

## “ID, Please” – School Security In The 21st Century

By Steve Roppolo (Houston)

Having just observed the eighth anniversary of the September 11 attacks, it's worth considering how much we have become accustomed to enhanced security measures in our day-to-day lives. Anyone who has traveled through a U.S. airport, shown up for jury duty at the local courthouse, or even attended a ball game over the past few years, knows that things aren't what they used to be. We've all become used to increased security, and we're usually willing to go along with the inconveniences and invasions of privacy, especially if it's clear the enhanced measures actually decrease the chances of an incident.

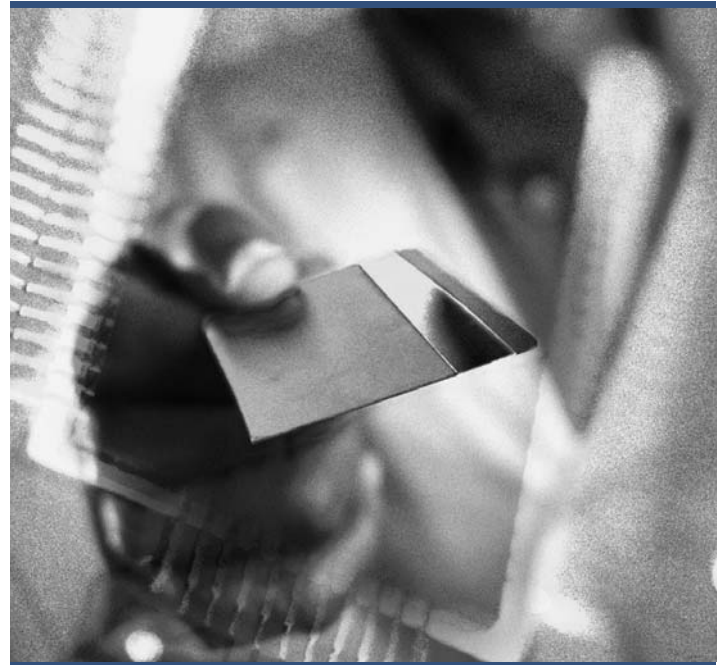
But not everyone is comfortable making the trade-off. Parents of two students at an elementary school in Texas' Lake Travis Independent School District (LTISD) objected to the school's rule requiring visitors to produce a Texas driver's license or other state-issued identification card to access certain areas of the school. The dispute escalated into a federal case, decided last month by U. S. District Judge Sam Sparks of Austin. While much of the decision applies only to public schools, it also contains guidance for any school, public or private, that tries to balance the privacy interests of parents and students with the need to protect children and maintain a secure school environment. *Yvonne Meadows v. Janie Braxdale and Lake Travis ISD*.

### Concerns About Intruder Led To Action

Following an incident in the 2004-05 school year in which an unidentified man gained access to an elementary school and exposed himself to a fifth grader, LTISD retained the services of Houston-based Raptor Technologies, Inc. to develop a security system that would require visitors – including parents – to provide proof of identification and compare the names with sex-offender databases. The Raptor system scanned the front of Texas drivers' licenses and utilized the visitors' names and dates of birth to run the sex-offender check. The scanned license image was also used to print out temporary “visitor badges” to be worn while on school premises. Without going through the Raptor screening process and wearing the badge, parents could access only certain areas of the school campus without a formal escort.

Yvonne Meadows refused to produce her driver's license when she arrived at Bee Cave Elementary School in September, 2006 to attend parent-teacher conferences. She objected in particular to the system's scanning of the card information and the sex-offender database review. Meadows also refused to comply with the policy on several other visits to the school. She pursued grievances about the rule and later filed a lawsuit in state court seeking to have the policy overturned. Since the lawsuit accused the school district of violating the U.S. Constitution, among other claims, LTISD removed the case to federal court in Austin.

In a 26-page decision, Judge Sparks ruled that the school district's use of the Raptor program was constitutional and did not violate the state and federal laws cited by Meadows. In so ruling, Judge Sparks noted that



“schools have not only an interest but a duty to take appropriate steps to protect our children while they are at school.” Moreover, he wrote that it was not for the courts or parents to decide what those steps should be, and that the Court's sole role in the dispute was to determine whether LTISD's security policies violated the law.

### Ideas To Consider

Schools considering enhanced safety measures would do well to review Judge Sparks' decision. The Raptor system favored by LTISD is not the only step a school can take to enhance the safety and security of the school premises. In addition, schools can consider:

- requiring parents and other volunteers to undergo training on issues relating to the sexual and physical abuse of children before being allowed to participate in school activities;
- adding security personnel for special events, including such things as plays, sporting events, and cheerleader competitions;
- completing criminal background checks on parents and guardians before allowing them to participate as chaperones at school events which might find them alone with children other than their own;

Continued on page 4

# Court Hands School A Victory On Issue Of Student Sexuality

By Todd Scherwin and Shadie Berenji (Irvine)

Issues of student sexuality have been emerging in private schools for the last five years or so. Questions abound regarding student sexual-orientation rights in religious and non-religious schools, regarding the rights of students to create gay and lesbian school clubs, and regarding the propriety of administrators' disclosure of student same-sex relationships to parents. In some situations, private schools have been sued for taking strong action where the administration determined that students who are engaging in same-sex relationships have violated the school's religious principles.

The law in California was unsettled on this issue until recently. The California Supreme Court has finally provided private religious schools in California some concrete guidance in this area. While binding precedent only in that state, California decisions are often harbingers of trends elsewhere. *Jane Doe v. California Lutheran High School Association*

## The Court's Ruling

The Unruh Civil Rights Act requires that all persons within the State of California be provided the same services in all "business establishments" regardless of sex, race, color, religion, ancestry, national origin, disability, or medical condition. Through case law, California courts have also added marital status and sexual orientation to the class of persons to be protected.

In the *California Lutheran High School Association* case, the parents of two female students who were expelled on the ground that they had a homosexual relationship sued California Lutheran High School (the School), a private religious institution. The School's basis for the expulsion was that such a relationship was expressly forbidden under the School's "Christian Conduct" rule. The students alleged that the School discriminated against them based on sexual orientation, in violation of the Unruh Civil Rights Act.

The School initially moved to dismiss the lawsuit, but both the trial court and the California Supreme Court refused to dismiss the case outright. This ruling, understandably, caused some amount of concern for religious schools in California. But after engaging in depositions and discovery, the School filed a motion for summary judgment asking the court again to dismiss the lawsuit on the basis that the school was not a "business establishment" covered by the Unruh Civil Rights Act. The trial court granted the School's motion and the students appealed.

In January of this year, the California Court of Appeal agreed with the trial court and upheld the dismissal of the case. The appellate court analyzed two prior cases decided by the California Supreme Court that addressed the meaning of the term "business establishment" within the Unruh Civil Rights Act. First, the court looked to *Warfield v. Peninsula Golf & Country Club*, which held that a member-owned nonprofit golf and country club that derived "a significant amount of revenue, as well as indirect financial benefit, from the use of its facilities, and the purchase of

goods and services on its premises, by persons who are *not* members of the club" and where "such 'business transactions' with nonmembers are conducted on a regular and repeated basis and constitute an integral part of the club's operations" is a business establishment within the meaning of the Unruh Civil Rights Act.



On the other hand, in *Curran v. Mount Diablo Council of the Boy Scouts*, the California Supreme Court held that "a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members" is not a business establishment within the meaning of the Unruh Civil Rights Act with regard to its membership decisions. The court in *Curran* also observed that the Boy Scouts was an organization whose primary function was the inculcation of a specific set of values to its members, and its recreational

facilities and activities were complementary to the organization's primary purpose.

By relying upon *Curran*, the appellate court in *California Lutheran High School Association* determined that the School was, like the Boy Scouts, "an expressive social organization whose primary function is the inculcation of values in its youth members" and held that the School was *not* a business establishment within the Unruh Civil Rights Act. That meant that the School was free to require students to adhere to its Lutheran values, which are "the very heart of the reason for the existence of the school."

On April 29 the California Supreme Court declined the request to review the Court of Appeal's holding effectively ending the primary litigation. However, because the mother of one of the students in the *California Lutheran High School Association* decision had a separate lawsuit alleging other claims, the debate on this issue is far from over.

## Unanswered Questions

One area of the decision that will likely require some further court or legislative clarification is an issue dealing with what appears to be the limitations of the holding. In analyzing the business-establishment issue, the Court noted that like the Boy Scouts in *Curran*, the School "could be a business, and therefore prohibited from discriminating, with respect to its *nonmember* transactions, yet *not* be a business, and hence *not* be prohibited from discriminating, with respect to its *membership* decisions." It is not entirely clear where the line is drawn in the distinction between member and non-member transactions.

One would certainly assume that this means that the School can discriminate (and is not covered by the Unruh Act) when it is making decisions about membership (i.e., admission, enrollment at school, adhering to school policies and guidelines that address core religious issues, discipline, and expulsion). On the other hand, if the School is engaging in transactions with non-members (one would assume that means persons not enrolled as students) that do not appear to be intimately related to its core religious activities (i.e., selling t-shirts at a football game), it cannot discriminate in such transactions.

Continued on page 4

# Carroll College Case Proves No Free Pass For Unions . . . Yet

By Bert Brannen (Atlanta)

With membership at its lowest point in over 60 years, unions are steadfastly proving they still know how to play politics. Organized labor has recently taken steps to reinforce its ranks through legislation, introducing significant reform efforts such as the Employee Free Choice Act (EFCA). The Act, in effect, would eliminate secret ballot elections from the provisions of the National Labor Relations Act (NLRA) related to union organizing, substitute card check verification instead, and make employer neutrality mandatory in the electoral process.

Since its introduction, EFCA has garnered substantial support from lawmakers, workers'-rights groups, scholars, and even religious leaders. But management and union opinion remains widely divergent on the force and breadth of this legislation, as evidenced by a large volume of academic discourse and media coverage.

## The Religious Element

As for EFCA's religious implications, the Act is gaining traction in many religious communities, particularly among the Jewish and Catholic faithful. In early May, the Jewish Labor Committee, a group of 30 rabbis affiliated with the AFL-CIO, took out an ad in Philadelphia's largest Jewish newspaper urging Sen. Arlen Specter to support EFCA. This is just one of many examples of efforts by religious leaders to persuade lawmakers to back the measure. In their letter to Specter, the Rabbis argued that EFCA "is a way of balancing the scales of justice, giving workers rights that most of us take for granted" and that opponents of the Act are engaging in a "smear campaign."

In addition to the efforts of these Rabbis, other interfaith leaders have joined together to disseminate the message that labor-law reform is a civil and human right. Faith Leaders of Workplace Fairness, a coalition of Jewish, Catholic, Episcopal, Baptist, Presbyterian, Lutheran, and Muslim groups, are calling on members of their faith communities to support EFCA as a "moral imperative." For many employers this should be cause for alarm because this diverse group and groups like it are speaking not just to their followers, but also putting their money where their mouth is, buying radio air spots, newspaper ads, and holding nationwide conference calls.

The Faith Leaders of Workplace Fairness argue that "as people of faith, we must stand with workers in their struggles and ensure that they are protected and can provide for themselves and their families." Couching this legislation in terms of morality, freedom, human dignity, fairness and justice could prove to be an effective strategy. In fact, the appearance of clergy alone may be enough to sway public opinion, especially for those who are close to their religion's leaders and devoutly follow its traditions.

A 2008 poll conducted by The Pew Forum on Religion and Public Life found that at least 83.1% of all Americans admit they are affiliated with some religion or particular faith. Therefore, if the Act's intentions are cast in terms of rescuing the American worker from the power imbalance in today's economy, employers are going to need a strong but thoughtful response to counter it.

## The Educational Element

Fortunately for those who oppose EFCA, judges are proving they are not easily distracted by lofty debates among academics or flashy headlines in the media. While support for EFCA is real, there are still some employers who, at least for now, can sleep better at night knowing a union threat is not imminent. One such group consists of religious-academic institutions. Worldwide there exist approximately 2,000 religious higher-education institutions, nearly half of which are in the United States.

On March 13, 2009, a little over two years from the exact date EFCA was first introduced, the U.S. Court of Appeals for the District of Columbia rescued religious schools from the grip of union organizers when it upheld a decision by the National Labor Relations Board that, as a religious institution, Wisconsin's Carroll College met the threshold for the religious exemption under the NLRA, because it presented itself as providing a religious educational environment and is a nonprofit affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church of the United States. *Carroll College v. NLRB*.

## Background

The U.S. Supreme Court ruled in 1979 that private educational institutions which teach both religious and secular material are not within the jurisdiction of the National Labor Relations Act since this would be a potential infringement of the schools' freedom of religion. This case, in effect, prevented unions from organizing on campuses of religious schools. *NLRB v. Catholic Bishop of Chicago*.

The NLRB subsequently created a test for determining whether or not a college or university was of "substantial religious character" and entitled to an exemption under the NLRA. But in 2002, the D.C. Circuit Court ruled in *University of Great Falls v. NLRB*, that the NLRB should not go "trolling through an institution's religious beliefs" to determine how closely linked a school is to a particular religion.

In late 2004, the Carroll College case arose when the UAW won a representative election to become the collective bargaining representative of Carroll College's faculty. The College argued that the NLRB's jurisdiction violated the Religious Freedom Restoration Act by infringing upon its free-exercise rights. An NLRB regional director decided that exercising jurisdiction over the college would not violate the Act because the school was not operated by the Presbyterian church and did not specifically teach or endorse Christian philosophies. Although the union was certified, Carroll College challenged the ruling by refusing to bargain.

The D.C. Circuit Court upheld the College and overturned the Board's decision to exercise jurisdiction over Carroll College, finding that it was an error for the Board to 1) analyze how effective the school is in inculcating its beliefs, and 2) looking at actual religious influence or control over the school. Instead the Court found that in determining whether a university is entitled to the religious exemption, it would apply the test established in *University of Great Falls*, which requires an institution to prove that it 1) holds itself out to students, faculty, and the public as providing a religious education, 2) is nonprofit, and 3) is affiliated with, or owned by, a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Since Carroll College's mission statement, articles of incorporation, course catalog and other documents describe its relationship with the Presbyterian Church and state that its purpose is to serve as a Christian liberal arts college dedicated to God, the D. C. Circuit determined that the school qualified for the exemption. The Court decided that its three prong test did not require that the Presbyterian Church sponsor the college, own the property, or have any right of control over it.

## Looking Ahead

Had EFCA been in effect when the union first stepped onto Carroll College's campus, the school may have been in for a much bigger court battle. Since the UAW was elected in a representative election, the college's workers got the benefit of using their secret ballot right, a right that could be obliterated if EFCA passes. All turned out well for Carroll College.

*Continued on page 4*

## “ID, Please” – School Security In The 21st Century

*Continued from page 1*

- enhancing the security of the school physical plant through physical barriers, preventing unauthorized personnel from accessing the campus while students are present; and
- installing video surveillance equipment.

While schools clearly have a great deal of leeway in implementing these kinds of security measures, it is important that schools develop a security policy with input from faculty, staff and parents and then communicate the substance of the policy to the school community. By managing the expectations of parents and other visitors regarding privacy issues, schools can avoid misunderstandings – and maybe even lawsuits.

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## Court Hands School A Victory On Issue Of Student Sexuality

*Continued from page 2*

### What Should Administrators Do?

The debate over what protections should be granted to same-sex relationships in employment and student relationships will continue in California and elsewhere. Based on this positive ruling for religious schools in California, religious schools everywhere should look closely at their policies to ensure that the school’s religious mission, values, and guidelines are clearly established.

Teachers should be required to utilize religious principles and instruction within all class subjects. Religious symbols, dress, celebrations, songs, attendance at chapel or similar services, etc. should be specified in school policies and made a regular and obvious practice. School contracts should make clear that the employee is required to adhere to the school’s religious guidelines and to be a role model. Student handbooks and student contracts must make these principles, practices, and expectations clear as well. Schools should also ensure that they have proof that the student and parent have received and understand their obligation to adhere to the School’s policies.

The more that the school makes its mission, values, principles, and expectations clear to everyone visiting, attending, or considering attending the school, the easier it will be for the school to establish that its admissions and expulsion decisions, when based on religion, should not be subject to question under the Unruh Act.

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## Carroll College Case Proves No Free Pass For Unions . . . Yet

*Continued from page 3*

However, given how easy it will be to organize and get recognition under EFCA, it is likely that unions will take another stab at the NLRA’s religious exemption, making an example out of some other college or university, especially a school that holds itself out as a religious institution but only marginally meets the Court’s tests.

Despite having to swallow the EFCA pill and accept the fact that it will become a reality for them in the near future, employers can hold out some hope that courts will continue to carefully analyze labor issues. Luckily, the D.C. Circuit delivered a “birthday” present of sorts to EFCA opponents by sending a clear signal that, for now at least, there aren’t going to be any free passes for unions.

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