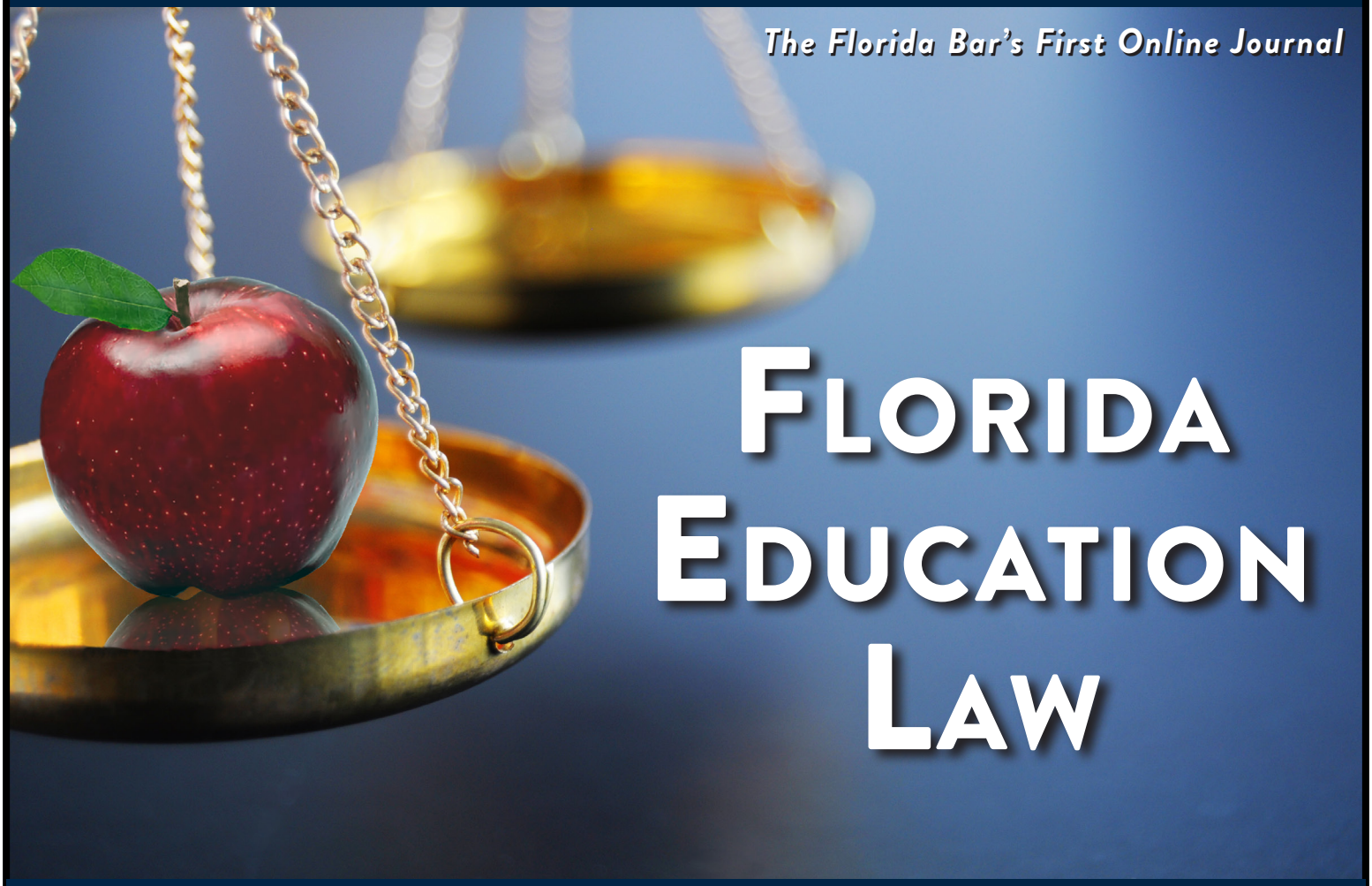
THE FLORIDA BAR EDUCATION LAW COMMITTEE



The Florida Bar's First Online Journal

FLORIDA EDUCATION LAW

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INSIDE:

Message from the Chair

by Joy Smith-McCormick

The Education Law Committee (ELC) is responsible for bringing together attorneys who solely practice in education law and others who practice in the different areas of education law. As a substantive law committee, the ELC is responsible for serving its purpose by reviewing existing areas of education law, studying developments in education law, and informing members of the bar of significant developments in education law. This year the ELC honored its commitment in these areas through its journal publication, committee meetings, and CLE offerings.

The ELC began this year with the distribution of the *Education Law Journal* – Volume II, Issue 1 (September 2018). Topics in this edition included open enrollment, "K-20 Collective Bargaining: A Case for Collaborative Conversations," and "Issues with Applicants for Positions with Florida School Districts in Regard to the Use of Medical Marijuana."

The ELC has also had a robust CLE offering this year. As there are a number of committee members seeking certification in education law, the goal was to provide multiple CLE opportunities to earn the credits necessary to qualify to sit for the certification exam. The ELC began this effort on November 7, 2018, with the presentation of Cybersecurity & Data Privacy: HIPAA and Intellectual Property Considerations and a presentation on Sexual Harassment: What Is Going on Out There in the Employment Arena, the Media and the Courts? This webinar was hosted by Buchanan Ingersoll & Rooney, PC.

During the 2019 Florida Bar Winter Meeting on January 19, the ELC conducted business to discuss increased participation on the *Education Law Journal*, Education Policy and Education Law CLE subcommittees. Following the meeting, CLE presentations were conducted on School Issues Faced by Transgender Youth, 2019 Open Government Update, and an Overview of Special Education.

For the benefit of members taking the education certification exam on March 9, Buchanan Ingersoll & Rooney, PC, provided an on-demand platform for participation in an education law certification review covering 14 topics. This CLE was organized as a webinar that members could independently access by selecting all or individual topics.

ELC member Gregg Morton has submitted for approval to update the *Education Law Journal* template and to establish an online presence for the ELC on social media. Accounts on Facebook, LinkedIn, and Twitter are planned to be maintained to promote the ELC and to produce real-time content related to topics in education law. The current chair and Morton will initially serve as administrators for these accounts.

The ELC experienced this year's success with the help and support of ELC Vice Chair Mark Lupe and Staff Program Liaison Tom Miller. Mark and Tom offered valuable and timely assistance without hesitation in the spirit of the ELC's mission. Thank you! Much appreciation for Allison Evans and Shareen Jordan of Buchanan Ingersoll & Rooney, PC, who played a vital role in the ELC's ability to organize and deliver CLE webinars.

Looking forward to next year, the ELC seeks to be more innovative in its response to fulfilling its mission and purpose. As a point of personal privilege, I am thankful for the opportunity to provide leadership to a committee full of highly qualified and knowledgeable attorneys. Thank you to each member that offered assistance and words of encouragement throughout our efforts!

*This message from the Chair also appears in the annual reports of committees published online by The Florida Bar Journal, available at https://www.floridabar.org/the-florida-bar-journal/annual-reports-of-committees-of-the-florida-bar2018-2019/#Education_Law.

Education Law Committee Joins Social Media

The Education Law Committee (ELC) recently received approval from The Florida Bar to add Facebook, Twitter, and LinkedIN social media accounts. This new social media presence with give the ELC members an additional way to stay in touch with each other between meetings. Additionally, it will give the ELC the ability to conduct more public outreach about the work and achievements of the ELC and its members. If you have artcicles, achievements, or updates you would like to share on the ELC's new social media accounts, please send them to educationlawfloridabar@gmail.com.

You can follow the ELC's accounts by searching for @FlaBarEdLaw on Twitter and Facebook. Members of the ELC who are on LinkedIN can send a message to educationlawfloridabar@gmail.com to be added to the ELC LinkedIN group.

Join A Network of Specialists: Become Board Certified In

Education Law

The Florida Bar's certification program is consistently recognized as a national leader among other state programs.

Board certified lawyers are: "Evaluated for professionalism and tested for expertise."

Florida Bar board certification can benefit you in the following ways:

- ★ *Certification provides an objective measure that a potential client can rely upon when selecting a lawyer.*
- ★ *By becoming board certified, you join an existing network – and a directory of lawyers at **FloridaBar.org/certification** – of specialists who frequently refer others to specialists in their fields of practice.*
- ★ *Certification may enhance the stature of your law firm and can result in lower malpractice insurance rates. Florida Lawyers Mutual Insurance Co. offers a 10 percent discount to board certified lawyers.*

Minimum standards for education law certification, provided in Rule 6-27.3, include:

- **Practice of law for at least 5 years;**
- **Substantial involvement in the specialty of education law during the 3 years immediately preceding application;**
- **50 hours of approved education law certification continuing legal education in the 3 years immediately preceding application;**
- **Peer review; and,**
- **A written examination.**

If you're considering board certification in education law, applications must be postmarked by August 31 for the following year's exam. Standards, policies, applications and staff contacts are available online at

FloridaBar.org/certification.

Removal of Dangerous Students with Disabilities (IDEA) from the School Environment

by Terry Harmon

Under the Individuals with Disabilities Education Act (20 U.S.C. § 1400, *et. seq.*), public schools (which includes school districts in Florida) that receive federal funding are required to provide a free appropriate public education (FAPE) to students with disabilities. See also, F.S. § 1003.57; Fla. Admin. Code R. Chapter 6A-6. FAPE consists of "special education" and, when necessary, "related services." 20 U.S.C. § 1401(9). "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. § 1401 (29).

With respect to school safety, Florida law states that it is a duty of school boards to provide "proper attention to health, safety, and other matters relating to the welfare of students." F.S. §1001.42 (8)(a). See also, F.S. §1006.07. Superintendents and principals in Florida also have legal duties relating to school safety. F.S. §§1006.08, 1006.09.[1] Recent legislative action has likewise made clear that school safety is a priority in Florida's schools (Fla. Ch. 2018-3 and 2019-22).

So what can a school district do when it must provide FAPE to a student with a disability who it believes is an immediate safety threat and substantially likely to injure themselves or others? Unfortunately, with the increase in mass school violence events across the United States, this is a question I have been asked repeatedly over the past several months. While there are a number of different options available depending on the particular student's circumstances (for example, whether the student's actions violated the code of conduct or whether any "special circumstances"[2] apply), this article will focus on immediate injunctive relief.

As a threshold matter, the IDEA requires that school districts educate dangerous students with disabilities. See, Magyar By & Through Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1438 (D. Ariz. 1997)("The state[] purpose of the IDEA is 'to assure that *all* handicapped children have available to them ... a free and appropriate special education'…[a]gain, Congress made no exception for misbehavior"). Further, under the IDEA, school districts are prohibited from unilaterally changing a student's educational placement even if the student is dangerous. 20 U.S.C. § 1415(j). But, in the case of a student wit who is an immediate threat and substantially likely to injure themselves and others if they remain in the school setting, school districts have an option.

In Honig v. Doe, 484 U.S. 305 (1988), the United States Supreme Court held that school districts may bring a civil action to request that a court enjoin a dangerous student with a disability under the IDEA from attending school.[3] To be entitled to such *extraordinary* relief, school districts are required to demonstrate that maintaining the dangerous student in their current placement is substantially likely to result in injury to the student or others and that the school district has "made all reasonable efforts to accommodate the student's disabilities."[4] Sch. Bd. of Pinellas County, Fla. v. J.M. By & Through L.M., 957 F. Supp. 1252, 1258 (M.D. Fla. 1997). See also, E. Islip Union Free Sch. Dist. v. Andersen, 161 Misc. 2d 945, 948–49, 615 N.Y.S.2d 852, 854 (Sup. Ct. 1994)(authorizing injunction that extended student's suspension and required that student remain in home-bound instruction until the school district could proceed with change of placement proceedings).[5] School districts contemplating moving for injunctive relief must be prepared to present evidence and testimony to meet the requirements set forth in Honig.

Immediate injunctive relief is not the only option available to school districts and, in fact, should only be considered in limited situations. A dangerous student's IEP team should always meet with parents to address safety concerns and possible interventions to allow the student to access their education in a school setting. This is what the IDEA requires. However, if a school district cannot meet a dangerous student's needs without placing the safety of the student and others at imminent risk, injunctive relief is an available option.

Terry J. Harmon *is a shareholder with Sniffen & Spellman, P.A., 123, North Monroe Street, Tallahassee, Florida 32301; (850) 205-1996; tharmon@sniffenlaw.com. Mr. Harmon is Board Certified by The Florida Bar in Education Law and has represented clients before the Florida Department of Education, the United States Office for Civil Rights, the Florida Division of Administrative Hearings, Florida State Circuit Courts, the United States District Courts for the Northern, Middle, and Southern Districts of Florida, and the Eleventh Circuit Court of Appeals. Mr. Harmon is a member of The Florida Bar's Education Law Committee, the Florida School Board Attorneys Association, and the Education Law Association.*

Endnotes:

1 The statutory citations herein are not intended to be a complete listing of all statutes that apply to school safety.

2 20 U.S.C. § 1415 (k)(1)(G).

3 Depending on whether the injunction is sought in Federal or

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State court, counsel must review Rule 65 of the Federal Rules of Civil Procedure or Rule 1.610 of the Florida Rules of Civil Procedure.

4 School districts are not required to exhaust IDEA administrative remedies prior to applying for an injunction. Gadsden City Bd. of Educ. v. B.P., 3 F. Supp. 2d 1299, 1304 (N.D. Ala. 1998)("… school officials may need immediate authority to enjoin a child who is scheduled to return from a suspension in less than twenty-four hours").

5 There was not a pending due process case when injunctive relief was sought in Andersen.

Why School Choice Transcends Politics

by Joy Smith-McCormick

Among the most important choices families must make, education commands our focus, as it is the foundation upon which high-functioning, productive citizens are developed. The education sector has been religious in its practices for centuries, but over the last 20 years more options to deliver education have emerged. Just as other sectors have responded to public demand to improve, school choice has evolved to meet families' need for a higher-quality education.

At the core of the school choice debate is a personal choice parents must make about the educational model that works best for their children. Most parents will agree that having different options is preferable to a one-size-fits-all approach. Because children must live with the consequences of a school that is not the right fit, this decision should be a parental responsibility, not one made by a committee.

Consider the issue of school choice within the context of Article IX, Section 1 of the Florida Constitution. It states, in part, that "[t]he education of children is a fundamental value of the people of the state of Florida. It is, therefore, a paramount duty of the state to make provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high quality education … "

Nothing in this mandate excludes school choice. This provision seems to support the type of flexibility that now includes school choice options as part of an overall system to ensure a high-quality education for all students. Local district magnet schools, charter schools, virtual schools, or some hybrid of all these aid in that flexibility.

Dismissing education choice is most consequential for black and brown children, who suffer from an academic achievement gap with their white counterparts and are more likely to travel the pipeline to prison rather than the pathway to college or gainful employment. That should motivate all stakeholders to explore any and all options to reverse this course.

Charter schools have been a successful option for these students. The most recent annual charter school performance report compiled by the Florida Department of Education shows that charter school students outperformed traditional school students. The data reveal a lower achievement gap for black and brown students in charter schools, and that low-income students in charter schools performed better than low-income students in district-managed schools.

In some political circles, school choice might be taboo. But most parents don't consider partisan politics when deciding about their children's education. Choice parents, however, are taxpayers who deserve fair, fact-based representation. Choice parents are voters. Their experience shapes their voices on the issue and should not be ignored by politicians for the sake of upholding an anti-choice platform.

As a choice parent, an education lawyer, and the legal and compliance director for a company of non-profit charter schools, I am in a committed relationship with the law and facts about choice. Conversations among some stakeholders are not well-informed, and their views sometimes are steeped in political myths.

I propose a time out on the politics to appreciate the facts and the basic premise of choice. Parents own this choice. Parents should not be vilified if they do not toe the party line when the party just might be out of step. Political dictates and aspirations will never be more important than parents' rights to choose what is best for their children's education. We all must consider softening political absolutes to make room for the reality of people's experience.

I encourage a movement to better educate all stakeholders and to dispel the myths around the issue of school choice. Whatever your politics, school choice is codified and a part of our public education system.

This article was previously published in redefinED.

***Joy Smith-McCormick** is legal and compliance director and general counsel for Kid's Community College Charter Schools (KCC). KCC's five not-for-profit, public charter school campuses serve more than 1,500 K-12 students in Hillsborough and Orange counties. As an active member of The Florida Bar, Joy serves as Education Law Committee chair and is a member of the Governmental and Public Policy Advocacy Committee. She has been practicing law for 17 years. Follow her on LinkedIn at https://www.linkedin.com/in/joy-smith-mccormick-esq-38829880 or on Twitter @joyisspeaking.*

Employee Discipline and the Right to Representation

by Gregg Riley Morton

Almost every public education institution in Florida has some form of organized labor presence. From instructional employees to bus drivers to administrative staff, employees at Florida's K-12 schools, state colleges, and universities are often in bargaining units that are represented by unions. Moreover, the employees in those bargaining units do not have to be members of the union to enjoy certain rights.

Any discussion of Florida public employee rights starts with the applicable constitutional provision. Article I, Section 6, of the Florida Constitution is entitled "Right to Work" and provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Chapter 447, Florida Statutes, also known as the Public Employees Relations Act or "PERA" was passed to implement Article I, Section 6, of the Florida Constitution with respect to public employees as well as "to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." § 447.201, Fla. Stat.

PERA provides mechanisms for unions, employers, and employees to enforce their respective rights by filing unfair labor practice charges with the Florida Public Employees Relations Commission (Commission). With regard to the rights of public employees, section 447.501(1)(a), Florida Statutes, prohibits public employers or their agents from interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed to public employees, as set forth in in section 447.301(1) and (3), Florida Statutes. Under these provisions, public employees are permitted to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection.

One of the rights encompassed in these provisions is the right to representation in disciplinary and investigative matters. This right is commonly known as the *Weingarten* right, named for the decision in the U.S. Supreme Court case *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The *Weingarten* right arises in situations where an employee who is subject to an investigatory interview reasonably believe that the investigation will result in disciplinary action. Under those circumstances, the employee has the right to representation during that interview. If a public employer fails to grant the right to representation, or if the employee perceives that the right has been refused or limited, the employee can file an unfair labor practice charge with the Commission alleging a violation. Charges alleging violations of *Weingarten* rights are among the most common that come before the Commission. Understanding when the right applies is an important method of both guaranteeing employees access to this representation when they are entitled to it and avoiding liability on the part of public employers.

The Commission first adopted the *Weigarten* rationale in *Seitz v. Duval County School Board*, 4 FPER ¶ 4154 (1978), *rev'd on other grounds*, 366 So. 2d 119 (Fla. 1st DCA 1979). The Commission has explained that a public employee's *Weingarten* right arises when: (1) the employee requests representation; (2) the employee reasonably believes an interview will result in disciplinary action; and (3) the exercise of the right will not interfere with legitimate employer prerogatives. *See Williams v. School District of Broward County, Florida*, 43 FPER ¶ 275 (2017). An employer violates this right by continuing an investigatory interview with the employee after the employee has requested representation. *See, e.g., Lewis v. City of Clearwater*, 6 FPER ¶ 11222 (1980). A meeting is considered investigatory if it is used to elicit "information" pertaining to alleged employee misconduct.

While historically representation has been provided by union officials to union members, the *Weingarten* right does not require the employee to be a union member or that the representation be provided by union officials. The Commission has expanded the right to include representation by other members of the bargaining unit regardless of their union membership. *Raven v. School District of Manatee County*, 34 FPER ¶ 125 (2008). Therefore, employees have the right to a representative of their choosing, whether it be a layperson, an attorney, or a rival union representative.

Not all circumstances involving discipline trigger the *Weingarten* right. If a meeting is being held merely to notify the employee of a disciplinary action and the reasons for the action, such a meeting does not constitute an investigatory or disciplinary interview by the public employer. *Williams,* 43 FPER ¶ 275; *Sarasota Professional Fire Fighters, Local 2546 v. Sarasota-Manatee Airport Authority*, 14 FPER ¶ 19064 (1988). Similarly, if a public employer holds a conference with an employee,

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but does not require the employee to submit any information to his or her employer, the Commission has held that such a "conference-for-the-record" is not an investigatory or disciplinary interview. *See Beightol v. School District of Miami-Dade County*, 36 FPER ¶ 484 (2010). Hence, a public employer can refuse to grant an employee's request for representation in such circumstances. However, the legality of an employer's refusal is fact dependent, and the nature of the meeting can be the subject of the evidentiary hearing. *See, e.g., Williams*, 43 FPER ¶ 275; *see also Lewis*, 6 FPER ¶ 11222 (determining that a *Weingarten* right exists where an employee is ordered to choose between voluntary resignation and dismissal even though no investigatory activity occurred at the meeting).

The right to representation is not automatic. An employee is required to request representation in order for the right to be preserved. Where an employee participates in an investigatory interview and fails to request a representative, the employee waives his or her *Weingarten* right. *Bradley v. University of South Florida Board of Trustees*, 43 FPER ¶ 123 (G.C. Summary Dismissal 2016).

Assuming that the *Weingarten* right has been correctly invoked, the role of the representative is primarily to serve as a witness for the employee. *See Florida State Lodge, Fraternal Order of Police v. City of Clearwater*, 8 FPER ¶13418 (1982). Nevertheless, the Commission has also indicated that witnessing the events is not necessarily the representative's exclusive function. *Id.* To what extent a representative can participate or to what extent an employer can limit that participation without committing an unfair labor practice is dependent on the facts of the case.

Whether an employee can prove a *Weingarten* violation largely revolves around the specific facts in the case. If the Commission determines that the public employer committed a violation, the Commission can award attorney's fees to the prevailing charging party in addition to other remedies. Even if a violation is not found, given the factual nature of what the interview entailed, which is often disputed, coupled with the somewhat subjective standard of whether an employee "reasonably believes" that an interview will result in disciplinary action, these cases often require an evidentiary hearing before a hearing officer and require significant litigation costs that may not be recoverable. To avoid exposure to this type of charge, some public employers err on the side of allowing employees to have representatives present even if the meeting in question technically does not require the *Weingarten* right to be honored.

Gregg Riley Morton *is Deputy General Counsel and a hearing officer with the Public Employees Relations Commission. He is a member of the Education Law Committee and the Labor and Employment Law Section's Executive Council. He is the chair-elect of The Florida Bar's Council of Sections and is a past-chair of the Animal Law Section.*

2019-2020
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