

# Legally Speaking

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## The Florida Retirement System (FRS) Lawsuit

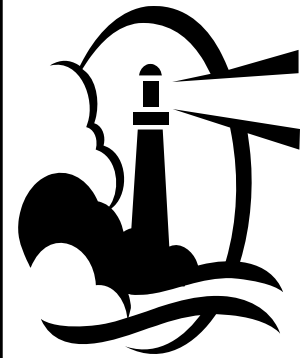
By James A. Robinson, General Counsel

You all know about the Florida Retirement System (FRS) lawsuit brought in the Circuit Court in Leon County against the State Board of Administration, the Chief Financial Officer, and the Administrator of the Florida Retirement System challenging Senate Bill 2100 (Chapter 2011-68, Laws of Florida), which mandated that 3% of the gross compensation of FRS members' salaries be contributed toward the employees' retirement benefits under the plan. It also eliminated the cost of living adjustment for service credit earned after July 1, 2011. The plaintiffs in the action were all members of the Florida Retirement System as of June 30, 2010, the day before the challenged legislation took effect.

In 1974, the Legislature created a mandatory pension plan for state workers which required no contribution, and which provided for a cost of living adjustment. The Legislature declared that the rights of the members in the pension plan "shall be legally enforceable as contract rights and shall not be abridged in any way." Section 121.011 (3)(d), F.S. In its decision in *Florida Sheriffs Association v. Department of Administration*, 408 So. 2d 1033, the Florida Supreme Court ruled that Sec. 121.011(3)(d), F.S., did not preclude the Legislature from "altering benefits which accrue for future state service." *Id.* at 1037.

The Circuit Court ruled on Mar. 6, 2012, that a state budget shortfall did not justify

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### 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.

## Virtual Schools

By Laurie Dart, Associate Counsel  
Pat Lusher, Director of Academic Computing

Online education expands opportunities for students beyond the traditional classroom setting and enables students to take challenging courses which may not be offered in their school, to take classes necessary to recover credits or to take classes at times that provide students flexibility in their daily schedules to accommodate work or extra-curricular activities. This article is intended to provide basic information regarding virtual learning opportunities which are offered as part of the public school system.

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## SB 98 – Inspirational Messages by Students at Student Assemblies

By James A. Robinson, General Counsel

On Mar. 1, 2012, Committee Substitute for Senate Bill 98 (SB 98) successfully passed the Florida House of Representatives. It had previously passed the Senate. The enrolled bill was subsequently signed by the governor and will take effect July 1, 2012.

SB 98 authorizes, but does not require, school boards to adopt a policy allowing an “inspirational message” to be delivered by students at a student assembly. The stated purpose of the bill is to “provide students with the opportunity for formal or ceremonious observance of an occasion or event.”

If a policy is adopted, it must provide that students who are responsible for organizing any student-led portion of a student assembly must have sole discretion in determining whether an inspirational message is to be delivered. Additionally, those students must choose the student volunteer(s) who will deliver the inspirational message. The student volunteer(s) must be solely responsible for the preparation and content of the inspirational message. Conversely, any policy must also provide that district personnel may not participate in, or otherwise influence, the determination of whether an inspirational message is to be delivered or select the student volunteer(s) who will deliver the message. Neither, may district personnel monitor or otherwise review the content of a student volunteer’s inspirational message.

The bill does not restrict the application of these policies to a particular

grade level. The bill is also silent regarding the types of assemblies (e.g., commencement exercises, sporting events) at which an inspirational message could be delivered, leaving that determination to be made by each school board in its policy, should it choose to adopt one.

Whether a policy will be adopted in this district is unknown.

The rules in the bill are intended to insulate the legislation and its application from a legal challenge based upon the First Amendment’s prohibition of the “establishment of religion,” commonly known as the Establishment Clause.

In 2001, the Eleventh Circuit Court of Appeals, our jurisdiction’s federal appeals court, reviewed a Duval County School Board policy in light of the case law involving the Establishment Clause in the public schools. The Duval policy stated, in part:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of

that message shall be prepared by the student volunteer and ... not be monitored or ... reviewed.

In *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), the court held the policy was “facially” constitutional. This means that the policy, as written, did not violate the Establishment Clause. The court ruled that the students’ speech under the policy was not state-sponsored speech, finding particularly persuasive the fact that, under the Duval policy, “school officials are affirmatively forbidden from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views.” The court also noted that the policy did not include religious terms such as “solemnizing” or “invocation,” but was “neutral regarding whether a message is to be given, and if a message is to be given, the content of that message” – in other words, there was no express religious purpose.

However, as noted above, *Adler* involved a “facial challenge,” and did not address a challenge to the policy’s actual application in a particular situation, which is a different type of lawsuit known as an “as applied challenge.” School boards who adopt a policy under SB 98 are likely to face a challenge on both grounds and it remains to be seen whether SB 98 will survive the challenge. ■

### SNAPSHOT

Three separate policy amendments went to first reading on Feb. 7, 2012, at which time the Board approved them for publication. A public hearing and second reading was held on Mar. 20, 2012, at which time the board approved the policy amendments with slight modifications from the first

reading. The approved amendments of these existing policies are summarized below.

- Policy 6320-PURCHASING AND BIDDING. This policy incorporates by reference the District’s Purchasing Handbook, which contains, among other things, the standard terms and conditions of our pur-

chasing contracts with vendors. The amendment to this policy added a new standard term that either the District or its approved vendor may terminate a purchasing contract without cause by giving the other party 90 days written notice of

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### Virtual Schools

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- Students may take virtual classes part-time or full time and may begin as early as kindergarten through their senior year. Pinellas County Schools has its own virtual school called Pinellas Virtual School (PVS). For middle and high school students, PVS uses digital resources and lesson plans that are the same as those used in many of the district's brick and mortar classrooms and the content and quality of the courses are the same as the courses taken by students while at school. All teachers are Pinellas County School employees and the students participating may likely be classmates of the students in their traditional assigned school setting. The curriculum used in PVS's elementary program is provided by K12 Inc., a company that Pinellas County Schools has contracted with to provide digital instruction.
- If a student wishes to participate in virtual learning part-time - i.e. remain in their current school but take one or more courses on-line to supplement their schedule, the options available include PVS or Florida Virtual School (FLVS). To enroll, the student must first contact their guidance counselor to complete the registration process.

While virtual learning used to be entirely optional, that is no longer the case. In 2011, Florida enacted Section 1002.321, Florida Statutes, which requires that students entering 9<sup>th</sup> grade in the 2011-2012 school year, and those that follow, take at least one online course dur-

ing their high school career in order to graduate.

- Students interested in full time virtual learning may do so through PVS or FLVS. With PVS, students may take up to six courses, per semester. If a student would like to take more than 6 courses, or courses outside of their regular school day, FLVS is available. One of the differences between PVS and FLVS is that PVS teachers are local and will be able to schedule face-to-face interaction with students. PVS uses the tools and resources of Moodle, Portal and Elluminate to keep in contact with students, parents, teachers and counselors. Grades and records are updated in portal for parent access throughout the course. FLVS is part of the Florida public education system with instructors who reside throughout Florida and beyond. All FLVS teachers hold a Florida teaching certificate. Grades and records are located in the FLVS content management system and are accessed through a login registered with FLVS.
- Students enrolling full-time with FLVS may do so under two different scenarios. The first scenario involves families who opt to educate their child through home education as defined in Section 1002.01, Florida Statutes. These families may use the FLVS curriculum to accomplish the home education. In such cases, the parent must notify the district's home education department of the intent to establish a home education program and the parent is registered as the "school of record." The parent must

comply with the provisions of Section 1002.41, Florida Statutes which includes, the evaluation and maintenance of a portfolio of records and student assessment testing. The second scenario involves the student enrolling in FLVS which becomes the public school of record just as though the student enrolled in another public school in a different district. These students are not Pinellas County School students. Statewide assessments must be taken and recent legislation codified at Section 1002.37(9) (c) Florida Statutes, clarified that the tests must be taken at the school to which the student would be assigned according to district school board attendance policies.

- Another difference between PVS and the FLVS programs is that PVS does not allow a "rolling admission" and neither does the second FLVS option referenced above where the school of record is FLVS. Each follows the traditional school calendar and has enrollment deadlines. In contrast, where FLVS is used as the curriculum for students enrolled in home education, students can enroll at anytime during the year and the courses are self paced.
- Students attending PVS or FLVS full-time are eligible to participate in extracurricular activities at the school to which the student would be assigned according to district school board attendance policies.

For further information regarding virtual school opportunities, you may visit <http://virtualschool.pcsb.org> and contact Pat Lusher at [lusherp@pcsb.org](mailto:lusherp@pcsb.org). ■

## Update on Subpoena Procedure

By David Koperski, Associate Counsel

The last issue of *Legally Speaking* contained an article entitled, "I Received a Subpoena – What do I do?" There is one update on the procedures that you should follow when you are served with a subpoena, whether it is for records, personal appearance and

testimony, or both. The article stated that you should contact our office's paralegal, Ms. Betty Turner, when you receive a subpoena. Rather, please contact Ms. Robin Tew, the District's Supervisor of Records Management, at 793-2701 ext.2021. Ms. Tew is very familiar with the procedures for re-

sponding to subpoenas, is the primary author of the District's "Student Records Manual," and should be involved since most subpoenas seek student records. If you missed last issue's article on subpoenas, you may access it, along with any other prior issues of *Legally Speaking*, on the District's website ([www.pcsb.org](http://www.pcsb.org)) by clicking "General Counsel" under the "About Us" tab on the home page. ■

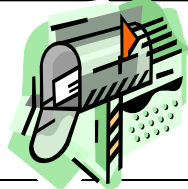
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**SNAPshot**

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termination. This allows the District to end a contract early if it best suits the District. While it also allows a vendor to do so, the 90-day period is sufficient time to find another vendor if the vendor ends the contract early. In addition, other terms relating to terminating a contract for cause were clarified.

- Policy 9210 - PARENT ORGANIZATIONS. This policy generally governs Parent Teacher Associations (PTAs) and Parent Teacher Student Associations (PTSAs). This policy was amended to clarify that copies of the PTAs' and PTSAs' outside bank statements will be sent to the school principal on a monthly basis and shall be reviewed and signed by a member of the PTA or PTSA that is not a signatory on the bank account.
- Policy 9212 - ENTERTAINMENT AND FUND DRIVES. This policy generally governs all entertainment and fund drives conducted in the name of the school, including those conducted by boosters and PTAs. This policy was amended to require that, if the event is a carnival or otherwise includes a mechanical ride, the organization conducting the event must submit to the District a commercial general liability insurance policy providing at least \$1,000,000 in coverage. This insurance policy is in addition to any other policy the organization holds, such as the one obtained through the Pinellas County Council of PTAs. ■

**FRS**

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ignoring the clear language of state statute and the Florida Supreme Court's ruling in *Sheriffs*. The Court found that the challenged legislation constituted impairment of contract, unconstitutional taking of private property without full compensation and an abridgement of the rights of public employees to collectively bargain the terms of employment. The Court ordered the State to pay back the 3%, plus the money deducted or withheld from compensation or cost of living adjustments, with interest, due those who were FRS members prior to July 1, 2011.

The ruling was appealed to the First District Court of Appeal on Mar. 6, 2012, the very day it was issued. On Mar. 16, 2012, the First District Court of Appeal certified that "this appeal is one presenting issues of great public importance and involves circumstances which require that the Supreme Court of Florida immediately resolve the issues."

***Supreme Court of Florida***

***WEDNESDAY, MARCH 28, 2012***

***CASE NO.: SC12-520***

***Lower Tribunal No(s): 2011 CA 1584, 1D12-1269***

***RICK SCOTT, ET AL.***

***vs.***

***GEORGE WILLIAMS, ET AL.***

***Appellant(s) Appellee(s)***

***... a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction.***

By order entered Mar. 28, 2012, the Florida Supreme Court accepted jurisdiction, established a briefing schedule, and set oral argument for 9:00 a.m., Wed., Sept. 5, 2012.

The State is not required to pay back what is owed FRS members pending the outcome of the appeal. We do not anticipate a final ruling for several months following the oral arguments in Sept.. If the Florida Supreme Court upholds the ruling, it is unclear how long thereafter FRS members would be reimbursed, but the State would be under a judicial mandate to do so. ■