

School Law Newsletter

Vol. 24, No. 2

Summer 2008

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Legislation Revises Student Assessment

On May 29, 2008, the South Carolina Legislature adopted and ratified bill H.4662, the Education Accountability Act ("EAA"). Subsequently, on June 6, 2008, Governor Mark Sanford allowed the bill to pass into law without his signature.

The EAA made sweeping changes to South Carolina's overall school accountability and student assessment programs, with the key alteration being the elimination of the Palmetto Achievement Challenge Test ("PACT"). The new, (as of now, unnamed), test will be unveiled in 2009. Under the new structure, students will complete a writing section in a separate portion of the test. The second portion of the exam will be administered later in the school year, featuring more multiple choice questions than the PACT. As an additional benefit, test scores will be available within a few weeks of testing as opposed to late July as was the case with the PACT.

In addition to replacing the PACT, the new law replaces the term "unsatisfactory" with "at risk" when describing school districts that fail to meet minimum academic standards. Also noteworthy, the new legislation:

- changes current "student performance indicators" from Advanced, Proficient, Basic, and Below Basic to Exemplary, Met, and Not Met;

- establishes a five-year annual review of the state's school accountability system to ensure it is working efficiently and effectively;
- reduces the school and district report cards to a two-page executive summary of the most pertinent information; and
- eliminates Academic Performance Plans.

Fourth Circuit Agrees with School District on Speech Issue

On June 23, 2008, the Fourth Circuit Court of Appeals ruled that Lexington County School District One ("District") did not violate the free-speech rights of a citizen when it denied him equal access to the District's information distribution system.

By way of background, in December 2004, the District Board of Trustees passed a resolution opposing the "Put Parents in Charge" Act ("PPIC"), a bill that would have allowed tax credits for private and home school tuition expenses. The District's public information officer then communicated the position to various groups including parents, students, and the public at large via the District's website, e-mail systems, and various other methods.

Randall Page, President of the pro-voucher group, South Carolinians for Responsible Government, requested access to the District's information distribution system to present his own message in support of the bill. When he was denied access, he filed suit in district court claiming that the District had created a public forum, and the District's denial violated his First Amendment rights by discriminating against his point of view. Disagreeing with Page's position, the district court entered judgment in favor of the school system concluding that its campaign was largely "government speech" and that its distribution system was not a public forum to which Page was entitled access.

Following this ruling, the case was appealed to the Fourth Circuit Court of Appeals ("Fourth Circuit"), and a three-judge panel affirmed the district court's determination. In reaching this conclusion, the appellate court examined "government speech," pointing out its

distinction from a First Amendment "free speech" analysis. Particularly, the Fourth Circuit noted that government speech is allowed as the position of a public body and "is exempt from First Amendment scrutiny." On the other hand, the Fourth Circuit distinguished that allowing private actors to speak on behalf of a viewpoint while excluding other private actors from speaking against the viewpoint would be a violation of free speech. Therefore, the central issue before the Fourth Circuit was whether the District's action constituted "government speech" or speech by private actors.

As explained by the Fourth Circuit, whether speech is government speech depends on the government's ownership and control of the message, and the government's ownership and control of the message may be determined from considering various factors. Emphasizing the fact that the District established its opposition to the bill, maintained control of the website and e-mail content, and controlled its dissemination to the public, the Fourth Circuit concluded the communication was indeed government speech.

Supreme Court to Decide Whether Title IX is Exclusive Federal Remedy for Cases of Sex Discrimination in Public Schools

On June 9, 2008, the United States Supreme Court granted certiorari in, and therefore will review, Fitzgerald v. Barnstable School Committee, a peer on peer sexual harassment case, to determine whether Title IX provides the exclusive legal remedy for cases of sex discrimination in public schools.

Jacqueline Fitzgerald, a kindergarten student, suffered repeated harassment from a third-grader, reporting to school officials that the older male student bullied her into lifting her dress and exposing herself on the school bus on multiple occasions. The school principal and prevention specialist acknowledged and investigated each incident as soon as it was reported and proposed to the Fitzgerald family at least two strategies to solve the problem. Specifically, the school recommended placing Jacqueline on a different bus or segregating her and the other kindergartners from the older students on the bus. The Fitzgeralds, however, rejected both of these options and proposed that the school either transfer the boy to a different bus or place an adult monitor on the bus to ensure that no harassment occurred. After the school district declined these options, the parents filed suit against the superintendent and School Committee ("Defendants") in a Massachusetts district court, asserting

sexual harassment claims under both Title IX and Section 1983 of Title 42 of the United States Code.

The district court granted the Defendants' motion to dismiss the Section 1983 claim and, after discovery, granted the Defendants' motion for summary judgment with respect to the Title IX claim. Prior to being appealed to the United States Supreme Court, a three-judge panel of the First Circuit Court of Appeals affirmed the District Court's decision holding that (1) the School Committee and Superintendent did not violate Title IX because they did not act with deliberate indifference, and (2) Title IX precludes counterpart Section 1983 actions against state actors.

As background, Title IX provides an implied private right of action for sex discrimination by federally-funded educational institutions. Section 1983, on the other hand, creates an express remedy for violations of the United States Constitution. In its review of Fitzgerald, the United States Supreme Court will seek to settle a long-standing split among the federal appellate courts as it determines whether Title IX provides the exclusive federal legal remedy for cases of sex discrimination in public schools. Currently, some federal appellate courts allow plaintiffs to bring both Title IX and 1983/constitutional claims for the same conduct while others have held that Title IX preempts these constitutional claims.

Oral arguments in this case are projected to go forward during the fall term, which commences in October 2008. The implications of this decision could be rather significant for school districts. However, it is important to note that the Supreme Court's ruling will only address whether Title IX should be the exclusive federal remedy for the misconduct at issue in this case and not whether Title IX preempts state law claims such as assault, battery, and negligent supervision which are covered and allowed by the South Carolina Tort Claims Act.

School Districts Required to Notify Parents of Nearby Sex Offenders

On June 16, 2008, Governor Mark Sanford signed into law H. 3094, a bill that will charge school districts with the responsibility of making sure parents receive information concerning registered sex offenders who reside near school bus stops. Specifically, under this new legislation, which will be codified as S.C. Code Ann. § 23-3-535, at the beginning of each school year, each school district must provide: (1) the names and addresses of every sex offender who resides within 1,000 feet of a school bus stop within the school district to the parents or guardians of a student who boards or disembarks a school

bus at a stop or (2) the hyperlink to the sex offender registry web site on the school district's web site to make the information accessible to parents and guardians.

To ensure compliance, local law enforcement agencies will check a school district's web site to determine if it has met this statutory obligation. If a hyperlink does not appear on the school district's website, it will be contacted by law enforcement to confirm that it, alternatively, has provided the parents or guardians with the names and addresses of every sex offender who resides within 1,000 feet of a school bus stop within the school district. If the school district has failed to provide this information, it will receive a notice of violation from local law enforcement. Of greater significance, if the school district does not comply within 30 days after receiving notice of its violation, it will be subject to other penalties in the form of equitable injunctive relief and potentially attorney's fees and costs.

Legislation Revises Charter Schools Act

On May 21, 2008, the General Assembly passed into law H. 4980, a bill amending the South Carolina Charter Schools Act ("Act"), S.C. Code Ann. § 59-46-10, *et seq.* The amendments address the approval, renewal, revocation, and termination of charters for charter schools as well as the termination of a charter school's contract with its sponsor. As directly affects charter school sponsors, the period for which a charter must be approved or renewed has been extended from five years to ten years.

In addition to these changes, the amendments substantially revise the Act's appellate procedure by directing appeals to the Administrative Law Court instead of the State Board of Education. Specifically, under the new appellate scheme, the following appeals now can be made to the Administrative Law Court:

- decisions of the Charter School Advisory Committee concerning an application, or
- a school district board of trustees' denial of an application or any final decision affecting the charter school, including decisions to revoke or not to renew a charter school.

Additionally, a school district board of trustees may appeal the granting of a charter by the South Carolina Charter School District to the Administrative Law Court. This change in appeal procedures is particularly significant, because the Administrative Law Court will expect school board hearings which it reviews to be formal hearings with a clear record made of the proceedings and evidence considered by the school board.

Also noteworthy, the 2008 Budget Provisos include an important provision, 1.80, which affects the funding of locally-approved charter schools. Under the provision, districts with locally-approved charter schools will receive funds after verification of student attendance on the fifth day of school at the beginning of each school year for those charter schools with approved incremental growth and due to expansion accounted for in their charter application. Thereafter, the Department of Education will release funds to districts on behalf of charter schools within 15 days of receipt of enrollment. Districts must then provide these funds to eligible charter schools no later than 30 days after receipt from the Department of Education.

Districts to Develop Automatic External Defibrillator Program

On June 5, 2008, the South Carolina Legislature passed into law Section 59-17-155, which requires school districts to develop and implement an automatic external defibrillator program for each high school subject to appropriations by the General Assembly. Under this new legislation, school districts will be charged with defining the purpose of the program and the manner in which the program will operate. Specifically, the program must require that defibrillators be provided on the grounds of each high school and that district employees and volunteers reasonably expected to use these devices obtain appropriate training. Additionally, as part of the program, school districts will be responsible for establishing guidelines for the periodic maintenance and inspection of the defibrillators. Significantly, the legislation provides protection from civil liability provided actions are not executed in a grossly negligent manner.

While this statutory provision is applicable for the 2008-09 school year, program development and implementation is subject to appropriations by the General Assembly.

Supreme Court Rejects "Class-of-One" Equal Protection Claim in Public Employment Context

On June 9, 2008, the United States Supreme Court handed down a ruling in Engquist v. Oregon Dep't of Agriculture that "class-of-one" equal protection claims were not viable in the public employment context. Anup Engquist, an Oregon public employee for the Department of Agriculture, filed suit against her employer after being laid off. Engquist asserted, among other things, a class-of-one equal protection claim, alleging that she was fired not because she was a member of a protected class but

simply for arbitrary, vindictive, and malicious reasons. The district court found that a class-of-one equal protection claim was viable in the employment context, and the jury returned a verdict for Engquist awarding her \$175,000 in compensatory damages and \$250,000 in punitive damages. Following an appeal, the Ninth Circuit Court of Appeals ("Ninth Circuit") reversed the lower court's ruling, noting that while a class-of-one equal protection claim could properly be used to challenge state legislative and regulatory action, the courts had routinely afforded the government more latitude when it acted as an employer rather than regulator.

Affirming the Ninth Circuit's decision, the United States Supreme Court held that the class-of-one equal protection theory is not viable in public employment cases. Although recognizing that the Equal Protection Clause protects persons, not groups, and applies to the government in its role as an employer, the Supreme Court determined that the class-of-one theory of equal protection is simply a poor fit in the public employment context. In reaching this conclusion, the Court emphasized the differences between the government acting as employer and sovereign, stating that although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment environment. The Court also noted that because the employment context inherently involves discretionary decision-making based on a vast array of subjective, individualized assessments, the Equal Protection Clause is not violated when one person is treated differently from others. Additionally, in issuing its ruling, the Court acknowledged that government offices could not function if every employment decision became a constitutional matter.

While the Engquist decision may be viewed as a victory for public employers, such as school districts, by providing them greater latitude in executing employment related decisions and providing protection against arbitrary discrimination suits, it is important to ensure that employers continue to treat employees fairly and prohibit and discourage discriminatory practices in the workplace.

New Procedure Added to Student Arrests

In June 2008, South Carolina lawmakers amended legislation which will affect the procedures concerning student arrests by school resource officers. Specifically, under the revised law, S.C. Code Ann. § 5-7-12(A), when a school resource officer arrests a student for a misdemeanor offense, the officer may issue a courtesy summons to appear to a student involved in the particular incident in connection with a school activity or school-

sponsored event. Additionally, a student arrested for a misdemeanor offense by a school resource officer must be provided a bond hearing in magistrate court within twenty four hours of his or her arrest. Accordingly, the new law ensures that if students are charged with the commission of misdemeanor crime, the students will either not be placed in jail, or if they are placed in jail, they will be provided with a bond hearing within twenty-four hours.



Of interest to school districts, Budget Proviso 1.77 provides as follows: "The Department of Education and local school districts are prohibited from selling space for or the placement of advertisements on the outside or inside of school buses."



ANNOUNCEMENTS

We are pleased to announce that Keith R. Powell and Connie P. Jackson have become shareholders with Childs & Halligan.

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