

Legally Speaking

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The Establishment Clause — Religion in Public Schools

By James A. Robinson, General Counsel

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These opening words of the First Amendment to the Constitution set forth a two-fold guarantee of religious liberty. The Establishment Clause and the Free Exercise Clause both serve to protect the religious liberty and freedom of conscience of all Americans. The U.S. Supreme Court, quoting Thomas Jefferson, stated that the Establishment Clause was intended to accomplish this end by erecting a "wall of separation between Church and State." *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947).

One of the fundamental principles of the Supreme Court's Establishment Clause jurisprudence is that the Constitution forbids not only state practices that aid one religion or prefer one religion over another but also those practices that "aid all religions." *Everson*, 330 U.S. at 15. As stated by the high court in *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985), "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." (Emphasis added.)

Courts apply the three-pronged framework first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in ruling on Establishment Clause cases. Under the so-called



Mission Statement

The mission of the Office of General Counsel 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.

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More About When Parents Cannot Agree

By James A. Robinson, General Counsel

Last issue we discussed the new policy concerning which parent controls when both are giving conflicting directions to the school staff. Generally, school staff members are not there to decide disputes between the parents. School personnel should encourage parents to avoid confrontations on school grounds and help de-escalate the situation should a confrontation develop. For their part, parents are

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Establishment Clause

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"Lemon test," a court must inquire (1) whether the government's action has a secular or a religious purpose, (2) whether the primary effect of the government's action is to advance or endorse religion and (3) whether the government's policy or practice fosters an excessive entanglement between government and religion. See 403 U.S. at 612-13.

Because public schools and administrators are subject to the Establishment Clause by operation of the 14th Amendment, the courts have struck down practices that improperly entangle public schools with religion.

In the words of U.S. Supreme Court Justice Felix Frankfurter, the "public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the constitution sought to keep strictly apart." *Illinois ex rel.*

... the Constitution forbids not only state practices that aid one religion or prefer one religion over another, but also those practices that "aid all religions."

McCullum v. Board of Education, 333 U.S. 203, 212 (1948).

The Supreme Court has long held that the Establishment Clause forbids school-sponsored prayer or religious indoctrination. The Court has struck down classroom prayer and scripture reading even where they were voluntary and students had the option of being excused. For example, a Pennsylvania law requiring that "[a]t least 10 verses from the Holy Bible" be read, without comment, at the opening of each public school on each school day, was struck down by the U.S. Supreme court in *Abington School District v. Schempp*, 374 U.S. 203 (1963). So, too, was a mandate that a prayer be read aloud by each class in the pres-

ence of a teacher at the beginning of each school day, despite the fact that pupils were not compelled to join in the prayer if their parents objected. *Engel v. Vitale*, 370 U.S. 421 (1962). A period of silence for "meditation or voluntary prayer" and allowing teachers to lead "willing students" in a nonsectarian prayer composed by the state legislature were found to violate the Establishment Clause in the case of *Wallace v. Jaffree*, 472 U.S. 38 (1985).

More recently, the Supreme Court struck down a policy allowing graduation prayers at school, even though a majority of the student body determined the content without review by school officials. The Court found that the policy created the perception of official encouragement of religion. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

The constitutional principle underlying all these decisions is that public schools may not take sides in matters of religion and may not endorse a particular religious perspective or any religion at all. What in essence is required of public school officials is that they be neutral. ■

Contract Provisions – Must Haves

By David Koperski, Associate Counsel

In previous issues of *Legally Speaking*, we have discussed the authority of the School Board and school personnel to enter into legally binding contracts with outside organizations. See Volume VII, Issues 3 and 4 at <http://www.pcsb.org/attorney/LegallySpeakingnew.html>.

The School Board is the agency head in the school district, and it is the ultimate contracting authority. However, in certain cases discussed in Issue 4 cited above, the School Board has delegated its authority to execute contracts to principals and/or other personnel.

For those contracts that do not need to go to the School Board for approval, the personnel signing the con-

tract should be aware of the following provisions that may be contained in draft contracts offered by an outside organization, as well as how to respond to them or their absence, prior to the final signing. The Office of General Counsel has form language that can be used to address all of the provisions discussed below.

- **Name of the District Party.** All contracts, whether signed by the School Board or by a principal or other administrator, should be in the name of "The School Board of Pinellas County, Florida." You could add the name of your school beforehand, if you wish, such as "Pinellas Park High School, on behalf of The School Board of Pinellas

County, Florida." The Board must be the party because it is the ultimate contracting authority.

- **Indemnification.** Contracts should not contain provisions that state the school or the School Board will indemnify, defend or hold the outside party harmless from any liability or damages. If the other party is a private party, it is desirable to have a clause indemnifying the School Board. Whether the other party is private party or a governmental entity, the School Board only should agree to be liable for damages proximately caused by its negligence and

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Parental Releases in Question

By James A. Robinson, General Counsel

The recent Florida Supreme Court decision in *Kirton v. Fields*, 997 So.2d 349 (Fla. 2008), raises questions concerning the enforceability of pre-injury releases signed by parents on behalf of minor children who participate in school-sponsored activities. In the decision released on December 11, 2008, the Florida Supreme Court held that a parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a *commercial* activity. The Supreme Court left open the possibility that it might apply the same reasoning to pre-injury releases involving school-sponsored events.

Kirton involved a father who took his 14-year-old son to a commercial ATV ride and signed a release and waiver of liability, assumption of risk and indemnity agreement on behalf of the minor child. While attempting a particular jump, the child lost control of the ATV and was ejected. The child died as a result of his injuries. The child's estate sued. The trial court granted the defendants' summary judgment based on the release. The appellate court reversed, holding that a parent cannot bind the minor child's estate by signing a pre-injury release. The Supreme Court agreed. The Court determined that public policy concerns prohibited parents from executing pre-injury releases on behalf of their minor children.

The Court reasoned that enforcing pre-injury releases would remove the incentive for business owners to take reasonable precautions to provide a safe environment for minor children. The Court noted that a commercial business can take precautions to ensure the child's safety and insure itself when a minor child is insured while participating in the activity. On the other hand, a minor child cannot insure himself or herself against the risks involved in participating in that activity. Relying on these public policy concerns, the Court determined that the pre-injury release signed by the child's father was not enforceable because it prevented the child's estate from bringing an action against the commercial establishment that provided the activity that resulted in injury.

What does this mean for schools? While *Kirton* involved a pre-injury release authorizing the child to participate in a *commercial* activity, the Court was clear that its decision should not be read as limiting the Court's reasoning only to pre-injury releases involving commercial activity. The Court noted that different policy considerations apply to pre-injury releases in the commercial setting. The Court explained that in the case of activities run by the community and volunteers, the provider of such activities or services cannot afford to carry liability insurance because volunteers offer their services without receiving any financial return, and invalidating those releases

would discourage volunteer participation. It is too soon to tell whether this Court would follow the reasoning of other sister courts to uphold the enforceability of pre-injury releases for non-commercial activities.

Until the Florida courts give more guidance, school personnel should understand that the releases they ask parents to sign for children to participate in field trips or other extracurricular activities ultimately may be found unenforceable. This underscores the need to ensure all staff members and volunteers are well trained on their supervisory responsibilities while attending trips and extracurricular activities and that all aspects of such events are carefully planned. Make sure to use vendors and carriers that provide adequate insurance. Risk management maintains a list of approved carriers. ■



Did you know? By Laurie Dart, Associate Counsel

Whenever you include a student's name or other identifying information in an e-mail, you should include the following in the subject line of the e-mail: "CONFIDENTIAL STUDENT INFORMATION" As an example, a subject line for an e-mail between a teacher and an AP could be:

"CONFIDENTIAL STUDENT INFORMATION – letter of recommendation for 11th grader Jane Doe." As you know, student records, and any personally identifiable information they contain, cannot be released without a parent's or adult student's consent, except in certain specific instances contained in the law, such as an

emergency. Including this notation in the e-mail will help prevent the inadvertent release of confidential student information in the event you ever need to release your e-mails to a third party in response, for example, to a public records request. ■

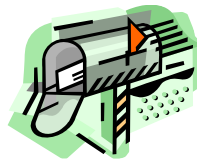
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When Parents Cannot Agree
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encouraged to confer and cooperate with each other in making educational decisions.

School personnel are not responsible for enforcing court orders or marital settlement agreements. For example, a divorce decree may provide that the father has custody on Monday, Wednesday and Friday, and the mother on Tuesday and Thursday. The school is not bound to honor such a schedule, nor is it the responsibility of the school to make note of such provisions in the student's cumulative folder or to police the enforcement of such a provision. If a parent shows up on the wrong day to pick up the child at dismissal (if during the school day, see the prior issues discussion), and assuming the parent is listed on the clinic card, do not be concerned about releasing the child to the parent. It is up to the other parent to go to court to enforce the decree.

If you are faced with a "no contact" order (an injunction) prohibiting one parent from having contact with a student, that is a different story. You should pay heed to such an order because of the potential danger to the child posed by contact with the enjoined parent. Please call the Office of General Counsel with any question or concern. ■

Contract Provisions
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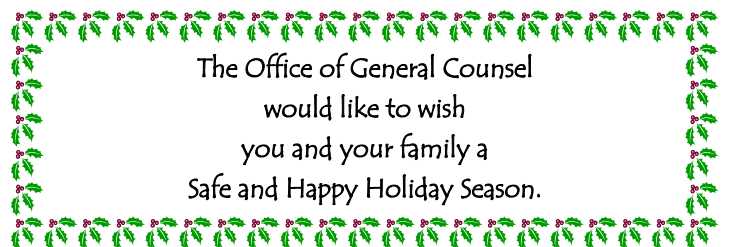
then only to the extent of the monetary limits and subject to the defense imposed by the Florida sovereign immunity statute, Section 768.28, F.S.

- **Attorneys' Fees.** Contracts should not contain provisions that allow the other party to recover its attorneys' fees incurred in enforcing the terms of the contract. These provisions potentially expose the district to much greater costs than are originally anticipated and could violate the legal provisions regarding sovereign immunity.
- **Late Fees, Penalties, Liquidated Damages.** For similar reasons, contracts should not contain provisions that allow the other party to recover these fees and penalties in the event we breach the contract.
- **Jessica Lunsford Act.** The Florida Jessica Lunsford Act requires that we perform a level 2 criminal background check on outside paid contractors if they have (1) access to school grounds when students are present, (2) direct contact with students, on or off school grounds, or (3) access to or control of school funds. If the contract contemplates these conditions, then it must contain a requirement that the contractor will comply with the Jessica Lunsford Act and

that it cannot begin to perform until a background check successfully is completed on its personnel performing the work. Please visit <http://www.pcsb.org/jlahome.html> for more information regarding this law and how to comply with it.

- **Governing Law & Venue.** If a contract identifies what state's laws will govern the contract, it should read "The State of Florida." Similarly, if a contract identifies what court will hear any dispute over the contract, it should read "The Circuit Court for the Sixth Judicial Circuit in Pinellas County, Florida, or the U.S. District Court for the Middle District of Florida."
- **Approval as to Form.** All contracts must be approved as to form by the General Counsel. Please forward them for review and approval before signature by either party.

If there is ever any doubt about the existence of signature authority or the provisions discussed, please contact the Office of General Counsel. ■



The Office of General Counsel
would like to wish
you and your family a
Safe and Happy Holiday Season.