



Mr. Michael D. Frist
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Testimony – School Bus Safety Legislation
House Transportation Committee
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Good morning. My name is Mike Frist and I am the director of business administration for North Penn School District in Montgomery County. I am joined by Marianne Cleary, who is the district's transportation coordinator and the immediate past president of the Pupil Transportation Association of Pennsylvania. We would like to thank Chairmen Markosek and Geist for the opportunity to testify to the committee on school bus safety – an issue that is of great concern to PSBA, our district and our taxpayers.

Everyday, roughly 970,000 students travel on one of the approximately 30,000 registered student transportation vehicles in Pennsylvania, covering a total distance of 1.3 million miles.¹ With school bus crashes accounting for only 0.4% of all vehicular crashes in Pennsylvania last year – the lowest rate among all vehicle classifications – there is no safer mode of child transportation in the Commonwealth.² In specific regards to North Penn School District, 14,276 public and non-public students regularly utilized our transportation services last year. Our fleet of 144 buses and 14 vans traveled nearly 1.9 million miles in doing so and we experienced only 21 accidents.

The authors of House Bills 216, 247, 1183 and 1793 should be recognized for their concern to ensure student safety. That said, some of the proposed measures are not necessarily the most effective solutions to the safety issues surrounding school buses. Before proceeding with the legislation, PSBA strongly encourages the committee to consider the rationale behind and consequences of a mandatory service cap and fire suppression system for every bus.

A 12-year limit on the duration of a school bus, as proposed in House Bill 1793, would be expensive, unnecessary and ineffective. The age of a school bus does not necessarily reflect its condition, and setting an arbitrary cap at 12 years would put roughly 1,800 buses unnecessarily out of service.³ Factors such as mileage and frequency of maintenance are more indicative of a vehicle's safeness; hence the statutory requirement for school vehicles to undergo semiannual inspection by state-certified mechanics, as well as an additional yearly safety inspection by the State Police.⁴

¹ Pennsylvania Department of Education, School Vehicle Statistics for the 2005-06 School Year, provided to PSBA on September 10, 2007. The Pennsylvania Department of Transportation otherwise claims that, based on 2005 data, 1.5 million students rode school buses on a daily basis, covering 350 million miles a year. It also claims that there are 29,628 "registered school buses," whereas the PDE data accounts for 30,774 "school vehicles." Due to the ambiguity of the PennDOT fact sheet, PSBA decided to cite the PDE numbers for these specific examples. The PennDOT statistical fact sheet can be accessed at <<http://www.dmv.state.pa.us/stats/schoolBusStats.shtml>>.

² Pennsylvania Department of Transportation, "2006 Pennsylvania Crash Facts and Statistics, Crashes by Motor Vehicle Type," <<http://www.dmv.state.pa.us/stats/schoolBusStats.shtml>>

³ Pennsylvania Department of Education, School Vehicle Statistics for the 2005-06 School Year, provided to PSBA on September 10, 2007.

⁴ 75 Pa.C.S.A. §4702, §4705

Considering the low crash rate of school buses in the Commonwealth, it is evident that this process has worked sufficiently.

Further exasperating the impracticality of a service cap is the cost it will pose to school districts. According to the Pennsylvania School Bus Association, the average cost of a new minibus or mid-sized bus is between \$40,000 and \$55,000, and the cost of a new standard 72-passenger bus ranges from \$75,000 to \$100,000. Replacing the 730 district-owned buses that were manufactured prior to 1995 would cost *at least* \$48.7 million. It is also likely that the replacement of the other 1,087 school buses operated by local providers will also have some increasing effect on the contract negotiated with a district.⁵

This bill would have a tremendous financial impact on districts, many of which already face high student transportation costs. If enacted, the mandate would force the North Penn School District to decommission 33 or 23% of our buses. Our 2006-07 transportation budget was over \$11.2 million, and our subsidy from the Commonwealth only covered 25% of these costs. This budget has grown by more than \$6 million dollars since 1994, and having to replace this many vehicles would put our district into a tough financial situation. As another example, Pleasant Valley School District in Monroe County would have to replace 34 standard-sized buses and one wheelchair accessible minibus. Based upon their most recent bid pricing, the district would have to spend approximately \$2.9 million or 9.54 mills to comply with the service cap. Since House Bill 1793 does not provide for an additional subsidy from the Commonwealth, districts like North Penn and Pleasant Valley and hundreds of others would be compelled to raise school property taxes or cut educational programs. Such an unfunded mandate is excessive and misguided. If there is truly a maintenance issue, then perhaps the General Assembly should examine the inspection process and its frequency instead of permanently parking thousands of the Commonwealth's school buses.

PSBA has similar concerns with House Bill 216, which requires an automatic fire suppression system to be installed in every school bus. In particular, we question the funding and necessity of this mandate. In the event that a school bus fire occurs, fire response protocol is already in place for the school bus occupants. State law requires school districts to conduct an evacuation drill at least twice a year on every bus and that a certified fire extinguisher shall be present in the driver's compartment. Each bus must also have multiple emergency exits located in the back, on the sides and on the roof of each bus.⁶ PSBA does not suggest that automatic fire suppression systems are superfluous in every situation. Such a mandate may be necessary for students who cannot evacuate in a timely manner. For instance, New York recently enacted legislation that required all school vehicles that transported three or more students with wheelchairs to be equipped with this system.⁷ However, if the General Assembly was to pursue that policy, it is imperative that it is supplemented with state funding.

If the Commonwealth believes that the automated fire suppression systems are necessary for all school buses, despite the current preparedness efforts, then it should provide school districts with financial assistance and a flexible timeline for implementation. As estimated by the Pupil Transportation Association of Pennsylvania, such a modification to a school bus would cost approximately \$2,700; bringing the total cost of this mandate to around \$79.7 million. Like House Bill

⁵ Pennsylvania Department of Education, School Vehicle Statistics for the 2005-06 School Year, provided to PSBA on September 10, 2007.

⁶ 24 P.S. §15-1517; 67 Pa. Code §171.1 et seq.

⁷ NY VEH & TRAF §375.21-i.

1793, this legislation does not reimburse districts for fulfilling this requirement, thereby resulting in either higher school property taxes or reduced educational programming. Additionally, the compliance period may be too short for districts or their bus service providers to equip the fleets with the system. House Bill 216 offers no solutions for districts who cannot immediately comply due to a lack of funding or installation complications. Noncompliance could result in financial penalties or litigation costs that further exacerbate a district's budget qualms.

With regard to House Bill 247, the proposed pilot program would combat a persistent problem in Pennsylvania that threatens the lives of our students – the illegal passing of school buses that are in the process of unloading or loading passengers. In 2005, 943 convictions were passed down to drivers who violated this law.⁸ Keep in mind that this number only reflects those who were caught. The current enforcement of this law relies too heavily on personal observations made by bus drivers, who are already busy monitoring the students' safety, and on the happenstance that a police officer catches a driver in the act. A two-way automated recording device mounted on the left side of a school bus will provide stronger enforcement, thereby deterring more drivers from passing. Equally important is the addition of sensors on the back of the bus that will alert the driver and disembarking students to the presence of the illegally passing vehicle. As you may know, North Penn School District has spearheaded this pilot program after three of our students won an award from the Christopher Columbus Fellowship Foundation in 2003 for this very proposal. With the \$25,000 grant, our district was able to successfully test the system on one of our buses. We are very supportive of House Bill 1183, but we believe it should be amended to permit the participation by multiple districts, which would necessitate additional financial assistance from the Commonwealth. Furthermore, the length of the program should be extended beyond one school year. The more districts involved and the longer they have to test the system, the more accurate the program's assessment will be.

In addition to targeting the negligence of other drivers on the roadway, PSBA supports measures that increase the standards of safety adhered to by school bus drivers. The prohibition of cell phone usage (including hands-free devices) by school vehicle drivers while driving, found in House Bill 1183, is necessary for the security of our students. This legislation follows the recommendations made by the National Transportation Safety Board and the American School Bus Council, who recognize the tragic potential of the cognitive distractions that are caused by this technology. To date, school bus drivers in 14 states and the District of Columbia are restricted from using any type of cell phone, while 2 other states have a general ban on hand-held devices usage while driving.⁹ Furthermore, House Bill 1793 provides exceptions for bus drivers who use their phones during emergency situations; thus, preserving the potentially life-saving utilization of this technology.

While House Bills 1183 and 247 are steps in the right direction, PSBA believes that the General Assembly could go further to enhance the safety of school transportation, particularly by clarifying the use of audio recorders inside school buses. In Allegheny County in early 2006, a state police trooper seized more than 100 school bus cameras and filed felony charges against a school bus operator based on the use of the audio component of the cameras, even though signs had been posted alerting passengers that cameras may be in operation. Although these charges were eventually dismissed by the district attorney, the incident has further clouded the legal landscape on this issue.

⁸ Pennsylvania Department of Transportation, "Pennsylvania School Bus Statistics,"

<<http://www.dmv.state.pa.us/stats/schoolBusStats.shtml>>

⁹ Insurance Institute for Highway Safety, "Cell Phone Laws (as of July 2007),"

<<http://www.iihs.org/laws/cellphonelaws.aspx>>

Although school districts in various other counties continue to use the audio component in security cameras in light of reassurance from district attorneys in those counties, the uncertainty generated by the Allegheny County incident has prompted numerous other school districts to disconnect the audio track out of caution, until the law can be better clarified. The unfortunate result is a broad step backward in the ability of school officials to protect students and staff from violence, bullying, false accusations and other misconduct.

When combined with video cameras, these recording devices can be of tremendous value when altercations and other seriously abusive incidents occur. The audio tracks also can be an extremely important tool for evaluating accusations that drivers have made inappropriate sexual comments to students, whether to validate victims' stories or to clear drivers of false accusations, as well as in preventing bullying of a verbally harassing nature. Schools have already installed these devices in hallways, cafeterias, stairwells, and other campus locations to supplement direct staff supervision and deter violence and bullying. A variety of state and federal grant programs exist to assist schools to take advantage of this technology to protect students and staff.

To resolve the current inconsistency in policy, PSBA recommends an amendment to the wiretap law that clarifies the specific conditions under which the interception of oral communication is lawful. House Bill 797, sponsored by Representative Walko, may be an appropriate vehicle that accomplishes our goal. Attached is the proposal made by PSBA to clarify current case law and remedy the recent Allegheny County situation.

The safety of our students is one of the highest priorities of our school districts, and PSBA welcomes the interest of legislators who wish to help us craft better public policy in this pursuit. Be that as it may, the General Assembly should not enact broad-sweeping unfunded mandates that are based on questionable threat assessments, especially when they divert millions of dollars from more practical solutions to more immediate school safety issues. We urge the committee to carefully discern the situations surrounding our school buses to identify actual threat factors and not just supposed dangers. Thank you for your consideration of PSBA's concerns and recommendations. I will be happy to answer any questions that you may have.

**PSBA proposal for amendment to Pennsylvania's
"Wiretapping and Electronic Surveillance Control Act," 18 Pa.C.S. § 5701 et seq.**

Amend the definition of "oral communication" at 18 Pa.C.S. § 5702 (Definitions) as follows:

§ 5702 Definitions. As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Oral communication." Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include any electronic communication. For purposes of this act, an expectation of non-interception is justified only in circumstances where it is objectively reasonable to believe that the conversation or other oral communication will not be overheard by other persons not directly participating in the communication. An expectation of non-interception shall not be considered justifiable in places that are not normally private in nature where crowds, the proximity of third parties or other conditions, including but not limited to the plainly visible operation of video or audio recording equipment, and signs providing notice that security cameras with video and audio capability are or may be operating in the area, make it objectively unreasonable to expect that a conversation or other oral communication conversation will not be overheard by other persons or captured on recording equipment that may be operating in the vicinity in a non-surreptitious manner.

Background and Analysis

Existing Law

Pennsylvania's Wiretapping and Electronic Surveillance Control Act, while one of the nation's most protective of personal privacy, makes an important distinction between the interception of electronic or wire communications (e.g., telephone taps), and the interception of oral conversations (e.g., audio taping or use of eavesdropping devices). In both cases, intentional recording or other interception is unlawful without the consent of all parties to the communication. Unlawful interception in violation of the Act is a third degree felony.

However, unlike the interception of electronic or wire communications, intercepting an oral conversation does not violate the Act unless the participants in the conversation: (1) actually believed that their conversation would not be intercepted; and (2) were justified in such a belief under the circumstances. The Act makes this critical distinction in the definition of "oral communication" in Section 5702, rather than in subsequent sections setting forth what constitutes a violation and listing numerous exceptions.

The proposed amendment strengthens and clarifies this distinction to conform to the interpretation of the Pennsylvania Supreme Court in Agnew v. Dupler, 553 Pa. 33, 717 A.2d 519 (Pa., 1998). As the Court explained in that case, unless a conversation takes place in circumstances where the participants could reasonably have a general expectation of privacy, the conversation does not meet the definition of an "oral communication" protected by the Act from interception. The Court also explained that

when it is possible for a conversation to be overheard by others nearby, it is not reasonable for the participants to have the necessary expectation of privacy and non-interception.

In *Agnew*, the Court considered a situation where a police chief was accused of violating the Act when he used an intercom system to eavesdrop on officers in the squad room down the hall from his office. The Court unanimously agreed that the conduct did not violate the Act, not only because the officers had no reasonable expectation of privacy where conversations in the squad room could be overheard by persons down the hall, but also because the officers were aware of the intercom system and that it could have been on.

The ruling in *Agnew* is significant for two main reasons. First, it reaffirms the General Assembly's policy choice, reflected in the Act's distinction between oral and electronic or wire communications, that the nature of modern life and the prevalence of consumer devices capable of recording sounds is such that it was not intended that citizens of the Commonwealth should have to live in fear of felony prosecution or civil suits under the Act simply because the non-surreptitious use of such devices happens to capture on tape bits and pieces of casual conversations amid the hubbub of public places. The intent of the Act was instead to protect truly private communications from intentional, surreptitious and non-consensual recording.

Prior to the decision in Agnew and continuing today, the distinction stressed by the Court is too often overlooked, misunderstood or undervalued. The amendment proposed by PSBA seeks to correct this by adding explanatory and clarifying language that reflects what the Supreme Court in Agnew has determined to be the meaning and intent of the Act, and that in turn helps to resolve continuing concerns affecting the safety and security of school students.

School Safety Concerns

The use of video monitoring cameras on school buses to enhance the safety of students and staff is an example of where misapplication of the Act due to inadequate understanding has attracted a good deal of attention and concern in recent months. Monitoring cameras are proven to be a powerful means of deterring student misconduct on buses, and for documenting misconduct when it occurs. The Act is not implicated by the use of video only, but comes into play only when the audio recording capability of the camera is activated.

Although much of the audio picked up by monitoring cameras on buses is unintelligible due to general hubbub and engine or road noise, it still can be of tremendous value when altercations and other seriously abusive incidents occur. The audio also can be an extremely important tool for evaluating accusations that drivers have made inappropriate sexual comments to students, whether to validate victims' stories or to clear drivers of false accusations, as well as in preventing bullying of a verbally harassing nature.

When school districts use this kind of technology, they typically install boxes in all buses, inside of which video cameras can be installed to monitor the behavior of both drivers and passengers. For budgetary reasons, a district may not have enough cameras for every bus in the fleet, and will rotate cameras among the buses from day to day. Although students and staff are warned generally via signs, policies, handbooks, and other means that cameras may be operating on the buses, neither students or drivers may know for sure whether the camera box contains an operating camera on any particular day.

Thus, while students may be on notice that the bus is subject to monitoring, they may not necessarily know which days it is happening.

School buses are not the only places in which monitoring cameras are used to enhance campus safety. They are also used to monitor hallways, cafeterias, stairwells, and other campus locations to supplement direct staff supervision and deter violence and bullying. A variety of state and federal grant programs exist to assist schools across the nation to take advantage of this technology to protect students and staff.

Shortcomings of Existing Statutory Language

Unfortunately, the ability of school districts in Pennsylvania to make use of the audio component of monitoring cameras is inconsistent around the Commonwealth, largely due to uncertainty about the meaning of our wiretapping statute and differing interpretations by district attorneys and police.

Although the inherent lack of privacy in conversations on a crowded school bus or school hallway might seem obvious to most, it would also seem obvious even before the Agnew decision that affirmatively putting students and staff on notice that cameras are in operation, via signs, handbooks, policies and other means, would erase any doubt about the applicability of the Act. In fact, for many years Pennsylvania State Police officials assigned to school bus safety programs have assured school officials that so long as they posted advisory signs and took other measures to alert passengers and staff to the use of cameras, the Act should not be a cause for legal concern.

Nonetheless, PSBA has been aware that district attorneys in some parts of the Commonwealth did not necessarily concur about the applicability of the Act in such circumstances, and so has suggested to school officials that before activating camera audio even with signs posted, it would be prudent to review the plan with the district attorney in their county to confirm that the DA would not regard the use of the audio under such circumstances to violate the Act. Without that assurance, even a remote possibility of felony prosecution could be too great a consequence for school officials to risk.

In Allegheny County in early 2006, a state police trooper seized more than 100 school bus cameras and filed felony charges against a school bus operator based on the use of the audio component of the cameras, even though signs had been posted alerting passengers that cameras may be in operation. Although these charges were eventually dismissed by the district attorney, the incident has further clouded the legal landscape on this issue. In what appears to have been an effort by the district attorney to allow the state trooper involved to save face, the district attorney explained that prosecution was not appropriate because there did not appear to have been any *intentional* violation of the Act. Importantly, the district attorney also stopped short of saying that the Act had been violated at all, whether intentionally or unintentionally.

Although school districts in various other counties continue to use the audio component in security cameras in light of reassurance from district attorneys in those counties, the uncertainty generated by the Allegheny County incident has prompted numerous other school districts to disconnect the audio track out of caution, until the law can be better clarified. The unfortunate result is a broad step backward in the ability of school officials to protect students and staff from violence, bullying, false accusations and other misconduct.

Drawbacks of Previously Proposed Solutions

To resolve this problem, some have proposed adding an exception specifically addressing the use of monitoring cameras on school buses to the 16 exceptions already contained in §5704 of the Act. Examples currently introduced include Senate Bill 125 (PN 170), and House Bill 797 (PN 916). For three main reasons, PSBA believes that this is not the best approach, and worse, could create new legal risks exposing business owners, average citizens and news media to prosecution and lawsuits.

First, current proposals for a new exception are too narrow to provide school officials the assurance and flexibility they need in order to take appropriate student safety measures. To begin with, the proposal is limited to use on buses, but schools use cameras in a variety of places on campus besides buses, where the audio track can be equally useful.

Second, an exception should not be necessary, because if properly interpreted consistent with Agnew, the Act does not apply to or protect oral conversations taking place in busy public places like school buses, hallways, malls, and the like. Addressing school bus monitoring as an exception as previously proposed would be inconsistent with the original intent of the Act in such circumstances, as explained in Agnew. By imposing new prerequisites, this approach actually would criminalize the kind of monitoring many district attorneys already believe is perfectly lawful under the Act as presently written. The key point is that the proviso in the definition of “oral communication” highlighted above was written so as to make such an exception unnecessary.

Third, and having broad impact beyond the school context, adding yet a 17th exception to the Act is likely to have the paradoxical effect of creating greater uncertainty about what kinds of commonplace conduct might violate the act, exposing average citizens, news media, business owners and others to increased risk of lawsuits or even criminal prosecution under the Act. Adding a specific exception unavoidably suggests that situations not covered by it are unlawful. And, when the exception should be unnecessary anyway because it addresses situations where the Act was not meant to come into play, this paradoxical effect is worsened.

The exceptions contained in § 5704 deal exclusively with the use of electronic recording or intercepting devices by law enforcement in criminal investigations and Vehicle Code stops, and interception of electronic or wire communications by non-law enforcement entities in certain narrow cases. Consistent with the Agnew ruling, none of the existing exceptions address the interception other than by law enforcement of oral communications.

The problem is, the more exceptions you add, the more they overshadow the general rule of the proviso in the definition of “oral communication,” limiting the reach of the Act from many everyday situations. If you need a specific exception for the kind of school-related monitoring described above, the list of other things that may require exceptions in order not to be deemed felonies could become endless. Existing exceptions already are becoming the basis for arguing that the Act can be violated by things it would seem were originally intended to be excluded by the general rule defining a protected conversation.

If you need an exception to cover places like school buses, what other common situations would be illegal without a specific exception in the law? Consider the case of a father openly using the family video camera to record his daughter’s participation in a high school basketball game. Where is the

exception that protects him from prosecution when he happens to capture portions of a conversation between people seated in the bleachers immediately in front of him?

Similarly, would the General Assembly need to adopt another exception to protect TV news organizations from possible criminal prosecution for recording sound when filming a crowd on the street? Where is the exception that makes that not a violation of the Act without consent of those filmed?

The critical point is that such exceptions should not be necessary, because Pennsylvania's wiretap law was never intended to apply to conversations in public or other places where people should not assume they will not be overheard.

Conclusion

For the above reasons, PSBA submits that the soundest approach to resolving the issue of video monitoring in schools and school buses, is not to add a specific exception for that, but instead to clarify and strengthen the original intent of the Act as explained in Agnew, using the language proposed by PSBA.