

Legally Speaking

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Florida Supreme Court Upholds 3% FRS Contribution

By David Koperski, School Board Attorney

On Jan. 17th, the Florida Supreme Court issued its opinion upholding the constitutionality of the 2011 law (SB 2100) that required public employees to contribute 3% of their salaries to the State and otherwise affected the Florida Retirement System (FRS). The practical effect of the ruling is that the withholding 3% of employees' salaries will continue and no refunds will be issued to public employees. The legal opinion of Scott, et al. v. Williams, et al. can be viewed online at <http://www.floridasupremecourt.org/decisions/2013/sc12-520.pdf>.

In 2011, several plaintiffs filed suit against the State of Florida and the relevant state officials seeking to invalidate the following two portions of a 2011 law known as SB 2100: (1) the requirement that all FRS members contribute 3% of their salary to the state; and (2) the elimination of the 3% retirement cost-of-living adjustment (COLA) for years of service provided after July 1, 2011. FRS is the state retirement system for the employees of numerous public agencies, including school districts, state agencies, community colleges and others. In Mar. 2012, the trial level court ruled in favor of the plaintiffs on all issues and ordered the reimbursement, with in-

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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.

Bullying and Harassment Policy

By Laurie Dart, Staff Attorney and Joan Reubens, Bully Prevention Specialist

Pinellas County Schools adopted Policy Against Bullying and Harassment 5517.01 - to protect students, employees and volunteers from certain unacceptable conduct of others. There are many situations involving inappropriate behavior that do not fall within the purview of this policy and the purpose of this article is to help identify those situations.

What is bullying or harassment?

Policy 5517.01 implements Section 1006.147, Florida Statutes, and defines the forbidden conduct much more narrowly than many believe. By definition, "bullying"

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FRS Contributions

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terest, of all salary contributions made by FRS members. The State appealed the case. The trial court's order was stayed (i.e., did not go into effect) until the resolution of all appeals. The case then moved quickly to the Florida Supreme Court (Court) as a matter of "great public importance." The parties briefed the issues and the Court heard oral argument on Sept. 7, 2012.

The Court opinion reversed the trial court rulings, found in favor of the State on all issues and upheld the challenged law. The seven Court justices were divided and found in favor of the State by a vote of 4-3. The Court addressed three primary arguments made by the plaintiffs. These arguments, and the Court's response to each, are summarized in turn below.

1. Impairment of Contract. Plaintiffs argued that SB 2100 violated the Florida Constitution's prohibition against laws impairing contracts and a related statute specifically addressing the preservation of rights in the FRS retirement system. See Art. I, s. 10, Fla.Const.; and s. 121.011(3)(d), Florida Statutes. In short, the plaintiffs argued that FRS members were protected against

changes to the FRS system, and specifically those that would change the system from non-contributory (on the part of employees) to contributory. The Court, as did the trial court below, gave significant attention to a 1981 Florida Supreme Court case that ruled that the Legislature could alter future FRS benefits "for future state service." Ultimately, the Court ruled that neither the law nor this case precluded the Legislature from amending current FRS members' rights and obligations going forward, and the Legislature was not limited to making changes to FRS applicable only to employees hired on or after the date of a new law. Put in reverse, the Legislature could not impair or impact a current employee's or retiree's rights or benefits that have already been earned or vested, but it could do so for future service. Summing up its ruling in this area, the Court wrote: "We recognize the authority of the Legislature to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired."

2. Unconstitutional Taking. Relatedly, plaintiffs argued that SB 2100 violated the Florida Constitution's prohibition against the government taking private property without public

purpose and just compensation. See Art. X, s. 6, Fla.Const. The Court quickly disposed of this argument by the following rationale: because the Court found there was no breach (i.e., impairment) of a contract between the State and FRS members (see 1. above), it ruled there was no unconstitutional taking.

3. Denial of Collective Bargaining Rights. Lastly, plaintiffs argued that SB 2100 abridged the rights of public employees to collectively bargain on the issue of retirement benefits. See Art. I, s. 6, Fla.Const. The Court rejected this argument, briefly concluding that nothing in the law prohibited public employees from collectively bargaining on the issue of retirement pensions or benefits with their employers.

While this case has concluded, it will be interesting to see what, if any, impact it has on another pending case, Robinson, et al. v. Robinson, et al., regarding a challenge to many aspects of the Student Success Act (SB 736), including the provisions regarding teacher contracts, evaluations and performance pay. This case is still at the trial court level and was just recently argued in front of the trial judge. It is unclear when the trial court will issue its ruling, but it is likely that the losing party would appeal as in the Scott case. ■

Student Records – Part I - Background & Parental Rights

By David Koperski, School Board Attorney

Issues relating to student records remain prevalent in public schools. While there has been some evolution in the rules in this area, challenges remain in applying them in our changing society, especially in the area of increased technology. This article is the first in a two-part series discussing the legal framework in this arena, and will provide basic information on the law and discuss the four rights provided to parents. Part II of this series, which will be in the next issue of *Legally*

Speaking, will detail the specific exemptions that allow us to release student records, and the information contained in them, without parental consent, such as to other educational agencies and the concept of "directory information."

This area is governed by Florida and federal law, and School Board Policy 8330. On the state level, sections 1002.22-.225, Florida Statutes, apply. These laws generally defer to the federal law on this issue, the Family Educational Rights

and Privacy Act (FERPA). See 20 U.S.C. 1232g; and 34 C.F.R. Part 99.

Student Records Defined

Student records, or "education records" as they are referred to in the law, are defined as any information, whether we created or received it, recorded in any way that are: (1) directly related to a student; and (2) maintained by the school district or a party acting for us. The definition is

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Student Records

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very broad and encompasses not only the traditional records located in Focus and in a student's cumulative file, but also other records such as a teacher's e-mail to a parent about their student. But, certain records are specifically exempted and are not entitled to be treated as student records, such as records kept in the sole possession of the maker (like a teacher) and not shared with others, records created about a student after they have already left our system, and records of our PCS Police Department.

Parental Rights Under the Law

FERPA creates four rights for parents/eligible students. These rights belong to parents, but transfer to their students when they reach 18 years of age or attend an institution

of postsecondary education – these students are known as “eligible students.” In the case of eligible students, the parents may still review a student's records so long as the student is a dependent of the parent, which is usually determined by the student living in the parent's household. This right of the parent of an eligible student is one of the exceptions to being able to release records without parental (or, in this case, an eligible student's) consent, which will be the topic of Part II of this series.

Note that in the case of divorced or separated parents, both parents retain all of these rights unless a court order specifically severs them, such as an order stating that a parent cannot access the child's records. The rights that belong to parents/eligible students are as follows.

The right of privacy and confidentiality of student records and the personally identifiable information contained in them. Absent an exception, which will be discussed in Part II, we may not release student records to outside persons or entities, or even to other PCS employees who do not have a legitimate educational interest in the records, without written parental consent. A “legitimate educational interest” exists where the employee needs such record or information in order to do his or her job.

The right to inspect and review student records maintained by the school. While we are not legally required to provide copies of records unless, for reasons such as great distance it is impossible for parents or eligible students to review the re-

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Bullying

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means “systematically and chronically inflicting physical hurt or psychological distress on one or more students or employees and may involve but is not limited to: teasing, social exclusion, threat, intimidation, stalking, including cyber-stalking as defined herein, physical violence, theft, sexual, religious or racial harassment, public humiliation and destruction of property.”

The term "harassment" is defined to mean any threatening, insulting, or dehumanizing gesture, use of data or computer software, or written, verbal or physical conduct directed against a student or employee that:

- A. places a student or employee in reasonable fear of harm to his/her person or damage to his/her property;
- B. has the effect of substantially interfering with a student's educational performance, opportunities or benefits; or
- C. has the effect of substantially disrupting the orderly operation of a school.

A single act committed by a person against another does not, by definition, constitute bullying. It may constitute harassment but only if the conduct “causes reasonable fear of harm” to a person or otherwise “substantially interferes with a student's educational performance, opportunities or benefits” or “substantially disrupts the orderly process of the school.” The key here is that the interference or disruption caused by the conduct **must be substantial**. Examples of conduct which would not constitute bullying or harassment include: a supervisor directing an employee on job related expectations, a teacher correcting the inappropriate behavior of a student, a co-worker's annoying habits, a supervisor's unpleasant disposition, or a snide comment or dirty look from a fellow student or co-worker.

Accusing someone of bullying or harassment if the accusation is not made in good faith is considered retaliation and is itself, a form of harassment under the policy. When accusations of bullying or harassment are made in bad faith, there may be consequences. The policy states:

Consequences for a Student or Employee who is Found to have Wrongfully and Intentionally Accused Another of an Act of Bullying or Harassment

Consequences and appropriate remedial action for a student found to have wrongfully and intentionally accused another as a means of bullying or harassment range from positive behavioral interventions up to and including suspension or expulsion, as outlined in the Code of Student Conduct. Consequences and appropriate remedial action for an employee found to have wrongfully and intentionally accused another as a means of bullying or harassment may be disciplined in accordance with district policies, procedures, and agreements. Consequences and appropriate remedial action for a visitor or volunteer, found to have wrongfully and intentionally accused another as a means of bullying or harassment shall be determined by the school administrator after consideration of the nature and circumstances of the act, including reports to appro-

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Student Records

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records, we may provide copies and may charge 15 cents per page for the copies.

The right to seek amendments to student records that parents believe are inaccurate, misleading or otherwise in violation of the student's privacy rights. School Board Policy 8330 provides the procedure for asking for such an amendment and the impartial hearing that is required by law.

The right to file a complaint or sue the school district concerning alleged failures to comply with the law. Complaints can be filed with the USDOE's Family Policy Compliance Office. Under Florida law, aggrieved parents may also file a civil lawsuit and be awarded attorney's fees if successful.

In our next issue, we will explore the various exceptions to the right of privacy and confidentiality discussed above. ■

Bullying and Harassment

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appropriate law enforcement officials. Accusations made in good faith, even though subsequently determined to be false, shall not be subject to discipline, consequences or remedial action as called for by this section.

Reporting Bullying or Harassment

Under the policy, allegations of bullying or harassment should be made to the school principal or to the person designated by the principal to receive such reports. Employees who do not work at a school should report alleged violations of the policy to their supervisor. The district has established an on-line reporting form found at www.bullying.pcsb.org. Anyone who believes that they have witnessed an act of bullying or harassment or has information regarding such act, is encouraged to use this process to report and may do so anonymously. Anonymous reports may not be the sole basis upon which discipline is based but may be the basis of the investigation which leads to other evidence supporting the discipline.

The language quoted above relating to bad faith reports is not intended to scare people or otherwise discourage the reporting of legitimate, good faith complaints of bullying or harassment. Last year, there were 1,400 reports of bullying and harassment made on the online reporting form and only 550 were substantiated. Often, good faith complaints, even if they are ultimately unfounded, result in positive improvements to the school environment. The policy does, however, penalize those who make a complaint in bad faith. Examples include a complaint made in an attempt to preempt discipline or one made to get back at someone for something that had been done to them.

Many complaints of bullying and harassment have been made due to disparaging remarks made by someone on an internet site. Although distasteful and offensive comments can be upsetting and harmful, there are limits on what the school district can do about them. Unless the internet communication "is accessed through a computer, computer system, or computer network within the scope of the district school system" (emphasis added) or otherwise causes substantial disruption to the school environment, courts have not upheld the school district's discipline of the author of the offensive communication stating that there needs to be a nexus between the communication and the school district in order for the district to discipline the author of the offensive communication. An article expounding on this issue appeared recently in the Spring 2012 issue of *Legally Speaking*.

In summary, Policy 5517.01 is a useful tool to protect against bullying and harassment but it has its limits and is not intended to address every situation in the workplace or school environment where students, co-workers or supervisors act unprofessionally. Further, it should not be used to shield employees and students from discipline for their own misconduct or poor behavior. ■