

August 5, 2014

Manny Arvon, Superintendent
Berkeley County Schools
401 South Queen Street
Martinsburg, West Virginia 25401



Dear Superintendent Arvon:

You have requested an interpretation of school law regarding the participation of faith-based childcare programs in the West Virginia pre-kindergarten program ("WV Pre-K") under West Virginia Board of Education Policy 2525 "West Virginia's Universal Access to a Quality Early Education System" in light of the concerns expressed by Patrick C. Elliott, Staff Attorney for the Freedom From Religion Foundation in his May 9, 2014 letter to you, a copy of which you have provided to me.

Mr. Elliott brought to your attention the following complaints by a parent or parents of children who attend pre-kindergarten classes at New Beginning Child Care Center, Inc., a collaborative partner with the Berkeley County Board of Education in WV Pre-K and a Christian faith-based organization:

- Religious symbols and images are located on the outside sign and the interior of the facility;
- New Beginnings hosts a bible study for its children every Monday; parents who do not want their children to participate are offered a four-day option;
- Prayers are said before breakfast and lunch; a staff member said that New Beginnings received special permission to say prayers;

Mr. Elliott asserted that it violates the Establishment Clause of the First Amendment to the U. S. Constitution for Berkeley County Schools to collaborate with a daycare center that has religious programming, although it is unclear whether he objects to religious programming just during WV Pre-K or the presence of any religious programming in a facility that houses a WV Pre-K program.

As you are aware, the inclusion of faith-based organizations to provide public funded services and education gained traction with an Executive Order by then President Bush that established the White House Office on Faith-Based and Community Initiatives. The No Child Left Behind Act of 2001 included faith-based organizations as one of the community-based organizations who were eligible to collaborate with local and state educational agencies on

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education initiatives, such as the 21st Century Community Learning Centers. More recently, the West Virginia Board of Education has directed the county school systems to collaborate with faith based early childhood program providers, among others, in providing universal pre-kindergarten education in Policy 2525 "West Virginia's Universal Access to a Quality Early Education System."

You are correct that Policy 2525 provides no guidance concerning the issues Mr. Elliott has raised. However, it is implicit in all of the WVBE policies that they must be implemented in a manner which does not violate the State or Federal Constitutions. Admittedly, the public school systems' collaboration with daycare centers operated by faith-based organizations or espousing faith-based curriculum poses challenges to functioning in a constitutional manner under the Establishment Clause; all parties could benefit from guidance by the West Virginia Department of Education, which I will do in this letter.

The county school systems can comply with the Establishment Clause while publicly funding WV PreK Programs by implementing safeguards requiring all community providers, including faith-based providers, to separate delivery of the pre-k program from any religious activity in time and location. These safeguards should be placed in the collaborative agreement between the county and all providers as requirements. During the hours of operation in which the the WV Pre-K program is operated, the providers must:

- (1) use the WV Pre-K Program approved curriculum;
- (2) refrain from teaching religious beliefs; and
- (3) avoid engaging in religious practices, including praying at mealtimes.

With respect to Mr. Elliott's items of concern, I believe that only one—praying at mealtimes—strays from these safeguards. I am assured that Berkeley County Schools knows that it cannot give special permission for New Beginnings to lead prayers at mealtime during WV Pre-K and has not done so.

Mr. Elliott's other concerns are directed more towards the faith-based nature of New Beginnings private day care services. I start from the premise that neither the county nor the State has the authority to impair or substantially burden the religious character of New Beginnings day care program as a condition of receiving public moneys to operate a WV Pre-K program. *See*, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. The county is not funding the day care program, for which parents must pay if they want day care before and after pre-K.

I think Mr. Elliott is mistaken in his assertion that New Beginnings has a bible study for the WV Pre-K students on Mondays but offers a four-day pre-k option to parents who don't want their child participating. As the collaborative agreement he attached to his letter makes clear, the WV Pre-K Program is offered Tuesdays through Fridays, with Mondays being the teachers'

planning period. Therefore, the Monday bible class is not a part of the pre-k program. If New Beginnings has not made this clear, then it should in the future.

With respect to religious icons and images, New Beginnings does not have to remove or cover them. What is important is that no State funds may be used to purchase or maintain them and they may not be included or alluded to during conversation or instruction during the WV Pre-K program. See, e.g., Iowa Statewide Voluntary Preschool Program for Four-Year-Old Children, *Frequently Asked Questions*, attached.

Mr. Elliott argues, in effect, that all universal pre-K classes must be held in a completely secular environment. The cases cited by Mr. Elliott all arise from conduct occurring on public school property and do not apply to pre-K classes being held in a faith-based organization. Berkeley County Schools offers WV Pre-K programs that it operates at eight locations, one of which is Jay Dee's Family Fun Center in Inwood. For those parents wanting wrap around day care, Berkeley County Schools partners with six day care centers, three of which appear to be secular in nature.

It is true that New Beginnings is the only WV Pre-K collaborative in the Inwood area that offers day care. The others are in Martinsburg. However, Berkeley County Schools is not required to offer day care services as part of its universal pre-k program, and it does not put public funds into supporting day care services. Parents must pay for the day care. Berkeley County Schools is willing to collaborate with any day care center in Berkeley County that are willing and able to meet the requirements set forth in the collaborative agreement. You cannot discriminate against faith-based organizations by requiring them to remove all religious symbols from their buildings and religious teachings from their day care program.

To assure that all collaborative day care centers understand their responsibilities for operating a WV Pre-K program, I am directing that the Office of Early Learning develop model language for the counties to use in their collaborative agreements with day care centers or other private partners, as other states have done. The Agreement should contain the following requirements and prohibition:

- The WV Pre-K program may not contain religious observances, such as prayer, grace, confession, church attendance or religious instruction or use religious materials.
- The WV Pre-K program cannot be used to proselytize or attempt to persuade or convert children or their families to religion or a particular religious persuasion.
- A child may not be excluded from the WV Pre-K program based on the family's religious creed or lack thereof.
- The WV Pre-K program may not require children or their families to participate

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in faith-based activities.

-WV Pre-K participants may not be prevented from engaging in their personal religious practices, provided those practices are not initiated by the staff.

As State Superintendent of Schools, I noted one practice that does have the potential for violating the Establishment Clause but is easily remedied. Your Collaborative Agreement states that "the Provider will assist the Board in enrolling not less than 18 eligible students to participate in the WV Pre-K Program. Children who are enrolled in the Center will have priority to enroll in the WV Pre-K Program. If space is available, other children may enroll on a first come, first served basis." Your Pre-K Registration Preference Sheet provides in bold and underlined font at the start of the list of participating day care center: "The following sites are **Full Day** programs and you **must be enrolled in the daycare to participate by calling the number listed below.**"

The language on the Preference Sheet is inconsistent with the collaborative agreement to permit children who are not enrolled for day care services to attend on a first come, first served basis if there is sufficient space.

Because transportation is not provided for WV Pre-K Programs, it makes sense to give priority to children enrolled in the day care center. However, if a parent wants his or her child to attend the WV Pre-K Program at a faith based organization, if there is space, but does not need or want its day care services, he/she should not be compelled to enroll her child in day care, particularly one that provides religious instruction, in order for the child to attend.

I would recommend that the Pre-K Preference Sheet state . . . "Priority for enrollment in WV Pre-K will be given to those enrolled in day care. If space is available, other children may enroll on a first come, first served basis."

Sincerely,



Charles K. Heinlein
State Superintendent of Schools

CKH/sgr

cc: Patrick C. Elliott, Esq.
Clayton Burch

Attachment