THE FLORIDA BAR EDUCATION LAW COMMITTEE

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# Florida Education Law

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## Message from the Chair

**by Nathan A. Adams, IV**

Have you ever wondered why you cannot sign up for the Education Law Committee on the Florida Bar annual fee statement? The answer is that the Education Committee is a substantive law committee, rather than a section of The Florida Bar.

I am privileged to serve as this year's Chairman of the Education Law Committee. One of my key goals is to find out whether it would be reasonable for this Committee to transition to section status in three to five years.

To join the Education Law Committee now, lawyers must complete a Committee Preference Form on the Bar website during the preference form period commencing on December 1 and ending January 15. From firsthand experience I can tell you: it is easy to miss the deadline. If you do, you must ordinarily wait another year to re-apply.

Lawyers are busy. The holidays are upon us during sign ups. Many never learn of them or misunderstand them in light of the annual fee statements. Several lawyers in this camp contacted us mid-year eager to join the committee and become involved. We had to tell them to wait (and not forget to sign up in December). It is hardly a recipe for marketing success.

Education committee appointments are for one year, so the sign up is an annual obligation. In contrast, standing committee appointments are for three years (July 1 to June 30).

Fundraising is also more difficult for a substantive law committee. Standing committees can fundraise by offering CLE for sale on the Bar's online catalog and by collecting dues, but we cannot. If the education committee offers CLE for sale, such as our certification exam preparation materials, all of the proceeds go to the Bar.

The Education Committee may not even utilize Bar letterhead, which makes contacting members via correspondence awkward for committee officers. Our letterhead advertises our firms or employers rather than the committee.

So what does it take to become a section? The most important requirement is to demonstrate to the Board of Governors' Program Evaluation Committee how roughly one percent of Florida Bar members in good standing will join the proposed section and pay dues. This is roughly 820 members today. In contrast, we had 64 members this year, down from 72 last year.

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## *MESSAGE FROM THE CHAIR, continued*

Thanks goes to Vice-Chair Youndy Cook who has formed a subcommittee including K-12, college, and university lawyers to begin a membership drive to see how much we can increase membership even with the institutional disadvantages that confront us. She needs your help.

Most of us can think of at least ten lawyers working in the field of education who are not members of the Education Law Committee. Lawyers who represent private institutions, state colleges (f/k/a community colleges) and most school districts north of West Palm Beach should be members. **Before January 15, please invite the education practitioners whom you know to join the Education Law Committee and don't forget to do it yourself.**

One school of thought is there just are not enough lawyers interested in or practicing education law to satisfy the threshold for section status. Maybe so or maybe we will find that if we expand the net as wide as feasible to reach lawyers who have any connection whatsoever with educational institutions (e.g., bond, intellectual property, and other lawyers) that we come close enough. At worst, a drive will expand our membership and opportunities to interact.

Related to numbers is a requirement that we prove that the committee can generate minimum mandatory dues or fees of about $3,000 per year. Judging by the demand for CLE that we offer, this would not be difficult if we could retain the related revenue. Thanks goes to Vice-Chair Ana Segura for continuing to recruit lawyers to offer quality CLE of interest to our entire membership.

There are other criteria as well that the committee should be able to satisfy including demonstrating consistent publications. With this issue, we return to print under the leadership of Jason Fudge, Bob Harris and their publications subcommittee with a focus on students with disabilities. Thanks also goes to them. As always, the articles are exclusively the work and viewpoint of their authors, not of the committee, its leadership or members. We welcome responses and rebuttals.

The Education Law Committee also continues to set the bar (don't groan) for innovative use of technology. We have discovered that it is cheaper, more efficient, and an excellent way to offer CLE in simulcast webinar and videoconferencing format. Equally, we have learned that holding committee meetings this way is not optimal as compared to in-person meetings. Last month, we agreed to expand our in-person meetings and networking opportunities to twice per year.

**Our next meeting will be via webinar and videoconference all day on January 25 beginning at 8:30 a.m.** It will be a CLE for those preparing for education certification or interested in a primer on the subjects covered on the exam. Please join us if you can and share your recommendations, articles, responses to articles, CLE proposals, or membership ideas with us. We look forward to a great New Year.

# State Law Harmony with FERPA Restored

**by Andy Bardos**[1]

Until recently, the privacy protections afforded by Florida law to students of public postsecondary educational institutions fell short of the protection demanded by federal law—with potentially perilous consequences for those institutions. The federal Family Educational Rights and Privacy Act ("FERPA"), also known as the Buckley Amendment, denies federal funding to any college or university that "has a policy or practice of permitting the release of education records" without consent.[2] FERPA defines "education record" to mean any material maintained by an educational agency or institution that contains information "directly related" to a student."[3] On the other hand, Florida's Public Records Act broadly entitles the public to inspect the records of public agencies, including public colleges and universities, and knows no exceptions besides those enacted by a two-thirds vote of each house of the Florida Legislature.[4]

In 2009, the Legislature amended Florida's public-records exemption for student records to incorporate FERPA's definition of "education records." The Legislature found that state law did not "conform to the federal definition of education records, which is more inclusive than the state law," and that the "inconsistency may result in noncompliance with federal law, for which public educational institutions could be sanctioned by the loss of all federal funds received from the United States Department of Education."[5] The Legislature expressly intended to synchronize state and federal law in order to secure public colleges and universities from the dilemma presented by state-mandated public disclosures that federal law does not prohibit, but sanctions.

The harmony established by the Legislature was nearly overthrown last summer in *Rhea v. District Board of Trustees of Santa Fe College*, 37 Fla. L. Weekly D1722 (Fla. 1st DCA July 19, 2012). The facts of the case were uncomplicated. In an email to the college, a student complained of the classroom behavior and teaching methodologies of an adjunct associate professor. The professor, whom the college did not retain, and who had received a copy of the email with the author's name redacted, denied the allegations and demanded an unredacted copy. The professor insisted that, with knowledge of the anonymous author's identity, he could demonstrate that the allegations were untrue. The college refused to provide an unredacted copy, asserting that release of the record without redaction of personally identifiable information would violate FERPA, while the professor demanded that the student be expelled for dishonesty.

To obtain the record in unredacted form, the professor sued the college under the Public Records Act. The college did not dispute that it was an agency subject to the Act, or that the record sought was received in connection with its official business.[6] Rather, the college invoked Section 1006.52(1), Florida Statutes, as amended by the Legislature in 2009, which exempts from disclosure all "education records, as defined in" FERPA. The state-law question, therefore, was whether the unredacted email was within the scope of federal protection for student privacy.

The trial court held that the unredacted email was an education record and dismissed the operative complaint. The First District Court of Appeal, however, reversed. The Court concluded that the email was not "directly related to a student," but only "peripherally or tangentially related to a student," and was thus not a protected education record.[7] The email, the Court noted, "focuses primarily on [the professor's] alleged teaching methods and inappropriate conduct and statements in the classroom, and only incidentally relates to the student author."[8] "The fundamental character of the e-mail relates directly to the instructor"—and not the student.[9]

In support of this conclusion, the Court relied on *Ellis v. Cleveland Municipal School District*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004). There, the Court found that incident reports describing physical altercations between students and substitute teachers, as well as student and employee witness statements, were not education records protected by FERPA. The Court reasoned that, while the records "involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves."[10] The Court explained that "FERPA applies to the disclosure of student records, not teacher records."[11]

The appellate court's conclusion that the unredacted email was unprotected, though the email identified a student and revealed the student's classroom experience and enrollment in a particular class, threatened to reintroduce a schism between state and federal law. In both formal and informal communications, the United States Department of Education had long advised public colleges and universities that records containing personally identifiable student information were education records whose disclosure would contravene FERPA, and Florida's public colleges and universities had faithfully adhered to the Department's guidance.[12] Thus, while the Court's conclusion that a record

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"primarily" related to a professor was unprotected might have been consistent with the *Ellis* Court's construction of federal law, it was squarely at odds with the settled interpretation of the federal agency charged with FERPA's administration.

Moreover, to the extent *Ellis* held that a document, to qualify as an education record, must relate *primarily* to a student, or *more directly* to a student than to a professor, its holding wandered from the language of FERPA. FERPA requires no more than that the record relate "directly" to a student.[13] Consistent with Department of Education guidance, a record that identifies a student directly relates to the student, regardless of whether it relates more nearly to another person. Thus, a record may relate "directly" to both a student and a professor.

The dichotomy in *Ellis* between "student records" and "teacher records" suggests a primacy-of-relatedness inquiry that finds no textual support in FERPA. The distinction arose from *Ellis*' misapplication of a Fifth Circuit decision in which a professor had claimed FERPA protection for her own college transcripts in her personnel file—transcripts that had no relation to any student of the institution that employed the professor and maintained the record.[14] The Fifth Circuit denied protection for the record not because it more nearly concerned a professor than a student, but because the professor was not a student, and no student was in any way implicated.[15]

Santa Fe College moved for rehearing, rehearing *en banc*, and certification of a question of great public importance. The college argued that the court should at most have reinstated the complaint and remanded to the trial court, and it differentiated *Ellis* on the ground that *Ellis* concerned altercations, while the record in dispute on appeal related to academic performance.

Twenty-six state colleges and universities filed an *amicus curiae* brief in support of the college. The *amici* argued that the federal Department of Education had construed FERPA to afford bright-line protection to records that contain personally identifiable student information, and that the adoption of a standard that requires a subjective determination of the "fundamental character" of the record and the nearness of its relationships to students and professors would defeat legislative intent to harmonize state and federal law. Because it articulated no objective rule, the Court's interpretation would require the *amici* to make equivocal judgments about endless varieties of records, and to make uncertain and hazardous choices between disclosure, which might invite federal sanctions, and nondisclosure, which would encourage costly public-records litigation. An amorphous standard, the *amici* argued, would stifle student speech, subject students to retaliation, produce inconsistencies in application, undermine student confidence in their educational institutions, and inject confusion into the sensitive domain of student privacy.

On March 13, 2013, the Court granted the motion for rehearing, withdrew its prior opinion, and substituted a new opinion that found the unredacted email to be an education record protected under state and federal law.[16] While the Court noted that FERPA restricts the term "education record" to records that relate "directly" to students, it

> reject[ed] any suggestion . . . that a record cannot relate directly both to a student and to a teacher. If the record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person."[17]

The Court explained that, "to the extent that Ellis converts the 'directly related' inquiry into a 'primarily related' test, we disagree with its approach, despite its acceptance by other courts."[18] The "plain-language interpretation of FERPA" required a departure from the reasoning of *Ellis*.[19]

At the same time, the Court did not articulate a generally applicable rule or standard criteria to determine whether a particular record is "directly related" to a student. The Court neither endorsed nor rejected the bright-line rule that records containing personally identifiable student information are by definition "directly related" to a student, nor did the Court propound any different criteria. Rather, the Court reviewed the facts in their entirety—specifically, that the email named a student, identified the student's enrollment in a class, described the student's impressions of the educational atmosphere, contained the students own words, and conveyed the student's connection to the information communicated—and concluded that, while the professor "may be the primary subject of the e-mail, the e-mail also directly relates to its student author."[20] The Court noted that information is "directly related to a student if it has a close connection to that student," but it did not further refine either of these formulations of the FERPA standard.[21]

The Court's substituted opinion does little, therefore, to disturb the settled practice of Florida's public colleges and universities in regard to education records. Moreover, the Court avoided a clash between state and federal law that would have exposed public colleges and universities to a Scylla-and-Charybdis dilemma between disclosure under the Public Records Act and nondisclosure under FERPA, both of which impose severe sanctions on non-compliance. But the Court's substituted opinion not only did no harm, it refuted the mistaken notion that records which relate primarily to

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a professor cannot relate directly to a student. The Court's opinion comports with guidance of the United States Department of Education and furnishes state and federal courts with precedential support for a plain-language interpretation of FERPA.

**Endnotes:**

1 Andy Bardos is an attorney with GrayRobinson, P.A., specializing in civil and appellate litigation, with an emphasis in election law and constitutional law. Andy represented the *amici curiae* on rehearing in the case discussed in this article.
2 20 U.S.C. § 1232g(b)(1).
3 *Id.* § 1232g(a)(4)(A).
4 Art. I, § 24(c), Fla. Const. Each enactment of an exemption to the constitutional mandate of public disclosure must also "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." *Id.*
5 Ch. 2009-240, § 3, Laws of Fla.; *accord* Fla. H.R. Educ. Pol. Council, HB 7117 (2009) Staff Analysis 3 (Apr. 1, 2009).
6 The Public Records Act defines "public records" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency," § 119.011(12), Fla. Stat. (2012), and defines "agency" to include "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law," *id.* § 119.011(2).
7 *Rhea v. District Board of Trustees of Santa Fe College*, 37 Fla. L. Weekly D1722 (Fla. 1st DCA July 19, 2012).
8 *Id.* at D1725.
9 *Id.*
10 *Ellis*, 309 F. Supp. at 1023.
11 *Id.* at 1022.
12 The Department's official guidance includes opinion letters issued by the Family Policy Compliance Office ("FPCO") of the Department's Office of Management. *See* https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html. Among the FPCO letters most relevant to the questions raised in *Rhea* are those dated October 31, 2003; August 8, 2001; and October 17, 1997.
13 *See* 20 U.S.C. § 1232g(a)(4)(A).
14 *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004) ("FERPA applies to the disclosure of student records, not teacher records." (citing *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987))).
15 *Klein Indep. Sch. Dist.*, 830 F.2d at 577-79.
16 *Rhea v. Dist. Bd. of Trs. of Santa Fe College*, 109 So. 3d 851 (Fla. 1st DCA 2013).
17 *Id.* at 858.
18 *Id.* at 857-58.
19 *Id.* at 858.
20 *Id.*
21 *Id.* at 857.

# The Penn State Effect

**by Erin Whitmore and Samantha Giudici**[1]

## Sandusky Investigation

Following an investigation and trial that shocked the nation, on June 22, 2012, jurors convicted Gerald A. Sandusky, known by most as "Jerry Sandusky," of 45 counts of criminal charges relating to the sexual abuse of 10 different victims.[2] He was sentenced to 30 to 60 years in prison.[3] Sandusky's conviction and sentencing followed an extensive investigation by the police and the Attorney General of the Commonwealth of Pennsylvania ("Attorney General") that uncovered years of sexual abuse of young boys by Sandusky.[4] Ultimately, the investigation revealed that Sandusky used his position with Penn State's football program and his connection to The Second Mile charity to find and build relationships with his victims.[5]

Sandusky joined the ranks of the Pennsylvania State University ("Penn State") football program first in 1962 as a student athlete then again in 1969 as a defensive line coach.[6] In 1977, Sandusky founded The Second Mile, a group foster home that would eventually grow to become "a charity dedicated to helping children with absent or dysfunctional families."[7] In 1999, Sandusky retired with "emeritus status."[8] This special status allowed Sandusky to maintain several privileges at Penn State including access to the recreational facilities.[9]

The criminal investigation involving Sandusky, which began in early 2009, was sparked when a teen victim reported to authorities that he was inappropriately touched by Sandusky "several times over a four-year period."[10] Eventually, it was revealed that as far back as the mid-1990s Sandusky was meeting his victims through The Second Mile and using his Penn State privileges to abuse them in Penn State's locker rooms,[11] Penn State's showers[12], Bowl games[13], team hotels,[14] and in his own home.[15]

## The Investigation Uncovers a Scandal

The Attorney General's investigation also uncovered that key personnel in Penn State's athletic department and administration were aware of accusations of Sandusky's sexual impropriety with young boys as early as 1998.[16] Perhaps the most damning evidence of Sandusky's activities came from Mike McQueary ("McQueary"), a graduate assistant with the Penn State football program. In 2001, McQueary reported to Joe Paterno ("Paterno"), Penn State's head football coach, that he witnessed Sandusky assaulting a young boy in the shower in a Penn State recreational facility.[17] An account of the incident was then reported to Penn State's Athletic Director, Timothy Curley ("Curley"), Penn State's Senior Vice President – Account and Finance, Gary Schultz ("Shultz"), and Graham Spanier ("Spanier"), Penn State's President.[18] Unfortunately, none of these individuals took any

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steps to identify the young boy or report Sandusky to the authorities.[19] Instead, they chose to "handle" the incident internally, allowing Sandusky the opportunity continue the abuse.[20]

Throughout the investigation and Grand Jury proceedings, Curley, Schultz, and Spanier failed to notify the Penn State Board of Trustees regarding the details of the investigation and the matter's seriousness.[21] In 2011, Paterno, Curley, Schultz, and Spanier were subpoenaed to testify in front of the Grand Jury about their knowledge of Sandusky's actions.[22] Then, on November 4, 2011, the Attorney General filed criminal charges against Curley and Schultz for "failing to report allegations of child abuse against Sandusky to law enforcement or child protection authorities in 2002 and for committing perjury during their testimony about the allegations to the Grand Jury . . . in January 2011."[23] Spanier has also been charged with "perjury, obstruction, endangering the welfare of children, failure to properly report suspected abuse, and conspiracy."[24] The trial on the charges against Curley and Schultz was scheduled to occur in January 2013, however, as a result of issues stemming from the grand jury proceedings regarding whether Penn State's attorney was representing the university and/or Curley, Schultz, and Spanier, preliminary hearings have not been held.[25] A trial on the charges brought against Curley, Schultz, and Spanier is not likely to be held until the end of this year, or even in 2014.[26] Notably, as of December 31, 2012, Penn State has spent approximately $41,059,671 in fees and cost related to the scandal.[27]

**Shortcomings in Mandatory Reporting Laws**

As has happened many times before, the fallout from the Penn State scandal led to scrutiny of the nation's laws regarding the reporting of suspected child abuse. Due to the utter failure of the university's administration to report or even investigate the allegations against Jerry Sandusky, the country demanded to know what could be done in the future to prevent such an extensive and long lasting cover up.

The main questions asked were, "Why didn't the Penn State administration report the suspected child abuse immediately?" and "Why weren't they punished?" The problem was that previously, many state laws only required mandatory child abuse reporting if the suspected abuse was by a person who was in some way responsible for the child's welfare, such as a parent or caregiver, or the reporter was someone with a statutory duty to report, such as a doctor or teacher.[28] In Florida, the mandatory child abuse reporting statute in effect prior to 2012 only required a person to report suspected child abuse if that child was "abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare."[29] Thus, since the Penn State administration was not required to report suspected child abuse under the law, no criminal penalties could be assessed for their decision not to report.

In addition, the administration's desire to protect the reputation of both the university and the football program created even greater incentives against reporting the suspected abuse. The administration felt that they could deal with the situation internally, and only if it continued did they have to worry about reporting it to the authorities.[30] This type of attitude that any problems that could affect the institution's overall reputation should be handled internally, without outside involvement, has been seen in previous situations with child abuse, such as in the Catholic Church child abuse scandals.

**The One Million Dollar Answer in Florida**

Florida was one of the first states to enact changes to its mandatory child abuse reporting laws based on the Penn State scandal.[31] The Florida Legislature estimated that the amount of child abuse actually reported and confirmed by social service agencies compared with the estimated amount of ongoing child abuse was roughly one out of ten.[32] Therefore, the Florida Legislature decided to amend section 39.201 to broaden the scope of what type of abuse triggered the mandatory reporting.[33] The Florida Legislature removed the limitation that only required reporting of suspected abuse if that abuse was by the child's parent or caregiver.[34] The new statutory language makes it mandatory to report suspected child abuse by any person, regardless of that person's relationship with the child or responsibility for the child's welfare.[35]

The Legislature also focused specifically on the reporting requirements of Florida educational institutions to prevent a similar situation to Penn State. The Legislature enacted a provision that imposed a one million dollar fine on Florida educational institutions for knowingly failing to report suspected child abuse that occurred on its campus or at a sponsored activity.[36] The high amount of this fine sent a message that the failure to report suspected child abuse occurring within the control of an educational institution would not be tolerated. The one million dollar fine also applies if the administration prevents another from reporting suspected child abuse.[37]

**Minimizing New Risks for Florida Educational Institutions**

Because the new law requires reporting abuse that occurs on campus and at sponsored events, Florida educational institutions will have to take extra precautions when involving minors in their activities. Many

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institutions may not even realize the extent to which minors are already present on campus on a regular basis. For instance, many educational institutions allow outside organizations to conduct athletic training, sports matches, and summer camps on their campuses. In addition, the institution and its employees may be involved in many community activities involving minors, such as fundraisers and charities. The changes in the law put more responsibilities on the educational institutions to be aware of what is occurring on their campus and in their sponsored activities. While the new statute has yet to be tested, educational institutions should ensure they are fully aware of all activities involving minors that they are, may be, or seem to be involved in.

The main starting point for taking precautions with minors on campus is to develop a centralized institutional policy requiring compliance with the revised reporting laws. This policy should detail the process for reporting a suspected violation and a prohibition of retaliation based on reporting. In addition, educational institutions should either conduct or require all employees, including administrators, to attend a training course on the new law and the new institutional policy.

Another step towards minimizing these risks is to conduct a thorough review of all programs, events, and situations and evaluate which of these events have the potential for bringing non-student minors onto the institution's campus. Then, the institution should separate these events into two categories: institutional programs vs. independent programs. For institutional programs, the institution should ensure that all employees and volunteers involved in the programs are informed of and trained on the newly formed reporting procedures. These programs should also be reorganized to ensure the institution has centralized control over the administration to prevent any closed, insulated, or independently operating departments or groups.

For independent programs and events, such as summer camps and fundraisers, educational institutions should carefully review their contractual agreements with the independent entities. Ensure that the independent operator has the required licensing, experience, and knowledge to operate the event. Delegate all responsibility for the care and supervision of participants to the independent operator and include an indemnification provision and insurance requirements in the contract. Further, the contract should prohibit the independent operator from using the educational institution's name or logo in any form of advertising, to make it clear that the institution is not associated with or co-sponsoring the activity.

Unfortunately, as the Sandusky situation at Penn State all to clearly illustrates, the failure of an educational institution to take preventative steps and minimize the risks to itself and minors that frequent its facilities can be devastating both financially and emotionally. As a result, and in light of the changes in Florida law which put more responsibility on educational institutions to ensure abuse is reported, the education of individuals employed by educational institutions as to reporting requirements and ways to minimize risks to minors is imperative to protecting

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both the educational institution and the minors who participate in its programs.

**Endnotes:**

1 The authors are associate attorneys with Alexander DeGance Barnett, P.A. in Jacksonville, Florida, practicing labor and employment law, representing management in both state and federal court, as well as representing educational institutions in a variety of matters. Ms. Whitmore and Ms. Giudici have experience regarding claims arising out of disabilities and accommodations by student, faculty, staff, and employees, claims for sex discrimination or sexual harassment, responses to charges filed with the Department of Education's Office of Civil Rights, student privacy issues, including questions related to obligations under the Family Education Rights and Privacy Act, and have provided advice and counsel on diverse faculty and student related issues.

2 *See* Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, Freeh Sporkin & Sullivan, LLP, 13 (July 12, 2012) [hereinafter The Freeh Report]; *Jerry Sandusky Writes to Newspaper, Says He's 'Trying to Learn' from Being in Jail*, The Patriot-News, Dec. 28, 2012, http://www.pennlive.com/midstate/index.ssf/2012/12/jerry_sandusky_writes_newspaper.html [hereinafter *Jerry Sandusky Writes to Newspaper*].

3 *Jerry Sandusky Writes to Newspaper*, *supra* note 2.

4 The Freeh Report, *supra* note 2, at 13; *Sandusky, Penn State Case Timeline*, ESPN.com, Nov. 9, 2011, http://espn.go.com/college-football/story/_/id/7212054/key-dates-penn-state-nittany-lions-sex-abuse-case [hereinafter *Penn State Timeline*].

5 Rohan, Tim, *Sandusky Gets 30 to 60 Years for Sexual Abuse*, N.Y. Times, October 9, 2012, http://www.nytimes.com/2012/10/10/sports/ncaafootball/penn-state-sandusky-is-sentenced-in-sex-abuse-case.html?_r=0.

6 The Freeh Report, *supra* note 2, at 19; *see also Penn State Timeline*, *supra* note 4.

7 *Penn State Timeline*, *supra* note 4.

8 The Freeh Report, *supra* note 2, at 21; *see also Penn State Timeline*, *supra* note 4.

9 *See* The Freeh Report, *supra* note 2, at 21.

10 *Penn State Timeline*, *supra* note 4.

11 *Id.*

12 *Id.*; *see also* The Freeh Report, *supra* note 2, at 19.

13 *Penn State Timeline*, *supra* note 4.

14 The Freeh Report, *supra* note 2.

15 *Penn State Timeline*, *supra* note 4.

16 The Freeh Report, *supra* note 2, at 20; *see also Penn State Timeline*, *supra* note 4.

17 The Freeh Report, *supra* note 2, at 22. This incident was reported to the Grand Jury as occurring in 2002, however, it was later discovered the incident actually occurred in February 2001. *See* The Freeh Report, *supra* note 2, at 66.

18 *See id.* at 14.

19 *Id.* at 15-16.

20 *Id.* at 54; *see also Penn State Timeline*, *supra* note 4.

21 The Freeh Report, *supra* note 2, at 80-81.

22 *Id.* at 26.

23 *Id.* at 13.

24 *Gary Schultz and Tim Curley Arraigned*, ESPN.com, November 2, 2012, http://espn.go.com/college-football/story/_/id/8584080/penn-state-nittany-lions-officials-gary-schultz-tim-curley-arraigned [hereinafter *Gary Schultz*].

25 *Gary Schultz*, *supra* note 24; *see also* Scolford, Mark, *Penn State Trial: Perjury Case Against Gary Schultz, Time Curley Proceeds*, Huffington Post, Sept. 26, 2012, http://www.huffingtonpost.com/2012/09/26/penn-state-perjury-gary-schultz-tim-curley_n_1917563.html; Thompson, Charles, *Cases against Penn State's Graham Spanier, Tim Curley and Gary Schultz May See Action After Long Wait*, The Patriot News, March 8, 2013, http://www.pennlive.com/midstate/index.ssf/2013/03/criminal_cases_against_graham.html [hereinafter *Long Wait*].

26 *Long Wait, supra* note 25.

27 *Penn State FAQ,* http://progress.psu.edu/faqs.

28 *See e.g.*, 23 Pa. Cons. Stat. § 6311(a) (2012) (requiring "[a] person who, in the course of employment, occupation or practice of a profession, comes into contact with children [to] report . . . when that person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under the care . . . of that person . . . is a victim of child abuse . . . ."); Conn. Gen. Stat. § 17a-101 (2012) (listing the persons who are required to report child abuse, including doctors, nurses, social workers, school employees, etc.).

29 Fla. Stat. § 39.201(1)(a) (2011).

30 *See* The Freeh Report, *supra* note 2, at 74-76.

31 *See* Fla. Staff An. H.B. 1355, at 2 (stating as the reasoning behind the changes to Fla. Stat. 39.201, that "[r]ecent national events have centered on issues with adults failing to report known instances of ongoing child abuse").

32 *See* Fla. Staff An. H.B. 1355, at 2 (citing Tiffany Sharples, *Most Child Abuse Goes Unreported*, Time Health, (Dec. 2, 2008), available at http://www.time.com (search "unreported child abuse" (last visited Jan. 19, 2012))).

33 *See* Fla. Staff An. H.B. 1355, at 2.

34 *See id.*

35 *See* Fla. Stat. § 39.201(1)(b) (2012).

36 *See* Fla. Stat. § 39.205(3) (2012).

37 *See id.*

# Update on Residency: Ruiz v. Robinson

**by Adam S. Brink, Esquire**[1]

Before the recent debate spurred by the collaborative efforts of the "Gang of Eight" to present compromise immigration reform legislation, the Florida State Board of Education (SBE) and the Board of Governors (BOG) were sued by a group of Florida resident, dependent U.S. citizens who were classified as nonresidents for tuition purposes because their parents, also Florida residents, are not lawfully present in this country.[2]

At issue in the case were nearly identical rules promulgated by the SBE and BOG implementing section 1009.21, Florida Statutes.[3] The plaintiffs had applied to attend various public postsecondary institutions in Florida, but claimed they were denied residency status by the institutions' application of these rules.[4] The plaintiffs argued that, by requiring them to submit documentation of their parents' immigration status, the defendants violated the 14th Amendment Equal Protection Clause.

## Applicable Florida Statute and Rules

Section 1009.21, Florida Statutes, requires public postsecondary institutions to classify students as residents or nonresidents for tuition purposes and establishes specific criteria for that classification. It defines "legal resident" or "resident" as a person who has maintained his or her residence in Florida for the preceding year, has purchased a home which is occupied by him or her as

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his or her residence, or has established a domicile in Florida.[5] It also sets forth a list of documentary evidence, from which applicants must submit at least two items, to be used in verifying the residency status of the applicant or, if the applicant is a dependent, the applicant's parents.

The law does not require that the public postsecondary institutions verify the U.S. citizenship of the applicant or the applicant's parents. However, some public postsecondary institutions claim on their websites that, to qualify as a resident for tuition purposes, the statute requires the student or the student's parents to be a U.S. citizen or permanent resident alien. A reading of the plain language in the statute shows that these institutions misconstrue the law.[6]

As required by Section 1009.21, the BOG and SBE promulgated Rules 72-1.001 and 6A-10.044, F.A.C. to implement the statute.[7] Both provide additional criteria for determining residency when an applicant or the parents of a dependent are not citizens of the United States. In that instance, "[t]he student, and parent if the student is a dependent, must present evidence of legal presence in the United States."[8] Classification as a nonresident for tuition purposes means that the student must pay a significantly higher tuition rate than residents and also renders the student ineligible for state financial aid programs such as Bright Futures scholarships and tuition assistance grants. The effect is to make access to postsecondary education for students in the plaintiffs' situation unattainable.

**Legal Arguments**

Central to the plaintiffs' argument was that the Defendants' policies and procedures, rooted in rule, treated the plaintiffs differently than similarly situated, dependent U.S. citizens solely on the basis of their parents' alienage and thus denying them equal protection of the laws as guaranteed by the 14th Amendment. The plaintiffs compared themselves to two groups of similarly situated individuals: 1) dependent students who are U.S. citizens and whose parents have resided continuously in the State of Florida for twelve months prior to their application to a public postsecondary institution, and 2) dependent students who are properly deemed out-of-state residents because their parents reside in another state.[9] While students from these groups can establish parental residency within 12 months under Section 1009.21, the plaintiffs and others in their situation would, in most instances, wait for as many as 6 years, when they would turn 24, before they could establish their own residency as an independent.[10]

The defendants' argument was predicated on the interplay between Florida's Section 1009.21, which grants residency status for tuition purposes to legal residents of the State, and federal laws concerning eligibility for state postsecondary benefits, including in-state tuition rates. According to the defendants, since the plaintiffs' parents are undocumented, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. §§ 1601, *et seq.* controls because states cannot provide state or local public benefits to unlawful immigrants without affirmative provision for such benefits through enactment of a state law.[11] By contrast, under PRWORA, a state *is* authorized to determine eligibility for state public benefits for a "qualified alien," a nonimmigrant, or an alien paroled into the United States.[12]

Accordingly, as the plaintiffs' parents did not fall into any federal classification for state benefits eligibility, the defendants argued that PRWORA required confirmation of the plaintiffs' parents' immigration status. To support their argument, they cited 8 U.S.C. § 1623, which provides that

> Notwithstanding any other provisions of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.[13]

Because the State would be extending a postsecondary education benefit to aliens "not lawfully present in the United States,"[14] the defendants claimed they would be forced to extend the same benefit, in-state tuition rates, to all U.S. citizens regardless of their state of residence. The defendants further argued that, by asking for proof of the parents' lawful immigration status, they were complying with PRWORA, which authorizes a state to require an applicant for state and local public benefits to provide proof of eligibility.[15]

The defendants also tied this notion of extending in-state tuition rates to all U.S. citizens to the requirement of proving lawful immigration status. According to the defendants, if Florida were forced to extend in-state tuition rates to all U.S. citizens by application of PRWORA, the reduction in tuition revenue, estimated by the defendants to be approximately $200 million annually, would have a significant negative impact on the quality of education provided by Florida's public universities and colleges. In other words, the loss of revenue caused by granting the plaintiffs in-state tuition jeopardized quality of education and thereby justified the requirement that the plaintiffs prove the lawful immigration status of their noncitizen parents.[16]

**Court Analysis**

The court analyzed the case using heightened scrutiny because the rules denied a benefit to the plaintiffs and impinged their "ability

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to attain post-secondary education at the State's public institutions solely by virtue of their parents' undocumented status, and in a very real way the regulations punish[ed] the citizen children for the acts of their parents."[17] It also dismissed the defendants' reliance on PRWORA to justify their requirement that the plaintiffs' parents prove lawful immigration status. Reasoning that the defendants fundamentally misconstrued PRWORA, the court stated the Act could not serve as a basis to restrict public benefits because the plaintiffs are not "aliens" but rather U.S. citizens. Most importantly, the court found that the tuition benefit accrues to the child and not the parent. Thus, granting in-state tuition to a U.S. citizen dependent would not bestow a benefit to his or her unlawful alien parent, rendering PRWORA inapplicable.

The court stated that the definition of "legal resident" under Section 1009.21 is facially neutral but concluded that the additional requirements set forth under the rules, as applied, classified the plaintiffs in such a way as to deny them the same benefits and opportunities afforded similarly situated individuals solely by virtue of their parents' immigration status. Because the relationship between the plaintiffs' residency, their parents' immigration status, and the state interest of providing quality public postsecondary education was "far too tenuous" to justify the rules and withstand heightened scrutiny, the court held the rules violated the Equal Protection Clause of the United States Constitution.[18]

The court's holding declared that the rules violate the Equal Protection Clause insofar as they require dependent, U.S. citizen residents of Florida, whose parents are also residents of Florida, to submit evidence of their parents' lawful immigration status. It also enjoined the SBE and BOG from interpreting the rules to the same effect starting with the Spring 2013 academic term.[19] Further, the court ordered the presidents of each Florida public college and university to provide written notice to all dependent U.S. citizen students of the change in the interpretation of the rules.[20]

The defendants did not file an appeal after entry of the final judgment.

## Post *Ruiz*

Although the *Ruiz* decision prohibits Florida public postsecondary institutions from requiring dependent, U.S. citizen residents of Florida to submit evidence of their parents' legal presence in this country, these students still face an uphill battle in establishing residency for tuition purposes. The court specifically noted that nothing in its decision would proscribe the BOG or SBE from requiring students to establish that their parents are in fact residents of Florida.[21] While it is possible to establish "legal residence" without having lawful federal immigration status, the nature of the documentary evidence required to establish residency under Section 1009.21 presents an oftentimes impassible obstacle for students to overcome. This is because nearly all of the documents prescribed under the statute a dependent's parent may choose to submit require the parent's lawful presence in the country to obtain.[22]

During the 2013 session, the Florida House of Representatives passed legislation that would allow students to establish residency using their own documentation if they attended high school in Florida for at least three years and submitted their Florida high school transcript as one required residency document within 12 months of graduation. As a result of the bill, students in the same position as the *Ruiz* plaintiffs would have the opportunity to establish residency in Florida using their own documentation. However, although the measure passed the House, it died in the Senate. As a result, dependent students must still rely on their parents to establish residency for tuition purposes, a task that may be all but impossible for individuals similarly situated to the *Ruiz* plaintiffs.

**Endnotes:**

1 Adam is an attorney for the Education Committee of the Florida House of Representatives. Credit goes to Jennifer Valenstein, Esq., Jason Fudge, Esq., Vikki Shirley, Esq., Heather Sherry, and Gavin Beagle, Esq. for their research and contributions to this article.

2 *See Ruiz v. Robinson*, 892 F. Supp. 2d 1321 (S.D. Fla. 2012).

3 Rules 6A-10.044 and 72-1.001, F.A.C.

4 The institutions included Palm Beach State College, Miami-Dade College, and Florida International University.

5 Section 1009.21(1)(d), Florida Statutes.

6 *E.g.*, University of Florida, *Establishing Florida Residency*, http://www.admissions.ufl.edu/residency/qualifying.html (last visited May 1, 2013); Florida International University, *Establishing Florida Residency for Tuition Purposes*, http://onestop.fiu.edu/new-students/residency/ (last visited May 1, 2013).

7 The Board of Governors has also promulgated a regulation that contains the same provisions as Rule 72-1.001. *See* Florida Board of Governors Regulation 7.005.

8 *Ruiz v. Robinson*, 892 F. Supp. at 1326.

9 The plaintiffs asserted that these two groups of individuals would have a state in which they could establish residency for tuition purposes, an option not made available to the plaintiffs under the rules.

10 *See* Florida Department of Education, Articulation Coordinating Committee, *Guidelines on Florida Residency for Tuition Purposes*, (2012).

11 *See* 8 U.S.C. § 1621. Currently, Florida has no statute affirmatively providing for postsecondary benefits for unlawful immigrants. For discussion on what it means to "affirmatively provide" for state benefit eligibility, see *Martinez v. Regents of the University of California*, 241 P.3d 855, 261 Ed. Law. Rep. 1088 (Cal. 2010).

12 8 U.S.C. § 1625.

13 *Ruiz v. Robinson*, 892 F. Supp. at 1330.

14 The defendants argued the prohibition on provision of state benefits extends to the unlawful immigrant's household and family eligibility unit pursuant to 8 U.S.C. § 1621(c)(1)(B).

15 *See* 8 U.S.C. § 1625.

16 *See Ruiz v. Robinson*, 892 F. Supp. at 1331-32.

17 *Ruiz v. Robinson*, 892 F. Supp. at 1330.

18 *See Ruiz v. Robinson*, 892 F. Supp. at 1333.

19 The State Board of Education has initiated rulemaking to amend Rule 6A-10-044 to reflect the court's decision. *See* 38 Fla. Admin. R. 5037 (Nov. 19, 2012).

20 *Ruiz v. Robinson*, Doc. 109, 1:11-cv-23776-KMM.

21 *See Ruiz v. Robinson*, 892 F. Supp. at 1332, n. 8.

22 Memorandum from Vikki Shirley, General Counsel, Florida Board of Governors, to University Registrars, University Admission Directors, and University General Counsel (Jan. 9, 2013) (on file with author).