

Legally Speaking

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100% Student Success

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Educate and prepare each student for college, career and life.

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'Tis the Season (...the other one)

By David Koperski, School Board Attorney

Unless you are a hermit, you are keenly aware that we are deep into a new election season. With the March 17th and August 18th primary elections in the rearview mirror, one final election remains – the November 3rd General Election. On this ballot, we will be casting votes for local, state, and national candidates, as well as on other matters, such as the extension of the School District Referendum that has passed since it first appeared on the ballot in 2004. Given the heightened public interest in the upcoming election, we wanted to remind everyone of the rules regarding political activities on school grounds and other district property. In short, based upon Florida law and our own School Board policies, we must remain neutral in elections and cannot act in any way that would further the campaigns of political candidates or questions on the ballot.

The general rule is that School Board property, including school sites and district technology, may not be used to promote the interests of any

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Legal Department Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the Superintendent and the District by ensuring timely and accurate legal advice and effective representation on all legal matters.

Scholarship Programs and Religious Schools

By Laurie Dart, Staff Attorney

This past summer, the United States Supreme Court found unconstitutional a “no-aid” provision in Montana’s constitution which prevented students from using funds from a state sponsored scholarship program for enrollment in a private Christian school. The case is Espinoza v. Montana Department of Revenue and involved a tax credit scholarship program which enabled any family awarded a scholarship to use it at any “qualified education provider.” The families of three children who were awarded scholarships intended to use them at private Christian schools but were denied the ability to do so by a rule adopted by the Montana Department of Revenue implementing the “no-aid” provision. In a 5-4 decision, Chief

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'Tis the Season (...the other one)

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political candidate, organization, or position on a political question. So, no person, whether they are a candidate, employee, parent, or other person, may engage in political activities on school grounds. This includes, among other things, (1) physically campaigning on school property, (2) using school resources or time to campaign, or (3) using school logos, photos, or other property in campaign materials. These rules are based upon certain Florida statutes and the School Board Policy Manual, and violations could result in both statutory sanctions and employee discipline. At the end of this article, we have included an FAQ section to address some recurring scenarios.

An important exception to this general rule is that a person or group may lease school property for a fee and use it for their own purposes (within certain parameters), including campaign purposes. The fact that we lease our property does not mean that we are endorsing or sponsoring the activity conducted on it – for example, houses of worship have, in the past, rented our school buildings for religious services on the weekends. Questions regarding leasing a school for any purpose can be referred to the Real Estate Department at 547-7137.

Other rules must also be followed. First, employees may not spend any of their duty time or school resources (for example, copiers or the district email system) to promote a candidate or political cause. This would include active campaigning, such as passing out flyers promoting a candidate or question, but it also includes more passive campaigning by employees, such as wearing a shirt or button promoting a candidate.

Second, other than fund-raising that occurs at an event held pursuant to a lease, no employee, candidate, or other person may engage in fund-raising on School Board property.

A trend during recent campaign seasons is for candidates to request school visits. During these pandemic times, we can and have limited nonessential visitors for safety reasons, and that certainly applies to political candidates. However, we also need to recognize that Florida law grants certain officials, including elected school board members (who could also be incumbent candidates for re-election), the right to visit schools at any time without prior notice. While this law allows unannounced visits and allows the member to travel around the school without an escort, these visitors must still follow the same safety and sign-in procedures normally used. Any visiting candidate should be informed that s/he cannot engage in any political campaigning, advocacy, or literature distribution, whether active or passive. This prohibition would include: (1) wearing of shirts or buttons with their names, district or other seat/office number, or other campaign information, (2) distributing campaign literature, and (3) speaking to people, whether employees or not, to promote their candidacy. If any visiting candidate is in violation of these rules, please remind him/her of them and ask for compliance.

Please be vigilant to ensure our sites are not being used by anyone – candidate, employee, parent, or other – to promote a candidate or political position. If you have any questions or a situation arises involving these rules on which you need guidance, please feel free to contact us at 588-

6219.

FAQs

Based upon our experiences, the following are common campaigning fact scenarios with answers, with the caveat that each specific incident should be viewed on a case-by-case basis for a final answer.

Q1 – May a candidate, district employee, or other person park on school property with a standard sized political bumper sticker on his/her car?

A1 – Yes. Bumper stickers are small in size and ubiquitous in our society and, thus, usually ignored. Once applied, they are difficult to remove, which would make it difficult to enforce a ban on their display.

Q2 – May a candidate, district employee, or other person park on district property with clearly visible campaign material, other than a standard bumper sticker, attached to his or her car, such as a large car magnet or sticker?

A2 – No. This is not allowable because this activity represents a more active engagement in political advertisement and campaigning on our property in violation of policy.

Q3 – May a district employee wear clothing (assuming it is not in violation of dress guidelines) or a political button during duty hours saying "Vote for XYZ" or some other message reasonably calculated to advocate for a candidate or political question?

A3 – No. This is not allowable because the employee is engaging in political advertisement and campaigning during duty hours in violation of policy. The conclusion is the same whether the employee is at a school or at a site not housing students. ●

COVID-19 School Litigation Update

By David Koperski, School Board Attorney

The pandemic poses unprecedented challenges in society, certainly one of the largest ones being the delivery of public education to 50 million public school students in the country, almost 3 million of whom are in Florida. Given the uncharted waters in which society finds itself, it is not surprising to hear that many lawsuits have been filed across various areas affecting public education. You may have heard of some of these cases in the news. This article will provide a status update, at least as of the date this newsletter was published, on some cases of interest to us. We will continue to follow these and other COVID-19-related cases, the final orders from which may or may not impact our practices during this 2020-21 school year, and possibly beyond.

State Teachers Association Challenge to State's Authority to Issue Emergency Order

This highly-publicized case brought by the Florida Education Association (FEA) and other plaintiffs against various state officials sought a court order declaring that Florida DOE Emergency Order 20-06 (EO) was unconstitutional. The EO stated, among other things, that any school district that wanted to receive full funding for virtually-educated students and receive other flexibility during this school year needed to submit and have approved a school re-opening plan that included re-opening in-person schools for those families that desired that option. One of the concerns for school districts was the Florida law that only funds virtual students at a portion of the in-person students.

For districts that anticipated tens of thousands of students wanting to remain home to start the school year, this meant devastating budget cuts with personnel layoffs likely if a re-opening plan was not approved. The EO waived this Florida law and, as noted above, granted full funding for virtually-educated students so long as your district had approved plans that included in-person education as an option.



In their complaint, the FEA and others argued that the EO, with the conditions described above, violated the Florida Constitution's provision regarding the operation of a "safe" and "secure" system of public education, as well as due process requirements to remain free from "arbitrary and capricious" government orders. The case was originally filed in a state trial court in Miami-Dade County, but was moved to Leon County (home to the State capital and the DOE defendants) because public defendants generally enjoy "home venue privilege," meaning that they can demand to be sued in their home counties. The trial court ruled in favor of the FEA on the primary arguments and stated that the EO could not require the re-opening of brick and mortar schools in exchange for the full funding of virtual students.

The trial court ruling was appealed, and the appellate court said that the trial court's ruling was not effective until after the appeal was concluded. As of the writing of this article, the matter was still under consideration by the appellate court. Regardless of the appellate court's ruling, the losing party could still appeal the matter to the Florida Supreme Court, which would have the dis-

cretion to hear or not hear the case. If it chose to hear the case, the parties would need to engage in another round of written legal briefs and possibly oral arguments before that court.

Federal IDEA Class Action in New York

On behalf of multiple students and families, a group of lawyers have filed a lawsuit in federal court in New York alleging that school districts have denied disabled students and their families certain rights under various federal laws, including the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. It appears from the plaintiffs' demands that one of the primary purposes of their lawsuit is to compel schools to re-open so that disabled students can receive their services in person, just as they did pre-COVID-19; that is now a moot point in Florida, with the last of the Florida districts to re-open in person – the large south Florida districts – re-opening as of the writing of this article.

The unique aspect of this case is that the plaintiffs have named every single school district in the United States as a defendant (currently, that is over 13,000). There are multiple legal problems with this strategy, and the federal court is being very active in holding the plaintiffs' lawyers' feet to the fire on this issue. Most of us are aware of plaintiff class action lawsuits where a group of plaintiffs want to represent everyone in the same situation. In fact, you may have received mail at some point asking you if you want to opt out of a class action lawsuit relating to some vacuum or car you purchased that allegedly has some defect. However, a "defendant class action" lawsuit is

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Scholarship Programs and Religious Schools (Cont'd from page 1)

Justice Roberts wrote the opinion for the majority and held that excluding schools from government aid solely because of their religious status violates the Free Exercise Clause of the First Amendment because it discriminates against schools and parents based on the religious character of the school. He wrote: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." The decision relied heavily on the Court's 2017 ruling in Trinity Lutheran Church of Columbia Inc. v. Comer involving the eligibility of a church owned pre-school to qualify for a grant available for non-profit agencies to resurface their playground. The church was denied the grant based on Missouri's "no-aid" provision. The Court held that the denial discriminated against the church "simply because of what it is---a church" and that violates the Free Exercise clause of the First Amendment.

More than 35 states, including Florida, have "no aid" provisions also known as Blaine Amendments prohibiting the use of government funds for religious purposes. Justice Alito's concurring opinion in Espinoza traces the history of the so called "baby Blaine amendments" explaining that the states modeled them after the failed effort of House Speaker James Blaine who in 1875 attempted to introduce an amendment to the U.S. Constitution in response to prejudice against Catholic immigrants and particularly Catholic education. Florida's "no-aid" provision found in Article

1 Section 3 of the Florida Constitution formed one of the challenges to Florida's Opportunity Scholarship Program (OSP) under Bush v. Holmes. Florida's First Circuit Court of Appeals agreed that the OSP was unconstitutional because it allowed public money to be used for religious purposes in violation of the "no-aid" provision. On appeal, the Florida Supreme Court found that the OSP was unconstitutional, but for reasons other than the "no-aid" provision. It stated:

"We affirm the First District's decision finding [the OSP] unconstitutional in *Holmes II*, but neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in Article I Section 3 of the Constitution, an issue we decline to reach.

The United States Supreme Court's decision in Espinoza appears to settle the question. That is, no-aid provisions cannot bar religious schools from participating in scholarship programs. ●

Covid-19 School Litigation Update
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much more difficult to prosecute, as the plaintiffs' lawyers are experiencing. Obviously, our district is one of the named defendants, but we have not been properly served with this lawsuit as of yet. As noted, there are multiple problems with this lawsuit and, if we are ever pulled into it, we will raise all relevant defenses. ●

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***The School Board Attorney
and Staff Attorney Offices
would like to wish you and
your families a Safe and
Happy Fall and Holiday
Season***

