

# Legally Speaking

Copyright © 2014 by The School Board of Pinellas County, Florida

VOLUME XIV, ISSUE 3

School Year End 2014

## In This Issue

Supreme Court Upholds Ban on Preferential Treatment in College Admissions	1
Access to Student Records	1
Service Animals	2
Must I Place Twins in the Same Classroom	2
The First Amendment Right <i>Not</i> to Speak - of Plates and Pledges	3



*The School Board of Pinellas County, Florida, prohibits any and all forms of discrimination and harassment based on race, color, sex, religion, national origin, marital status, age, sexual orientation or disability in any of its programs, services or activities.*

### School Board Members

Carol J. Cook  
Chairperson  
Linda S. Lerner  
Vice Chairperson

Janet R. Clark  
Rene Flowers  
Terry Krassner  
Peggy L. O'Shea  
Robin L. Wikle

Michael A. Grego, Ed.D.  
Superintendent

www.pcsb.org

## Supreme Court Upholds Ban on Preferential Treatment in College Admissions

By Laurie Dart, Staff Attorney

In a recent case challenging a constitutional amendment enacted by the voters of the State of Michigan banning the use of racial criteria in college admissions, the United States Supreme Court determined in Schuette v. Coalition to Defend Affirmative Action, et al. 2014 U.S. LEXIS (U.S. S. Ct. April 22, 2014), that it did not have the authority to invalidate the law prohibiting "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin." Justice Kennedy authored the opinion of the Court which was decided on a 6-2 basis (Justice Kagan recused herself). As carefully framed by Justice Kennedy, the issue decided was not the constitutionality of affirmative action programs. He stated:

"The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States ... Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education."



### 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.

*(Continued on page 4)*

## Access to Student Records

By David Koperski, School Board Attorney

We all know the general rule that parents of minor students can access their children's student records. However, sometimes confusion arises when the situation involves a step-parent or a parent with whom you never interact. Under both federal and state student records laws, the definition of "parent" is very broad. Two recent agency rulings illustrate this principle in the context of stepparents and noncustodial parents accessing student records.

In the first case, a school was dealing with two households – one with the biological mother and her new husband (stepfather), and the other with the biological father. The school released student records to the stepfather and the biological father filed a complaint claiming

*(Continued on page 3)*

## Service Animals

By Heather Wallace, Assistant School Board Attorney

**S**chool Board Policy 2630 - *Service Animals*, addresses the procedures to allow a service animal to accompany a student to school. In reviewing a request for a service animal, there are several different layers of laws and regulations that must be considered. As a public entity, the District is subject to Title II of the Americans with Disabilities Act (ADA) which prohibits public entities from discriminating against individuals on the basis of their disability. In 2011, the ADA was modified to require public entities to modify policies and procedures to allow the use of service animals by individuals with disabilities.

A service animal is defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability." There are several important aspects of this definition. The first is that it applies only to dogs, not any other animals (although we will discuss miniature horses shortly). Another is that the dog must "do work or perform tasks" for the individual. Some examples of a work or task in the school

setting would be assisting a blind student with navigation, alerting a student who is deaf or hard of hearing or pulling a wheelchair. Providing comfort or emotional support do not fit within the definition. Beyond the regulations of the ADA, the District must also look to IDEA and Section 504 for guidance. If a service animal is needed in order to provide a student with a Free Appropriate Public Education (FAPE), the animal should be allowed to accompany the student. Such a decision would be made by an IEP or 504 team at a team meeting.

If the determination is made that it is appropriate for the student to have a service animal on campus, there are requirements that the animal meet the standards in Board Policy 2630 relating to appropriateness, behavior and training. For example, the animal must be clean, housebroken and not engage in disruptive behavior. The student must be able to handle the animal and keep the animal in control. If the student is unable to handle the dog, a handler must be provided by the parents.

A parent in Broward County has recently brought suit against the Broward County

School Board because the board has required that a handler and insurance be provided in order for the dog to be allowed on campus. The student is 6 years old and the dog is trained to alert for on-coming seizures. Because the student is unable to handle the dog himself, the district has required that a handler be provided. The outcome of this case should provide further guidance to school districts as to what are considered legitimate restrictions to be placed on the presence of a service animal.

Separate from the definition of service animals, language regarding public entities to permit the use of miniature horses by individuals with disabilities was also added in the 2011 modifications. In determining whether the use of a miniature horse is appropriate, districts may consider whether the handler has sufficient control of the horse, whether it is housebroken, whether the size, type and weight of the horse can be accommodated in the facility and whether the presence of the horse compromises, in any way, legitimate safety requirements in the operation of a school. ■

## Must I Place Twins in the Same Classroom?

By David Koperski, School Board Attorney

**R**ecently, several schools have called us regarding parents' demands to place their twin children in the same classroom. In fact, a Florida law specifically addresses the rights that parents of twins, triplets or other "multiple birth siblings" have to place their children in the same classroom. Under this law, a parent of multiple birth siblings who attend the same school in the same grade can, with certain exceptions, require the school to place the children in the same classroom so long as the parent made the request in writing at least five days before school begins or within five days of their mid-year enrollment. Conversely, a parent can also re-

quire that the siblings be placed in separate classrooms, subject to the same exceptions and timelines.

There are several grounds for denying a parent's demand for the same or separate classrooms. First, if "factual evidence of performance" indicates that the siblings should be separated, then the school may place them in separate classrooms. This evidence may include the students' negative academic or behavioral histories in prior school years when they were in the same classroom. Second, a school may deny a request to keep the siblings separated if it would require the school to add an additional class to the grade level. Third, and some-

what related to the first exception, a school may revisit keeping the siblings in the same classroom after the first grading period following the siblings' initial enrollment in the school and placement in the same classroom. If, after this period has passed, the principal, in consultation with the classroom teacher, determines that the requested classroom placement is disruptive to the school, the principal may separate the siblings and reassign the siblings to other classrooms as needed. In this case, the parent may appeal the principal's decision, but the siblings must remain in the classroom chosen by the parent until the appeal is

*(Continued on page 4)*

## The First Amendment Right *Not* to Speak – Of Plates and Pledges

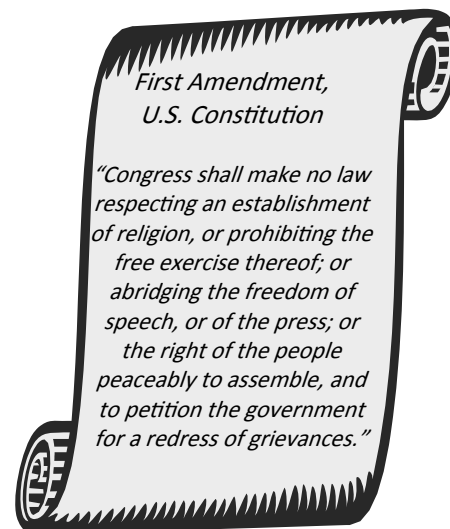
By David Koperski, School Board Attorney

Most people associate the First Amendment to the U.S. Constitution with the right to freedom of speech. Actually, there are six separate rights and prohibitions in the First Amendment. In the order mentioned by the Amendment, they are: (1) prohibition on the establishment of religion; (2) right to freely exercise your religion; (3) freedom of speech; (4) freedom of the press; (5) freedom of assembly; and (6) right to petition the government for redress of grievances. While freedom of speech certainly garners its fair share of public debate and court cases, most people are not aware that the right to freedom of speech also includes the right not to speak – in other words, the right to be free from government-compelled speech.

One famous example of the right not to speak is a 1977 U.S. Supreme Court case involving the New Hampshire state motto, "Live Free or Die," which is a reference to a famous Revolutionary War general's speech. New Hampshire placed their motto on their license plates. A motorist who did not wish to be viewed as agreeing with the motto covered it with tape (actually, he also cut part of the motto off entirely and then covered the hole

with tape because neighbor children kept removing the tape). After the motorist was cited for violating a law that precluded covering any part of the license plate's lettering, he sued the State and others claiming he had a right to not be forced to use a license plate with the motto on it. The case ultimately made it to the U.S. Supreme Court and, there, a majority of the justices ruled in favor of the motorist, stating "... where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." Two of the nine justices disagreed with the ruling, wondering whether people could now deface American currency because they disagree with the statement "E Pluribus Unum" or "In God We Trust."

Similarly, courts have ruled that public school students cannot be punished if they refuse to recite the Pledge of Allegiance. Most recently in a case from Palm Beach County Public Schools, our federal appellate court ruled that a student has a right to remain silent during the Pledge and, so long as the student does not interfere with the Pledge, cannot be punished for exercising this right.



All staff members should be aware of this student right and of our current School Board Policy 8810 - *The American Flag*, which codifies this right in our District. Thus, so long as students are not disruptive, they may either stand and recite the Pledge, or they may stand or sit and remain silent. The First Amendment protects both forms of expression. ■

### *Access to Student Records* (Continued from page 1)

that the school did not have the authority to release the records. The agency that handles these complaints, the U.S. DOE's Family Policy Compliance Office, ruled that the school did not act wrongfully because the stepfather was included in the broad definition of "parent" since he assisted the mother in caring for the child. On the other side of the coin, in the second case, a school denied records access to a noncustodial biological mother who was essentially a stranger to the school. Here, the agency ruled that the school violated the mother's rights be-

cause the mother's right to access had not been severed by a court order.

These two cases remind us of the general rule regarding access to student records – namely, that parents, who are broadly defined to include non-biological parents who exercise supervisory authority over the student, have the right to access student records unless a court order has specifically severed that right. Thus, even if you have never spoken with a parent, that parent has a right to review his/her child's student records so long as (1) there is no court order severing this right, and (2) you have proof of identity and parentage, which can become tricky

if the parent is not local; we can assist you with this issue if it arises in your school.

As you deal with families with various structures, please keep in mind the rules regarding who can access student records. To review our comprehensive two-part series on the rules regarding student records, including the right to access, please see *Legally Speaking* Volume XIII, Issues 2 and 3, located on our [Legal Services website](#). ■

**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  
E-mail: [davisme@pcsb.org](mailto:davisme@pcsb.org)

**Legal Staff Members**

David Koperski, School Board Attorney  
Heather Wallace, Assistant School Board Attorney  
Laurie A. Dart, Staff Attorney  
Betty Turner, RP, Paralegal  
Kerry Michelotti, Legal Secretary  
Barbara Anson, Legal Secretary  
Melanie Davis, Clerk Spec II - Newsletter Publisher  
[davisme@pcsb.org](mailto:davisme@pcsb.org)

**Twins**

*(Continued from page 2)*

complete. Fourth, this law cannot supersede the placement of an ESE student as determined by the IEP team – for example, if one twin is an ESE student that is placed full-time in an ESE classroom and the other is a general education student, the parent could not force the school to place the ESE student in the general education classroom, or vice versa. Lastly, neither can this law supersede normal disciplinary procedures – for example, if one twin engages in misconduct that leads him to be placed in a disciplinary classroom for six weeks, or even removed from the teacher's classroom altogether, the parent could not force the school to place the student back in the original classroom.

If you face a request regarding placement of twins or other multiple birth siblings, please feel free to contact us for guidance. ■



**Supreme Court**

*(Continued from page 1)*

The constitutional amendment at issue was put on the ballot by the Michigan voters following the Supreme Court's review of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The Court found in Gratz v. Bollinger, 539 U. S. 244 (2003) that the undergraduate admissions plan violated the Equal Protection Clause and was unconstitutional. In response to the Gratz decision, the university revised its undergraduate admissions process to limit but still utilize race as a factor in its admission process. The Supreme Court reviewed the law school's admission plan in Grutter v. Bollinger, 539 U. S. 306 (2003) and found that the narrowly tailored consideration of race in the admissions process was constitutional. In response to these judicial decisions, a ballot initiative was approved in Michigan and the State Constitution was amended prohibiting public universities from granting a preference to an applicant based on race.

Last year the Supreme Court also heard a case involving affirmative action (Fisher v. University of Texas discussed in *Legally Speaking*, Vol. XIII Issue I). The admissions policy adopted by the University of Texas was essentially identical to the policy already approved by the Supreme Court in Grutter, causing many people to believe that the Supreme Court's decision in Fisher would overrule Grutter resulting in the end of affirmative action in admission policies. The Court did not reach the merits however, and instead found that the lower court failed to evaluate the admissions policy under the high standard of "strict scrutiny" required for such cases.

The Supreme Court has had two opportunities to strike down the use of race in admission policies and has declined to do so. In Schutte, Justice Kennedy stated:

In Fisher, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in Fisher, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions ... This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters." ■