

Legally Speaking

Copyright © 2017 by The School Board of Pinellas County, Florida

VOLUME XVII, ISSUE 2

Spring 2017

In This Issue

Court Update - Florida Tax Credit Voucher Law Survives	1
Participation of Students with Disabilities in Advanced Courses and Special Programs	1
Supreme Court Ruling in ESE Procedural Matter	2
Release of Student Records to DCF	3



Vision
100% Student Success
Mission

Educate and prepare each student for college, career and life.

School Board Members

Peggy L. O'Shea
Chairperson
Rene Flowers
Vice Chairperson

Carol J. Cook
Terry Krassner
Joanne Lentino
Linda S. Lerner
Eileen M. Long

Michael A. Grego, Ed.D.
Superintendent

www.pcsb.org

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.

Court Update – Florida Tax Credit Voucher Law Survives

By David Koperski, School Board Attorney

A three year old court case involving the state's tax credit voucher program has been resolved against the challengers, which included the state level teachers union and various other parties. In this case, known as *McCall v. Scott*, the Florida Supreme Court declined a request to review an appellate court's procedural ruling that the plaintiffs lacked "standing," which is the ability to even bring a lawsuit to challenge the law. Thus, after years of litigation over this voucher program, the law remains on the books. It is interesting to note, however, that no court actually reached the legal arguments against the law itself, but rather disposed of the case by ruling that the plaintiffs could not, themselves, bring a challenge. It remains unclear whether any other party will attempt to bring a separate lawsuit, or, more importantly, whether any person or group even exists that could overcome the "standing" problem that plaintiffs experienced in this case.

The tax credit voucher law in question was first enacted in 1999, along with two other voucher programs, the McKay Scholarship program for students with disabilities, and the now defunct Opportunity Scholarship voucher program. The latter voucher program was invalidated in 2006 when the Florida Su-

(Continued on page 4)



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.

Participation of Students with Disabilities in Advanced Courses and Special Programs

By Heather Wallace, Assistant School Board Attorney

The district has a number of advanced courses and special programs available to students with disabilities (students eligible under Section 504 or ESE). It is important to note that students with disabilities are entitled to participate in advanced courses and special programs within certain parameters. There are actually three separate areas of the law that we must consider when determining if it is appropriate for a student with a disability to participate in these programs: Section 504 of the Rehabilitation Act (Section 504), Title II of the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Section 504 and

(Continued on page 3)

Supreme Court Ruling in ESE Procedural Matter

By Laurie Dart, Staff Attorney

In *Frye v. Napoleon Community Schools*, The United States Supreme Court recently decided a procedural issue regarding the extent to which parents of disabled children are required to “exhaust their administrative remedies” which is legal-speak for saying that they must first pursue a special education due process hearing under the IDEA to challenge actions of local school districts before they can file a lawsuit in court.

The case originated at an elementary school in Michigan and involved a twelve year old girl with cerebral palsy who was denied the ability to bring her service dog, a Goldendoodle named Wonder, to school. Wonder was a trained service dog recommended by the student’s pediatrician when she was five years old and assisted her in various life activities including helping her to retrieve dropped items, helping her balance when she used her walker, opening and closing doors, turning on and off lights, helping her take off her coat, and helping her transfer to and from the toilet. The school denied the request to bring Wonder to school reasoning that all of the student’s academic and physical needs were already met because she was provided a one-on-one aid under her IEP. In response, the family removed the student from the school and began homeschooling her. They also filed a complaint with the Department of Education’s Office for Civil Rights (OCR), claiming that the student’s

rights under Title II of the ADA and Section 504 of the Rehabilitation Act were violated due to the exclusion of her service animal. OCR agreed causing the school to invite the student and Wonder back to school. The family declined the invitation and instead enrolled the student in a different school and filed suit in federal court against the local and regional school districts, as well as the school principal.

The federal trial court in Michigan dismissed the suit because the family had not followed the IDEA’s administrative procedures prior to filing suit. The appellate court (Sixth Circuit) upheld the dismissal on the same theory. On appeal, the Supreme Court vacated and remanded the case back to the Sixth Circuit directing the court to analyze the true nature of the relief sought by the family. Justice Kagan, who authored the decision, rejected the Sixth Circuit’s reasoning that the administrative procedures in the IDEA had to be followed whenever the plaintiff alleged harm that was essentially educational in nature. Rather, the Court held that the “exhaustion of remedies” provision of the IDEA applies only to cases where the “gravamen” of the lawsuit is a claim that the school did not meet its obligation to provide a FAPE to the disabled child and in order to make this determination, the Court needed to look at the substance of the complaint and not just the surface. Acknowledging that conduct could violate the IDEA (which guarantees in-

dividually tailored educational services for children with disabilities) as well as Title II and Section 504, which address nondiscriminatory access to public institutions for people with disabilities, the Court suggested that lower courts ask two questions to determine the gravamen of the complaint:

- 1) Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school?
- 2) Could an adult at the school have pressed essentially the same grievance?

If the answers to the questions are yes, the complaint is unlikely to be about a denial of FAPE. If the answers are no, then the complaint probably does concern FAPE and the plaintiff would first need to follow the administrative process required under the IDEA before bringing suit against a school district.

Whether the questions suggested by the Court actually assist lower courts in sorting out the true nature of a plaintiff’s complaint remains to be seen. In a concurring opinion, Justice Alito, joined by Justice Thomas, questioned the utility of these questions stating: “Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray.” ■

On a Lighter Note - Transcripts from Actual Courtroom Testimony

Attorney: Now doctor, isn’t it true that when a person dies in his sleep, he doesn’t know about it until the next morning?

Witness: Did you actually pass the bar exam?

Attorney: How was your first marriage terminated?

Witness: By death.

Attorney: And by whose death was it terminated?

Witness: Take a guess.

Participation of Special Ed Students

(Continued from page 1)

the ADA (which also apply to ESE students who are eligible under the IDEA) both prevent an entity that receives federal funds, such as a school district, from discriminating against people with disabilities. A blanket policy that would prohibit students with disabilities from participating in advanced courses or special programs would violate this requirement. Each student must be looked at on an individual basis to determine if participation in the course or program they have elected to participate in is appropriate for them.

Under Section 504 and the ADA, the relevant inquiry is whether the child is otherwise qualified to participate in the program and whether the accommodation requested for the child to be successful in the program would result in a fundamental alteration of the program or an excessive financial or administrative burden. With regard to the "otherwise qualified" standard, this would apply in a situation where there is a prerequisite to being admitted to the program. For example, if there is a prerequisite course that must be taken

prior to admission, a student with a disability that had not taken and passed that course would not be considered "otherwise qualified" because they have not met the standard that all students, including those without disabilities, would be required to meet.

Unfortunately, there is no hard and fast rule to determine whether an accommodation is one that requires a "fundamental alteration" of the program. Each such request must be looked at on an individual basis. An example would be if a student needs to attend for a shortened day. If the student can still meet the requirements of the program in terms of core courses, etc., it is likely that this would be a reasonable accommodation, even though the student might not be able to comply with attendance requirements that have been placed on the program. However, if a program requires a demonstration of math computation skills, an accommodation allowing the use of a calculator would likely be considered a fundamental alteration. The district is only required to provide reasonable accommodations to level the playing field, not to provide a student with a disability an undue advantage over students who

are not disabled. If challenged, it is the district's burden to prove that an accommodation would result in a fundamental alteration.

An undue financial or administrative burden would have to be a significant burden, not anything that could be accomplished with some additional effort.

As a further safeguard against discrimination, the district requires that a Manifestation Determination Review (MDR) be conducted prior to consideration of dismissal from magnets, fundamentals or other district application programs. When a student is being considered for dismissal, a team must determine if the activities that have resulted in a recommendation of dismissal are a manifestation of the student's disability and consider whether additional services are appropriate. The only time an MDR is not required is if the causes for dismissal are causes that do not result from the behavior of the student, such as if a child is being considered for dismissal solely as a result of actions of the parents (such as failure to sign and return documents, etc.). ■

Release of Student Records to DCF or Other Agencies

By David Koperski, School Board Attorney

Schools sometimes call us asking whether they can release student records to the Department of Children and Families (DCF) or DCF-authorized agents. In short, we can, without prior parental notice or consent, release student records to DCF or a community-based care lead agency acting on behalf of DCF, so long as the representative provides a copy of the court order or other written legal authority showing their interest in the case. The community-based care lead agency for Pinellas and Pasco Counties is Eckerd Community Alternatives. A list of

the community-based care lead agencies throughout the state can be found at <http://www.myflfamilies.com/service-programs/community-based-care/cbc-map>.

As previously noted in prior articles on student records in *Legally Speaking*, we cannot release student records without prior parental consent (or student consent if over 18 years of age or attending a post-secondary school) unless we have specific statutory authority to do so. For example, federal and state law allow us to release information in

the case of an emergency when it is necessary to protect the health or safety of any person, or pursuant to a subpoena if we notify the parent of our receipt of the subpoena. One of the other statutory exceptions mentions groups like DCF and its related community-based care lead agencies, and this exception will also apply to other organizations that are contracted with the community-based care lead agency to assist them in their work.

Thus, we can, without prior parental notice or consent, release student

(Continued on page 4)

**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

Legal Staff Members

David Koperski, School Board Attorney
Heather Wallace, Assistant School Board Attorney
Laurie A. Dart, Staff Attorney
Kerry Michelotti, Legal Assistant
Barbara Anson, Legal Assistant
Melanie Davis, Legal Clerk - Newsletter Publisher
davisme@pcsb.org

gram. In the former, the state would take the funds that would have actually been sent to a public school district for the student and send them directly to the private school attended by the student – so, someone could track the exact dollars transferred from a public school district to a private school. In the latter, there is no set amount of funding that someone could track from one to the other. Rather, it was the total amount of funds at the state level, not just for education spending, but for all spending, that was reduced when a company made a donation to the scholarship fund and was able to “write off” that donation from its state corporate income tax liability. As you can see below, this distinction became very important in the *McCall* case in determining whether the plaintiffs could even challenge this law.

On the “standing” issue, the courts ruled that the plaintiffs could not show the requisite “special injury” or funding provisions that courts require plaintiffs to show in cases like this before they will even reach the substantive legal issues. The plaintiffs did allege that they are parents who have children in the public schools or are teachers and administrators in the public schools who have been “directly injured because of the loss of funding caused directly by the scholarship program.” However, the courts ruled that any presumed reduction in public education funding stemming from reduced general state revenue due to the tax credit voucher program is “speculative, as is any claim that any such diminution would result in reduced per-pupil spending or in any adverse impact on the quality of education.” In short, the courts rejected plaintiffs’ standing because they could not point to any specific funding that the tax credit voucher program took away from public education and diverted to private schools – rather, the voucher program simply meant that less money was collected overall by the state, which may or may not have meant less money going into public education.

Because of the basis of this ruling, it remains in doubt whether *any* person or group could have standing to challenge the constitutionality of this tax credit voucher program. Regardless, at this time, the tax credit voucher program remains a lawful educational choice in the state, as does the McKay Scholarship voucher program, which has not experienced any legal challenge since its enactment. ■

Court Update (Continued from page 1)

preme Court ruled that it violated the Florida Constitution’s guarantee that taxpayer-supported public education must be operated as a “uniform, efficient, safe, secure and high quality system of free public schools.” In reaching its conclusion, the court first noted that the Opportunity Scholarship program used public education funds to support education in private schools that were not required to abide by various rules applicable to public schools, such as requiring certified teachers and following the state’s accountability system. From that, the court ruled that this created a dual system of public education (or at least a dual system of the use of public education funds) – one where all of the rules for public schools applied, and one where they did not.

The plaintiffs in the recent challenge attempted to use this 2006 ruling to attack the tax credit voucher law, but could not get past the procedural issue of whether they could even challenge the law. Before addressing this “standing” issue, it is important to understand a significant difference between the invalid Opportunity Scholarship voucher program and the tax credit voucher pro-

***Release of Student Records
(Continued from page 3)***

records to these agencies and their authorized agents to allow them to perform their organizational missions – the protection of children’s safety and welfare. Note, however, that this exception does not cover all child welfare organizations and if a school receives a request for records from an agency not listed as a community-based care lead agency, or an organization that cannot prove it has a contract with one of these agencies, the school cannot release the records unless they have written parental consent or another exception applies, such as the emergency exception. If you are in doubt as to whether you should release student information, please contact us and we would be happy to work through the issues with you. ■