Pinellas County School Board Attorneys Office

Legally Speaking

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In This Issue

Emergency Order 20-07 and COVID-19 Litigation Updates

By David Koperski, School Board Attorney

It is hard to believe the COVID-19 pandemic began about one year ago. It has caused devastation in the U.S. and around the world, but there is reason to be optimistic about 2021 with multiple vaccines currently being administered. In Volume XXI, Issue 1, of *Legally Speaking*, we discussed COVID-19 litigation affecting public schools. This article will provide an update on those cases, as well as provide a general overview of the Florida Department of Education's Emergency Order relating to the second semester.

EO 20-07

As we know, the Florida Department of Education ("DOE") issued Emergency Order 20-06 ("EO 20-06") in early July 2020. It required public school districts that wanted to receive full funding for virtual students and certain flexibility to submit and have approved a school re-opening plan that included opening in-person schools for those families that desired that option. One of the concerns for school districts was the Florida

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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.

Another Free Exercise Clause Case

By Laurie Dart, Staff Attorney

The last edition of *Legally Speaking* discussed the recent Supreme Court decision of Espinoza v. Montana Department of Revenue which found that a provision in the Montana state constitution preventing students from using funds in a state sponsored scholarship program to attend a private Christian school was unconstitutional because it violates the Free Exercise Clause of the First Amendment.

In reliance on the Espinoza case, the U.S. Court of Appeals for the 2nd Circuit issued a decision on January 15, 2021, finding that a student attending a catholic high school in Vermont could not be prevented from participating in the state's dual enrollment program which allowed

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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 if a re-opening plan was not approved; for context, PCS starting in August with about 40,000 virtual students (about 40% of our student population) and, as of the writing of this article, have about 27,000 (27%) virtual students. EO 20-06 waived this funding law and allowed districts to avoid these budget cuts. However, EO 20-06 expired at the end of the first semester. It was also the subject of a high-profile lawsuit (see below).

On November 30, 2020, the DOE issued Emergency Order 20-07 ("EO 20-07"). This new order addressed the second semester and summer 2021 programs. EO 20-07 continued the same principles as EO 20-06, including the right for families to attend in-person schools, but also added additional requirements for school districts that wanted to continue to receive full funding for virtual students. Districts seeking this option needed to submit a "Spring 2021 Education Plan" by December 15, 2020, and receive DOE approval. PCS timely filed its plan and received DOE approval shortly thereafter.

Plans must include interventions for students who are struggling academically, as well as plans for summer programs to address academic deficiencies, particularly those made worse during the pandemic. EO 20-07 also clarified that families and students could, at any time, move between virtual education and in-person education, also stating that districts must process those requests in a reasonable amount of time. All but one or two school districts have filed and received approval of their Spring 2021 Education Plan. As more people are vaccinated in the weeks and months ahead, hopefully society will reach herd immunity by the end of the school year, or at least by the start of the next. Regardless, PCS will continue with its safety protocols and academic interventions for as long as needed.

COVID-19 Litigation Update

Since our last article on these issues, each of the high-profile court cases that we discussed has reached a resolution. Below is a brief discussion of each of the cases and their resolutions. More information on each case can be found in Volume XXI, Issue 1, of *Legally Speaking*, accessible here: https://www.pcsb.org/Page/482

EO 20-06 Lawsuit

As noted above, DOE Emergency Order 20-06 that addressed the first semester was the subject of a lawsuit filed by the Florida Education Association, the statewide teachers' union, and other plaintiffs, including teachers and parents. In mid-August 2020, the trial court held a multi-day hearing and then ruled in favor of the plaintiffs on their motion for a preliminary injunction. Essentially, the court struck out the requirements of EO 20-06 that (1) schools needed to re-open brick and mortar schools for in-person education in order to receive full funding, and (2) school districts needed to submit a re-opening plan to receive benefits.

As was anticipated by all, the state defendants quickly appealed. Under Florida law, when the state appeals an adverse ruling, the ruling is stayed (i.e., it doesn't yet take effect) until the end of the appeal. There is an exception to this, which the trial court recognized, but the appellate court almost immediately thereafter ruled did not apply. So, even though the plaintiffs obtained a favorable ruling at the trial court level, that ruling could not be enforced until the end of the appeal. Throughout the appeal, the parties engaged in various procedural tactics, but on October 9, 2020, the appellate court issued its ruling upholding EO 20-06 as written and reversing the trial court's grant of the preliminary injunction. The plaintiffs attempted to have this ruling reviewed by other judges at the appellate court, but that request was denied.

Interestingly, at that stage, the case was not over because all that was on appeal was the preliminary injunction ruling – a full trial could still theoretically be held by the trial court. However, any future hypothetical rulings in favor of the plaintiffs would certainly have been appealed by the state, and the plaintiffs just got a good picture of how the appellate court would likely treat those hypothetical rulings. So, after what we can only assume were lengthy discussions about the case, the plaintiffs voluntarily agreed to dismiss the entire case on December 23, 2020. This action officially terminated any further development in this case. No legal action has been initiated against EO 20-07, the second semester order from the DOE, and we do not anticipate that any will be filed.

Federal IDEA Class Action in New York

This case was filed against every

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Religious Groups Using School Grounds

By David Koperski, School Board Attorney

*M*embers of the community and even district employees sometimes ask us whether it is illegal for school grounds to be used for religious purposes. The two common examples are (1) student clubs that have a religious purpose, such as a bible club or the Fellowship of Christian Athletes, and (2) religious services held on school grounds on the weekends, such as church services on Sundays. During the COVID-19 pandemic, these uses have been curtailed, if not eliminated. However, as we exit from the strictest safety protocols as society reaches a certain level of herd immunity, these issues will resurface. Each of the two examples above raise the same "church-state" legal issues, but are answered slightly differently. Before addressing these specific examples, it is worthwhile to provide the legal context in this area.

The First Amendment to the United States Constitution contains a provision that prohibits the government from "establishing" a religion. In fact, the First Amendment mentions religion even before free speech, stating:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Establishment Clause has historically come to mean more than just the federal government officially recognizing a religion, like the country of England does with the Christian Anglican Church or the country of Thailand does with Buddhism. Rather, our courts have interpreted this provision to generally mean that any federal, state, or local government (like Pinellas County Schools) may not engage in activities that can be viewed to endorse or sponsor religion. For example, in 2000, the U.S. Supreme Court told a Texas high school that it cannot allow its football team members to lead a prayer on the field before the start of the game where the school allowed the team to use the school stadium's PA system to broadcast the prayer to the spectators. While no school employee was involved in the actual prayer, the Court said the school gave the impression that it was endorsing the prayer by allowing the use of its PA system and tolerating the prayer as part of the official pre-game ceremonies. Reaching the opposite conclusion, the Supreme Court ruled in 2019 that a 32-foot Christian cross erected on public property in 1925 to honor local fallen World War I soldiers did not violate the Establishment Clause. The Court pointed to, among other factors, the extended period of time the cross has been there and the non-religious meaning it has had over the years. After all, courts have not said that religion must never be mentioned in the public sector – just look at the cash in your pocket (…if you still carry cash) for a reference to God or realize that, immediately before any oral argument in the U.S. Supreme Court, the Court Marshall states: "God save the United States and this Honorable Court."

So, the question for us is whether the Constitution allows the other uses identified in the first paragraph above. First, regarding student clubs with a religious purpose, we must also consider one of the other rights contained in the First Amendment – freedom of speech. For decades, if not longer, public schools have allowed their grounds to be used after school hours by non-school-sponsored student clubs, such as the Boy Scouts, the 4-H Club, and sometimes religious clubs. Some schools refused to allow student religious clubs based upon fears that they would be sued for violating the Establishment Clause. Some of these schools were sued anyway, but by the student religious clubs claiming that the schools were discriminating against them based upon the religious content of their clubs' speech.

Eventually, Congress got involved and passed a federal law known as the Equal Access Act that clarifies that these non-school-sponsored student clubs have the same access to school facilities as other similar groups. Not surprisingly, this law was challenged on the same religious grounds, but the U.S. Supreme Court ruled that it was valid. Thus, it is not unlawful for a school to allow a non-school-sponsored student religious club to use its facilities on the same basis as other non-school-sponsored student clubs – in fact, it would unlawful to not allow them. In the end, this is not the school sponsoring or endorsing religion, but rather it is just the school not discriminating against these types of clubs based upon their speech. And, even though a school employee may be sitting in on the club, that person should only be there for supervision purposes and should not be taking an active role in the meetings or the student organization hosting them.

Second, regarding leases of our school grounds, School Board Policy 7511 outlines the rules whereby outside organizations can lease our facilities. The policy was passed to allow the public to have access to our facilities when we are not using them, usually for a fee.

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public school district in the country on behalf of all of their disabled students. The case alleged that, during COVID-19, 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. The plaintiffs' lawyers attempted to maintain this case as a class action, not only as to the class of plaintiffs (i.e., all disabled students), but also as to the class of defendants (i.e., every public school district). A plaintiff class action case is hard enough to bring and win, but a defendant class action is even more difficult.

Throughout the litigation, the federal court judge issued rulings against the plaintiff class on a multitude of procedural issues. Ultimately, and relevant to our purposes, the judge dismissed all school districts outside the State of New York. The plaintiffs' lawyers did not appeal this decision and so all Florida school districts are freed from being dragged into this case.

Postscript

While these two COVID-19 cases are concluded, we continue to watch other court and legislative developments regarding COVID-19. For example, as the Florida Legislature prepares for its 2021 General Session starting on March 2nd, legislators have proposed certain bills relating to COVID-19 that impact school districts, including possible limitations on liability for COVID-19-related damages.●

PINELLAS COUNTY
SCHOOL BOARD
ATTORNEYS OFFICE
301 Fourth St. SW
PO Box 2942
Largo, FL 33779-2942
Phone: 727-588-6220
Fax: 727-588-6514

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Certain school-based organizations, such as the SAC, will be able to use our facilities without charge and other school-related organizations, such as booster clubs, may be able to use the facilities without charge under certain circumstances. However, purely private organizations would be charged a lease fee and certain other incurred expenses. A multitude of outside organizations lease our facilities, including churches and other religious organizations. To allow a secular group to lease our facilities and disallow a religious organization would likely amount to unlawful discrimination against religion under state and federal law and/or a violation of the right to free speech. Regardless, allowing a religious group to lease our facility for a fee when it is not otherwise being used as a school is not tantamount to endorsing that group's message – much like the student groups discussed above, it is merely the District not discriminating against religion and recognizing others' rights to free speech.

Given the child-focused nature of our business, any presence of religion usually raises red flags. Each situation must be addressed on its own facts, and the answers are not always easy, many times leading to disagreements among the judges in our highest courts. However, it is clear that for these two commonly-asked scenarios, the use of our facilities under the proper circumstances does not violate the Establishment Clause or other law.●

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students at "publicly funded" schools to attend up to two courses at a Vermont college. The high school student in this case lived in a community that did not operate a public high school. In such cases, the "sending district" allowed students to attend a private school paid for with public dollars but could not use the tuition for religious schools. As a result, students in religious schools could not take advantage of the dual enrollment opportunity available to all other students attending private school.

The lower court upheld the state's denial of the student's dual enrollment application on the basis that the religious school was not "publicly" funded. In reversing, the appellate court held that the publicly funded requirement "plainly evinces religious discrimination" in violation of the Free Exercise Clause of the First Amendment.●