and the state board of education had voted to change the regulation, they had also seemingly come to understand the problems with the changes. The basic education committee resolved to try to address it further before it was presented to the House Education Committee, which has to review and approve regulatory changes.

On behalf of PSBA, Deputy Chief Counsel Emily Leader contacted via national e-mail the membership of The National School Boards' Association Council of School Law Attorneys for input and comments. Nine members replied and indicated that they too disagree with the interpretation of the regulations as promoted in "Letter to Cox." One of these individuals is an attorney in Virginia and she indicated that school districts in Virginia are still permitted to initiate hearings for initial program and placements. After presenting the original version of these comments to The Standing Committee on Special Education, Ms. Leader confirmed that Virginia's regulations still permit school districts to request such hearings.

Ms. Leader also received responses from sixteen attorneys in Pennsylvania who collectively represent over fifty school districts. One of these attorneys contacted nine Pennsylvania attorneys who represent parents of students with disabilities. In addition, one intermediate unit forwarded information on its member school districts. None of the individuals contacted presented arguments in favor of this proposed rule change and, where they offered an opinion, all of them agree this is in contravention of the mandates of the IDEA. It is true that a school district rarely initiates due process hearings at all. For the most part, continued work with the parents leads to a resolution of differences.

In November of 2003, despite the resolution, PDE adopted the required change to the State Board of Education Regulation section 14.162(c), eliminating the right to request a hearing where the issue is an initial placement. (see attached).

The final decision with regard to this issue was made only recently. On Thursday, March 25, 2004, the state regulatory panel unanimously approved the regulatory change, and parents will have the final say over whether their children can be placed in special education programs no matter what the effect on the student, his/her classmates or the public school entity. The new regulation is now final and fully effective.

Further complicating the matter is the No Child Left Behind Act, which requires impossible progress out of even the most handicapped of students, upon threat of significant sanctions. When a student requires special education but is not receiving it by reason of his parent's refusal, makes no progress and even impedes the progress of those around him, only the Districts have everything to lose by not being able to help students who need and qualify for special education, but for their parents' refusal.

Pennsylvania is not the only state grappling with this conundrum. In March of 2003, Geoffrey Yudien of the Vermont Department of Education wrote a letter to OSEP seeking an advisory opinion on the same issue raised by Mr. Cox, and the situation raised above: namely, whether or not students who are thought to be exceptional, but by reason of parent refusal cannot be placed in special education, are still protected by IDEA with regard to disciplinary issues. (See Letter to Yudien, dated 3/20/03 attached hereto). OSEP opined that if parents refuse the protections of IDEA, they also forfeit the protections of IDEA. As an example, a student who is thought to be exceptional has violated the school discipline code. But-for his status as "thought to be" he would be subject to the same discipline as any other regular student, however pursuant to IDEA if he is "thought to be" he is entitled to the protections afforded by the IDEA. The end result of the Letter to Yudien by OSEP is that if you refuse the benefits of IDEA by rejecting special education services, you forfeit the protections. Thus, in the example given, if the parent refused the benefits of IDEA, the student could be expelled just like any regular education student. Although the opinion only deals with the protections of discipline, the rationale is easily expanded to include the other protections of IDEA as well.

The end result of OSEP's opinions is a paradox only a governmental entity could create. Public school entities remain obligated to evaluate students who are thought to be exceptional. This includes seeking a due process hearing to force an evaluation where a parent refuses. But even if the student is found eligible for special education services pursuant to IDEA and state law, Districts may not override a parent's refusal to agree to an initial placement, not even with a due process hearing.

Although at first glance this could be seen as a break for Districts (after all, it is that many less students to whom districts will have to provide potentially expensive services), it leaves in its wake the very real possibility of increased litigation by students and even their parents who may file suit many years later seeking compensatory damages for the failure to provide services. While the refusal of services should be an absolute bar to filing suit, it was not the student who was denied services that actually rejected services, it was that student's parents. Indeed, there is already precedent for lawsuits based upon the alleged denial of services filed by the very parents who had refused services in the first place. Schweiker v. Bristol Township School District, U.S.D.C. E.D.Pa 01 CV 2725.[3] It is not hard to foresee litigation which will require the joining of parents, PDE, OSEP and ODR as co-defendants based upon the change in regulation which in effect ties the hands of the public school entities.

The prevalent opinion from school attorneys is that the only way to afford public school entities some measure of protection in this particular situation is for the school district to request a hearing, even though it will be turned away by ODR, thereby doing all it could do to initiate services. A thorough letter should be sent to the parents and student explaining the school district's position and offering services. The letter should be sent certified mail, return receipt requested in order to document what was done in the event of a law suit a decade or more later. After that, no less than annually, the District should send another comprehensive letter to the parents explaining that an evaluation and services are always available.

D. **Fair Labor Standards Act Regulations.** The U.S. Department of Labor (DOL) released its final changes to the Fair Labor Standards Act's (FLSA) exemptions on April 23, 2004 and set a deadline of August 23, 2004, for employers to achieve compliance. Among the changes, are the following:

1. The salary below which an employee may not be classified as exempt has been increased to $23,660 a year.
2. The new regulations include a "highly compensated employee" exemption if the employee earns over $100,000 and performs an exempt duty on a regular basis.
3. The new rules eliminate the so-called "long tests" for the executive, administrative and professional exemptions. Each of these exemptions now has a single duties test that is comprised of a number of components. The new standards need to be reviewed and applied carefully.
4. The new rules contain a new "safe harbor" rule. Under the safe harbor rule, an employee may retain his/her exempt status if the employer made a good-faith effort to comply with FLSA by: (i) having a "clearly communicated policy" that prohibits improper pay deductions; (ii) having a complaint mechanism; (iii) reimbursing workers for improper deductions; and (iv) making a good-faith commitment to comply in the future.
5. The new rules have changed the rules for which employees lose their exempt status if the employer has violated the rules with respect to an individual employee. Essentially, under the new rules, exempt status would be lost only "in the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." This change significantly limits the exposure of employers from what some courts have ruled.

E. **Auditor General Issues *Best Practices for School Districts to Follow When Procuring Legal Services* (May, 2004).** After investigating allegations regarding a solicitor's billing practices, the Auditor General issued a "Best Practices" paper suggesting that public school entities adopt the following practices when procuring and reviewing legal services:

1. School districts should use a Request for Proposal process inquiring into the solicitor's (i) background and experience in education law; (ii) experience advising or representing school districts; (iii) fees, including amounts charged to other school district over the prior two years; and (iv) resumes of all lawyers at the firm who will provide legal services to the districts.

2. School districts should enter into written agreements with solicitors, addressing such areas as: (i) fees; (ii) scope of services; (iii) attorneys and paralegals authorized to perform work for the school district; (iv) reimbursable costs; (v) billing format and content; (vi) monthly billing requirement; (vii) malpractice insurance; (viii) conflict of interest issues; and (ix) contacts with the media.

3. There should be an annual review of the solicitor's performance, focusing on (i) adequacy of expertise; (ii) results obtained for the school district; (iii) reasonableness of fees; and (iv) responsiveness to, and interaction with, the board, the administration and the public.

4. Bills should be carefully scrutinized to insure that they are consistent with the fee agreement and are reasonable.

II. **NO CHILD LEFT BEHIND.**

A. *PSBA vs. Secretary Paige and Secretary Phillips* (Currently in the planning stages). In January, 2004, the Executive Board of the Pennsylvania School Boards Association voted to have our firm evaluate the basis upon which the NCLB can be attacked in the courts. Issues be assessed include the following:

1. NCLB is Inadequately Funded Resulting In Violations of 20 U.S.C. § 7907(a)

Despite providing the highest level of federal education funding in history,[4] many groups argue that NCLB has had the practical effect of significantly increasing the costs incurred by States and local educational agencies ("LEAs")[5] to implement NCLB's requirements, above and beyond the available federal funding. Several organizations have undertaken cost studies and have determined that NCLB is under-funded.[6] Although the results vary by study, opponents argue that NCLB has cost and will cost significantly more than the federal government has appropriated and is expected to appropriate in future years.[7] In contrast, supporters of the measure steadfastly contend that these claims are bogus, and, in support thereof, point to the fact that states are collectively sitting on more than $5.75 billion in unspent federal education money from fiscal years 2000 through 2002.[8] According to Congressional reports, Pennsylvania has almost $44 million dollars in unspent Title I aid for disadvantaged students. Supporters also argue that authorized funding levels are simply funding ceilings and add relatively little to the funding inadequacy argument.[9]

In NCLB, Congress unequivocally expressed its intent that States and LEAs should not foot the bill for any of the costs associated with the amendments. Section 7907 of the ESEA provides: "Nothing in this chapter[10] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, *or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter*." 20 U.S.C. § 7907(a) (emphasis supplied). Thus, if a State chose to accept the conditions imposed by NCLB, pursuant to Section 7907(a), all costs associated with the implementation of NCLB's mandates should be reimbursed through federal funding.[11] The State and the LEAs within the State should not incur any debt associated with NCLB compliance. There is legal authority for the argument that federal statutes enacted pursuant to the spending power do not obligate a participating state to pay for services or programs for which federal reimbursement is unavailable. See, *Harris v. McRae*, 448 U.S. 297, 309, 100 S.Ct. 2671 (1980)(the Federal Government cannot compel a State to provide services that Congress itself is unwilling to fund).

2. The Secretary of the USDOE Promulgated Regulations Regarding Disabled Students in Violation of NCLB

The achievement of students with disabilities is a major concern of NCLB and Congress has designated "students with disabilities" as a subgroup for which assessment data must be disaggregated. 20 U.S.C. § 6311(b)(2)(C)(v). Like most other provisions of NCLB, Congress has left it up to the states to determine how students with disabilities will be assessed and what "reasonable adaptations and accommodations" will be provided to students with disabilities. 20 U.S.C. § 6311(b)(3)(C)(ix)(II).

Pennsylvania has published *Accommodations Guidelines* to assist schools and school personnel with determining what type of assessment accommodations, if any, are appropriate for students with IEPs and/or 504 plans. The newest version of the *Guidelines* was published in March, 2004. *See, 2004 Accommodations Guidelines* (available at http://www.pde.state.pa.us). Accommodations noted in the *Guidelines* range from extended testing time to utilizing Pennsylvania's alternative assessment test, but the *Guidelines* are not exhaustive of every possible accommodation since accommodations are individualized in nature.

Pennsylvania developed the Pennsylvania Alternate System of Assessment ("PASA") as required by the 1997 amendments to the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1412(a)(17)(A). The IDEA mandated the development of "guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs." 20 U.S.C. § 1412(a)(17)(A)(i). Participation in the PASA is determined by a student's IEP team, using PDE's criteria as a reference. 34 C.F.R. § 300.347(a)(5); *see also, A Guide to Pennsylvania's Statewide Assessment for Students with Significant Disabilities* (available at http://www.pde.state.pa.us/special_edu/cwp). According to PDE, "the PASA is appropriate for students who have significant cognitive disabilities[12] and require intensive instruction and extensive support in order to perform and/or participate meaningfully and productively in the every-day activities of integrated school, home, community, and work environments. These students require substantial modification of the general education curriculum as well as instruction in areas not presently assessed by the PSSA." *Id.*[13] The IDEA does not contain any limiting language regarding the number of students in the State or in a LEA who can take the PASA in any given year; to the contrary, participation in alternate assessments is appropriate "for those children who cannot participate in State and district-wide assessment programs." 20 U.S.C. § 1412(a)(17)(A)(i). Nor does State law or regulation limit the number of students who can participate in the PASA. The only requirement is that the student's IEP team must indicate in the IEP which assessment to use and what accommodations, if any, are required by the student to achieve an accurate assessment of knowledge. 34 C.F.R. § 300.347(a)(5); 22 Pa.Code § 4.51(j).

Despite NCLB's declaration that the states determine the manner in which students with disabilities will be assessed and NCLB's silence about the limits or level of participation in such assessments, the Secretary promulgated regulations that infringe upon the powers retained by the States in this regard. Pursuant to regulations enacted in December 2003, if an IEP team determines that an alternative assessment is required for a student with disabilities, the "alternative assessment must yield results for the grade in which the student is enrolled . . .." 34 C.F.R. § 200.6(a)(2)(ii)(A).[14] The Secretary then created a limited exception to this requirement, allowing students with the "most significant cognitive disabilities" to be assessed under "alternate academic achievement standards" defined by the states (e.g. standards deemed appropriate for their intellectual development), 34 C.F.R. § 200.6(a)(2)(ii)(B), provided that the inclusion of those students who score at proficient or advanced levels on the alternate academic achievement standards (at the LEA and State level)[15] does not exceed 1.0% of all students in the grades assessed, 34 C.F.R. § 200.13(c)(1)(ii). Both of these actions by the Secretary are inconsistent with the statute.

Disabled students and their parents may also have claims for discrimination based upon these standards. Arguably, these regulations violate the Equal Protection clause and the rights conferred on disabled individuals under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq*., and Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*.[16] Under Section 504, a recipient of Federal financial assistance "may not . . . utilize criteria or methods of administration . . . that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap . . .." 34 C.F.R. § 104.4(b)(4)(i). Title II, which is applicable to any public entity, contains a similar provision protecting any "qualified individual with a disability." 28 C.F.R. § 35.130(b)(3)(i).

3. **The Minimum Qualifications for Teachers and Paraprofessionals Contained in NCLB and Federal Regulations Violate 20 U.S.C. §**

A prior Congressional enactment actually prohibits the USDOE and its Secretary from exercising control over the personnel of a school or LEA, the same control that Congress now requires the USDOE to have under NCLB. GEPA expressly states: "No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . .." 20 U.S.C. § 1232a (Emphasis added).

By enforcing NCLB's provisions and federal regulations related to highly qualified teachers and paraprofessionals,[17] the Secretary is violating Section 1232a of the GEPA by exercising direction, supervision and control over the personnel of Pennsylvania schools and LEAs receiving Title I funding. The Secretary's actions are potentially reviewable under the APA, 5 U.S.C. §§ 702 or 704. Potential remedies include declaratory or injunctive relief against the Secretary to prohibit him from enforcing NCLB's staffing mandates.

4. The PSSA Has Not Been Validated For the Purposes Required by NCLB

ESEA requires each State and LEA to use student assessments to measure the annual progress of individual schools and the LEA to determine whether the school is making adequate yearly progress as defined in Section 6311. 20 U.S.C. § 6316(a)(1). Specifically, the assessment tests "will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards . . .." 20 U.S.C. § 6311(3)(A). The tests must be of "high-quality", must be administered annually, and must "include, at a minimum, academic assessments in mathematics, reading or language arts and science."[18] *Id*.

In Pennsylvania, the Pennsylvania System of School Assessment ("PSSA") pre-dates NCLB and was developed as a means of, *inter alia*, "providing students, parents, educators and citizens with an understanding of student and school performance" and to "determine the degree to which school programs enable students to attain proficiency of academic standards . . .." 22 Pa.Code § 4.51(a). It was not, however, developed to assess the annual performance of a school or LEA (or the State for that matter) within the parameters of the NCLB amendments and was not designed as the determiner of sanctions or rewards attached to such performance. Despite this, pursuant to Pennsylvania's State Plan, the PSSA is the assessment used by PDE to determine whether schools and local educational agencies are making adequate yearly progress as required by NCLB.[19] There is no evidence, however, that the PSSA has been validated as a test capable of measuring AYP of a school and/or local educational agency as defined by NCLB,

especially where the students whose scores are used to make these determinations change on an annual basis. Nor is there evidence that the PSSA has been validated to measure AYP for students with disabilities who may not be on grade-level and for LEP students for which English is not the predominant language, or subgroups of 40.

The ESEA requires that the test chosen by the State "be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards." 20 U.S.C. § 6311(3)(C)(iii). The test also must "be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this chapter and are consistent with the requirements of this section . . .." 20 U.S.C. § 6311(3)(C)(iv).

As set forth in Section 6311, the main purpose for the state assessment system is to gauge the performance of the State, schools and LEAs, as opposed to the assessment of individual student performance.[20] Therefore, the PSSA, to be valid, must be "of adequate technical quality" to measure the annual performance of the State, schools and LEAs as required by the ESEA.[21] In any litigation brought by PSBA, it will be asserted that the PSSA is not valid under Section 6311.

5. The PSSA in its Current Form is Invalid and Unconstitutional as Applied to ELL Students

NCLB requires States to assess limited English proficient students in a "valid and reliable manner" that includes "reasonable accommodations" and "to the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do . . .." 34 C.F.R. § 200.6(b)(i). Federal regulations also require each State to identify the languages other than English that are present in the state's student population and "indicate the languages for which yearly student academic assessments are not available and are needed." 34 C.F.R. § 200.6(b)(ii). Each State must "make every effort to develop such assessments." 34 C.F.R. § 200.6(b)(iii)(A).

PDE submitted the State Plan to the USDOE in May, 2003. Section 5.4 of the State Plan does not identify the languages other than English that are present in the student population served by PDE. Rather, Section 5.4 states: "For language groups of 5,000 or more students, the Department plans to provide native language assessments to recently enrolled students by Spring of 2005." PDE has violated federal law by failing to identify the languages other than English present within Pennsylvania. It has also failed to specifically identify the languages for which native language assessments are not available and are needed. From the face of the State Plan, neither the USDOE nor any other reader has any idea how many languages are present in Pennsylvania, how many different language groups fall into the 5,000 or more category and how many schools and LEAs have language groups falling into the category.

PDE also has not instituted any native language assessment tests despite NCLB's requirement that it assess limited English proficient students in a valid and reliable manner that includes reasonable accommodations and "to the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do . . .." 34 C.F.R. § 200.6(b)(i). Its admission that there are language groups of 5,000 or more students in Pennsylvania (notwithstanding its failure to name them) and that it intends to provide such assessments by Spring of 2005 implies that native language assessments are not available and are needed.[22]

Further, the accommodations that PDE allows limited English proficiency ("LEP") students to have during the PSSA are prohibiting those students from being assessed in a valid and reliable manner.

Beginning with the 2003-2004 administration of the PSSA, interpreters can be utilized for LEP students; however, the interpreters can only translate the directions on all parts of the PSSA and words and open-ended (multiple choice) questions on the Writing and Math sections of the PSSA into the native language – they are prohibited from translating any part of the Reading assessment into the native language and are prohibited from defining any word. PDE's 2004 Accommodations Guidelines, p. 6. Bilingual dictionaries that include word definitions are prohibited. PDE's 2004 Accommodations Guidelines, p. 6. Interpreters and bilingual dictionaries were not even allowable accommodations prior to the 2003-2004 PSSA testing. It is unreasonable and ridiculous to assume that every LEP student will be sufficiently accommodated by having only the directions of the PSSA read to them in their native language, or that these very limited accommodations will allow the assessments to be valid and reliable.

PDE included LEP students in the 2002-2003 and 2003-2004 PSSA assessments (in English) and used (or will use) their subgroup data for purposes of determining AYP.[23] Many schools and LEAs did not achieve AYP based, in part or in whole, on the subgroup data for the LEP students and are now subject to the sanctions of NCLB.

PDE's failure to implement native language assessment tests for LEP students as the only valid and reliable way to test those students also violates Equal Protection and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[24] Because of this failure, LEP students are essentially denied the opportunity to have any meaningful participation in the assessments. LEP students and their parents could bring challenges against PDE for the manner in which they are being assessed under Title VI and the Equal Protection clause. As noted above, rights protected by the Equal Protection clause and Title VI are individual rights, and PSBA and its LEAs are not the proper parties to be enforcing those rights.

6. **PDE Has Failed to Provide Technical Assistance as Required by NCLB**

NCLB requires each SEA to provide "intensive and sustained support and improvement" for schools and LEAs receiving Title I funds. 20 U.S.C. § 6317(a)(1). As part of that support, each SEA must, *inter alia*, establish "school support teams . . . for assignment to, and working in, schools in the State . . .." 20 U.S.C. § 6317(a)(4)(A)(i). The school support teams are part of the technical assistance that PDE must provide to Pennsylvania LEAs and schools. 20 U.S.C. § 6316(c)(9)(A). Said teams and other technical assistance must be prioritized and provided as follows: first, to LEAs with schools subject to corrective action; second, to LEAs with schools identified as in need of improvement; and third, to all other LEAs and schools that need support and assistance in order to meet the standards set by PDE. 20 U.S.C. § 6317(a)(2).

NCLB provides some parameters for the establishment of school support teams. Section 6317(a)(5) states in pertinent part:

(5) School support teams
* * *
(B) Functions. Each school support team assigned to a school under this section shall –

(i) review and analyze all facets of the school's operation, including the design and operation of the instructional program, and assist the school in developing recommendations for improving student performance in that school;

(ii) collaborate with parents and school staff and the local educational agency serving the school in the design, implementation, and monitoring of a plan that, if fully implemented, can reasonably be expected to improve student performance and help the school meet its goals for improvement, including adequate yearly progress under section 6311(b)(2)(B) of this title;evaluate, at least semiannually, the effectiveness of school personnel assigned to the school, including identifying outstanding teachers and principals, and make findings and recommendations to the school, the local educational agency, and where appropriate, the State educational agency; and

(iii) make additional recommendations as the school implements the plan described in clause (ii) to the local educational agency and the State educational agency concerning additional assistance that is needed by the school or the school support team.

20 U.S.C. § 6317(a)(5).

Based upon the language in Section 6317(a)(5)(ii), PDE must provide a school support team to a school on the corrective action list and/or on the school improvement list *before* the implementation of the school's improvement plan, in light of sub-clause (ii)'s requirement that the school support team collaborate in the "design" and "implementation" of such a plan. *Id*. This is further supported by Section 6316(c)(9)'s requirement that, for any LEA, which has failed to make AYP for two consecutive years, an SEA "shall provide technical or other assistance if requested . . . to better enable the local educational to – (i) develop and implement the local educational agency's plan; and (ii) work with schools needing improvement." 20 U.S.C. § 6316(c)(9). Because school improvement plans must be developed and submitted to their LEAs for approval "no later than 3 months after being so identified," 20 U.S.C. § 6316(b)(3)(A), school support teams should be dispatched to a school before that three month window has expired. Analyzing this requirement against the 2002-2003 PSSA results, the school support teams should have been in place between August, 2003, when PDE identified schools, and November, 2003, the deadline for school improvement plans.

Not only did PDE fail to dispatch school support teams in the Fall of 2003, PDE has never organized any school support teams to assist LEAs and schools, to the best of our knowledge. As of Fall, 2003, the only "technical assistance" that PDE had provided to schools and LEAs was in the form of regional workshops and information on PDE's website.[25] None of the technical assistance was school or LEA specific, nor was it conducted on-site at each school or LEA. NCLB could be interpreted to require *individual* technical assistance to each LEA identified for improvement. 20 U.S.C. §§ 6316(c)(3) and 6316(c)(9)(A).

7. **PDE Violated Federal Law in its Determination that the Minimum Number for Subgroup Accountability Purposes was 40**

NCLB identifies certain subgroups that must annually make AYP at the same state-established percentages as the total student population of a school and LEA. The subgroups are: (1) economically disadvantaged students; (2) students from major racial and ethnic groups; (3) students with disabilities; and (4) students with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C)(v)(II)(aa-dd); 34 C.F.R. § 200.13(a)(7). Congress did not choose to establish a minimum number of students for purposes of determining whether a school and LEA had to include subgroup results in its AYP calculations. Federal regulations require each State to "identify and justify in its State plan the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used." 34 C.F.R. § 200.7(a)(2). That determination must be made "based on sound statistical methodology." *Id*. The regulations require not only that PDE state the number that it has picked in its State plan, but PDE must also: (1) "justify" the chosen number based upon the "sound statistical methodology" employed; and (2) show how that number is "sufficient to yield statistically reliable information". *Id*.

Statements made by PDE in the State Plan indicate that PDE did not follow these regulations when it established the minimum number of students as 40. Section 5.5 of the State Plan addresses the minimum number of students in a subgroup for AYP reporting purposes. In the paragraph preceding the announcement of the N=40 in Section 5.5, PDE discussed the reliability and validity of picking a number for this purpose. PDE espoused in pertinent part:

"The challenge in determining the minimum number of students in a group for accountability purposes is to include a maximum number of schools and groups while at the same time assuring the reliability and validity of the decisions that result. Numerous studies have demonstrated that even at a group size of 100 or 200, there is a substantial risk of identifying groups as not making AYP on the basis of chance rather than real underperformance. Furthermore, that risk increases when a school or LEA has

multiple subgroups. However, setting minimum N's as high as 100 has the effect of eliminating large numbers of schools, as well as subgroups, thereby perpetuating the damage that is caused by lack of accountability. In determining an appropriate minimum N for accountability in Pennsylvania, the Department has sought to make a decision that is sound from an educational point of view through close examination of the data about the schools in this state. We have been guided by two underlying principles:

* Every school must be included in the accountability system; no school is immune to the requirement for annual yearly progress because of small size

* The accountability of subgroups at the school and/or LEA level should be maximized, consistent with reliable and valid accountability decisions.

There are several problems with PDE's statements. First, Congress did not authorize PDE to "maximize" the number of subgroups at the school and/or LEA level; rather, Congress instructed the states to establish a "minimum number of students sufficient to yield statistically reliable information." 34 C.F.R. § 200.7(a)(2). There is nothing in Section 6311(b)(2)(C) of NCLB or in Section 200.7 of the federal regulations requiring the number of subgroups to be maximized. Instead, it is clear from these provisions that the focus must be on the reliability and validity of the information. Contrary to these federal requirements, PDE insists on using an admittedly unreliable number for the express purpose of over-identifying schools as not making AYP, not based on statistically reliable data, but to over-identify such schools.

Second, not every school or LEA has one or more subgroups. Nothing in NCLB requires every school to have a subgroup. The identification of subgroups is separate and apart from the other accountability provisions, wherein AYP is required to be made by the entire student population of a school or LEA. PDE's statement in its first bullet point seems to incorrectly imply that some schools and/or LEAs will not be subject to the requirements of NCLB because of their small size. It also appears that PDE may be trying to over-identify subgroups based not on reliable statistical information, but on the perceived need to make every school accountable in more than one manner. This is clearly not what is required by NCLB.

Despite PDE's admission in the State plan that "numerous studies have demonstrated that even at a group size of 100 or 200, there is a substantial risk of identifying groups as not making AYP on the basis of chance rather than real underperformance" and that the "risk increases when a school or LEA has multiple subgroups," through discussions and negotiations with USDOE, PDE decided that "40" would be used as the minimum number of students in a subgroup and included that number in the May 30, 2003, revised State Plan.[26] PDE has not disclosed any statistical methodology used to establish the number at 40 and PDE employees could not remember any such methodology when questioned at an AYP hearing.[27] 40 was essentially chosen because the USDOE would not approve a smaller number, according to PDE.[28]

N=40 is not justified in the State Plan. It is also statistically invalid when compared to the other information contained in Section 5.5 indicating that group sizes of 100 or 200 are at a substantial risk of identifying groups on the basis of chance.

8. The State Plan Is Invalid Because It Was Not Adopted In Accordance With The Commonwealth Documents

The Commonwealth Documents Law ("CDL") establishes a process for issuing regulations that includes public notice of a proposed rule, receiving comments from interested parties and holding hearings when appropriate. The term "regulation" is defined by the CDL as "any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency." 45

P.S. § 1102. There is no question that the State plan issued by PDE is a regulation as defined by the CDL. A regulation establishes "binding norms having the force of law."[29]

Agency "regulations" must be promulgated pursuant to the notice and comment procedures contained in the CDL in order to have the force and effect of law.[30] Such procedures include publication of the proposed rule-making in the Pennsylvania Bulletin. Weaver v. Department of Corrections, 720 A.2d 178 (Pa.Cmwlth. 1998). Regulations issued by a state agency that do not comply with the CDL's requirements have no force or effect and cannot form the basis for a decision by the state agency.[31] PDE did not publish the regulations that appear in the State plan pursuant to the notice and comment provisions contained in the CDL. Those regulations were not published in the Pennsylvania Bulletin and they are not published in the Pennsylvania Code.

The "Workbook" that is the State Plan at bar was drafted pursuant to federal requirements contained in NCLB and federal regulations. The State Plan is a regulation that, *inter alia*, establishes standards for the inclusion of particular subgroups in testing requirements under NCLB and for the use of federal money. Because it is a regulation, the State Plan must have been promulgated in accordance with the CDL to be valid and enforceable. However, it was not.

9. PDE is Violating NCLB by Making the First-Level AYP Determinations for Schools

Pursuant to Section 6316 of the ESEA and federal regulations, a LEA is responsible for: (1) annually reviewing the progress of each school to determine whether the school is making AYP; and (2) identifying schools for school improvement, corrective action and restructuring, including providing individual schools within the LEA with an opportunity to review the AYP data on which identifications are made prior to the identification, considering evidence provided by school principals before making the identification, and making final determinations with respect to the identification. 20 U.S.C. § 6316(a)-(b); 34 C.F.R. §§ 200.31, 200.32, 200.33, 200.34. The SEA is responsible for, among other things, reviewing the progress of *each LEA* to determine whether its schools are making AYP, determining if each LEA is carrying out is responsibilities, providing technical or other assistance as requested and/or required under ESEA, identifying for improvement a LEA that fails to make AYP for two consecutive years, and taking corrective action *against a LEA*. 20 U.S.C. §§ 6316(c)(1)(A), 6316(c)(3), 6316(c)(9)(A), 6316(c)(10)(B). Under ESEA, the LEA has the sole responsibility for making AYP determinations and identifications of schools.

Federal regulations further define the responsibility of the LEA in this regard. "An LEA must identify for school improvement any elementary or secondary school served under subpart A of this part that fails, for two consecutive years, to make AYP . . ." and must make that identification "before the beginning of the school year following the year in which the LEA administered the assessments that resulted in the school's failure to make AYP for second consecutive year." 34 C.F.R. § 203.32(a)(1)-(2). Similar standards are in place for identifying schools for corrective action. *See*, 34 C.F.R. § 203.33(a). The regulations also establish due process rights associated with the AYP determination – if the principal of a school that a LEA proposes to identify for school improvement or correction believes, or a majority of the parents of the students enrolled in the school believe, that the proposed identification is in error for statistical or other substantive reasons, the principal may provide supporting evidence to the LEA. 34 C.F.R. § 200.31(b)(1). The LEA must consider the evidence presented by the principal before making the final determination. 34 C.F.R. § 200.31(b)(2). The final determination must be made public not later than 30 days after the LEA provides the school with the opportunity to review the data on which the proposed identification is based. 34 C.F.R. § 200.31(c).

In sharp contrast to the clear requirements of the ESEA and its implementing regulations, PDE has

usurped the responsibilities of Pennsylvania's LEAs by taking over the LEA's initial functions of determining AYP for all schools and by making identifications of schools that allegedly fail to make AYP. For the 2002-2003 school year, PDE issued preliminary AYP reports (which included the preliminary decision of whether the entity has made AYP for that particular year) for each *school* and LEA based upon the PSSA results. *See, State Plan,* §§ 1.1, 1.4, 4.1. According to the State Plan, the AYP reports set forth the AYP status, detailed numerical calculations and "delineate the resulting consequences/impacts consistent with NCLB requirements for a single accountability system." *State Plan*, § 4.1. While the State Plan includes an appeal procedure that schools and LEAs must utilize if they seek to appeal from the AYP determination, the objections of principals and parents are not part of that process. *State Plan,* §§ 4.1, 9.2.

PDE's website essentially confirms that it has violated the ESEA and the federal regulations. On the web page addressing the 2003 AYP Appeal Policy, PDE makes the following statement:

"Introduction

The PA Department of Education is required by federal regulation (34 C.F.R. § 200.31) to develop an appeal process. The appeal process may be employed only when a district or school has a legitimate question regarding the accuracy of its AYP determination and that question can be resolved through the presentation of reliable and relevant information . . .. The appeal of the school or district must be submitted to the PA Department of Education within 15 days of the electronic receipt of the AYP data.

Reasons for an Appeal

According to the federal regulations an appeal can be granted only if the 'proposed identification is in error for statistical or other substantive reason.' (34 C.F.R. § 200.31). There are three kinds of criteria that may constitute the basis for an appeal in Pennsylvania:

· *Data Error. A school or district demonstrates that the data that were the basis for the negative determination are inaccurate and that when the errors are corrected, the school will have met AYP.*
· *Special Circumstances. Special circumstances include: (1) A school or district demonstrates that it missed AYP because a small number of students were absent for extended periods because of serious medical conditions. (2) A school or district that misses AYP solely because of attendance or graduation rates demonstrates an improved attendance or graduation rate in the year in question (2002-2003). (3) A school or district demonstrates that its AYP determination was affected by an unforeseen circumstance beyond its control (e.g., major natural disaster).*
· *Significant Growth. Schools or districts that demonstrate significant achievement growth from the previous year may also be considered a substantive reason.*

The following situations do not constitute the basis for an appeal:

· *A school or district believes that its AYP determination is the result of student absences, and the absences do not fall within the first example of 'special circumstances' described above.*
· *A school or district believes that its AYP determination is attributable to its mobile student population.*
· *A school or district believes that it would have achieved AYP if a different or modified assessment instrument has been used.*
· *A school or district demonstrates that students refused to take or complete the assessments.*
· *A school or district demonstrates that it missed the targets by only a few points or percentages.*

Process for an Appeal

It is the responsibility of the Superintendent/Executive Director to develop an internal plan for: (1) notifying principals of the appeal process upon receipt of the electronic transmission of school AYP determinations; (2) examining the appeals of individual schools and denying those appeals which are not valid; (3) submitting to the Department of Education, within 15 days of DRC's electronic transmission of AYP determinations, those appeals which the district intends to grant (as well as the district's appeal, if applicable) in accordance with the "Submission Requirements" listed below; and (4) notifying a school, within the established 30 day period, that an appeal has been granted or denied.

It is the responsibility of the PA Department of Education, within 30 days of the commencement of the appeal period, to review all appeals to ensure that all revised AYP determinations are consistent with the established Appeal Process. Therefore, no school should be informed that its appeal will be granted prior to the Department's review.

Reviews will be conducted by appropriate Department staff and recommendations will be made to the Deputy Secretary for Elementary and Secondary Education. Upon completion of the review, the Department will inform the Superintendent/Executive Director by the deadline of its determination(s)." See, http://www.pde.state.pa.us/pas/cwp/view.asp?a=3&Q=94657&pasNav=|6138|&pasNav=|6138|.

We suggest that this statement illustrates several violations of federal law. First, it clearly indicates that PDE will be usurping the functions of the LEA to make the initial AYP determination for schools within the LEA's authority.

Second, without any legal justification either in federal law or in the State Plan, PDE limits the criteria that may constitute the basis for an appeal and the type of evidence that will be accepted during the appeals process. In contrast, Section 200.31 without question allows principals to present "supporting evidence" (to the LEA) if they believe that the identification is "in error for statistical or other substantive reasons." 34 C.F.R. § 200.31. There is no limitation to the substantive reasons why an appeal may be brought (as long as it is statistically or substantively related) or to the types of evidence presented therein.

Third, PDE has essentially created a two-tiered review process for school-level AYP determinations wherein the Superintendent/Executive Director of an LEA must review the appeals, deny all appeals that have no merit based upon PDE's criteria, and then, essentially, certify to PDE that it is submitting only those appeals that fall within PDE's criteria. Yet, the Superintendent/Executive Director has no authority, under PDE's rules, to grant any appeals and is expressly instructed not to inform schools that their appeals will be granted, even if the Superintendent/Executive Director believes an appeal is meritorious. In addition to violating federal law, this prohibition also violates Section 9.2 of the State Plan, which permits "appeals to the LEA *or* the Department, *respectively* . . .." (Emphasis added).

Finally, the due process rights afforded to principals, parents and schools by Section 200.31 of the federal regulations are also being violated by PDE – principals, parents and schools have no role in the AYP determination process and appeal process under either the State Plan or the procedures contained on PDE's website.

It is clear that PDE did not follow the provisions of ESEA during the 2003 AYP determinations. It is also clear that one effect of PDE's involvement in identifying schools was that the due process rights of principals, parents and schools were violated.

10. The Provisions of NCLB Exceed Congress' Spending Clause Authority

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206-207, 107 S.Ct. 2793 (1987).

The ESEA was enacted pursuant to Congress' spending power[32] – it is a federal to state grant program whereby the Federal government provides financial assistance to participating States and LEAs to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301. One of the ESEA's purposes is "distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest." 20 U.S.C. § 6301(5). The ESEA contains numerous conditions governing the use of the grants provided to States and LEAs. Like other federal-state cooperative programs, the ESEA is voluntary – meaning the States are given the choice of complying with the conditions set forth in the ESEA or foregoing the benefits of

federal funding. *See, Pennhurst State School and Hospital*, 451 U.S. 1, 11, 101 S.Ct. 1531, 1537 (1981).

Pennsylvania has elected to participate in the ESEA programs and has submitted its "Consolidated State Application Accountability Workbook" ("State Plan") to the U.S. Secretary of Education ("Secretary") as required by the ESEA. 20 U.S.C. § 6311(a)(1). Section 6311 of the ESEA lists the criteria that the State Plan must address in order for the State to receive grant money under the program. The Secretary may decline to approve a State's plan. 20 U.S.C. § 6311(e)(1)(F). If a State fails to meet any of the requirements of Section 6311, then the Secretary "may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled these requirements." 20 U.S.C. § 6311(g)(2). Unlike other spending clause statutes, the ESEA does not expressly provide for a cause of action against the United States Department of Education ("USDOE") and the Secretary for, *inter alia*, the disapproval of a state plan or the Secretary's decision to terminate or reduce funding. *See, Pennhurst*, 451 U.S. at 14 (Developmentally Disabled Assistance and Bill of Rights Act provides a state, which is dissatisfied with a funding decision or whose plan has been disapproved by the Secretary of the Department of Health and Human Services, with appeal rights to the federal court of appeals). The ESEA also does not recognize any other cause of action related to its provisions.

Congress' spending power is not unlimited. The Supreme Court has identified four broad constitutional limitations of the spending power: (1) the exercise of the spending power must be in pursuit of the general welfare; (2) Congress must condition the States' receipt of federal funds unambiguously so that the States can exercise their choice knowingly, cognizant of the consequences of their participation; (3) conditions on federal grants must be related to the federal interest in particular national projects or programs; and (4) other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Dole*, 483 U.S. at 206-208.

First Limitation – "In Pursuit of the General Welfare"

It is unlikely that any court would interpret NCLB as violative of the first limitation. The Supreme Court has stated that courts should defer substantially to Congress' determination as to what lies within the general welfare. *Dole*, 483 U.S. at 207.[33]

Second Limitation – "Conditions Must Be Unambiguous"

The second limitation, that Congress speak unambiguously, could be a potential grounds for challenging NCLB.

"The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract. There can, of course, be no knowing acceptance of a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."

Pennhurst, 451 U.S. at 17 (citations omitted).

Under the spending power, Congress cannot surprise States "with post acceptance or retroactive conditions." *Id.* at 25. In determining whether a statute and its accompanying administrative regulations provide recipient states with the requisite level of notice for imposing funding conditions, courts rely on traditional methods of statutory construction. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n. 15, 107 S.Ct. 1123 (1987). However, once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state

action that would be improper. *Bennett v. Kentucky Dep't of Educ*., 470 U.S. 656, 666-69, 105 S.Ct. 1544 (1985) (noting that federal grant programs cannot prospectively resolve every possible "ambiguity" concerning particular applications of their statutory requirements). Where a clause in spending legislation is ambiguous, courts will typically defer to the construction given the phrase by the agency charged with monitoring and enforcing the statute. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 448, 107 S.Ct. 1207, 1221 (1987).

The definition of ambiguous is "reasonably capable of being understood in more than one sense." *Black's Law Dictionary*, 6th Ed. (1990), p. 80. To be violative of the Spending Power, we would have to prove that a term or terms of the 2001 amendments were so ambiguous that Pennsylvania could not have been aware of what was expected of it, Pennsylvania LEAs and/or schools before the State agreed to comply with the program requirements. Based upon our review of NCLB's provisions as set forth in more detail above, we believe that a number of provisions are ambiguous. Examples are:

(1) 20 U.S.C. § 7907(a) – This section informs the States that neither the State nor its LEAs will be required to expend any financial resources as a result of NCLB's provisions. In reality, that has turned out to be incorrect. Again, proving that non-federal resources are being expended to implement NCLB's requirements must be completed through expert testimony. Based upon this provision, Pennsylvania could not have known that the Commonwealth or its LEAs would be required to fund any measure or consequence associated with NCLB when it agreed to accept federal funding.

(2) 20 U.S.C. § 6319 – Section 6319's qualifications for teachers and paraprofessionals, on their face, indicate that the federal government is exercising control over the credentials and duties of school staff. 20 U.S.C. § 1232a explicitly prohibits such an exercise of power. Due to these competing statutory provisions, Pennsylvania could not have understood what it was agreeing to enforce with respect to staff qualifications when it elected to accept federal funding.

(3) Subgroup data – NCLB requires that subgroup data only be disaggregated where the number is sufficient "to yield statistically reliable information . . .." 20 U.S.C. § 6311(b)(1)(C)(v). When it decided to accept federal funding, Pennsylvania did not know that the USDOE and its Secretary would require it to use a number—i.e., 40—that is not statistically sufficient to yield valid and reliable information about subgroups.

(4) Disabled students – 20 U.S.C. § 6311(b)(3)(C)(viii)(II) informed Pennsylvania that students with disabilities were to be afforded "reasonable adaptations and accommodations . . . necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." In light of the USDOE's promulgation of regulations that preclude Pennsylvania from determining what adaptations and accommodations are appropriate on a student-by-student basis, Pennsylvania had no notice of this requirement.

Third Limitation – "Conditions Must Be Related To The Federal Interest"

The third limitation requires the conditions attached to the receipt of federal monies to be directly related to the federal interest in particular national projects or programs. "[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164 (1978) (plurality opinion). Federal caselaw has not defined the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power and has not determined whether the conditions must be *directly* related to the *particular* purpose of the expenditure. *South Dakota v. Dole*, 483 U.S. at 209; *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827, 845 (S.D.Ohio 2002)(court assumed that a direct relationship is required but went on to find the existence of a

direct relationship). The Supreme Court has never struck down an exercise of the Spending Power on the basis that the funds were not reasonably related to the encumbering condition imposed upon their receipt. *Gerhardt, supra.*

One way that NCLB may violate this limitation concerns its provisions governing "highly qualified teachers" and paraprofessionals. These provisions, which require LEAs to hire and employ only "highly qualified teachers" and paraprofessionals as a condition of federal funding, arguably are unrelated to the federal interests behind ESEA. Section 6301 of the ESEA sets forth the Act's purposes – included among them is NOT any reference to or relationship between meeting the needs of low-achieving students and the qualifications of the nation's teachers and paraprofessionals. The only "purpose" contained in Section 6301 relating to staff is a reference to elevating the quality of instruction through professional development opportunities. 20 U.S.C. § 6301(10). An argument can be made that Congress did not have an interest in legislating minimum teacher and paraprofessional qualifications as those qualifications are not related to their federal interest in meeting the educational needs of low-achieving children.

Another way that NCLB may violate the third limitation concerns the sanctions attached to failure to make AYP. Nothing in NCLB suggests how placing schools and LEAs in school improvement, corrective action or restructuring achieves NCLB's stated purpose to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301.

The manner in which the USDOE has regulated relating to students with disabilities is also clearly not within the Federal Government's interests as expressed in NCLB, considering that the Federal Government left it up to the States to determine what accommodations and assessments should be provided to disabled students.

Fourth Limitation—"Constitutional Provisions That May Provide An Independent Bar To The Conditional Grant Of Federal Funds"

a. Tenth Amendment

The Tenth Amendment may bar Congress' intrusion into the area of regulating school staffing qualifications. "The Supreme Court has recognized that the Tenth Amendment may be implicated when the financial incentives offered by the federal government to the States cross the impermissible line where 'pressure turns into compulsion.'" *Hodges v. Thompson*, 311 F.3d 316, 320 (4th Cir.2002), citing *Dole*, 483 U.S. at 211. "Congress may use its Spending Power to influence a State's legislative choices by providing incentives for States to adopt certain policies, but may not compel or coerce a State, or go so far as to 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* citing *New York v. United States*, 505 U.S. at 161, 112 S.Ct. 2408.

The Supreme Court has opined that education is an area "where States have historically been sovereign." *United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). In this country, there is a "deeply rooted tradition of state and local control over education." *Bennett v. New Jersey*, 470 U.S. 632, 634, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985). Although it is true that Congress has stepped into the realm of education under the auspices of its spending power on a number of occasions, its tread has typically been focused on establishing and funding programs designed to promote fair and equal educational opportunity for all students regardless of race, national origin, disability or income. Before NCLB, Congress had never prescribed any qualifications for teachers beyond requiring professional development programs to be in place and left the design of such programs up to the individual schools and LEAs. *See*, Pub.L. 89-10, Title I, § 1119, *as added* Pub.L. 103- 382, Title I, § 101, Oct. 20, 1994, 108 Stat. 3555.[34]

On their face, Congress' minimum teacher and paraprofessional qualifications seem to violate the

Tenth Amendment.[35] While an argument can be made that Congress has unconstitutionally regulated in violation of the Tenth Amendment to the United States Constitution, the Supreme Court has previously held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not, in turn, limit the range of conditions legitimately placed on federal grants. *Oklahoma v. Civil Service Comm'n.*, 330 U.S. 127, 67 S.Ct. 544 (1947). Where the State has the power to opt out of the federal program, courts are unlikely to find a violation of the State' sovereignty. *Dole*, 483 U.S. at 210.

b. Equal Protection clause to the Fourteenth Amendment

The Equal Protection clause also may be a bar to the use of the spending power under NCLB. Federal agencies cannot enact regulations pursuant to Spending Clause legislation that exceed the limits of Congress' Spending Clause powers. The Spending Clause power "may not be used to induce the States to engage in activities that would themselves by unconstitutional." *Dole*, 483 U.S. at 210. The Equal Protection clause contained in the Fourteenth Amendment to the United States Constitution prohibits the States from making or enforcing "any law which shall abridge the privileges and immunities of citizens of the United States." Am. XIV, Sec. 1, cl. 2. It is asserted that the USDOE's regulations regarding the assessment of students with disabilities are violative of the Equal Protection clause and the rights conferred on disabled individuals under Section 504 and Title II of the Americans with Disabilities Act, as noted above.

By requiring disabled students (who do not fall within the class of significant cognitive disability) to take assessments at grade level, regardless of their disability and its effect on their intellectual ability, federal regulations force states, LEAs and schools to discriminate against disabled students. The IDEA recognizes this fact and requires that a disabled student's IEP team make the determination whether participation in all or part of the state assessment system is appropriate. 34 C.F.R. § 300.347(a)(5).

11. 20 U.S.C. § 6311(b)(2)(I)'s requirement of 95% participation in annual assessments violates the First Amendment, Free Exercise Clause

For a school to make AYP annually, Section 6311(b)(2)(I) of NCLB requires not less than 95 percent of all students in a school and in any subgroup in a school to take the assessment. 20 U.S.C. § 6311(b)(2)(I). No student is permitted to opt-out of taking the annual assessment tests on which AYP is determined. There are no exceptions contained in NCLB permitting schools or LEAs to waive a student's participation in the test for, as one example, a religious conviction that does not permit the student to take the test. If the school or LEA permits the student not to take the test (or the student simply does not show up to school on that day), that student is counted against the school and LEA's 95% participation rate. This is a common problem in Pennsylvania that is having an effect on participation rates and, consequently, AYP results of schools and LEAs.

12. Violations of the Unfunded Mandate Reform Act of 1995

On March 22, 1995, Congress passed the Unfunded Mandate Reform Act of 1995 ("UMRA"), P.L. 104-4, March 22, 1995, 109 Stat. 48, with the intent to, *inter alia*, curb the practice of imposing unfunded Federal mandates on States and local governments. As noted therein, the UMRA had several purposes, including:

* * *

(2) to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local and tribal governmental priorities;

* **

(5) to require that Congress consider whether to provide funding to assist State, local, and tribal governments

in complying with Federal mandates . . .;

* * *

(7) to assist Federal agencies in their consideration of proposed regulations affecting State, local and tribal governments, by –

(A) requiring that Federal agencies develop a process to enable the elected and other officials of State, local, and tribal governments to provide in put when Federal agencies are developing regulations; and

(B) requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing the Federal mandates upon State, local, and tribal governments and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process;

2 U.S.C.A. § 1501.

The UMRA does not prohibit Congress from enacting unfunded measures – rather, it requires Congress to obey special procedures when doing so. If any bill in Congress includes a Federal mandate, the report of the committee accompanying the bill must contain a number of statements, including the direct costs to the State and local governments required by the mandates and whether and how the committee has created a mechanism to allocate the funding in a manner that is reasonably consistent with the expected direct costs among and between the State and local government. 2 U.S.C.A. §§ 658b(a), (c), and (d). The Act also requires every federal agency to prepare a written statement containing, *inter alia*, a qualitative and quantitative assessment of the anticipated costs to State and local governments, before it promulgates proposed rulemaking "that is likely to result in promulgation of any rule the includes any Federal mandate that may result in the expenditure by State, local, and tribal governments . . . of $100,000,000 or more . . . in any one year." 2 U.S.C.A. § 1532(a).

In terms of relief, the only relief available under the statute is to "compel the agency to prepare such written statement." 2 U.S.C.A. § 1571(2). The inadequacy or failure to prepare a statement or written plan by a federal agency "shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule." 2 U.S.C. § 1571(3); *Associated Builders & Contractors, Inc. v. Herman*, 976 F.Supp. 1, 15 (U.S.D.C. 1997).

Supporters of the NCLB are adamant that NCLB is not a mandate that falls within the auspices of the UMRA because of its nature as voluntary spending legislation that is not forced upon the States absent their request for federal funding. In support of this notion, the supporters cite to the Congressional Budget Office's ("CBO") declaration that NCLB is not a mandate.[36] *See*, http://rpc.senate.gov/_files/Apr2104UnfundedJG.pdf.

III. EMPLOYEE LITIGATION.

A. *Burger vs. McGuffey School District*, 839 A. 2d 1055 (Pa. 2003) (Pending before the Court of Common Pleas of Washington County on an appeal from a dismissal by the School Board.) This superintendent dismissal case raises a number of unique issues. As a result of allegations of sexual harassment, sex discrimination and retaliation against the superintendent, the school board suspended the superintendent without pay pending dismissal proceedings. The superintendent filed a mandamus action asserting that superintendents are immune from being suspended without pay, even where there are substantial allegations of wrongdoing. The Court of Common Pleas agreed and entered a peremptory writ in mandamus ordering the school district to continue paying the superintendent his salary until the completion of the dismissal proceedings. After the school district appealed the decision to the Commonwealth Court, the Common Pleas Court entered an order lifting the automatic stay that resulted from the appeal. (*See*, Pa.R.A.P 1736(b)) The Commonwealth Court affirmed the lifting of the stay and the Supreme Court refused to intervene.

After hearing argument first before a panel and then before the Court *en banc*, in a five (5) to two (2)

decision, the Commonwealth Court reversed the trial court's decision and ruled that school districts have the power and authority to suspend superintendents without pay pending dismissal. After granting a Petition for Allowance of Appeal, the Supreme Court agreed with the Commonwealth Court that School Boards possess implied authority to suspend superintendents accused of serious misconduct within the constraints of procedural due process. *Id.* at 1061. Although the holding was limited to the authority of School Board's to suspend superintendents pending dismissal, the Supreme Court commented on procedural due process issues. The Supreme Court recognized the flexibility of due process and encouraged a more fact-driven inquiry than was taken by the lower court. The Supreme Court suggested that due process requires looking at factors such as the position heal by the public employee, the character of the alleged conduct in relation to that position and it potential impact on the public trust, the interim procedures afforded to the employee, and the extent and length of the deprivation, and any other circumstances evidencing excessive hardship.

The Supreme Court's decision is not the en d of the litigation between the parties. The school district responded to the mandamus action by filing a counterclaim. In a case of first impression in Pennsylvania, the school district has asserted a claim of "disgorgement" against the superintendent, asking that the court order the superintendent to return his salary and fringe benefits to the school district for the period of time that he was involved in the alleged harassment, discrimination and retaliation. In addition, the school district asked for reimbursement of any damages and costs that may result from the claims of the victim of the superintendent's alleged harassment, discrimination and retaliation. The Court of Common Pleas dismissed the disgorgement claim on the basis of a rule of civil procedure that prohibits counterclaims in a mandamus action. The School District has the right to file the claim as a separate and independent action.

At the present time, the court of Common Pleas of Washington County is presiding over the superintendent's appeal of his dismissal. The issues involved in the dismissal include the interpretation of Section 1080 of the School Code and procedural issues unique to superintendent dismissal proceedings.

IV. **Student Discipline**.

1. *Valentino C., et. al. v. School District of Philadelphia, et al.*, 2003 WL 177210 (E.D. Pa. 2003). (unreported)

The student was diagnosed with attention deficit hyperactivity disorder, oppositional defiant disorder, depression, and separation anxiety disorder. He was enrolled in a bilingual middle school and placed in an emotional support class. In the spring and summer of 1999, in the first of two incidents involving the student, the teacher claimed that he scolded the student and the student reacted by picking up a desk and moving toward the teacher to strike him with it. In contrast, the student claimed he picked up a chair to defend himself from the teacher. In accordance with school district policy, the teacher filed a police report. The student was arrested and detained in a holding cell for 21 hours. The second incident involved an allegation that a school police officer struck the student.

The student brought an action in Federal Court in the Eastern District Pennsylvania. The student had three sets of claims: (1) a First, Fourth, and Fourteenth Amendment claim; (2) a so-called state-created danger claim; and, (3) an Individuals with Disabilities Education Act (IDEA), Eighth and Fourteenth Amendment claim. The school district filed a motion for summary judgment. Concurrently the student moved to amend his complaint.

The student's First, Fourth, and Fourteenth Amendment claims, through 42 U.S.C. §1983, flowed from his arrest and incarceration. The Court found that the correct approach was to analyze the student's claim under the Fourth Amendment's reasonableness standard. In the public school context, the Court found that "reasonableness is determined by balancing the individual's Fourth Amendment interest, including the expectation of privacy, against legitimate government interests." *Id.* at 5. The Court noted that the interests of students to maintain their privacy rights must be weighed against the school's interest in preventing a potentially violent situation. To evaluate the reasonableness of a seizure, the Court said it must, first, identify the intrusion, second, determine whether the intrusion was justified at its inception, and, third, determine whether the intrusion was reasonably related in scope to the circumstances that gave rise to the intrusion.

Under the Fourth Amendment, the student claimed that the teacher illegally caused an unreasonable seizure (the arrest) by calling the police. A public school student has a reduced expectation of privacy. The Court noted that the interests of the government to maintain safety, and avoid violent situations, are particularly compelling. As the Court noted, "all public school students, know and expect that, for their own protection and he protection of their fellow classmates, they are subject to removal from class at any time for disciplinary reasons." *Id.* at 5. The Court recognized that the school district did not have the power to arrest or incarcerate. The Court noted that the police, not the school district, arrested and incarcerated the student leaving the issue of the school district's power to do so irrelevant to the case. The Court only addressed the student's detainment while awaiting the arrival of the police. The Court acknowledged the dispute of facts regarding whether the teacher or the student was the aggressor mentioned above, but rejected the subjective intent of either teacher or the student from consideration. Rather, the Court felt that the teacher acted reasonably in removing the student to maintain a proper educational atmosphere in the classroom. Furthermore, contacting the police regarding such an incident was in keeping with school district procedure to report any alleged student assault to the police. The Court decided that the teacher, who called the police in accordance with school district procedure, acted reasonably, and, as a result, the intrusion was reasonable in scope.

The student also raised a state-created danger claim. In arguing the state-created danger claim, the student had to establish four elements: "(1) the harm inflicted was a foreseeable and fairly direct result of the state official's actions; (2) the state official's actions "shock the conscience"; (3) there is a special relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity for harm that would not have otherwise occurred." *Id.* at 8, *citing Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996).

The student claimed that his detention, caused by calling the police, created a danger. Regarding the first prong, the Court found that the "physical suffering" and "continuing psychological problems" as a result of calling the police were too attenuated to be foreseeable or a direct result of the school district's action. Secondly, the Court did not find that the teacher's actions shocked the conscience. Shocking the conscience requires extreme conduct, particularly those actions reserved only '"at the ends of tort law's spectrum of liability.'" *Id*. at 9 *quoting County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). With regard to the third element, a special relationship, a special relationship exists when a state actor's "actions make 'a discrete plaintiff vulnerable to foreseeable injury.'" *Id*. at 9, *quoting Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995). The Court decided that there was no special relationship because a foreseeable danger was not present here. Finally, the Court found that there was no causal connection between the School district and the harm.

Regarding the IDEA, Eighth and Fourteenth Amendment claims, the student was equally unsuccessful. The student argued that the school district violated the Fourteenth Amendment by depriving him of his due process provided by IDEA when they called the police for the student's arrest. The student looked to the IDEA's "stay put" provision which stated that "[d]uring the pendency of any proceedings conducted pursuant to this section, . . . the child shall remain in the then-current educational placement of such child." *Id*. at 10, *quoting* 20 U.S.C. § 1415(j). The student argued that the arrest removed him from his current educational placement. The court rejected this interpretation as "strained" on the basis that the "stay put" provisions cannot render a student out of the reach of law.

The student also alleged that the school district violated the IDEA by failing to immediately transfer his medical records to the police. According to the student, failing to send the records "amounts to deliberate indifference under the Eighth Amendment" which prohibits cruel and unusual punishment. The Court also rejected this argument. The Court pointed out that the student ignores the IDEA provision that says '"[n]othing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a

child with disability to the appropriate authorities . . .." *Id*. at 11 *quoting* 20 U.S.C. § 1415(k)(9)(A). Furthermore, the Court also stated that the IDEA does not require the transfer of medical records (under any circumstances), only educational and disciplinary records. Regardless of which documents the student alleged should have been transferred, as the Court noted, there is no IDEA provision that requires the transferal of records immediately upon arrest.

Based upon all of the above, the Court granted the school's motion for summary judgment, on all of the federal claims described above. The student also had several pendant state law claims flowing from his allegation that a police officer struck him. The Court denied the school district's motion for summary judgment for these claims because it was unsure if it retained subject matter jurisdiction over these claims. The Court granted the student's motion to amend his complaint and ruled that the school district's "summary judgment motion, as to the pendant state law claims, is denied with leave to renew once" the student files his amended complaint. *Id.* at 12.

2. *Flaherty v. Keystone Oaks School District, Dr.*, 247 F.Supp.2d 698 (W.D. Pa. 2003).

The student who initiated this case was a high school student who was disciplined for posting four messages (three from a home computer, one from a school computer) of questionable content on an internet message board. In these messages, the student boasted about his school's volleyball team and ridiculed the opponent school. For example, the student said things such as:

"you're no good and your mom . . . is a bad art teacher. . .. These purple panzies [sic] are in for the surprise [sic] of their lives. I predict players and fans will want to transfer to Ko after this game is through. I also predict that Bemis [a student on the opposing volleyball team] is going to shed tears on the court. So people from baldwin [sic] I will tell you this, you better save the ridiculous price of 2 dollars to go watch your school get embarrassed and for Bemis to make a spectacle of himself [sic]. . .. My dog can teach art better than Bemis' mom. . . . [A team member] stands 6 foot 7 inches and is ready to show those plum foreigners how to spike in America."

Id. at 701.

The student claimed that the Student Handbook, under which he was disciplined, was unconstitutionally overbroad and vague in its portions that allow punishment for speech. The Handbook prohibits "physical, verbal or written abuse directed toward a school employee" . . . "[I]nappropriate language/verbal abuse (may be considered "Attack") toward an employee . . . [i]nappropriate language/verbal abuse toward another student. . .. It is the responsibility of the student to: . . . 13. Express ideas and opinions in a respectful manner so as to not offend or slander others . . . B. Technology Abuse . . . c. use of computers to receive, create or send abusive, obscene, or inappropriate material and/or messages." *Id.* at 701. The student claimed that terms such as "inappropriate," "offensive," and "abusive," with no qualifying terms, are unconstitutionally overbroad.

The Court noted that "'[a]n overbroad statute is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well.'" *Id.* at 702, *quoting Killion v. Franklin Regional School District*, 136 F.Supp.2d 446, 458 (W.D. Pa. 2001). The Court was quick to note that a statute may only be invalidated if it is substantially overbroad on its face, and not merely because one

could conceive of an impermissible application. The Court noted that the U.S. Supreme Court held that a student's speech "may be regulated only where it substantially disrupts school operations or interferes with the rights of others or there is a realistic threat of doing so." *Id.* at 3, *citing Tinker v. Des Moines Independent Community School Dist.*, 343 U.S. 503, 513 (1969). Furthermore, *Tinker* also states that a student's speech "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Tinker*, 343 U.S., at 681. Based upon the ruling in *Tinker*, the Court found the Student Handbook to be unconstitutionally overbroad. Specifically, the Court said:

"the breadth of the Student Handbook policies are overreaching in that they are not linked within the text to speech that substantially disrupts school operations. Absent said language, I can find no way to reasonably construe the Student handbook policies to avoid this constitutional problem . . . the terms abuse, offend, harassment, and inappropriate, as set forth . . . are simply not defined in any significant manner."

Id. at 704.

Additionally, the Court noted that merely attempting to avoid offense, discomfort, or unpleasantness are not justifications for abridging First Amendment rights. Therefore, the Handbook was held to be unconstitutionally overbroad and unconstitutionally vague.

The Court also pointed out that the Handbook is overreaching because it did not set forth any geographical limitations. The student is being disciplined for speech that occurred on his home computer. The Court ruled that a policy without limitations that could be applied to behavior off school premises and not related to school activity is unconstitutionally overbroad.

The United States Supreme Court has set additional standards by which to determine if student speech is covered by the First Amendment. A school district may not regulate a student's speech for expressing a particular opinion unaccompanied by any disorder or disturbance on [the student's] part. *Tinker*, 343 U.S. at 508. That is, a school district may not prohibit speech in order to suppress the expression of a particular political view point. However, because a school district may prohibit speech in the interest of setting the boundaries of socially appropriate behavior, lewdness, obscenity, and vulgarity which carry with it no particular view point may be prohibited.

A school district may also regulate speech in a school publication. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The *Hazelwood* court concluded that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,' [] even though the government could not censor similar speech outside the school." *Hazlewood*, 484 U.S. at 266.

C. S.G. v. Sayreville Board of Education, 333 F.3d 417 (3rd Cir. 2003)

A five-year-old kindergarten student was suspended from school for saying "I'm going to shoot you" to his friends during a game of "cops and robbers" in the school yard, during recess. The incident occurred on March 15, 2000, after three separate incidents, two occurring on March 4, 2000 and one on March 10, 2000, which involved students threatening another student, and/or a teacher, that they would shoot the student and/or teacher. Consequently, a new policy was adopted by the school district that took affect on March 10, 2000, which prohibited statements referring to violence or weapons. The student contended that he was merely playing a game and did not threaten physical harm, nor did he disrupt school operations or interfere with his classmates' rights. The student was suspended for three days, and while that suspension was not part of his permanent scholastic record, the teacher had a record of the suspension in her personal files which she would be free to share with the principal of another school.

The student brought a civil rights action pursuant to 42 U.S.C. § 1983 for violations of freedom of

speech, procedural due process, and Equal Protection.

The Court pointed out that "[s]tudents cannot be punished for merely expressing their personal views on the school premises unless 'school authorities ha[ve] reason to anticipate that [such expression will] substantially interfere with the work of the school or impinge upon the rights of other students.'" *Id.* at 421, *quoting Tinker v. Des Moines Independent Community School Dist.*, 343 U.S. 503, 506 (1969). However, the Court recognized that a student's First Amendment rights are not unlimited as they "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 421, *quoting Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). The Court also noted that the school district's right to maintain order is limited by the rule of law that the school district cannot prohibit particular political viewpoints, however, the rights of a public school student are not identical to the rights of adults in other settings.

The Court found that the student's First Amendment rights were not violated. The Court held that the policy to immediately discipline students making statements referring to violence or weapons does not address expressive speech. The Court found that the violated policy did not address any particular viewpoint, and was designed to maintain order in the school, especially in light of the maturity level of the children involved. The Court also held that a school district is afforded greater deference in its control of speech among younger students than high school students.

The student also raised a due process claim because his parents were not present when the suspension was issued. This claim was also rejected. The Court indicated that a suspension of ten-days or less requires oral or written notice and an opportunity for the student to give an explanation for the behavior. There does not need to be a delay between the notice and the "hearing" (i.e.: the student's explanation). The teacher, in this case, asked the student what he did and he admitted to playing guns and making the prohibited statements. According to the Court this was sufficient to satisfy the due process requirement.

The student's Equal Protection claim was premised upon the idea that the suspension was based solely upon a school policy that did not have a rational basis. The Court summarily addressed this by saying "there was no clearly established law holding that such a policy was irrational. Nor do we see any Equal Protection violation." *Id*. at 7. Essentially, the Court found that there is a valid state interest in controlling student conduct, especially when considering the recent acts of violence involving guns. Therefore, it is not unreasonable to create policies that would curtail conduct that may have the capacity to lead to violent behavior.

D. *T.W. v. School District of Philadelphia,* 2003 WL 1848705 (E.D. Pa.) (unreported)

The student was a sixteen year old girl who was expelled from school as a result of a physical altercation with a classmate. The altercation occurred at a classmate's "Sweet Sixteen" party held at a local restaurant. The student, and her friends, went to the party knowingly uninvited (her friend was expressly told not to come). When they arrived, the classmate and the classmate's mother instructed them to leave. Instead of leaving as requested, the student allegedly assaulted her classmate and her mother. Subsequently, her classmate's mother reported the student's actions to the school principal. After a hearing, the student was transferred to another school in order to avoid further problems. The school district had the purported authority to discipline and transfer the student under the district's "off school grounds" disciplinary policy. This policy specifically applies "to any behavior 'off school grounds when the conduct may reasonably be expected to undermine the proper disciplinary authority of the school, the safety of students or staff, or [cause] disruption within the school.'" *Id*. at 3.

The student brought a Fourteenth Amendment claim asserting that the provision was unconstitutionally vague. State law claims were also asserted. The Court initially addressed the fact that there is no right to

attend a particular public school. The Court then went on to explain that a penal statute is vague only if it does not define the offense so that persons with ordinary education could understand, and is not promulgated with sufficient clarity to avoid discriminatory enforcement. The Court also noted that school disciplinary regulations are not required to have the same level of specificity as a criminal statute and that a school regulation survives a vagueness analysis if someone of ordinary intelligence would be on notice of what behavior is prohibited.

The student claimed that a reasonable person would not have understood that the provision would apply to behavior at a place and time unrelated to school. The Court rejected this argument by saying that it "is clear that [the student's] actions . . . [at the party] and her threat of continuing violence after the altercation may have reasonably been expected to undermine the disciplinary authority of school officials and jeopardized the safety of [her classmate], as well as other Carver students." *Id.* at 7. The Court found that the "off school grounds" provision of the school district policy to be sufficiently clear for Fourteenth Amendment purposes.

The student also alleged that she was being disciplined for making threats at the party, violating the First Amendment provision of freedom of speech. However, the Court rejected that argument by pointing out that the school district did not base their discipline on any threats that may or may have not been said. In addition, the student was transferred to a non-disciplinary academic school, which the court deemed not to be a "punishment." Finally, the Court made it clear that the right to freedom of speech is not absolute. A threat, which "a reasonable person would interpret . . . as a serious expression of an intent to cause a present or future harm" is beyond the ambit of the protection of the First Amendment, and therefore permissible to take immediate action against it. *Id.* at 9, *quoting Doe v. Pulaski County Special School District*, 306 F.3d 616, 622 (8th Cir. 2002).

Upon denying the student's federal law claims, the Court also denied her state law claims, for lack of jurisdiction, without prejudice to her right to refile in state court.

E. *Hoke v. Elizabethtown Area School District*, 833 A.2d 304 (Pa. Cmwlth. 2003)

The case involves a student of the Lancaster Catholic High School. He allegedly violated the Diocese of Harrisburg's school policies regarding offenses for the possession of weapons, and using and selling drugs. The principal of Lancaster Catholic contacted the student's parents about the incident. According to the Diocese's school policies, the student's offense warranted permanent expulsion. The principal gave the student the choice of either permanent expulsion or immediate withdraw from the school. The student chose the latter, and subsequently attempted to enroll in the school district's public high school. Upon doing so, the student was informed by the school district that he could not enroll without a school board expulsion hearing concerning the incident at Lancaster Catholic.

It was the school district's established "full faith and credit" policy to give full faith and credit to the disciplinary decisions of other school entities. Under that policy, the school district will not admit a student from another school entity if that student is still subject to an unfinished expulsion. If a student does, in fact, withdraw from a school in the face of an expulsion hearing, the school district offers the opportunity to have a hearing with it to determine the guilt or innocence of the student and if expulsion is appropriate. The student did not submit to the school district's offer of a hearing. Instead, the student enrolled at a local private school and brought an action to enjoin the school district from conducting an expulsion hearing.

The student brought an action in the Court of Common Pleas of Lancaster County seeking declaratory and injunctive relief from the school district's "full faith and credit" policy. In response, the school district claimed that the student could not seek judicial intervention until after all administrative remedies under the school district and the local agency law were exhausted. The Court noted that the doctrine of exhausting

administrative remedies is designed to prevent a premature interruption of administrative processes. These processes provide the agency with an opportunity to develop an adequate factual record, to develop a cohesive body of law, and allow the agency to exercise its expertise. However, the student claimed that the school district does not have the authority to handle the kind of claim the student was asserting because the student was not enrolled at the school district at the time of the incident which undermines the school district's authority.

On appeal to the Commonwealth Court, the school district policy was stricken. The Court stated that school districts may only make rules that are within the limitations granted by the General Assembly, regardless of how noble the intention. The school district's "full faith and credit" policy stated that a "school district receiving a student who transfers from a public or private school during a period of expulsion for an act or offense involving a weapon may assign that student to an alternative assignment or provide alternative education services, provided that the assignment may not exceed the period of expulsion." *Id*. at 311. The school district claimed that merely because the student was "constructively expelled" (as opposed to formally expelled), it should not prevent the school district from exercising its authority. The Court ruled that the School Code does not allow the school district to "independently bring expulsion proceedings against the student where Lancaster Catholic chose not to do so." *Id*. at 312. Furthermore, the Court pointed out that, according to the School Code, a school district may only discipline students enrolled at the time of the incident. The Court determined that a school district's authority to discipline a student is limited by "that which is expressly or by necessary implication granted by the General Assembly, regardless of how worthy the purported goal." *Id*. at 310. Therefore, a school district policy that contradicts the School Code must not be upheld. The Court acknowledged that this may leave a loophole open for students like the student who "leave in the face of expulsion," however, "that is a matter for the legislature to consider; we cannot rewrite the statute." *Id*. at 312.

The student was also successful in regard to his exhaustion arguments. The Court initially stated that "exhaustion of administrative remedies is intended to prevent the premature interruption of the administrative process, which would restrict the agency's opportunity to develop an adequate factual record, limit the agency in the exercise of its expertise and impede the development of a cohesive body of law in that area." *Id.* 309. In light of this, the Court drew the distinction that in this case the student would not be exhausting an administrative remedy since exhaustion "does not include the authority for the school board to rule on the legality of the disciplinary policy . . . the [administrative] hearing process . . . is not the remedy he seeks because it does not resolve [the student's] claim that the School District lacks authority to discipline him in the first place." *Id.* at 309.

F. *Hampton Township School District v. Robinson*, 807 A.2d 344 (Pa. Cmwlth. 2002). (unreported).

A seventeen-year-old student met with other members of the school's marching band in a wooded area approximately half a mile from school property to drink alcohol before the band's performance at a football game. The student had a "single sip" of scotch before the game. While they missed rehearsal, the students participated in the scheduled band activities for that evening. The band director detected the odor of alcohol on the student and informed the principal and assistant principal. When the principal and assistant principal confronted the student, the student admitted that he had a drink of alcohol off the school's premises.

The student was immediately suspended, and after a school board hearing was expelled pursuant to the section of the school district's code of conduct which defines as an offense the "[p]ossession, use, or [being] under the influence of alcohol or other drugs, steroids, narcotics, or other health endangering compounds." According to the policy, "[a] student who, while under the school's jurisdiction, on or about school property or while at school related functions is found to possess, use or be under the influence of alcohol or other drugs, steroids, narcotics, or other health endangering compounds . . .," may be disciplined. *Id.* at 4.

The student filed an appeal under the local agency law and the Court of Common Pleas reversed. On appeal to the Commonwealth Court, the school district, argued that it had the authority to discipline the student because (1) the alcohol consumption took place immediately before a school sponsored event, (2) the alcohol consumption took place on property in close proximity to school property and, (3) the student was "under the influence" when at a school event on school property. The Commonwealth Court rejected the school district's arguments.

The Court's analysis draws a different interpretation of the school's code of conduct. Initially the Court agreed with the school district that even a sip would be sufficient to be "use" of alcohol under the code of conduct. The Court, however, did not find that there was a sufficient nexus between the school's property and where the student consumed alcohol to be considered drinking on school property. Instead, the Court found that the school district did not "establish that the consumption/use of alcohol took place "about" the High School property." *Id.* at 5. The Court also found that the code of conduct did not sufficiently define what constituted "under the influence." The Court found that consumption of alcohol cannot be equated with "under the influence." The Court also observed that the school district offered no evidence that the student displayed symptoms of being under the influence. Therefore, the Court overturned the discipline of the student.

G. *Schmader v. Warren County School District*, 808 A.2d 596 (Pa. Cmwlth. 2002)

A third grade student was charged with "one count" of "Miscellaneous Inappropriate Behavior" pursuant to the school district's discipline code for his alleged involvement in a threatened assault of a classmate. The discipline code prohibited "behavior that may be harmful to others." *Id*. at 599. The student's friend indicated to the student that he would like to injure a classmate with a dart. The student indicated that he did not want to be involved with the matter. He did not tell his mother because she was not home, and forgot to tell his sister of the alleged threat. He did not say anything to the principal regarding what the dart was going to be used for because he did not want to "hurt his friend." *Id*. at 597. He also did not tell the threatened victim about his friend's ideas because his friend "would probably make something up." *Id*. at 597. The principal eventually held an informal hearing with the student and his mother about the student's involvement. There was a conflict in the testimony regarding what the student said during that conversation. The mother denied that the student ever said he intended to make his classmate bleed, while the principal contended he did, in fact, say that. The student was suspended for the rest of the day and was issued three days of fifteen minute after school detentions.

On appeal to the Court of Common Pleas of Warren County pursuant to the local agency law, the Court reversed the discipline. The school district appealed to the Commonwealth Court.

The student contended before the Commonwealth Court that the language of the disciplinary code under which he was disciplined was unconstitutionally vague. In addressing this issue, the Court noted that a statute or regulation "must not be so vague as to require persons of ordinary intelligence to guess at its meaning or its possible application." *Id*. at 599, *citing Grayned v. City of Rockford*, 408 U.S. 104 (1972). "All that is required is that the language convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Id*. at 599 *citing Roth v. United States*, 354 U.S. 476 (1957). In the context of a school district discipline code, the Court stated that while some specificity is required, school disciplinary rules do not need to be as detailed as a criminal code.

The Court determined that the Warren County school district disciplinary code under which the student was disciplined was not unconstitutionally vague. According to the Court, "any eight-year-old child knows or should know that knowledge of the intent of another child to throw a dart in order to injure a child is 'behavior that may be harmful to others,' and, therefore, is wrong, and . . . he or she will be in 'trouble' at school" if such an act is committed. *Id*. at 600. Therefore, the court determined that the language in the

discipline code was not unconstitutionally vague.

The Court also held that the student had no recourse to the Court when the discipline exacted is less than ten days. The Court stated that "three days of a 15-minute after school detention does not rise to a constitutional deprivation of any type of property right requiring redress through the judicial system." *Id*. at 600. Specifically, '"[Pennsylvania law] does not provide any recourse from a school district's decision to suspend a student for fewer than ten days." *Id.* at 600, *citing In re JAD*, 782 A.2d 1069 (Pa. Cmwlth. 2001). Therefore, since the student was suspended for only three days, the courts can provide him with no recourse. The Court went on to state that "[t]he law is clear that in Pennsylvania, local school boards have broad discretion in determining school disciplinary policies. Therefore, when one attacks a school board action on matters committed by law to its discretion, he has a heavy burden, as the courts are not prone to interfere unless it is apparent that the school board's actions are arbitrary, capricious, and prejudicial to the public interest. In the absence of a gross abuse of discretion, the courts will not second-guess policies of the school board." *Id.* at 600 *citing Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117 (Pa. Cmwlth. 2000). Based upon this, the Commonwealth Court held that the discipline imposed on the student would be upheld because the school district's actions were not arbitrary or capricious.

H. *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003)

In order to combat drug use among its students, the school district adopted a policy of random, suspicionless drug and alcohol testing of students who had a parking permit or participated in an extracurricular activity. In order to obtain a parking permit, or participate in an extracurricular activity, the student (or parent if the student was a minor) was required to sign a contract consenting to a drug and alcohol test. The school district argued that extracurricular participants are student leaders and role models and should set an example for the other students, not to use drugs or alcohol. There was no preexisting drug problem within this group of students, they were targeted for symbolic reasons as role models.

The contract permitted the school district to collect breath, urine, and blood samples from students. These samples were only used for drug and alcohol testing, and not for any other medical testing. The policy requires "[t]esting . . . in five different circumstances: initial testing, random testing, reasonable suspicion testing, return-to-activity testing, and follow-up testing Students must submit to testing initially when they register for an extracurricular activity or apply for a parking permit. [Unannounced, t]he School randomly tests five percent of the targeted students on a monthly basis." *Id*. at 79. Following a positive test result, a medical review officer conducts an investigation to determine if there is an alternative explanation for the positive result. Within three days the tested student may request a retest. If no retest is requested, or if the second test is also positive, the results of the test are shared with school faculty and staff on a "need-to-know" basis. The policy requires the school district to protect the confidentiality of the results. Subsequently, the principal, student, and the student's parents, hold a conference to discuss the test results.

According to the policy, the consequences of a positive test result are participation in a six-week drug assistance program, weekly testing, and suspension from extracurricular activities and parking privileges for a period not less than a calendar year. A second positive test results in a one year suspension from extracurricular activities and parking, and upon a third positive test participation in extracurricular activities and parking are permanently prohibited. Finally, the contract provided that a positive test will not result in suspension or expulsion from school or affect academic standing in any way.

Two students, one who was involved in non-athletic extracurricular activities, and another who was an athlete and had a parking permit, contested the mandatory drug testing. Both had tested negative.

The students alleged that the mandatory searches violated their right to be free from an unreasonable search and seizure as protected by Article I, Section 8 of the Pennsylvania Constitution. There was no federal Fourth Amendment claim made. *See*, *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995), and

Board of Education of Indep. Sch. Dist., No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002). Additionally, the students' parents also alleged that the tests violated their parental rights because the test results were disclosed to others, and the counseling required after a positive test interfered with their fundamental right to make decisions regarding their children's health care.

Although the case was brought under the Pennsylvania Constitution only, the Pennsylvania Supreme Court started its analysis by looking at the Fourth Amendment of the U.S. Constitution and the cases decided under it "as background and to understand the basis for our distinct approach under Article I, Section 8." *Id.* at 84. The Pennsylvania Supreme Court acknowledged the general rule that a search must be predicated upon probable cause, unless there are "special needs" which would make this requirement impractical. The U.S Supreme Court held that special needs exist in a public school due to its "custodial and tutelary responsibilities to its students, as well as its need for flexibility and informality in devising disciplinary structures to maintain an environment conducive to learning." *Id*. at 84 *citing Veronia School District 47J v. Acton*, 515 U.S. 646 (1995). Therefore, as long as a search is reasonable, a school official can search based upon less than probable cause.

Based upon *Veronia*, the Court, in this case, developed a balancing test, "weighing three basic factors: (1) the nature of the privacy interest at issue; (2) the character of the intrusion; and (3) the nature and immediacy of the governmental concern and the efficacy of the means employed to address that concern. . . . [p]ublic school students have a lower expectation of privacy than citizens generally; student-athletes' expectations of privacy are necessarily lower still, given pre-season physical examinations and the communal undress inherent in the locker rooms; the search was relatively unobtrusive; the district had a demonstrated need to address the well-documented drug crisis extant in the school; the district had an interest in deterring drug use among students generally and student athletes in particular, because of the increased risk of physical injury attendant upon the mixture of drugs and athletics . . .." *Id*. at 85.

In making its determination, the Pennsylvania Supreme Court also analyzed *Board of Education of Indep. Sch. Dist., No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822. (2002). The *Earls* decision dealt with a school district which required all middle and high school students to consent to random drug testing in order to participate in extracurricular activities. In *Earls*, the U.S. Supreme Court extended the decision in *Vernonia*. The *Earls* Court "observed initially that, because there is a 'special need' in the school environment to uncover or prevent drug usage, individualized suspicion is not a prerequisite to a valid search . . . it [is] appropriate [under *Vernonia*] to weigh the intrusion upon the children's Fourth Amendment rights against the promotion of a legitimate governmental interest." *Id*. at 86. The *Earls* Court did not perceive any controlling distinction between athletic and non-athletic activities; instead it determined that all participants in extracurricular activities have a diminished expectation of privacy. The U.S. Supreme Court also found collecting urine samples, and sharing the test results on a "need to know basis," was a permissible intrusion on privacy. Finally, it "removed any inquiry into the actual efficacy of the program . . . stating categorically that testing extracurricular participants is an effective means of achieving the goal of deterring student drug use generally." *Id*. at 86.

In comparing the Federal Constitution with the Pennsylvania Constitution, the Pennsylvania Supreme Court stated "[t]he cases decided under Article I, [Section] 8, have recognized a 'strong notion of privacy, which is greater than that of the Fourth Amendment'" and require a greater degree of scrutiny. *Id.* at 88, *citing Commonwealth v. Glass,*_ 562 Pa. 187 (2000). The state balancing test "involves balancing four factors: (1) the students' privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) 'the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search." *Id*. at 88, citing *In Re. F. B.*, 726 A.2d 361 (1999). "The reasonableness of a search will depend in part upon a measure of the reason and purpose for the search and the government's chosen means of effecting it. This consideration is appropriate, for if the method is not efficacious, then the government's need to conduct the intrusion is correspondingly diminished." *Id.* at 88. The search of a

person involves a greater privacy interest than the search of a thing.

Using the above four-pronged balancing test, the Court analyzed the drug testing in question. The Court determined that the intrusion that this policy inflicts on a student's privacy right cannot be viewed as trivial. While the Court acknowledged that a student's expectations of privacy are diminished in a school setting, the privacy of a student's excretory functions are diminished only modestly; there are few activities more personal than that of the evacuation of bodily fluids. Therefore, the student's privacy interest remains rather high and the intrusion pervasive. The Court recognized "that the intrusion is ameliorated somewhat by the fact that the policy states that all tests will be 'conducted according to established protocol,' and that '[u]rine or blood samples shall be collected by trained medical personnel in a manner that balances the values of privacy and confidentiality with the accuracy of the tests.'" In terms of notice, the Court ruled that there was sufficient notice.

Finally, in its analysis of reasonableness, the Court looked at the reasonableness of testing only the targeted group. The school district contended, generally, that it sought to deter drug use. More specifically, it also recognized the increased safety-risk for an athlete or driver to be impaired by drugs. However, aside from being a "role model," the Court did not believe that there seemed to be a reason for the testing of participants in non-athletic extracurricular activities. Furthermore, beyond the general desire to prevent drugs in school, the school district did not present any evidence that a drug problem actually existed in the school district, nor did it present evidence to indicate that the students selected for the random testing were at an increased risk of drug use. "Even if bootstrapping from a general perception of a youth drug problem in America warrants an assumption that some general drug problem exists in every school district, the under-inclusive and over-inclusive means chosen by the District here are not an efficacious manner of addressing that generic concern." *Id.* at 93.

Ultimately, the Court decided that a policy such as the one in this case will only be constitutionally acceptable if there is some actual showing of the need to have such a policy. However, the Court believed that "it hardly seems likely that the District will be able to prove the effectiveness of this policy in achieving the stated purpose, since it 'invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.'" *Id.* at 95 *citing Board of Education of Indep. Sch. Dist., No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822. (2002).

In conclusion, the Court held that the testing policy "cannot be deemed constitutional on its face because it authorizes a direct invasion of student privacy, with no suspicion at all that the students targeted are involved with alcohol or drugs, or even that they are more likely to be involved than students who are exempted from the policy." *Id.* at 93.

I. *T.S. and L.S. v. Penn Manor School District*, 798 A.2d 837 (Pa. Cmwlth. 2002).

The school district had a policy prohibiting the "transfer or disposition of 'drug look-a-likes.'" *Id.* at 838. According to the policy, a drug look-a-like is, for example, sugar that mimics the appearance of cocaine, or substituting oregano for marijuana. A ninth grade student arranged to buy marijuana in the school cafeteria. After the purchase, another student informed him that what he purchased was not marijuana. Upon learning that he did not have marijuana, the student threw it away. The next day school authorities asked him if he was in the presence of students who were involved in a marijuana transaction. He acknowledged the he was in the presence of students engaged in a marijuana transaction, but said that he did not "see anything." *Id.* at 838. Approximately a week later, the student was questioned again and admitted to buying what he thought to be marijuana. He was then charged with violating the policy prohibiting the transfer of "drug look-a-likes." The student was suspended out-of-school for ten days and subsequently, expelled for the remainder of the school year, only to be permitted back for the next year if he met several

conditions.

Upon being disciplined, the student filed an appeal with the Court of Common Pleas of Lancaster County pursuant to local agency law. Upon appealing, the student served the school district with interrogatories. The school district objected to the student's requests that sought pupil records. The student intended to compare himself to other students involved in similar incidents. The school district claimed that some of the documents requested were considered confidential pursuant to the United States Family Educational and Privacy Rights Act and, therefore, could not be compelled to be produced. The trial court sustained the school district's objections.

At the trial court hearing, the student alleged that he did not have adequate notice that purchasing a drug look-a-like was impermissible. On appeal to the Commonwealth Court, the student "assert[ed] that the trial court erred by not allowing them to make any inquiry, either through discovery or at trial, of the possible inequitable treatment of Student as compared to others involved in the same incident. . . . [and] repeat the charge that [the student was] not properly notified of the School District's policy proscribing the use of 'drug look-a-likes."' *Id.* at 839.

The Court decided that the student did not offer any justifiable rationale for concluding the that trial court abused its discretion. The trial court properly protected the privacy rights established by the United States Family Educational and Privacy Rights Act. The Court also rejected the student's contention that he had no notice because the "[s]tudent acknowledged that he had seen the policy contained in the student handbook and admitted that he knew he was not supposed to buy or possess drug look-a-likes in school. There is substantial evidence supporting the conclusion that Appellants were notified of the School District's drug and alcohol policies." *Id.* at 840.

J. *Bender v. Exeter Township School District*, 63 Pa. D. & C.4th 414 (Berks Co. 2003).

A 12-year-old girl, in the sixth grade, was overheard by a cafeteria worker using the word "kill" in a statement. There was a factual dispute surrounding the use of the word. The student alleged that she said '"I could just kill [her]' while the school district alleged she said 'I'm going to kill Katie."' Id. at 416. Perceiving this to be a threat against a classmate, the principal suspended the student. In order to further address the problem, school officials created a "'Confidential IST recall action plan'" which required the student to have "no contact . . . with the student involved in the threats. If [the student] makes any contact such as speaking to a student, she will receive another suspension." *Id.* at 416. The next day the student had a chance encounter in the school library with the classmate she allegedly threatened and said "hello" and/or told her she wanted to talk. School authorities immediately suspended the student. Following her suspension, an informal hearing was held with the student, her mother and grandmother, their attorney, and the principal. The informal hearing essentially consisted of the principal demanding a proof of residence from the student's mother and informing the mother that the student would be transferred to an alternative school. The student's attorney attempted to speak, only to be cut off by the principal. The principal then gave the mother a bag containing the student's belongings.

Upon being disciplined, the student, filed a motion for a preliminary injunction to enjoin the school district from going through with the transfer. The Court first analyzed the Confidential IST recall action plan as an agreement between the student and the school district. The Court found that the agreement was a contract as it had an offer, acceptance, and consideration. The Court also determined that the contact the student had with her classmate was "a chance and de minimis contact in the extreme." *Id.* at 420. However, nowhere in the agreement was it stated that expulsion or reassignment to another school is the penalty for contact with her classmate, it merely stated "another suspension." Accordingly, the Court held that the school district violated the agreement by reassigning the student to an alternative school because of her contact with her classmate.

Additionally, the Court determined that the school district did not have the authority to transfer the student to an alternative school. The Pennsylvania School Code explicitly states that only middle, junior and senior high school students can be placed into an alternative school. 24 P.S. § 19-1902-C(6). The student here was an elementary school student, and, therefore, outside the ambit of the statute.

The Court also recognized that the School Code requires an informal hearing before placing a student into an alternative school. The Court held that the meeting between the principal, the student, the student's mother, grandmother, and attorney, did not constitute an informal hearing. The Court noted that the principal did not let the attorney speak, and already had the student's belongings packed, indicating that the decision was already made, despite the "hearing."

Finally, the Court decided that the school district acted in an arbitrary and capricious manner. Despite the school district's concern over maintaining a violence free educational environment, the Court did not find the actions of the school district to be valid. In the Court's opinion:

[i]nvoluntarily placing a sixth-grade girl in a disruptive student's unit in an alternative school five weeks before the end of the school year because she said "hello" to another student or told the student that she wanted to talk to her is . . . arbitrary and capricious conduct under any definition and is prejudicial to the public interest. It most certainly is extremely harmful to the young girl's education and future psychological makeup. To place a sixth-grade girl in a school for troubled students, most of whom are there for drug and weapon offenses, should only be done in the most drastic of circumstances. This is certainly not one of those circumstances.

Id. at 425.

K. *D.C., K.J. and K.C. v. The School District of Philadelphia*, 2004 WL 362313 (Pa. C. C. P., Philadelphia, 2004)

The plaintiff students were all adjudicated delinquents, attending alternative schools, who attempted to enroll in a regular day school program. The school district denied them all enrollment. The School District required the students to first attend a transitional program before being reintegrated into a regular school. The students challenged the constitutionality of 24 PA.C.S. § 2134 which requires the students to attend the transitional school.

24 PA.C.S. § 2134 requires students living in a district of the first class who attend an alternative school to go to a transitional program before reentering a regular school. A student living in a district of the first class "is barred from *immediately* re-entering a regular school." *Id.* at 4. The students alleged that: (1) the statute "violates the Pennsylvania Constitution's ban on special legislation;" (2) "the statute violates the equal protection clause of the United States Constitution;" (3) "the statute violates the due process clause of the Pennsylvania Constitution;" and (4) "the statute violates the due process clause of the United States Constitution." *Id.* at 5. The Court found that the statute survived all of the student's constitutional challenges.

Article III Section 23 prohibits statutes that are "special" or "local" in nature that regulate "the affairs of counties, cities, townships, wards, boroughs or school districts." Another way to describe it is that "[a] special law is the opposite of a general law. A special law is not uniform throughout the state or applied to a class . . . [as a] general law is." *Id.* at 8, *citing Wings Field Preservation Assoc. L.P. v. Commonwealth of Pennsylvania Dept. of Transportation*, 776 A.2d 311 (Pa. Cmwlth.2001). The Court, in this case, ruled that the statute is not a special law. The Court, looking to the Pennsylvania Supreme Court, recognized that the General Assembly has constitutional authority to classify counties and townships by population. Pa. Const. Article III § 20. However, the General Assembly may not distinguish between members within a class. Furthermore, the Court stated "whether a statute is special legislation . . . does not ultimately depend upon

uniform treatment, but upon whether the statute in question is reasonably related to a legitimate state interest." *Id.* at 10. The statute in question only applies to the classification of school districts of the first class. It is just by happenstance that that classification only contains one constituent: the Philadelphia School District. Additionally, a one-member class is suspicious, but those suspicions are allayed if the class is an open one. That is, if a one-member class could never take on another member, it may be unconstitutional. In this case, the classification is open, other districts, were they to reach a certain population, would enter the class and the statute would apply equally to it.

The Court also determined that the statute was based upon a legitimate state interest. Consequently, it survived federal Equal Protection analysis. First, the Court indicated that:

"there is clearly a legitimate state interest in ensuring that students returning from placement and those in regular school program receive an education without the fear of disruption and/or violence. . . . The Court finds that the size of first class school districts clearly could provide sufficient grounds to warrant separate treatment. Moreover, population as a basis for classification is specifically provided for by the Pennsylvania Constitution, The General Assembly could have legitimately found that a large student population poses additional challenges and difficulties in administration and education not found in less populous school districts. Furthermore, the General Assembly may have recognized that students who have been adjudicated delinquent and who are returning from placement are more likely to be "lost" when returning directly to a regular classroom in a school district with a very large student population.

Id. at 12.

Next, the students alleged that the transition statute violated the Equal Protection Clause of the Pennsylvania Constitution. The students alleged that there was no difference between themselves and other similarly situated students in less populous districts. The Court rejected this allegation by pointing out that the classification of the statute is determined by the population of the school district in which the students live, which does not involved a fundamental right. Since no fundamental right is in question, the Court is to use the rational basis test. The Court rejected this assertion and said that there *is* a difference. A large district faces unique challenges not faced by smaller districts.

The Court also determined that the statute did not violate the Due Process Clause of the United States Constitution. In order to employ a due process analysis, the Court first had to determine the right to which the student was allegedly being deprived. The Court said the students allege "they were deprived of their entitlement to an education in a regular school setting without procedural due process protections." *Id.* at 17. The students viewed the assignment to a transitional program as a disciplinary transfer, which should be accompanied by due process protections. First, the Court made it clear that there is no a fundamental right to a public education. Second, the disciplinary transfer, that required transferring the students out of a regular classroom setting, had already occurred. Therefore, a move to a transitional program was not disciplinary in nature. In fact, as the Court noted, it was quite the opposite of disciplinary. The statute is designed to help re-integrate the student into a regular class room setting. Succinctly, the Court said "[t]he fact that [their] education is not occurring where the students prefer is not a sufficient basis to strike down the statute." *Id.* at 19.

The Court then addressed whether the transition statute created an irrebuttable presumption. An irrebuttable presumption is problematic because "an entitlement given by the state could not be taken away arbitrarily by a statutory presumption that cannot be challenged in a meaningful manner." *Id.* at 21. The Court decided "that the Transition Statute did not deprive the students of a constitutionally protected entitlement" because the students were *already* removed from a regular classroom setting. *Id.* at 21. The Court indicated that moving to a transitional program comes after removal from a regular classroom setting. The removal is where the question of protected entitlement is relevant, not the transfer to a transitional program. Therefore, the Court ruled that "[t]he Transition Statute does not create an irrebuttable presumption that has the result of depriving the students of a protected interest or entitlement." *Id.* at 21.

The Court further held that the transition statute does not violate Pennsylvania's constitutional due process provision. The students claimed that the transfer to a transitional program harmed their reputation, a transfer for which they should have been given the opportunity to challenge. The students contended that depriving them of the opportunity to challenge the transfer is a deprivation of due process. The Court disagreed. The Court stated that "[t]he Transition Statute and the attendant assignment of [the students] to an Alternate Education Setting do not inflict a separate and distinct harm to [the students'] reputations. Any harm that attached to [the students'] reputation was inflicted by their commission of a criminal act under which they were adjudicated delinquent and placed into placement."

L. *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (2002).

An eighth grade student created a web site that included "derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher, Mrs. Kathleen Fulmer and Nitschmann Middle School principal, Mr. A. Thomas Kartsotis." *Id.* at 851. Describing the website, the Court said:

Within the web site were a number of web pages. . .. Among other pages was a web page with the greeting "Welcome to Kartsotis Sux." Anther page indicated, in profane terms, that Mr. Kartsotis engaged in sexual relations with a Mrs. Derrico, a principal from another school, Asa Packer School. The web site also contained web pages dedicated to Mrs. Fulmer. One page was entitled "Why Fulmer Should be Fired." This page set forth, again in degrading terms, that because of her physique and disposition, Mrs. Fulmer should be terminated from her employment. Another animated web page contained a picture of Mrs. Fulmer with images from the cartoon "South Park" with the statement "That's Right Kyle . . . She's a bigger b____ than your mom." Yet another web page morphed a picture of Mrs. Fulmer's face into that of Adolph Hitler and stated "The new Fulmer Hitler movie. The similarities astound me." Furthermore, there was a hand-drawn picture of Mrs. Fulmer in a witch's costume. There was also a page, with sound, that stated "Mrs. Fulmer Is a B____, In D Minor." Finally, along with the criticism of Mrs. Fulmer, a web page provided answers for certain math lessons [The opinion inserted blanks in place of the profane words actually spelled out on the web site]. The most striking web page regarding Mrs. Fulmer, however, was captioned, "Why Should She Die?" Immediately below this heading, the page requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman [no address was given to submit payment]. The diagram consisted of a photograph of Mrs. Fulmer with various physical attributes highlighted to attract the viewer's attention [such as "Puke Green Eyes," and "Hideous smile"]. Below the statement questioning why Mrs. Fulmer should die, the page offered "Some Words from the writer" and listed 136 times "F___ You Mrs. Fulmer. You are A B___. You are A Stupid B___." Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.

Id. at 851.

Mr. Kartsotis believed these threats to be serious and convened a faculty meeting, and contacted the local police and the Federal Bureau of Investigation. Mrs. Fulmer suffered from extreme emotional and physical distress, and consequently went on medical leave. The moral of the school and staff "was comparable to the death of a student or staff member." *Id.* at 852.

The school district took no immediate action to confront or punish the student, nor did it refer the student for psychological evaluation. However, after the end of the school year, the school district sent a letter to the student's parents informing them of the district's intent to issue the student a three-day suspension, which was extended to ten days after an informal hearing. An expulsion process was initiated shortly after, resulting in the student's expulsion.

The student appealed the expulsion to the Court of Common Pleas of Northampton County. The student contended that the school district violated his First Amendment rights. The Court of Common Pleas disagreed. The student appealed to the Commonwealth Court, which upheld the Court of Common Plea Court's decision. Subsequently, the student appealed to the Pennsylvania Supreme Court. The Supreme Court granted allocatur to review the Commonwealth Court's decision on the issue of whether the student's First Amendment rights were violated.

The Supreme Court indicated that a school district must balance a student's constitutional rights with preservation of order, a proper educational environment, and inculcate the habits and manners of civility. The school district contended that the student made a "true threat" which is not speech protected by the First Amendment. The Court, agreed that true threats are not protected and listed the "[f]actors to be considered [when evaluating a statement to determine if it is a true threat], which included how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence." *Id.* at 656. The Court then analyzed the contents of the web site and decided that, while it does include parts that could be arguably perceived as a threat, that it

did not constitute a true threat, in light of the totality of the circumstances. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm. This conclusion is supported by the fact that the web site focused primarily on Mrs. Fulmer's physique and disposition and utilized cartoon characters, hand drawings, song, and a comparison to Adolph Hitler.

Id. at 859.

The actions of the school district, after it discovered the web site, demonstrated its lack of fear of violence. The school district allowed the student to attend class and extracurricular activities until the conclusion of the school year. The Court said: "The lack of immediate steps taken directly against [the student], and the lack of immediate notification of his parents about the web site, for the extended time period that passed in this case, strongly counters against a conclusion that the statements made in the web site constituted true threats." *Id.* at 860.

Upon deciding the speech was not a true threat, the Court then considered if the school district may nevertheless punish the student for his speech on the web site. As the Court noted, a school district has the right to maintain order and create an atmosphere conducive to learning. The school district "'must be able to show that its action [issuing a punishment] was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Id.* at 861 *quoting Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). However, the Court indicated that while a school district may restrict speech if it would cause a disruption, it does not have to wait for an actual disruption before it takes action if it is reasonable to expect a disruption from such speech. The Court concluded by stating that while "a student does not shed his or her constitutional right to free speech in the school setting, a school district might, within constitutional bounds, prohibit speech and punish a student for speech, if the school sustains its burden of establishing that the student speech materially disrupts class work, creates substantial disorder, invades the rights of others or it is reasonably foreseeable that the speech will do so." *Id.* at 861 - 862.

In order to determine whether the school district may regulate the student's speech, the Court began its analysis of the student's web site with the location of the speech. The Court noted that a school district can exert much more control over student speech if it is on campus. The Court found that a web site was within a sufficient nexus with the school district to be considered on-campus speech. The site could be and was accessed at school. The student encouraged other students to look at the site while at school. The Court held that "where speech that is aimed at a specific school and/or campus personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id.* at 865. The Court pointed out that speech by the student was unique in case law as it was not political, latent (i.e.: the listener had to go look for it on the internet, the speech was not brought to the listener) and was not expressed at a school event, nor did the school sponsor the speech. Therefore, the Court decided that punishment for "lewd, vulgar, and plainly offensive language" is permissible for allowing such language "undermines the basic function of a public school," including an environment conducive to learning and teaching the manners of civility. *Id.* at 868. The Court found that the student's language did, indeed, cause

significant disruption to the educational environment. "[I]t was inevitable that the site would pass from students to teachers and have an impact upon the school environment. . .. The web site was a 'hot' topic of conversation even prior to faculty discovery. Finally among the staff and students, there was a feeling of helplessness and low morale. The atmosphere of the entire school community was described as that as if a student had died. Finally, the disruption also involved parents. Certain parents understandably voiced concerns for school safety and question the delivery of instruction by substitute teachers. In sum, the web site created disorder and significantly and adversely impacted the delivery of instruction." *Id.* at 674. Therefore, the Court ruled that the school district's disciplinary action against the student was not violative of the First Amendment.

M. *Rhames v. School District of Philadelphia*, 2002 WL 1740760 (E.D.Pa.)(unreported)

The student was involved in an altercation with a classmate in a hallway. The student alleges he was defending himself. During the scuffle, a second classmate came from behind and struck the student in the temple with the butt of a gun, at which time, school security was called to intervene. The two classmates fled, and were pursued by security. The student was arrested and detained.

The student brought an action against the school district in federal court for false arrest, false imprisonment, unlawful detention and malicious prosecution. The school district moved for summary judgment. The Court granted the motion for summary judgment on all claims. The Court pointed out that in order to succeed on the claims for false arrest and imprisonment, and malicious prosecution, the student must establish that the school district had no probable cause for his arrest. "Probable cause exists for an arrest when, at the time of the arrest, the facts and circumstances within the arresting officer's knowledge are 'sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.'" *Id.* at 3, *quoting Sharrar v. Felsing*, 128 F.3d 819 (3rd Cir. 1997). In order to determine if there was probable cause, "the court should assess whether the objective facts available to the arresting officers at the time of the arrest were sufficient to justify a reasonable belief that an offense had been committed." *Id.* at 3. The school district produced a signed affidavit by the student in which the student admits that he '"preemptively punched [the classmate] in the face several times.'" *Id.* at 3. The student alleges that he was acting in self-defense. The Court dismissed the student's claim for false arrest and imprisonment, and malicious prosecution because the student did not provide any evidence whatsoever to dispute the affidavit, that he was acting in self-defense, and did not deny that he struck his classmate. Consequently, the student's claims of conspiracy to commit false arrest and imprisonment, and malicious prosecution were also dismissed because the underlying acts were not proven. Essentially, the Court dismissed all of the student's claims against the school district because he offered no evidence, whatsoever, for any of his claims.

N. *Rinker v. Sipler*, 264 F.Supp.2d 181 (Pa. M.D., 2003).

A student brought a Fourth Amendment claim for an unreasonable search and seizure. The student was escorted to the assistant principal's office for suspicion of possessing marijuana, on the school bus, on the way to school. During the conversation, the assistant principal and a security officer noticed that the student appeared incoherent and smelled of marijuana. Based on this, the assistant principal decided to search the student. The security officer, at the direction of the assistant principal, "had [the student] pull out his front and back pockets. [The security officer] then [placed his hands in [the student's] pockets to make sure that there was nothing inside of them. [The student] was then ordered to take off his socks and shoes, and a walking cast that he wore because of a recent ankle sprain. . .. [He] was told to lower his pants. He lowered his pants to his knees. [The security officer] then ran his hands around the interior of [the student's] boxer shorts to make sure nothing was hidden inside. [The student] was not ordered to remove his boxers and did not do so." *Id.* at 184. After this, the assistant principal searched the student's bookbag and locker. Nothing was found. Subsequently, the assistant principal sent the student to the nurse to be examined. The nurse examined him and performed some tests, and thought he looked like he was under the influence of marijuana. After the examination, the student gave a written statement admitting to smoking marijuana four days before.

Finally, the assistant principal "asked [the student] to give a sample for urinalysis and he agreed to do so. [The student] drank some water before attempting to give a urine sample. [The security officer] gave [the student] an additional drink of water and took him into a bathroom not usually open to students. The bathroom was smaller than that used by students, having only one toilet and no urinals. As [the student] attempted to produce a sample, [the security officer] stood behind him. [The student] was unable to urinate. [The security officer] ran the water in the sink and is alleged to have splashed water on [the student's] neck. Eventually, [the student] was taken to a larger bathroom, one used by students, and produced a sample" which came back negative. *Id.* at 185.

The student was issued a ten-day out-of-school suspension. The student's mother was called, and arrived at the school. The assistant principal asked her to sign a waiver of expulsion hearing form. She refused, but was told that the student would be expelled regardless of her signature, or if a hearing was held.

The student brought an action against the school district in United States District Court for the Middle District of Pennsylvania, for violating his Fourth and Fourteenth Amendment rights. The school district moved for summary judgment, which was granted on all federal claims. The student alleges that the search of his person, possessions, and locker was a violation of his Fourth Amendment right to be free from unreasonable searches. The Court stated that:

"[u]nder ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Id. at 187 *quoting New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

With respect to in-school searches, probable cause is not necessary, however, generally, individualized suspicion is necessary. The Court decided that the school district had individualized suspicion that the student may have been in possession or under the influence of marijuana. The order to search the student came only after the assistant principal questioned him and noticed he smelled of marijuana and looked like he was under the influence of drugs. The Court held that this was sufficient to give the assistant principal individualized suspicion and, subsequently, order a search.

The Court also found that the scope of the search was reasonable. A search "is reasonable in scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of he student and the nature of the infraction." *Id.* at 189, *quoting New Jersey v. T.L.O.,* 469 U.S. 325 (1985). The assistant principal had a reasonable basis to search. The Court ruled that how the search was conducted, as detailed above, was reasonably related to the objective of discovering if the student possessed marijuana. There was no nudity, women present, or inappropriate touching. The Court did not find it significant that the examination came after the search.

Regarding the urinalysis, the student claimed it was conducted in a constitutionally unreasonable manner. The Court rejected this claim and decided that there was nothing unreasonable about it. The Court decided that the manner in which the urine is collected is the touchstone for reasonability. The Court, after reciting the facts listed above regarding how the urine samples were produced, said that "[i]t did not intrude on the essential level of privacy found in a public bathroom." *Id.* at 191.

The student also raised a procedural due process claim. The student claimed that his procedural due process rights were violated because he was expelled without a hearing. The Court rejected this allegation because the student had not yet been expelled. The student's mother left the meeting with the principal, with

the mistaken impression that the student was expelled. However, no school document indicated that the student was expelled. Indeed, the school documents reflect that "a hearing or waiver would be necessary before any expulsion." *Id.* at 191. The student's mother received, in writing, from the school district, this same information.

Finally, the student brought an Equal Protection claim against the school district. However, the Court noted that there was no evidence presented to support the allegation that the student was treated differently than his classmates. The student merely triggered sufficient individualized suspicion. There was no evidence presented to indicate that he was singled out, and therefore, as the court held, there was no equal protection violation.

O. *Giambra v. Wyoming Area School District*, Docket No. 54 E of 2002 (A Pending Case before the Court of Common Pleas of Luzerne County)

A school district policy prohibits the students from using drugs or alcohol or attending an event or party where they are being used. A party subject to this policy can be off of school property, after school hours, and not including school personnel or other students. A violation of this policy results in a suspension from extracurricular activities. No classroom or academic suspension will result. The student in this case allegedly attended a party, after school hours and off of school grounds, which included the consumption of alcohol. At the student's request, a due process hearing was held. After an investigation and hearing, the district found that the student violated the policy. She was subsequently issued a fourteen day suspension from extracurricular activities. However, before the suspension was implemented, the student successfully acquired a preliminary injunction preventing its enforcement until after the conclusion of this case. Consequently, the student was never barred from participation in extracurricular activities.

The student argues that the policy unreasonably interferes in her parents' right to: raise their child; freedom of personal choice in family matters; and their privacy rights because the policy is too broad in that it regulates activities that are not school related. The student also alleges that the policy violates her freedom of association by regulating where she may or may not go. Furthermore, the student alleges that the notification of suspension damages her reputation.

The school district argues that its policies were enacted validly according to the procedures promulgated by the Pennsylvania School Code. These policies are designed to protect the lives and safety of students and promote good social behavior and a drug free educational environment. In support of its argument that the school district may regulate off-campus alcohol consumption, the school district cites *King v. Hempfield School District*, 8 Pa. D. & C. 4th 48, 52 (Lancaster C.C.P. 1990), which stated that "[a] school policy against alcohol consumption cannot be considered an unreasonable use of discretion." The school district points out that the *King* decision recognized that the conditions a school district sets for participation in extracurricular activities should be upheld as long as they are reasonable. The Public School Code does not define "reasonableness," however the Pennsylvania State Board of Education regulations define a reasonable rule as one that "uses a rational means of accomplishing some legitimate school purpose." 22 Pa. Code 12.3. The school district believed that deterrence of drug and alcohol use is a legitimate school purpose, and their policy a rational means to affect that purpose. The student argued that 24 P.S. §5-510 of the School Code limits a school district's authority to impose discipline. §5-510 authorizes school boards to "adopt and enforce such reasonable regulations" regarding "the conduct and deportment of all pupils attending the public schools in this district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school." However, the school district pointed out that Section 511 of the School Code allows broader authority than does Section 510 with respect to athletics, games of any kind, school publications, debating, forensic, dramatic, musical, and other activities related to the school program. The discipline in this case regarded extracurricular activities, not academics. Therefore, the School District is arguing that the limitations of §5-510 do not apply.

The student's parents also claimed that the school district violated their right to raise their children free from governmental interference by regulating off-campus behavior. Specifically, the parents contended that in regulating off-campus behavior, the school district violated their First Amendment liberties, as well as their privacy rights regarding familial association and raising one's children which are protected from state action by the Fourteenth Amendment. In response, the school district contended that the privacy rights regarding the raising of one's children, and familial association, are not absolute. The school district argued that a state action is legitimate if it has only an incidental affect on these rights. Therefore, since the school district polices were directed at reducing drug and alcohol abuse, it only had an incidental affect on the parents' First Amendment and privacy rights regarding familial association and raising one's children.

The student also argued that the policy violated her constitutionally protected freedom of association. The school district argued that there was no violation because this right only applies to intimate or private relationships and association with underage drinkers is not a protected intimate association. Finally, the school district argued that the policy had only an indirect affect on the student's right to association and served the legitimate interest of reducing drug and alcohol use.

The student filed a motion for judgment on the pleadings which was dismissed. The parties are presently in discovery.

V. CHARTER SCHOOL LITIGATION

A. *Boyertown Area School District vs. Pennsylvania Department of Education.* 797 A.2d 421 (filed May 2, 2002, Pa. Cmwlth.), 2002 WL 826610, 39 SLIE No. 20. A number of school districts filed "appeals" from the decisions made by the Department of Education to withhold subsidy in order to pay so-called cyber charter schools. The appeals were filed pursuant to the Administrative Agency Law. The Administrative Agency Law provides that no "adjudication" is valid unless the party that is affected by the adjudication was given advance notice and a hearing. The Department of Education argued that its decision to withhold subsidy was not an adjudication because, according to the Department, it was a ministerial act under the Charter School Law. The appeals were argued before the court in March, 2002, *en banc*. In a resounding rejection of the Department's position, the Commonwealth Court ruled that the decision to withhold funds was an "adjudication" and that the Department was required to provide notice and a hearing before withholding funds from school districts. There was a disagreement among the judges, however, as to the issues that could be raised by school districts at the hearings. Five judges appeared to believe that any issue could be raised, including the issue whether the charter of any charter school was valid. Two judges believed that school districts that objected to withholding to pay a charter school could not challenge the validity of the charter.

A Petition for Allowance of Appeal that was filed by the PDE has been denied. In addition, as will be addressed later, in *PSBA vs. Zogby,* the Commonwealth Court purported to clarify its decision in *Boyertown* by stating that only limited issues could be adjudicated in the administrative hearing before PDE. Essentially, under that purported clarification, the only issue that could be adjudicated was whether the bills by the charter schools were correct in the sense of whether the students were residents of the school district and actually enrolled in the charter school.

In May, 2003, the Secretary of Education personally met with school district solicitors and administrators involved in the litigation to discuss the many problems inherent in the Charter School Law as written and applied and to see if there could be a reasonable resolution of the dispute short of scheduling scores of administrative hearings.

B. *Pennsylvania School Boards Association vs. Zogby,* 802 A.2d 6 (Pa.Cmwlth.2002), Petitions for Allowance of Appeal have been filed by both sides and are pending at Nos. 482 and 551 MAL 2002. In this case, PSBA and four school districts challenged the legality of cyber charter schools and asserted that before any subsidy could be withheld from school districts, the Department of Education was required by the Administrative Agency Law to provide prior notice and an opportunity to be heard. The action was filed pursuant to both the Commonwealth Court's original and appellate jurisdiction.

A Motion for a Preliminary Injunction and Writ in Peremptory Mandamus was filed against the

Department of Education for purposes of prohibiting the Department from withholding subsidies from school districts in order to pay cyber schools. The preliminary injunction was denied upon finding that the school districts will not be irreparably harmed.

Ruling on preliminary objections that were filed by the Department of Education, the Commonwealth Court followed its decision in *Boyertown* and concluded that the Department of Education had to provide notice and hold a hearing in accordance with the Administrative Agency Law. Because the Commonwealth Court ruled that a hearing was required under the Administrative Agency Law, the Court ruled that it could not address the issues raised pursuant to the Court's original jurisdiction and the Court dismissed those claims. Then, in *dicta*, several of the judges of the Commonwealth Court discussed two issues in what can only be described as dicta. A majority modified the *Boyertown* decision by holding that the issues to be litigated in any such administrative hearing would be limited. Four members of the Court said:

*"When a school district refuses to pay, the Secretary has no authority to decide that the charter was granted illegally and to decline to withhold payment from the school district on that basis. * * * [T]he statute gave the Secretary no discretion as to whether the grant of the charter was proper, vesting sole discretion in the chartering school district and the State Charter School Appeal Board. A contrary construction of the statute would mean that no grant of a charter school (sic) would ever be final because a non-chartering school district could always say the charter school was not established in accordance with the Charter School Law or was not carrying out its educational mandate."*

802 A.2d at 10-11.

The second element of dicta by the Commonwealth Court was articulated by only a plurality of the Court. Specifically, four judges concluded that cyber schools were not "prohibited" by the Charter School Law. It was noteworthy that the four members of the Court who joined in that conclusion did not rule that cyber schools were "authorized" by the Charter School Law, but instead merely were not prohibited by the Charter School Law.

C. *Downingtown Area School District vs. Pennsylvania Department of Education* (Pending before the Commonwealth Court at No. 1627 C.D. 2002) This is an appeal pursuant to the Administrative Agency Law from a decision by the Department of Education to withhold subsidy at the special education tuition rate and pay it to the Collegium Charter School. In this case, a child was enrolled in the Downingtown Area School District and, while enrolled, was evaluated to determine if the child was a child with disabilities. It was concluded that the child was not. The child then enrolled in the Collegium Charter School, who reevaluated the student and labeled the student as a student with disabilities. Colligium then began billing Downingtown at the special education rate for the student. Downingtown asked for the evaluation records as well as the entire IEP. Collegium refused to provide the information, providing only the cover sheet of the IEP. As a result, Downingtown refused to pay the special education rate. The next time that Downingtown heard about the issue was when it received notice that subsidy was being withheld by the Department. No prior notice was provided and no hearing was convened. In accordance with the Commonwealth Court's decision in *Boyertown*, an appeal was filed and is pending in the Commonwealth Court. The Commonwealth Court remanded the matter to the Secretary of Education to conduct hearings in accordance with *Boyertown.*

D. *Central Dauphin School District vs. Infinity Charter School.* The charter school applicants filed an application with the Central Dauphin School District to create a school for gifted students. After hearings in accordance with the Charter School Law, the School Board rejected the application for a number of reasons. A reason of statewide significance was because the school would be discriminating on the basis of intellectual ability if it was going to be a school for the gifted, as it claimed to be. The Charter School Law clearly prohibits such discrimination. The Charter School Law provides that: "a charter school shall not discriminate in its policies or practices on the basis of intellectual ability, except as provided in paragraph (2), or athletic ability, measures of achievement or aptitude, status as a person with disability, proficiency in the English language or any other basis that would be illegal if used by a school district." 24 P.S.§17-1723-A(b)(1). On appeal to the Charter School Appeal Board, the Appeal Board reversed and found that the school would not discriminate on the basis of intellectual ability. Although the applicant clearly stated that it was going to be a school for the gifted and advertised itself in that fashion, there were about two sentences of testimony that they would accept all students, whether they were gifted or not. The Appeal Board ruled that such limited testimony was sufficient to get around the prohibition.

On appeal to the Commonwealth Court, the Court affirmed in 4-3 decision. The Court first found that the Infinity Charter School ("Infinity") would not discriminate in favor of mentally-gifted children. The Court looked to the admissions policy of Infinity, which provided that the school would not discriminate in admissions and would use a lottery system in applications exceeded openings. Because all students were eligible to participate in the charter school, the
Court found that there was no violation of Section 17-1723-A(b)(2) of the Charter School Law.

The Court next found that there was sustainable support from the community for the proposed charter school. The Court agreed with the Charter School Appeal Board that testimony from twenty (20) individuals who spoke at public hearings in support of the school provided a record of community support.

The third factor considered by the Court in approving the charter was the adequacy of the financial plan. The School District had argued that the budget was inadequate because teacher salaries were too law and too little money was budgeted for physical education, arts, and computers. The Court did not believe that this level of detail was required of charter schools so long as the school was able to provide a comprehensive learning experience for students.

The Court then determined that the physical plant proposed by the charter school was an adequate description of the school under the Charter School Law. The Court agreed with the Charter School Appeal Board that the provision of an address and description of the facility was adequate.

The fifth factor taken into consideration by the Court was that the charter school had provided adequate information in its application regarding the qualifications and background of the school staff. The School District had argued that the Charter School Law required the charter school to identify the names of all faculty and staff, and reports and clearances for each of these individuals. The Court found that it was unrealistic that the charter school would have all of his information in place during the application process, and that it had met its burden by supplying reports and clearances for key staff. *Id.* at 204.

Finally, the Court held that the charter school achieved the Charter School Law's objectives to provide an innovative educational setting. The Court looked to the record regarding the differences in the gifted programs offered by the charter school and the school district, and found the charter school's program innovative and distinct. *Id.* at 205.

The dissenting judges focused upon the charter school's self-declared mission as a school for mentally-gifted students. The dissent believed that the charter school's stated intent not to discriminate could easily be subterfuge. In addition, the the dissent noted that the charter school's "policy" of non-discrimination was not noted in either its application or its marketing materials. *Id*. at 207.

E. *Voyager Charter School vs. Garnet Valley School District*, (Filed 5-27-03 at No. 03-03359 by the Court of Common Pleas of Delaware County), *rev'd*, ___A.2d ___ (2004). The Voyager Charter School is another school for the gifted. After hearings, the school board voted to reject the charter application. Like the Central Dauphin case, the school board here believed that the school was unlawfully discriminating on the basis of intellectual ability. Among the many indications of such discrimination in its promotional material and application, was a statement in the application that the school's curriculum would not be appropriate for non-gifted learners. Another basis for the rejection of the application by the school board was the concept of intellectual honesty. It is intellectually dishonest, and a factual misrepresentation, to claim to be a school for the gifted if the school will take anyone and in light of the fact that Chapter 16, the regulations governing gifted education in school districts, does not apply to charter schools. Another reason why the application was denied was because the school had no location. The applicants simply advised the school district of a half dozen or so different possible sites for the school.

The applicants filed a Petition for Appeal with the Court of Common Pleas of Delaware County. The Courts do not rule on the merits of the petition, but are restricted to determining whether the Petition for Appeal was sufficient. If so, the court is to send the case to the Charter School Appeal Board for review of the substantive validity of the school board's denial. One of the items that the statute requires on the Petition for Appeal is a statement of the location of the school. In this case, the charter school applicants simply stated that the school would be located in the school district. The Court found that such a statement was insufficient and the Court dismissed the appeal.

On appeal, in an unreported decision, a panel of the Commonwealth Court, reversed in a 2-1 decision. Ignoring the arguments of the School District and failing to address all of the issues raised, the Court issued a limited decision that the residents who sign the petition need not be told of the address of the facility. At the time that this handout was prepared, a Petition for Reconsideration was filed with the Commonwealth Court.

VI. **Grievance Arbitration.**

A. Implied Just Cause. *Hanover Public School District vs. Hanover Education Association,* 814 A.2d 292 (Pa.Cmwlth. 2003), *aff'd*, 839 A.2d 183 (Pa. 2003) In this case, a teacher was suspended for three days without pay for hitting a student's hand for the purpose of slapping a computer mouse out of the student's hand. Despite the absence of a just cause or statutory savings clause in the collective bargaining agreement and despite the absence of anything in the collective bargaining history of the parties, the union filed a grievance and submitted the dispute to arbitration. The union argued that there was "implied" just cause because the contract defined the contract year and the salary to be paid to the employee. The arbitrator ruled that the contract year and salary provisions of the collective bargaining agreement were not violated as a result of the suspension, but that all collective bargaining agreements contain implied just cause. The arbitrator said:

"The only basis on which Mr. Albrecht's grievance would be arbitrable would be under the theory of implied just cause. As is stated in Elkouri and Elkouri, How Arbitration Works, Fifth Edition, at page 886: ' . . . many arbitrators would imply a just cause limitation in any collective bargaining agreement. For instance, Arbitrator A. Dale Allen, Jr., held that 'a just cause limitation on discharge is implied in any labor agreement. The reasoning is that '[i]f management can terminate at any time for any reason, such as one finds in the employment at will situation, then the seniority provision and all other work protection clauses of the labor agreement are meaningless." This is reiterated in Fairweather's Practice and Procedure in Labor Arbitration, Fourth Edition, which states at page 273: " the typical labor agreement expressly, or impliedly, creates a right to employment unless the employee engages in conduct justifying discharge for cause, just cause, or proper cause. Further, there is no management rights clause in the parties' agreement, and Fairweather notes: 'absent contractual language that expressly reserved to management the right to discipline or terminate an employee in a particular situation, arbitrators turn to the principal of just cause.' Based on the generally accepted principle of implied just cause, Mr. Albrecht's grievance contesting the three day suspension as being without just cause is substantively arbitrable."

Arbitrator's Decision at 6.

Ruling that the matter was arbitrable, the arbitrator denied the grievance, concluding that the school district had just cause to suspend the teacher. The Arbitrator found that the teacher committed an assault and battery on the student. The arbitrator found that the school district properly suspended the teacher with a last chance warning and ruled that satisfactory ratings do not excuse such improper conduct or insulate the employee from discipline.

The school district filed an appeal to the Court of Common Pleas of York County challenging the arbitrator's conclusion that the matter was substantively arbitrable. In a decision issued June 21, 2002, the York County Court of Common Pleas ruled that the matter was governed by the Commonwealth Court's decision in *North East School District vs. North East Education* Association, 542 A.2d 1053 (Pa.Cmwlth.1988). On appeal to the Commonwealth Court, that Court affirmed the trial court's decision. The Supreme Court affirmed with a 5-2 *per curium* order.

B. *Montgomery County Intermediate Unit vs. Montgomery County Intermediate Unit Education Association*. 797 A.2d 432 (Pa.Cmwlth.2002) In this case, the Intermediate Unit terminated a professional employee. Despite the absence of a "just cause" provision in the collective bargaining agreement, the discharged employee and union filed a grievance and submitted the dispute to arbitration. The Intermediate Unit challenged the substantive arbitrability of the dismissal in light of the absence of a "just cause" provision. The parties agreed to bifurcate the case and the arbitrator ruled that the matter was arbitrable,

finding that just cause was implied in the collective bargaining agreement. The Intermediate Unit filed an appeal with the Court of Common Pleas of Montgomery County. The Court reversed, finding that just cause is not to be "implied" into all collective bargaining agreements. The union filed an appeal to the Commonwealth Court, which ducked the issue. The Commonwealth Court ruled that the arbitrator's ruling that the dispute was arbitrable was not appealable. The Commonwealth Court concluded that appeals must wait for completion of the arbitration process. According to the Commonwealth Court, "[t]his approach increases the likelihood of more efficient, uninterrupted arbitration and, hopefully, resolution beyond the courthouse walls." (slip opin. at 4).

3. *State System of Higher Education vs. Association of Pennsylvania State College and University Faculties*, 834 A.2d 1235 (Pa. Cmwlth. 2003). The faculty union filed a grievance in response to the university implementing a chemical biotechnology program without obtaining approval from the union. The arbitrator ruled in favor of the union and directed the University to cease and desist from such an action. The University appealed and the Commonwealth Court reversed.

The Commonwealth Court reviewed the standard for review in an arbitration case, citing the Supreme Court's decision in *State System of Higher Education (Cheyney University) vs. State College & University Professional Association*, 560 Pa. 135, 743 A.2d 405 (1999). The Court then undertook a detailed review of the facts to determine if the issue in the case is within the terms of the collective bargaining agreement and if the arbitrator's decision can be rationally derived from the collective bargaining agreement. In that detailed review, the Court noted that the University's decision to approve curriculum or to make other program-related decisions is not subject to mandatory collective bargaining by virtue of Section 702 of the Public Employee Relations Act. 43 P.S. §1101.702. The Court also noted that the collective bargaining agreement did not expressly mention the issue that was subject to the dispute.

After essentially determining that the matter was not determined by the arbitrator in accordance with the collective bargaining agreement, the court then addressed two arguments by the union that the arbitrator's decision should be upheld notwithstanding the fact that the decision did not meet the standards of the essence test.

The union argued that there was settlement of a prior grievance that compelled the result reached by the arbitrator. The court rejected that argument after suggesting that there was insufficient testimony that a grievance had been filed in the prior dispute and finding that there was nothing in the agreement that the University gave up any of its management prerogatives.

Finally, the union argued that the past practice of the parties supported the arbitrator's decision. The Court rejected that argument after concluding that a past practice is not binding on a public employer unless that practice is subject to mandatory bargaining under the collective bargaining agreement. *See also, South Park Township Police Association vs. Labor Relations Board*, 789 A.2d 874 (Pa.Cmwlth. 2002), *Petition for Allowance of Appeal denied*, 569 Pa. 727, 806 A.2d 864 (2002).

C. *Parilla vs. IAP Services, Inc.*, ___ F.3d ___, 2004 WL 1067931 (3rd Cir. 2004). A former employee filed suit against her former employer under Title VII of the Civil Rights Act of 1964. Invoking the provisions of an arbitration agreement in the employee's employment contract, the employer filed a motion to compel arbitration. The trial court refused, holding that the arbitration agreement was not enforceable because unconscionable provisions permeated the arbitration provisions of the employment contract to such an extent that they could not be severed. The Third Circuit reversed. In reversing the trial court's decision, the third Circuit noted and held the following points:

· Arbitration agreements are enforceable to the same extent as other contracts.
· A party to a valid and enforceable arbitration agreement is entitled to an order compelling such arbitration.
· The courts will look to state law to determine whether the arbitration agreement is valid.
· Applying the relevant state contract law, a court may also hold that an agreement to arbitrate is unenforceable based on a generally applicable contractual defense, such as unconscionability.
· If a contract or term of the contract at the time that the contract is made is unconscionable, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable terms, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
· A provision requiring that an employee present his/her claim within 30 days is substantively

unconscionable. Such a provision is unreasonable and unduly favorable to the employer. It also prevents an employee from invoking the continuing violation and tolling doctrines.

· A provision in an arbitration agreement that "other than arbitrator's fees and expenses, each party shall bear its own costs and expenses, including attorney's fees" is substantively unconscionable both under state and federal law claims for attorneys' fees and costs that may be otherwise awarded to a prevailing employee.

· A provision that requires the confidentiality of the arbitration proceedings is not unconscionable.

· A provision requiring arbitration of Title VII disputes and expressly prohibiting administrative or judicial proceedings is not unconscionable.

· A provision prohibiting the parties from selecting an arbitrator who resides in a particular location is not unconscionable.

· A provision that requires the losing employee to pay for the costs of arbitration is not unconscionable on its face. However, if the employee can prove that he or she cannot pay the costs reasonably anticipated in the arbitration, such a provision would not be enforceable. An arbitration provision that makes the arbitral forum prohibitively expensive for an employee is unconscionable.

· An employer cannot "cure" unconscionable provisions by "waiving" them.

· An arbitration agreement that contains multiple unconscionable provisions may be enforced and the unconscionable provisions severed. Where disregard of the offending conditions leaves a fair agreement that will accomplish the primary objective of the parties, enforcement of that agreement will normally be appropriate. Severance is inappropriate when the entire clause represents an integrated scheme to contravene public policy.

D. Lloyd vs. Hovensa, LLC, ___ F.3d ___ (3rd Cir.2004), 2004 WL 1067934. The employer required all applicants for employment to sign an arbitration agreement as a condition of the application. An unsuccessful applicant filed a Title VII suit and a suit under various common law theories. The employer filed a motion to stay the judicial proceedings pending arbitration and a motion to compel arbitration. Such an agreement is generally enforceable.

VII. TORT CLAIMS ACT.

A. *Gloffke vs. Robinson*, 812 A2d 728 (Pa.Cmwlth. 2002), *aff'd*, 835 A.2d 1288 (Pa. 2003). This was a personal injury suit by a woman who was rear ended by a bus belonging to the Lehigh & Northampton Transit Authority ("LANTA"). After a jury trial, at which LANTA was found liable, the jury did not award any non-economic damages because the found that she did not sustain a permanent loss of bodily function, a requirement under the Political Subdivision Tort Claims Act for an award of non-economic damages. The Plaintiff argued that the limitation on damages that is contained in the Political Subdivision Tort Claims Act is unconstitutional as being violative of Equal Protection. The Commonwealth Court disagreed and ruled in favor of LANTA. A Petition for Allowance of Appeal was filed and the Supreme Court granted it with an order that provided as follows: "AND NOW, this 20th day of February 2003, the Petition for Allowance of Appeal is GRANTED, LIMITED to the question of whether the sovereign immunity provision (▶42 Pa.C.S. § 8528), and the local governmental immunity provision (▶42 Pa.C.S. § 8553), violate the due process and equal protection clauses of the Pennsylvania and U.S. Constitutions."

The difference between the two provisions is that under the sovereign immunity statute, there is no need to prove permanent loss of bodily function in order to recover non-economic damages. The Plaintiff pointed out that the sovereign immunity statute rather than the Political Subdivision Tort Claims Act covers some public transportation systems, like SEPTA. Therefore, the Plaintiff argued that there is an irrational distinction based upon whether the public transit authority is covered by the sovereign immunity law or by the Political Subdivision Tort Claims Act. In a *per curium* order, the Supreme Court affirmed the Commonwealth Court's ruling that the different treatment was constitutional.

VIII. MISCELLANEOUS.

A. **Retirement System**. Purchase of Prior Part-time Service Credit. *Pennsylvania School Boards Association vs. Public School Employees' Retirement System*, ___ A.2d ___ (Pa. Cmwlth., filed August 12, 2002 at No. 188 M.D. 1999, appeal filed to the Supreme Court, and at the time that this update was prepared, we are awaiting decision from Supreme Court). The Retirement Board adopted a new Policy Statement in

1999 that, for the first time, permitted members of the retirement system to purchase prior part-time service that was not creditable under the system. Specifically, hourly part-time employees who work fewer than 500 hours or 80 days in a school year are not permitted to be members of the system. Until the new Policy Statement was adopted by the Retirement Board, if such a part-time employee subsequently became a member of the retirement system, the employee was prohibited from buying credit for those hours of part-time service that were not creditable. For reasons that have not been explained, the Retirement Board decided to change that practice in 1999. PSBA filed suit to enjoin the change as being in violation of law and because it would increase costs to school districts. In addition, PSBA argued that the decision was made in breach of the fiduciary obligations of the Board. The Retirement Code provides that members of the Board, PSERS, and its employees and agents "stand in a fiduciary relationship to the members of the system regarding the investment and disbursements of any moneys of the fund . . .." 24 Pa.C.S. §8521(e).

The Retirement Board filed Preliminary Objections to the part of the complaint alleging the breach of fiduciary obligations. The Retirement Board argued that PSBA has no standing to raise the issue as only members of the system can assert fiduciary obligations. The court agreed with the Retirement Board. It held that only "members" of the system have standing to enforce the fiduciary obligations of the Retirement Board. The court said: "PSBA and its member school districts are not members of the retirement system and therefore not within the class of persons owed a fiduciary duty by the Board."

In a decision issued August 12, 2002, the Commonwealth Court ruled in favor of PSERS. The decision was based upon a thorough review of the maze of statutory provisions. An appeal was filed and is pending before the Pennsylvania Supreme Court.

B. **Invasion of Privacy. Wiretapping. Cameras on School Busses**. *Kepply vs. Twin Valley School District*, (Pending before the Court of Common Pleas of Berks County at No. 01-10464). In an effort to improve student conduct on its school buses, the School District installed empty boxes on several of it buses in which video cameras could be placed. Although the video camera's were not generally used, but when used, the School District had not turned off the audio function of the camera. Although there is absolutely no evidence that any conversation was ever actually intercepted by any camera, a former student of the school district has filed a class action case that is pending in the preliminary stages of the litigation. She claims that the failure to turn off the audio feature of the camera's invaded her right to privacy and violated Pennsylvania's Wiretap and Surveillance Control Act.

The Court denied the Plaintiff's motion to certify this as a class action. The Court essentially found that such cases are not amenable to class action suits because the circumstances pertaining to each class member is unique, which would require individual hearings to determine whether a violation occurred and what damages were incurred. Such individual hearings are inconsistent with the rationale for class action litigation.

C. **Student Transportation**. *Chipman vs.Avon Grove School District*, Chester County Court of Common Pleas at No. 03-2473, 841 A.2d 1098 (Pa.Cmwlth. 2004), *pending on a Petition for Allowance of Appeal.* In this case, parents of a private school student filed an equity action against the school district asking the court to order the school district to stop using a transfer station and to shorten the length of time the student spends going to and coming from school. The Plaintiffs argue that section 1361 of the School Code requires that when school districts transport their own students, "the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic [schools]." 24 P.S. §13-1361. According to the Plaintiffs, because the school district does not use transfer stations for pubic school students, it cannot use such stations for private school stations. The trial court denied the Plaintiffs' Petition for a Preliminary Injunction.

D. **Intermediate Unit Entrepreneurial Programs**. *Reich vs. Berks County Intermediate Unit* and *Spitler vs. Berks County Intermediate Unit.* These cases are pending in the Commonwealth Court. In 1996, the Berks County Intermediate Unit began bidding on bus transportation contracts with school districts in Berks County in competition with private contractors. Reading School District awarded such a contract to the Intermediate Unit in 1996 and several years later; the Muhlenburg School District awarded a bus transportation contract to the Intermediate Unit. In early 2003, the Tulpehocken School District awarded another contract to the Intermediate Unit. The Plaintiffs argue that they are entitled to have the contracts

enjoined for two reasons. First, the Plaintiffs argue that Intermediate Units have no power or authority to contract with school districts to provide bussing services. Second, the Plaintiffs argue that there are accounting irregularities so that the Intermediate Unit can funnel money from other programs and undercut the price charged to school districts.

At the start of the 2003-2004 school year, the Court of Common Pleas issued a decision in favor of the Intermediate Unit and school districts. It specifically found that Intermediate Units had the power and authority to provide transportation services to school districts and it concluded that the Plaintiffs failed to present any evidence that the accounting by the Intermediate Unit was improper. The matter is pending before the Commonwealth Court.

E. **Settlements**. *Berkheimer Associates agent for North Ceventry Township and. Owen J. Roberts School District vs. Norco Motors*, 842 A.2d 966 (Pa.Cmwlth. 200_), Berkheimber Associates was a tax collector for the school district and a township. Berkheimer filed suit to collect unpaid taxes on behalf of the school district and the township. As the tax collection suit was approaching trial, the parties reached a settlement "in principle" and so notified the court. The court marked the case settled and did nothing more until the settlement blew apart. The Defendants then filed a Motion to Enforce the Settlement and the Court granted the Motion, finding as factual determinations that there was an agreement and that the school board had approved the agreement. These factual findings are hotly contested. As legal findings, the trial court concluded that Berkheimer was the Plaintiff and that Berkheimer's representations that the case was settled was binding on the school district because Berkheimer had "apparent authority" to bind the school district. This case raises a host of legal issues, and provides food for thought. Can school districts contract with "agents" who can bind school districts under theories such as "apparent authority." Should contracts with tax collectors (and others that a court may conclude are agents that can bind public schools) be reviewed to see if appropriate provisions can be or should be inserted into the agreements to limit or prohibit the agent from binding the school district?

F. **Mandate Waiver—Multiple Prime Construction Contracts**.

(i) The Pennsylvania Department of Education published the following memorandum pertaining to mandate waivers with respect to multiple prime contractors requirements in connection with construction and renovation.

"On May 13, 2003, the Attorney General's Office, at the request of the Pennsylvania Department of Education, filed papers in the Pennsylvania Supreme Court withdrawing the Department's appeal in Perkiomen Valley
Plumbing & Heating, Inc. v. Commonwealth of Pennsylvania. This lawsuit by Pennsylvania construction contractors challenged the Department's authority to grant case-by-case waivers of the multiple prime contract requirement in Section 751 of the Public School Code.

The Department took this action because it was convinced that this dispute between construction contractors and the Department of Education did not belong in court. The best approach is for the administration to work with the General Assembly on a legislative solution. As a result of the withdrawal of its appeal, the Department of Education will process mandate waiver applications in accordance with the following standards.

First, the Department will not process or grant any additional applications for waiver of the multiple prime contract mandate in Section 751 of the School Code. Second, the Department will not rescind or modify any multiple prime
contract waiver that was approved prior to May 13, 2003, the date on which the Department withdrew its appeal. That fact notwithstanding, school districts and other entities that have received multiple prime

contract waivers are advised to consult with their solicitors concerning the impact, if any, of the unpublished opinion in the Perkiomen Valley Plumbing & Heating case upon other Pennsylvania school districts. Thus, you would be well advised to seek counsel from your solicitor if your district is currently moving forward or planning to proceed with a construction project under a previously-granted multiple prime contract waiver.

Third, the Perkiomen Valley Plumbing & Heating case challenges the Secretary's authority to grant mandate waivers in one and only one context: the multiple prime contract provision in Section 751 of the School Code. Applications for waivers of other mandates in Section 751 or elsewhere in the School Code are unaffected. The court action does not challenge the Mandate Waiver Program in any respect other than multiple prime contract waivers. For all other mandate waiver applications, the Mandate Waiver Program remains open for business.

If you have any questions about the Mandate Waiver Program or the impact of
the Perkiomen Valley Plumbing & Heating case, please call Sally Chamberlain at (717) 705-0863 or Carle Dixon at (717) 787-5480. Thank you."

Note: This publication is not a substitute for the advice of an attorney. The application of law to particular situations requires the analysis of a skilled attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

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[1] Perry Zirkel, Ph.D., J.D., LL.M., a professor at Lehigh University, a member of Pennsylvania's Special Education Appeals Panel, and a well known authority in the field of special education, recently published an article in The Education Law Reporter entitled, "Do OSEP Policy Letters Have Legal Weight?" 171 Ed. Law Rep. 391, January 16, 2003. In his conclusion, he makes a crucial point which we highlight here, "… if the child is ultimately the frame of reference, then arguably such state laws [which permit school district initiated hearings for initial services] add to rather than conflict with the requirements of the IDEA." Zirkel at 396.

[2] The Officer for Dispute Resolution ("ODR") is responsible for providing independent local level hearings.

[3] In *Schweiker*, the parent had refused services in first grade, and twelve years later filed suit seeking compensatory damages for the entire twelve years. The case eventually settled.

[4] *See*, http://www.foxnews.com/story/0,2933,111386,00.html.

[5] An LEA is defined by state law as: "[A] school district, cyber charter school, charter school, area vocational-technical school or intermediate unit." 24 P.S. § 2-220.

[6] *See*, *An Analysis of Cost Impact of ESEA – No Child Left Behind Act on New Hampshire*, New Hampshire School Administrators Association, November 19, 2002; United States General Accounting Office, *Title I: Characteristics of Test Will Influence Expenses* (available at www.gao.gov). In contrast, other studies have concluded that federal funding is sufficient -- see, Meave O'Marah, Kenneth Lkau, and Theodor Rebarber, *NCLB Under the Microscope: A Cost Analysis of the No Child Left Behind Act of 2001 on State and Local Education Agencies*, Accountability Works, January 2004 (available at www.educationleaders.org); Meave O'Marah and Theodor Rebarber, *Financial Impact of the No Child Left Behind Act on the State of New Hampshire & Review of the Cost Analysis of the NHSAA*, The Josiah Bartlett Center for Public Policy, February 2003; American Legislative Exchange Council, *Myths and Facts on No Child Left Behind* (available at www.alec.org).

[7] Title I funding is severely structured by the federal government – the estimations of increased cost beyond that which is appropriated can be attributable, at least in part, to the way in which the funding is structured. Funds are earmarked for certain

programs and are restricted for use in only those programs or to pay for enumerated costs. One prime example of a significant, unfunded consequence of NCLB's provisions relates to school choice. A school failing to make adequate yearly progress ("AYP") for two consecutive years must provide school choice to all students attending that school (not only to those students who are not individually making AYP). The LEA must provide students within that "failing" school the option of transferring to any other school or charter school within the LEA that is making AYP, regardless of the capacity of that other school or charter school. 20 U.S.C. § 6316(b)(1)(E)(i); 34 C.F.R. § 200.32. The practical effect of this requirement is that schools that are making AYP must either increase class size (if space is available) or hire new teachers and construct new classrooms. The resulting catch is that Title I funds cannot be used to pay for school construction costs.

[8] *See, No Child Left Behind Funding: Pumping Gas into a Flooded Engine?* An Analysis by the Majority Staff of the U.S. House Committee on Education & the Workforce, U.S.Rep. John Boehner (R-OH), Chairman, January 14, 2004, which can be found at http://edworkforce.house.gov/issues/108th/education/nclb/nclbfundingreport.pdf.

[9] *The 'No Child Left Behind Act': Neither Unfunded Nor a Mandate*, U.S. Senate Republican Policy Committee, April 21, 2004, p. 5 (available at http://rpc.senate.gov/_files/Apr2104UnfundedJG.pdf). Supporters also point to the fact that appropriated funds have historically been billions of dollars less than the authorized levels.

[10] The "chapter" referred to in Section 7907(a) is the entire ESEA.

[11] Supporters in Congress believe that any lawsuit challenging NCLB as an unfunded or underfunded mandate would likely fail because compliance with the law is voluntary. FN 6, *supra*. Our view, though, is not focused on the voluntariness of the law – to the contrary, the focus is on what should happen after a State chooses to accept federal funding. Pursuant to Section 9707(a), all costs associated with implementation of NCLB requirements must be paid by the federal government and shall not be incurred by the states or LEAs.

[12] There does not appear to be a definition of "significant cognitive disabilities" in federal or state law. Analyzed under their generally accepted meanings, those words indicate a student with significantly impaired mental processes of comprehension, judgment, memory and reasoning.

[13] There are six criteria used to determine whether a student is eligible to participate in the PASA. Said criteria can be found on PDE's website at http://www.pde.state.pa.us/special_edu/cwp.

[14] Requiring all disabled students (except those with the most significant cognitive disabilities limited to 1.0% of the student population), regardless of disability or intellectual functioning, to take assessments on grade level is akin to requiring a wheel chair bound student to race against his non-handicapped peers by walking up the stairs.

[15] The 1.0% cap does not apply at the school building level.

[16] "[A]n otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of his handicap." *Brookhart v. Illinois State Bd. of Educ*., 697 F.2d 179, 184 (7th Cir.1983).

[17] Pursuant to NCLB, all teachers employed by LEAs that receive Title I funds must be "highly qualified." 20 U.S.C. § 6319(a)(1). All teachers "who teach core academic subjects" must be highly qualified by the end of the 2005-2006 school year. 20 U.S.C. § 6319(a)(2); 34 C.F.R. § 200.55(b)(1). Federal law defines a "highly qualified teacher." 20 U.S.C. § 7801(23). For those teachers who are not new to the profession, in addition to holding at least a bachelor's degree, they must prove competency in the areas in which they teach. 34 C.F.R. § 200.56(c). Elementary school teachers must demonstrate subject knowledge and teaching skills in reading/language arts, writing, mathematics, and other areas of the basic elementary school curriculum by passing a State test. 34 C.F.R. § 200.56(c)(2)(i). Middle school and high school teachers must "demonstrate a high level of competency by – (i) passing a rigorous State test in each subject area in which the teacher teaches . . . ; or (ii) successfully completing in each academic subject in which the teacher teaches – (A) an undergraduate major; (B) a graduate degree; (C) coursework equivalent to an undergraduate major; or (D) advanced certification or credentialing." 34 C.F.R. §§ 200.56(b)(3) and (c)(3)(i) (Emphasis added). As an alternative for middle and high school teachers, each State can establish a HOUSSE (High, Objective, Uniform State Standard of Education) to demonstrate competency in each academic subject in which a teacher not new to the profession teaches. 34 C.F.R. § 200.56(c)(2)(ii). In Pennsylvania, teachers need not go back to school and complete coursework in each subject area; rather, to add an additional area of certification, they must take and pass an "appropriate content area test in the area to be certified." 22 Pa.Code § 403.4(c)(1). Paraprofessionals must be credentialed in the manner set forth in 20 U.S.C. §§ 6319(c) and (d) and 34 C.F.R. § 200.58. Schools and LEAs are prohibited from using paraprofessionals in any manner other than for those responsibilities described in 20 U.S.C. § 6319(g) and 34 C.F.R. § 200.59.

[18] Assessments in science are only required after the 2006-2007 school year.

[19] Graduation rates and attendance rates are also used to determine AYP. 20 U.S.C. § 6311(b)(2)(C); 22 Pa.Code § 403.3(c). NCLB does not require that attendance rates be used as an additional indicator of AYP but permits each State, in its discretion, to include other academic indicators, including attendance rates, in its AYP definition. 20 U.S.C. § 6311(b)(2)(C)(vii). PDE, in its State Plan, requires that schools and LEAs have 95% attendance rates in order to make AYP, in addition to 95% graduation rates and proficiency scores on the PSSA.

[20] This is clearly the case in light of ESEA's failure to require annual monitoring of individual student performance Similarly, supplementary educational services and school choice are made available to all students at a school that fails to make AYP, even those students who have made AYP on an individual basis.

[21] Pennsylvania's State Plan indicates that its assessment system (i.e., the PSSA) will be built upon Chapter 4 of Title 22 of the Pennsylvania Code, the provisions of which pre-date the requirements of NCLB. Chapter 4 does not contain the same assessment standards, sanctions or rewards that appear in NCLB. Consequently, the PSSA, which was designed for assessment purposes consistent with Chapter 4, may be invalid for the different assessment purposes required by ESEA.

[22] In the Reading School District's appeal from PDE's AYP determinations applied to its schools, Secretary Phillips concluded that NCLB only calls for native language testing "to the extent practicable," and that "[u]pon consideration of the costs involved, the time involved and the need for native language assessments in specific languages, it is clear that a native language assessment is not practicable at this time." (R. 351a). The Secretary's conclusions are erroneous. Native language assessments have been required, to the extent practicable and where most likely to yield accurate and reliable information, since the 1994 reauthorization of the ESEA. P.L. 103-382 at § 101.

[23] At the end of February, 2004, the USDOE issued new guidance regarding the assessment of LEP students under NCLB. LEP students in their first year of enrollment have the option of taking the PSSA reading assessment. If students choose to participate, their performance level results will not be included in the AYP calculations for the school or LEA. All LEP students are still required to participate in the PSSA mathematics assessment, with accommodations as appropriate. However, the mathematics scores of LEP students in their first year of enrollment will not be used to determine AYP status. The second half of the new guidance indicates that the USDOE is now allowing schools/districts/states to include current LEP students and those students who have exited the program within the past two years in the LEP subgroup.

[24] Title VI applies to any program or activity receiving Federal financial assistance and prohibits persons, on the grounds of race, color or national origin, to be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination. 42 U.S.C. §2000d. The regulations for Title VI state in pertinent part: "A recipient, in determining the types of services . . . or other benefits . . . which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services . . . other benefits . . . will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjection individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2). A state is not immune from suit in federal court under the Eleventh Amendment for violation of Title VI. 42 U.S.C. § 2000d-7(a)(1).

[25] *See*, Record from Reading School District appeal from PDE's 2002-2003 AYP determinations, R. 141a, 347a.

[26] *See*, testimony of PDE officials from Reading School District v. PDE, R.R. 176a; 202a; 250a.

[27] R. 182a. When Cheryl McCann ("McCann"), the Director of Federal Programs and Grant Administration for the Reading School District, asked if a statistical analysis relative to the 40 number was completed, the only information given to her by PDE were the charts that are included in the State plan, which show how schools would be affected if N were different numbers. (R. 156a-157a). PDE never told McCann whether an analysis was undertaken to determine if 40 was a statistically reliable number. (R. 157a).

[28] In fact, PDE had originally chosen 75 as the minimum number, but 75 was rejected by the USDOE for unknown reasons. On September 19, 2002, the State Board of Education approved regulations that are currently in effect and require 75 to be used as the minimum number. 22 Pa.Code § 403.3(c)(5). Further, the number of 75 has not been rescinded by PDE or the State Board of Education. While 40 was adopted by the State Board of Education on May 22, 2003, notice of which was published in the Pennsylvania Bulletin on June 14, 2003, 33 Pa.B. 2841, PDE never published regulations (and the State Board of Education has not published a notice) amending 22 Pa.Code § 403.3(c)(5) to rescind the language contained therein establishing 75 as the number.

[29] *See, Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334 (1977); *Department of Environmental Resources v. Rushton Mining Co.*, 139 Pa.Cmwlth. 648, 591 A.2d 1168, 1173, *petition for allowance of appeal*

denied, 529 Pa. 626, 600 A.2d 541 (1991).

[30] 45 P.S. §§ 1201, 1202; *Lowing v. Public School Employes' Retirement Bd.*, 776 A.2d 306 (Pa.Cmwlth.2001)(in order for an agency to establish a substantive rule creating a controlling standard of conduct, it must comply with the provisions of the CDL); *R.M. v. Pennsylvania Housing Finance Agency of Com.*, 740 A.2d 302 (1999), *appeal denied*, 759 A.2d 390, 563 Pa. 669.

[31] 45 P.S. § 1208; *Com. v. Colonial Nissan, Inc.*, 691 A.2d 1005 (Pa.Cmwlth.1997); *Baker v. Com., Dept. of Public Welfare*, 502 A.2d 218 (Pa.Cmwlth.1985); *Community Country Day School v. Com., Dept. of Ed.*, 414 A.2d 428, 431 (Pa.Cmwlth.1980); *Elkin v. Com., Dept. of Public Welfare*, 419 A.2d 202 (Pa.Cmwlth.1980); *School Dist. of Pittsburgh v. Pyle*, 390 A.2d 904 (Pa.Cmwlth.1978); *Centennial School Dist. v. Secretary of Ed.*, 376 A.2d 302 (Pa.Cmwlth.1977); *Newport Homes, Inc., v. Kassab*, 332 A.2d 568, 17 Pa.Cmwlth. 317 (1975).

[32] *See, Association of Community Organizations for Reform Now v. New York City Dept. of Educ.*, 269 F.Supp.2d 338, 346 (S.D.N.Y. 2003), which analyzes NCLB as spending clause legislation.

[33] Dissenters on the Supreme Court have, in spending clause cases, noted on several occasions: "If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 655, 119 S.Ct. 1661, 1677 (1999)(in dissent); *Dole*, 483 U.S. at 216 (in dissent); quoting *Butler, supra*, at 78.

[34] The 1994 amendments to the ESEA did establish minimal qualifications for "instructional aides" employed by LEAs receiving Title I funds. Instructional aides were required to: (A) possess the knowledge and skills sufficient to assist participating children in meeting the educational goals of this part; (B) have a secondary school diploma, or its recognized equivalent, or earn either within two years of employment, except that a local educational agency may employ an instructional aide that does not meet the requirement of this subparagraph if such aide possesses proficiency in a language other than English that is needed to enhance the participation of children in programs under this part; and (C) are under the direct supervision of a teacher who has primary responsibility for providing instructional services to eligible children. *Id.*

[35] The ramifications of Congress' establishment of minimal qualifications for school instructional employees are vast. First, the highly qualified standards are more exacting than any certification standards previously imposed in Pennsylvania. For example, prior to NCLB, Pennsylvania did not require middle school teachers to hold certification in all core subject areas taught, which is now required by NCLB. Many middle school teachers only have elementary certification and will have to either return to school or take the PRAXIS test in each core subject area that they teach. Special education teachers are also affected, as they must now have core subject area certification (middle and high school level) or elementary certification in addition to their special education certification if they do not team teach with a properly certified teacher.

Second, these standards are usurping the functions of this Commonwealth to set its own personnel standards for LEAs. Pennsylvania allowed LEAs to hire teachers with emergency certifications, 24 P.S. § 1109.1, 22 Pa.Code §§ 49.31 and 49.32, or teachers under conditional employment pursuant to 24 P.S. § 1109.2. This is particularly important in urban and rural areas where it is difficult to find certified teachers in many subject areas. Starting on January 8, 2002, however, LEAs receiving Title I funds were prohibited from hiring teachers with emergency certificates, as those teachers are not considered to be "highly qualified." Under NCLB, by the end of the 2005-2006 school year, all elementary and secondary core subject teachers must be highly qualified, meaning any middle or high school teacher who is not certified in every core subject area or who is teaching under an emergency certificate is not highly qualified. If teachers fall into these categories after these dates, the LEA can be sanctioned and the teachers may be subject to termination for violating or failing to follow school laws.

[36] In its *A Review of CBO's Activities in 2003 Under the Unfunded Mandates Reform Act*, April 2004, the CBO stated: "According to UMRA, the conditions attached to most forms of federal assistance (including most grant programs) are not mandates. Yet complying with such conditions of aid can sometimes be costly. States often consider new conditions on existing grant programs to be duties not unlike mandates. The two most often cited examples of such conditions are the requirements for receiving federal funding under the No Child Left Behind Act and the Individuals with Disabilities Education Act. Those laws require school districts to undertake many activities including, respectively, designing and implementing statewide achievement tests and preparing individualized education plans for disabled children. Such requirements, which are potentially costly for state and local governments, are clearly conditions for receiving federal assistance and thus are not considered mandates under UMRA. That federal assistance is substantial, however; the federal government appropriated about $34 billion in 2004 for elementary and secondary education programs, most of which was authorized under those two laws." (Available at http://www.cbo.gov/showdoc.cfm?index=5378&sequence=0).