THE BOARD REPORT

COURT LIMITS EXECUTIVE SESSION PARTICIPATION

Under the Sunshine Law, a School Board may conduct an executive session in order to consult with the district's legal counsel on litigation matters involving the district. A recent decision of the Commonwealth Court, however, may change the way your district conducts litigation-related executive sessions. In the case of *Trib Total Media, Inc. v. Highlands School District*, 1588 C.D. 2009, Trib Total Media sued the School District for violation of the Sunshine Act arising out of an executive session to discuss litigation. The Board invited owners and representatives from a local commercial shopping center to attend the executive session to discuss a potential tax appeal related to the property. When a newspaper reporter attempted to attend the meeting, the reporter was turned away.

Allegheny County Judge James dismissed the Complaint on the basis that the Act's definition of "executive session" specifically states that the agency "may admit those persons necessary to carry out the purpose of the meeting," which was, in his view, broad enough to include the taxpayer and its representatives. On appeal, a three-judge panel of the Commonwealth Court reversed Judge James and held that the executive session with the shopping center's representatives did violate the Sunshine Act. The Commonwealth Court panel looked at the purpose of the Act, namely to permit the public to have notice of and the right to attend meetings of public agencies where official business is discussed or acted upon. While the Act provides a specific exception for executive sessions held for the purpose of conferring with legal counsel related to litigation, the Commonwealth Court held that this exception should be construed narrowly. The Court stated that the plain language of the executive session exception permits a school district's board "to consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed." The Court stated that this exception was intended to protect the attorney-client privilege for public agencies, because if agencies were required to discuss litigation strategy in public, it would be detrimental to the public interest. The Court also noted, however, that attorney-client privilege is destroyed when an outside third party is present while such communications are made.

The Court held that because the Act's exception is specifically limited to consultations with the district's attorney or other professional advisor, this excludes settlement meetings such as the one conducted by the Highlands Board with the taxpayer litigant and its representatives: "By including representatives of the shopping center in the executive session, the Board destroyed the confidentiality of the communications between the Board and its solicitor. We conclude that by doing so, the Board took the meeting outside the scope of Section 708(a)(4) and rendered it a private meeting that violated the Sunshine Act." It is clear from the panel's opinion that the presence of any third party, apart from district representatives and its legal counsel, destroys the executive session privilege, which raises the issue of whether board members may attend settlement conferences held in connection with pending litigation.

One way in which school districts may address the ruling in the Highlands case is to specify how meetings held with the Board and its legal counsel are structured and framed. The Sunshine Act defines a "meeting" as a gathering held "for the purpose of deliberating agency business or taking official action." The best course of action for school districts who wish to have third parties deliver information directly to the school board in connection with a litigation matter would be to have a session in which no deliberation -- defined under the Act as "the discussion of agency business held for the purpose of making a decision" -- or official action occurs and the Board merely receives information from a third party, such as a litigation adversary or labor union. Under these circumstances, such a gathering would not constitute a meeting under the Sunshine Act. Thereafter, if the Board needs to discuss or deliberate regarding the subject matter involved, it would need to exclude any third parties from the room, convene an executive session and speak directly with the Board's legal counsel or satisfy some other exception under the Sunshine Act, such as executive sessions held for personnel matters or collective bargaining. By limiting the parties who attend litigation-related executive sessions and changing the board's meeting structure, a school district can ensure its compliance with the Act.

Highlands School District has filed a Petition for Reconsideration with the Commonwealth Court to review the panel's decision in this case. We will update the status of this litigation in future issues, but if this decision is upheld, it will significantly impact the way in which school districts conduct executive sessions concerning litigation.

FACILITY NAMING RIGHTS TRUMP ZONING RESTRICTIONS

In this age of limited revenue, school districts are increasingly considering whether to sell naming rights to their athletic facilities in order to generate revenue. We addressed several concerns with permitting such naming rights in the Summer 2008 edition of Education News. The focus of this article is to consider the regulatory impact of municipal zoning ordinances on such naming rights.

In an Opinion filed on July 20, 2010, the Third Circuit Court of Appeals held in *Melrose, Inc. v. The City of Pittsburgh* that bona fide "naming rights" signs are permissible even where a zoning ordinance prohibits advertising billboards. The Court applied a three-part test to determine whether a naming rights sign on a public destination facility (such as a school stadium) was either an impermissible advertising sign or a permissible building name sign:

1. Is a major purpose or result of the identification sign to establish name recognition by the public for a specific destination point at a set geographical location?

2. Is the sign temporary or transitory like a commercial billboard? To be permissible, it must be in place for a substantial time to connect the name with the facility. However, it need not be immune from unexpected, unforeseen or unwelcome circumstances that might result in termination of the naming rights.

3.Does the facility owner, in this case the School District, remain in control and not assign its rights to an advertising agency? Ultimately, the School District must remain responsible for any other zoning compliance.

When a sign has both an advertising and an identification component, the identification purpose must be genuine and not merely an effort to utilize a location as an advertising vehicle. By applying the three-part test articulated by the Court, naming right signs will have a better likelihood to survive a zoning challenge.

SUPERINTENDENT'S CORNER

Danger for Retired School Employees

While the financial crisis facing the Public School Employee's Retirement System (PSERS) is well-known, with more and more retired school employees returning to school employment, another danger has been highlighted by the Commonwealth Court's recent decision in *Baillie v. Public School Employees' Retirement Board*. The Court upheld a PSERS decision that a retired IU Director return almost $80,000 in annuity payments. The Court agreed with PSERS that the employee was not entitled to receive an annuity after rehire because the situation did not qualify as an emergency for purposes of the Retirement Code and because he was never truly separated from service.

While Section 8346(b) of the Retirement Code authorizes public schools to employ a retired school employee who is collecting a retirement annuity when there is an emergency, the Court held that an emergency is limited to the following circumstances: 1) when an emergency creates an increase in the work load such that service to the public is seriously impaired, or 2) when there is a shortage of appropriate personnel. In *Baillie*, neither circumstance existed.

Further, a key aspect of the case involved the issue of whether Baillie was actually separated from service with the IU. The Retirement Code states that a member of the retirement system is entitled to receive an annuity "upon termination of service." The Court concluded that Baillie was never separated from service with the IU. He finished his work week on one Friday and returned on Monday, the next business day. Therefore, he continued to work without interruption. Consequently, Baillie never qualified as an annuitant and was not eligible to be hired on an emergency basis.

The *Baillie* decision reinforces a couple of basic principles. First, an employee must actually be separated from service in order to qualify as an annuitant under the Retirement Code. Second, retired school employees may only return to service without a loss of annuity if there is an "emergency" or "shortage of personnel." This requirement is also highlighted in the PSERS Retired Member Handbook. The Handbook recognizes that while the employer makes the decision whether these requirements have been satisfied, "employers are expected to first make a 'good faith' effort to secure non-retired school personnel." Ultimately, the Handbook then cautions, as the *Baillie* court confirmed, that PSERS "reserves the right to review an employer's determination that a qualifying emergency or shortage exists." If your School District is considering hiring a retired school employee, be certain that these criteria have been met or else you may be placing the retired employee in danger.