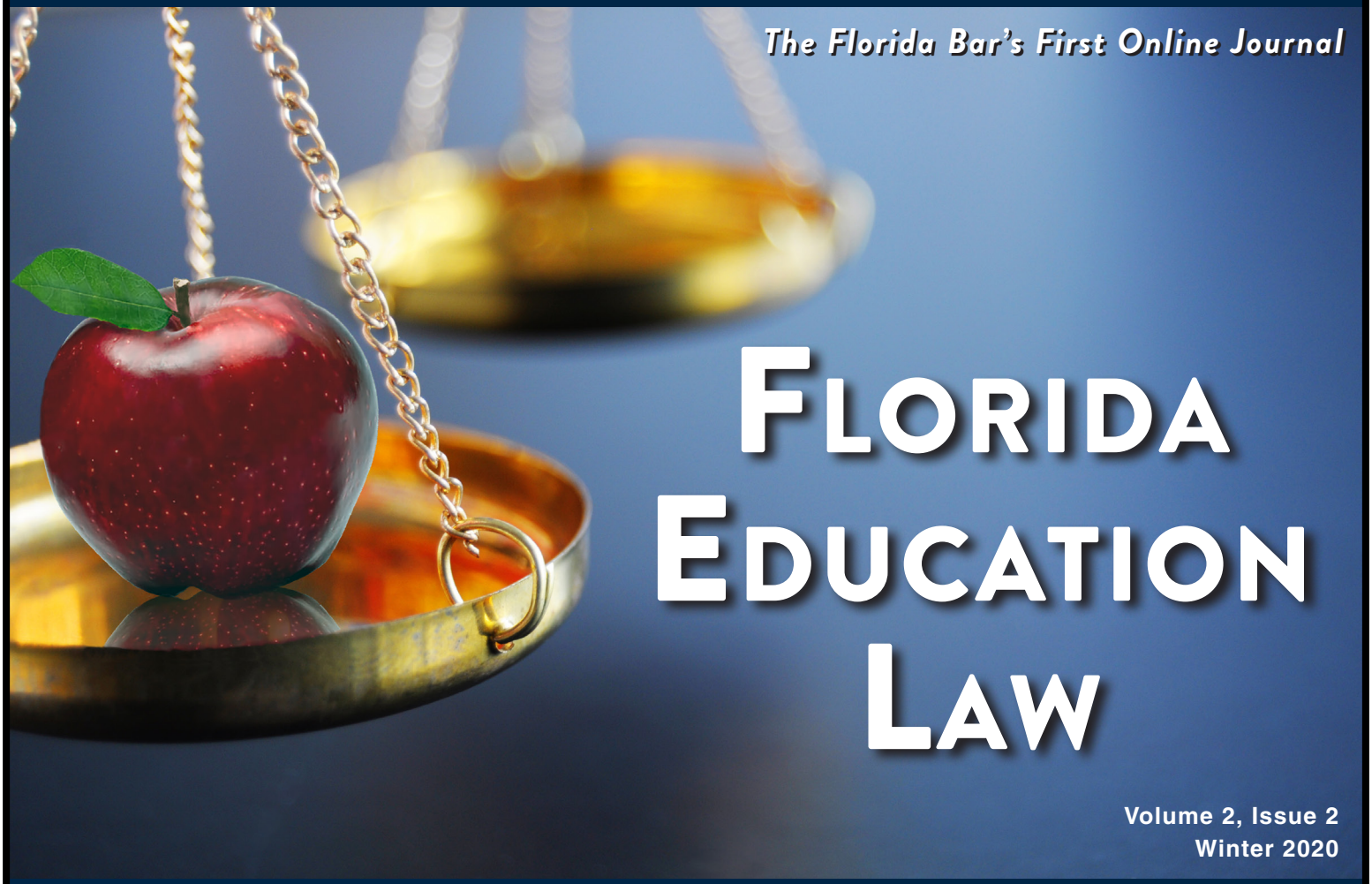
THE FLORIDA BAR EDUCATION LAW COMMITTEE



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INSIDE:

Message from the Chair

by Nathan A. Adams, IV

Bridge-building is the theme of this year's Education Law Committee. Our goal is to facilitate understanding and professionalism in the corners of education law that have found it difficult to work together. Too often we spend more time thinking poorly about one another's skills, competence or character than trying to address the issue at hand.

In K-12, the divide is obvious in the areas of IDEA and school choice. In post-secondary, Title IX pits institutions against plaintiffs. There are many more examples. So how can we facilitate the type of dialogue that it takes to build more professional working relationships? We invite your input. Here is where we have started.

The committee has reached out to every corner of the education Bar to increase membership and to solicit opportunities to work together, beginning with co-hosting continuing education programs. We are making progress.

More members means more diversity of perspectives and greater opportunities to have dialogue. I am pleased to report that we have grown this year from 78 members to 115 members.

On Jan. 15, the Education Law committee presented CLE on *Academic Freedom* and co-hosted the **Community College Conference on Legal Issues** in Orlando, then participated in a roundtable with Florida college attorneys. The committee singles-out Bill Mullowney to thank him for making this possible. Here is a tradition that we can build on in future years.

On Jan. 24, the committee sponsored an **Education Review Workshop** to help lawyers brush up on the practice and get ready for the education law certification exam. By expanding the numbers of board certified education lawyers we can ensure a plentiful supply of excellent education practitioners. Workshop topics covered included *Article IX of the Florida Constitution, FERPA, Children with Special Needs, Employment Law/Labor Relations, Faculty Tenure and Promotion*, and *Federal Grants and Contracts Compliance*. There was something for all education lawyers. Our special thanks goes to Daniel Woodring, John Palmerini, Mary Lawson, Terry Harmon, Sherry Andrews and Isis Carbajal for presenting. Those materials are now posted on-line, along with last year's review materials.

On Feb. 21, the committee co-sponsored with the **Florida School Board Attorneys Association** more continuing education: *Ethics in the Practice of Education Law*, featuring hard to get ethics credit, and *Cyber Crime Trends*, featuring a presentation from the FBI. Here is your chance to speak up about the ethics in our profession with both sides at the lunch table.

We are in search of more opportunities before the June board meeting to co-sponsor events especially with the state universities and plaintiffs' bar. If we do not hold the event it will be because you did not invite us.

We hope the next issue of this journal will feature a point/counterpoint by lawyers for plaintiffs and school boards. Please volunteer on a topic to write a point or counterpoint to help us build bridges in our profession.

For more information on upcoming events, please visit our website at http://bit.ly/FlaBarEdLaw.

***Nate A. Adams, IV**, is a partner with Holland & Knight LLP and Florida Bar board certified education lawyer.*

Due Dilligence Alert: Hazing Edition

by Maddison Cacciatore

On Tuesday, June 25, 2019, Governor DeSantis signed strict legislation against hazing into law, which went into effect on October 1, 2019. Are your institutions and organizations prepared for these amendments? Do they have a compliance system in place?

The amendments to section 1006.63, Florida Statutes, attempt to resolve certain loopholes that arose from ambiguities in the original statute, which was signed into law in 2005. These changes broaden the class of individuals who are criminally liable for hazing events and injuries, expand the potential victim pool of hazing, and encourage students to call emergency services and render aid to the victim without fear of prosecution. The aim of the new legislation is to reduce harm to students caused by hazing. However, no such effect will be achieved unless institutional and organizational leaders educate their members regarding these changes. The following is an in-depth overview of this law, and its changes, to educate those who can help further expand the deterrence effect of this legislation. Additionally, this overview notes a few possible unintended consequences of the statutory language.

Overview of the Law

Section 1006.63(1) defines the term "hazing" as an "action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for the purposes" of initiation into, admission into, or affiliation with an organization operating under the sanction of a postsecondary institution. Hazing also includes "the perpetuation of a tradition or ritual of any organization."

Under this new law, it is a third-degree felony to "intentionally or recklessly commit, solicit another person to commit, or actively plan any act of hazing upon a member, applicant, or former member of an organization." Importantly, the hazing must result in a permanent injury, serious bodily injury, or the death of such person. When no serious injury results from hazing, but the action creates a substantial risk of physical injury or death, the action is considered a first-degree misdemeanor. Consent is not a defense to hazing nor is the fact the activity occurred at a non-school regulated event. In addition to any sentence imposed as a result of hazing, the defendant must complete a four-hour hazing education course, and the court has the discretion to mandate drug or alcohol probation, if applicable.

Section 1006.63 requires that public and nonpublic institutions adopt a written anti-hazing policy, which outlines rules and includes penalties for failure to comply. The institutions must also provide a program to enforce the new policy. If an organization blatantly disregards the policy, Florida College System Institutions and State Universities have the authority, pursuant to this law, to rescind the organization's permission to operate at their institution. Moreover, Florida College System Institutions and State Universities may impose fines and withhold diplomas and transcripts pending compliance with the adopted anti-hazing policy and payment of said fines.

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Follow Us on SOCIAL MEDIA

The Education Law Committee (ELC) is on Facebook, Twitter, and LinkedIN! These accounts give ELC members an additional way to stay in touch with each other between meetings and also give the ELC the ability to conduct more public outreach about the work and achievements of the ELC and its members. If you have articles, 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.

Upon approval of the anti-hazing policy, Florida College System institutions and State Universities must provide a copy of the policy, rules, and penalties to every student enrolled. Additionally, every organization operating under the sanction of a Florida College System Institution or State University must incorporate the policy into their bylaws.

Subsections 8(a), 8(b), and 10 only apply to Florida College System institutions and State Universities. However, private universities compliance efforts could be evidence of no negligence in litigation connected to hazing.

Subsections 11 and 12, referred to as "Andrew's Law," incentivizes bystanders to aid a hazing victim in exchange for no criminal prosecution. Under subsection 11, a person may not be prosecuted if they can establish four things: 1) they were present at the event where the hazing occurred; 2) they were the first person to call emergency services; 3) they provided their name, the address where aid was needed, and a description of the medical issue to the operator answering the call; and 4) the person must remain at the scene with the victim until aid arrives and cooperate with emergency personnel on scene. Subsection 12 provides immunity from prosecution to a person who establishes that they provided aid to the injured victim, in good faith, until the called assistance arrives.

Key Differences From the Original Hazing Law and Their Potential Effects

There are multiple additions to Florida's hazing law, all of which aim to close potential loopholes identified over the past ten-plus years and incentivize the calling of emergency services. The first major change to section 1006.63 comes under subsection 1, where the law defines the different circumstances that are considered hazing. The law now covers "any action for the purposes of . . . the perpetuation or furtherance of a tradition or ritual of any organization operating under the sanction of a postsecondary institution." This inclusion of rituals and traditions is presumably the result of *Martin v. State,* where an organization member participated in the tradition of "crossing" another student, which resulted in that student's death. In *Martin*, the defendant argued that "crossing" was exempt under the hazing statute, and that the law is void due to vagueness. The Florida Supreme Court ultimately rejected these arguments. Nonetheless, the legislature now provides that any action or situation in furtherance of a ritual or tradition unequivocally falls under the definition of hazing, more efficiently deterring organizations from engaging in such behavior.

Arguably one of the most significant amendments to the statute is found under subsection 2, which covers who can be criminally prosecuted for hazing. Section 1006.23 now covers persons who commit the actual act of hazing to persons who commit *and* persons who solicit another to commit or are actively involved in the planning of an act of hazing. Originally, only persons who commited acts of hazing could face prosecution. In planned hazing incidents, organization leaders presumably know of the event and help in its planning, but do not attend in order to avoid potential consequences. Moving forward, the law includes anyone who has anything to do with the hazing, whether or not they are present for the actual event. This will hold organization leaders criminally liable for the actions of their peers, which will motivate them to observe anti-hazing policies in place within their organization, fundamentally reducing organizational participation in hazing.

Subsections 2 & 3 broaden the class of people who can be victims of hazing to include former members. The change follows a 2018 incident where a resigned member of the Alpha Epsilon Pi fraternity, Nicholas Mauricio, was knocked unconscious and received a skull fracture as the result of the fraternity's "scumbag of the week" ritual. Prosecutors reported there was insufficient evidence to charge anyone under the original hazing law, as Mr. Mauricio was not a registered member of the organization at the time of the incident. The addition of former members to the class of individuals who are considered victims of hazing, under this statute, seeks to cover conduct like that of Mr. Mauricio's. This addition also allows students to feel safe when making the decision to leave an organization, as they will be able to without the fear of repercussions.

Arguably, this amendment does not go far enough. There will likely be instances where a student is an "applicant" for an organization, but then decides they do not wish to continue with the membership process. What happens if this person experiences hazing as a result of their resignation prior to them becoming a registered member? In these situations, would a resigned applicant still be an applicant for the purposes of this law? Conversely, would the organization members escape prosecution solely because the student has resigned during the application process, rather than after becoming a member? This possible ambiguity may lead to an unintended loophole for organizations. This loophole could be closed through the addition of a "resigned applicant" category under subsections 2 and 3.

The largest addition to section 1006.63 is "Andrew's Law," comprising subsections 11 & 12. These subsections follow the hazing related death of Andrew Coffey in 2017. Mr. Coffey was pledging the Pi Kappa Phi fraternity and was forced to drink an entire bottle of Wild Turkey bourbon. As a result, he became intoxicated and seriously ill. Rather than calling the emergency services to help Mr. Coffey, the fraternity members moved Mr. Coffey to the couch, where he died from alcohol poisoning. The fraternity members testified the reason for their failure

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to call emergency services was their fear of criminal prosecution for their actions. "Andrew's Law" seeks to alleviate this fear and in turn incentivize calling for help.

Subsection 11 indicates that a person may not be prosecuted if they can establish the four factors listed under (11)(b). By stipulating that prosecution will not be pursued, the section encourages people to call emergency services when a victim of hazing needs medical assistance. Subsection 12 essentially provides immunity from prosecution to anyone who, in good faith, renders assistance to the victim intended to improve or stabilize the victim's condition while waiting for medical services to arrive. This subsection pushes organization members to stay and help a victim, thus, preventing unnecessary harm during the time it takes emergency services to arrive.

Despite the noble intention of the legislature, there may be some unintended consequences due to the specific words used in these amendments. Subsection 11(b) states, "A person *may* not be prosecuted under this section…." Every word within a law has a purpose. Here, the legislators chose a word that insinuates immunity from prosecution is a possibility and not a guarantee resulting from compliance with this statute. "May" is defined as "to be a possibility" or "loosely required to." Per the language of this law, is a person who meets all of the criteria listed in (11)(b) immune from prosecution or does the prosecutor have discretion? If so, is the prosecutor's decision based on the severity of the hazing incident or the severity of the injury? This ambiguity, if interpreted to mean that a person who meets all four criteria listed could still face prosecution, could actually deter participants and bystanders from calling emergency services—conflicting with the spirit of the statute.

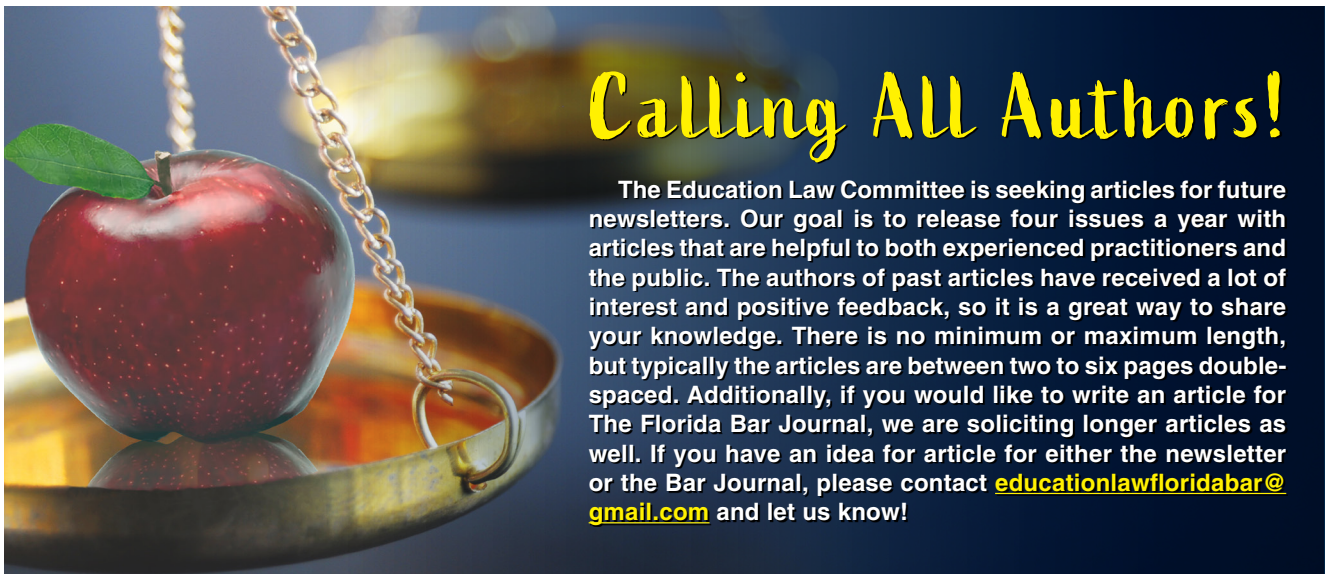
The legislative intent to the statute was ostensibly to provide definitive immunity to someone who can establish all four factors under 11(b). However, the statute should have used similar or the same language found in subsection 12, i.e. "…a person is immune from prosecution under this section…." This language is definitive and leaves no room for inconsistent interpretations.

Regardless,the amendments to Section 1006.63 are undeniably valuable. By incentivizing the giving of aid and broadening the people who can be found criminally liable for hazing activity, the statute should decrease hazing related deaths and injuries suffered by students in Florida.

Maddison Cacciatore *is a 3L at Stetson Law. She works as a law clerk within the Tobacco Division at Abrahamson & Uiterwyk and serves as a Stetson Ambassador, Treasurer of the Real Property, Probate and Trust Law Association, Secretary of the Education Law Society, and Professor Lake's Research Assistant in the Center for Excellence in Higher Education Law and Policy.*

Endnotes

1 Fla. Stat. §1006.63(1) (2019).
2 *Id.*
3 *Id.*
4 *See* Fla. Stat. §1000.21(3) (2019).
5 *Martin v. State*, 259 So. 3d 733 (Fla. 2018).
6 Byron Dobson, *Gov. DeSantis Signs 'Andrew's Law', Enacting Tougher Hazing Measures*, Tallahassee Democrat, Jun. 26, 2019, https://www.tallahassee.com/story/news/2019/06/26/fsu-hazing-andrews-law-gov-desantis-florida-tougher-hazing-measures/1566778001/.
7 *Id.*
8 Fla. Stat. §1006.63.
9 Black's Law Dictionary (11th ed. 2019).
10 Fla. Stat. §1006.63.



Medical Marijuana Employee Protection Act: What the Future Could Hold for Florida

by Leonard Dietzen

With the passing of the 2016 constitutional amendment and the Legislature's enacting of statutes implementing the voters' will, hundreds of thousands of Floridians have become lawful medical marijuana users.[1] By and large, Florida employers were not impacted by the legalization of medical marijuana because both the use and possession of marijuana are still illegal under federal law.[2] Under Florida's Constitution, employers are not required to accommodate medical marijuana use in the workplace. However, other states have expanded medical marijuana users' rights to include additional protections.

The Florida Legislature is currently considering similar protections. House Bill 595 and Senate Bill 962 will, if passed, afford sweeping rights to Florida employees using medical marijuana. The bills, both entitled Medical Marijuana Employee Protection Act, impact both public and private sector employers. In short, this proposed law would afford new employment rights for applicants and employees, including the right to sue employers if an adverse personnel action is taken against a lawful medical marijuana user because of his or her status as a qualified medical marijuana patient. The only caveat relates to jobs involving safety-sensitive duties, such as teachers, school bus drivers and firefighters.

Challenges for Employers

To justify a failure to hire or an adverse personnel action against a medical marijuana employee, the employer will now be required to establish, by a preponderance of the evidence, that the lawful use of medical marijuana is impairing the employee's ability to perform his or her job duties. This will undoubtedly be a tricky, fact-intensive and expensive undertaking for Florida employers. If the employer fails to prove impairment, the employee can obtain injunctive relief (such as job reinstatement), money damages and an award of attorney fees. In essence, medical marijuana use could soon become a newly protected class for all applicants and employees in Florida.

Definition of Exempt Jobs

Under these bills, an employer may not take any adverse action against any employee or job applicant who is a qualified medical marijuana patient unless the position at issue involves safety-sensitive job duties. The bills define "safety-sensitive" as "tasks or duties of a job that the employer reasonably believes could affect the safety and health of the employee performing the tasks or duties or other persons, including, but not limited to, any of the following:

- The handling, packaging, processing, storage, disposal, or transport of hazardous materials.
- The operation of a motor vehicle, equipment, machinery, or power tools.
- The repair, maintenance, or monitoring of any equipment, machinery, or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
- The performance of firefighting duties.
- The operation, maintenance, or oversight of critical services and infrastructure, including, but not limited to, electric, gas, and water utilities or power generation or distribution.
- The extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment, or transport of potentially volatile, flammable, combustible materials, elements, chemicals, or any other highly regulated component.
- The dispensing of pharmaceuticals.
- The carrying of a firearm.
- The direct care of a patient or child.

What Employers Can Do

Employers should examine the written job descriptions of all positions to confirm they accurately reflect the job duties actually performed, and determine which positions might include safety-sensitive tasks or duties which could exempt that position from compliance with these new bills. If the position entails such safety-sensitive duties, those should be identified by language from the statute and should state that a positive drug test could result in discipline up to and including termination or failure to hire. According to the bill, employers would be permitted to take "appropriate adverse personnel action" against any employee whose medical marijuana use impairs the employee's ability to perform his or her job responsibilities. Employers will have to be on alert for impaired employees, document where performance falls below acceptable standards, and be able to articulate how the impairment impacted the employee's performance. Training on how to document employee misconduct will be needed so employers can establish that an employee was facing an adverse personnel action for reasons other than medical

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marijuana use. Both public and private Florida employers are sued far too often by sober applicants and employees under a wide variety of federal and state laws. Just when the HR Department begins to understand the complexity of who in their workplace is in a protected class and who is "at will," along comes potential legislation that would afford great protections to qualified medical marijuana users.

As with any new bill, the devil is in the details. Employers should review the bills and follow their paths through the Legislature.[3] Although it is possible the bill will not become law this year, national trends indicated that employees who are qualified medical marijuana users will have many new workplace protections in the near future. Employers need to stay tuned as the Legislature grapples with this expensive and expansive potential new law.

Leonard Dietzen *is a partner with the Rumberger/Kirk law firm. His practice is concentrated on the representation of private and public sector employers in all aspects of labor and employment law. He is the school board attorney for the Suwannee County School Board and provides legal counsel to numerous other school boards and charter schools in Florida. You can reach him at ldietzen@rumberger.com.*

Endnotes

1 Section 381.986, Florida Statutes.

2 Marijuana is classified as a Schedule I drug by the Controlled Substances Act.

3 https://www.flsenate.gov/Session/Bill/2020/595 and https://www.flsenate.gov/Session/Bill/2020/962.

FAILING TO EXECUTE THE VISION:
The 11th Circuit Court of Appeals Adopts a New Standard in Assessing Implementation Cases Under the IDEA

by John P. Leombruno

There is a popular Japanese proverb that goes something like this: "*vision without action is a daydream, and action without vision is a nightmare*." Said another way, both are dependent upon one another for success. In the world of special education law, this axiom can be used to accurately summarize how courts are reviewing allegations that a child has been denied a free and appropriate education under the Individuals with Disabilities Act (IDEA); either as a result of an individual education plan (IEP) that has been inadequately drafted, or an IEP that has been inadequately implemented. The Supreme Court has already weighed in, several times, on how to judge the "vision" (i.e. the IEP), and now the United States Court of Appeals for the Eleventh Circuit has provided Florida courts with a new standard on how to judge the "action" (i.e. the failure to implement an IEP).

Generally speaking, a claim that a child has been denied a free and appropriate education, as guaranteed by the IDEA, will come in one of two forms. Either parents will claim that a child's IEP was inadequately drafted to meet its substantive obligation under the IDEA, or that the IEP, even if sufficiently drafted, was not properly carried out. The former claims are referred to as "*content*" cases; the latter as "*implementation*" cases. Although Courts through the years have created and expanded on the appropriate standard in reviewing content-based claims, neither the United States Supreme Court, nor the Court of Appeals for the Eleventh Circuit, had established a test for evaluating implementation cases. That is, until recently.

In 2019, the Eleventh Circuit finally tackled the issue head on when it delivered its opinion in *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019), and established a standard of review for implementation cases that focused on the concept of materiality. Specifically, the Court held that minor or trivial deviations in the implementation of an IEP would be insufficient to support a claim that a child had been denied a free and appropriate education, and that plaintiffs would be required to demonstrate that a school had "*failed to implement substantial or significant provisions of a child's IEP*." *Id.* at 1211.

In laying out the rationale for its decision, the Court in *L.J.* spent considerable time discussing both the history of the IDEA and several landmark decisions over the years regarding content-based claims. These cases created a slow transition away from a philosophy that the IDEA only required schools to provide an educational benefit that was slightly more than minimal or trivial, and towards a higher philosophy that the substantive guarantees under the IDEA could only be met by offering an educational plan that was likely to make meaningful progress. Since the evolution of the standard in content-based cases was clearly important to the Court in *L.J.*, a brief discussion of said history is necessary to understand the Court's rationale.

In the mid-seventies, Congress enacted the Education for All Handicapped Children Act (later renamed as the IDEA in 1990, upon its reauthorization by Congress) to ensure that a free and appropriate education would be available in a public setting to all children with disabilities. While the IDEA provided the crucial first step of ensuring that all children with disabilities were able to participate in public education, it was not until the early eighties when the U.S. Supreme Court recognized that the IDEA offered more than just a series of procedural rules and safeguards. Specifically, in 1982 in *Board of Education of the Hendrick Hudson Cent. School District v. Rowley*, 458 U.S. 176 (1982) the U.S. Supreme Court held that the IDEA was significantly more than a series of procedural rules, and actually created a substantive "*right*" to a free and appropriate education; a right that could not be honored unless a reasonably calculated IEP enabled the child to receive some educational benefit.

Although *Rowley* was an important step in the right direction for special education, the decision fell short when the Court intentionally refused to establish a specific standard to test the actual substance of the educational benefit being conveyed. In this void left by *Rowley*, several lower courts began to find that this substantive right conferred by the IDEA could be met so long as the educational benefit being offered to the student was slightly more than minimal or trivial.

Thirty-five years later the U.S. Supreme Court decided to wade back into the waters of content-based cases in order to establish a more substantive-based standard with its decision in *Endrew F. v. Douglas County School District*, 137 U.S. 988 (2017). *Endrew* flatly rejected the *de minimus* standards that had been created by several lower courts in the aftermath of *Rowley*, opining that an

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educational program offering only a trivial benefit violated the spirit and guarantees of the IDEA. The *Endrew* court held that in order to convey the substantive right to a free and appropriate education under the IDEA, schools must offer IEPs that are "*reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances*." *Id*. at 999. In other words, *Endrew* focused on the substance and quality of the educational benefit, not merely its existence, when determining whether a school has met its obligations under the IDEA.

The Court in *L.J.* clearly found the reasoning espoused in *Endrew* to be significant and applicable to its own analysis. If *Endrew* stood for the proposition that the educational guarantees under the IDEA could only be upheld by ensuring that the educational benefit being offered was substantive and something more than trivial, then it stands to reason that in order to find a violation of the IDEA in the context of an implementation case, a substantial, material, and non-trivial departure must occur.

To support its conclusion that a materiality standard of review (and not a condition of perfect adherence) was required in implementation cases, the Court looked to several key provisions of the IDEA. First, the Court noted that the definition of a free and appropriate education under the IDEA includes a statement that the special education and related services must be "in conformity with" an established IEP. The Court held that the use of that particular phrase was significant in that the term implied that only general adherence, not perfection, was required. *L.J.* at 1212.

Second, the Court pointed out that the IDEA requires an IEP to be reviewed no less than annually in order to continually adjust to the unique needs of the child. *Id*. at 1212. The Court held that because the IDEA requires IEPs to be flexible, an interpretation that they are to be rigidly and perfectly applied is not supported. Id. at 1212. Lastly, the Court noted that 20 U.S.C. § 1414(d)(1)(A)(i) defines an IEP as a "written statement", and that cases like *Endrew* refer to an IEP as a "plan", as opposed to a contract that requires perfect adherence.

Although the *L.J.* decision set forth a new standard for implementation cases, like *Rowley* and *Endrew* before it, the Court refused to provide a precise roadmap for navigating the new standard. Instead the Court opted to "*lay down a few principles to guide the analysis*." *L.J.* at 1214. The Court held that reviewing courts must "*compare the services that are actually delivered to the services described in the IEP itself*." *Id*. at 1214. This means a court is required to consider implementation failures both "*quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP.*" *Id*. at 1214.

The Court also pointed out that a child's lack of progress could be evidence of the materiality of an implementation failure but cautioned that such evidence is not necessarily dispositive. *Id*. at 1214. Finally, the Court pointed out that courts "*should consider implementation as a whole in light of the IEP's overall goals*" and that courts must consider the "*cumulative impact of multiple implementation failures when those failures, though minor in isolation, conspire to amount to something more*." *Id*. at 1215.

While *L.J.* provides much needed guidance to a gray area of litigation, the decision is sure to be met with mixed reviews by those dealing with these implementation claims. Some will suggest the new standard makes it more difficult to hold schools accountable when they fall short of meeting the needs of students. Others will argue that the decision allows educators to better serve their students without fear of due process claims being filed because of lack of perfect adherence. Did the court go too far? Not far enough? Time will ultimately judge the decision, as lower courts begin to view implementation cases through their new court-ordered lens. What should not be disputed, however, is the intent of the Court. *L.J.* sought to resolve a void in implementation litigation, while at the same time solidifying the principle that an IEP is the vehicle through which the mandates of the IDEA flow. Although the court provided focus on "how" to review implementation claims, the Court never waivered on "what" was important: that schools must be held accountable when they fail to execute the vision.

***John Leombruno** is a shareholder with the Arnold Law Firm, which specializes in charter school law, education law, family law, and criminal defense. You can reach him at jleombruno@arnoldlawfirmllc.com.*

Endnotes

1 *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 U.S. 988 (2017).

2 *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019).

3 20 U.S.C. § 1400(d)(1)(A).

4 *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354 (4th Cir. 2015); *K.E. v. Indep. Sch. Dist.*, 647 F.3d 795 (8th Cir. 2011); *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008).

5 20 U.S.C. § 1401(9).

6 20 U.S.C. § 1414(d).

Espinoza v. Montana Department of Revenue: A Case with Big Implications for Florida School Choice

by Terry J. Harmon, and Jeffrey D. Slanker

On January 22, 2020, the United States Supreme Court held oral arguments in a case with national and local importance for the landscape of education law and school choice in Florida. In Espinoza v. Montana Department of Revenue, (U.S. Supreme Court Case No. 18-1195), the Supreme Court is considering whether states may maintain scholarship or student aid programs that are religiously neutral, but permit the expenditure of public funds to be used at religious schools. Florida, in fact, has just such a program.

The Issue Before the Supreme Court

The specific issue pending before the Supreme Court in Espinoza is whether it violates the United States Constitution, and specifically the Equal Protection and Free Exercise of Religion Clauses of the Constitution, to invalidate a generally available and religiously neutral student aid program because the program affords students the choice of attending religious schools.

The case comes to the Supreme Court by way of the Montana Supreme Court.[1] The Montana Supreme Court held that a state law allowing tax credits to be used to benefit parochial schools violated the Montana Constitution.[2] The Montana Supreme Court reached this conclusion notwithstanding the fact that the program made funds generally available to attend any private school, including non-religious private schools.[3] An exploration of the underlying case, and the state of the law in Montana helps to understand the context of the case before the Supreme Court.

The Underlying Case

The case stems from the Montana Supreme Court's analysis of a scholarship program created by the Montana Legislature in 2015.[4] Part of the program allows a dollar-for-dollar tax credit up to $150 for private donations to a scholarship program.[5] Those donated dollars could then be used by families in Montana to pay for private school tuition.[6]

The program itself is neutral.[7] In other words, Montana residents that benefit from the program can use the donated dollars to attend any private school of their choosing, including religious schools.[8]

What was key to the resolution of case before the Montana Supreme Court was that Montana, like many other states, contains a "Blaine Amendment" in its state constitution.[9] There is a long history of Blaine Amendments in the United States. The idea for such amendments originated after a speech by President Ulysses S. Grant (1869–77) where he called for a Constitutional amendment that would mandate free public schools and prohibit the use of public money for sectarian schools.[10] The next year, Congressman James Blaine proposed an amendment to the U.S. Constitution to this effect. The "Blaine Amendment" would prohibit state governments from using public funds for religious schooling.[11] The amendment did not pass, but many state governments enacted amendments to their own constitutions similar to the one proposed by Congressman Blaine.[12]

As stated, Montana's constitution contains a prohibition against using public funds, directly or indirectly, to aid religious educational institutions.[13] The Montana Supreme Court held that the aid program was unconstitutional and in conflict with this feature of their state's constitution because aid provided by the state could be used at religious schools.[14]

The plaintiffs then challenged the Montana Supreme Court's decision in the United States Supreme Court which agreed to hear the case in June of 2019.[15] The petitioners argue that banning the use of generally available scholarship money for religious schools violates the federal constitution.[16] They argue that striking down the tax credit aid program violates the Free Exercise, Establishment and Equal Protection Clauses of the Constitution and assert that each Clause "demand[s] that the government show neutrality—not hostility—toward religion in student-aid programs."[17] They further argue that banning the use of funds at religious schools "in otherwise generally available student-aid programs rejects that neutrality and shows inherent hostility toward religion."[18]

Setting the Stage for the Supreme Court's Review

The *Espinoza* case comes somewhat on the heels of the Supreme Court's ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, which the Supreme Court issued in 2017.[19] In *Trinity Lutheran*, the Supreme Court found that a Missouri program that disqualified churches and other religious organization from receiving grants for playground resurfacing violated the Free Exercise Clause

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of the First Amendment.[20] Missouri denied religious institutions such grants under their state's constitution, which contains a Blaine Amendment. That Amendment provides:

> [t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.[21]

The Supreme Court held that Missouri's policy of denying grants under the program to religious institutions violated the Free Exercise Clause by "expressly denying a qualified religious entity a public benefit solely because of its religious character."[22] The Supreme Court however left open the possibility that other programs with similar limitations could withstand constitutional scrutiny and specifically stated that its decision did "not address religious uses of funding or other forms of discrimination."[23]

Oral Argument and Likely Outcomes

The Supreme Court held oral arguments in *Espinoza* on January 22, 2020.[24] Audio and transcripts from the oral arguments are available online.[25] From the oral arguments, it seemed that the Supreme Court was divided on a potential outcome. Advocates for the petitioners faced questions concerning the merits of their position, but also whether the petitioners, parents that utilize the scholarship funds for their children, had standing to challenge the decision of the Montana Supreme Court. Questions on the merits portend that petitioner might have persuaded Justices Alito and Kavanaugh, but not Ginsburg, Sotomayor and Kagan who seemed to ask questions hostile to petitioner's arguments. Obviously, only time will tell. A decision is expected in June, 2020.

Florida Law and Blaine Amendment

Whatever the outcome, it is likely going to be significant for school choice in Florida. Like Montana, Florida's Constitution contains a Blaine Amendment. The Blaine Amendment in Florida's Constitution provides that: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."[26]

Florida, under Governor Jeb Bush, maintained a voucher program that was struck down by the Florida Supreme Court in 2006 which held that the program ran afoul of the Florida Constitution's guarantee of "uniform" public education.[27] Florida's First District Court of Appeal struck down the program just a few years earlier on the grounds that it conflicted with Florida's "no aid" provision in Florida's Blaine Amendment.[28]

In May of 2019, Governor Ron Desantis signed Senate Bill 7070 into law, which created the Family Empowerment Scholarship.[29] The scholarship program provides funds to families to be used at schools of their choosing, with no restriction on using the funds at religious schools.[30] Accordingly, the outcome of the Supreme Court's decision in the *Espinoza* case will have major impacts on this program, which could face legal challenge and should be closely followed by education law practitioners.[31]

Jeffrey D. Slanker *is a lawyer at Sniffen and Spellman, P.A. in Tallahassee. He practices labor and employment law, civil rights defense, local government law, education law and administrative law. His litigation experience in education law includes matters involving Title IX of the Education Amendments of 1972 and the Individuals with Disabilities Education Act.*

Terry J. Harmon *is a shareholder at Sniffen and Spellman, P.A. in Tallahassee. He is Board Certified in Education Law and represents K-12 and postsecondary educational institutions in a wide variety of transactional and litigation matters.*

Endnotes

1 *Espinoza v. Montana Dep't of Revenue*, 139 S. Ct. 2777 (2019).

2 *Espinoza v. Montana Dep't of Revenue*, 2018 MT 306, ¶ 3, 393 Mont. 446, 455, 435 P.3d 603, 606, *cert. granted*, 139 S. Ct. 2777, 204 L. Ed. 2d 1157 (2019).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 606-07.

8 *Id.*

9 Art. X, § 6, Mont. Const.

10 *See* President Grant's Annual Message to Congress, Dec. 7, 1875, 4 Cong.Rec. 175 et seq., which apparently inspired the drafting and submission of the Blaine Amendment. *See* Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv.L.Rev. 939 (1951).

11 Russell A. Hilton, *The Case for the Selective Disincorporation of the Establishment Clause: Is Everson A Super-Precedent?*, 56 Emory L.J. 1701, 1720 (2007).

12 Mark Edward DeForrest, *Locke v. Davey: The Connection Between the Federal Blaine Amendment and Article i, S 11 of the Washington State Constitution*, 40 Tulsa L. Rev. 295, 296 (2004).

13 Art. X, § 6, Mont. Const.

14 *Supra*, note 2.

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FLORIDA SCHOOL CHOICE, continued

15 139 S. Ct. 2777.

16 *Espinoza v. Montana Department of Revenue*, 2019 WL 4447277 (U.S.), 2 (U.S.,2019).

17 *Id.* at 1.

18 *Id.*

19 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

20 *Id.* at 2017.

21 Art. I, §7, Mo. Const.

22 137 S.Ct. at 2024.

23 *Id.* at 2021, n. 2.

24 United States Supreme Court Docket for Case No. 18-1195, <https://www.supremecourt.gov/docket/docketfiles/html/public/18-1195.html> last visited January 26, 2020.

25 *See id.*; Oral Argument – Audio, Espinoza v. Montana Dept. of Revenue Docket Number: 18-1195, United States Supreme Court, <https://www.supremecourt.gov/oral_arguments/audio/2019/18-1195> last visited January 26, 2020.

26 Art. 1, §3, Fla. Const.

27 *Bush v. Holmes*, 919 So. 2d 392, 412-13 (Fla. 2006).

28 *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. 1st DCA 2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006).

29 Florida Department of Education, *Family Empowerment Scholarship*, <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/fes/> last visited January 26, 2020.

30 *Id.*

31 *More money sought for school legal fights*, Florida Politics, August 27, 2019 <https://floridapolitics.com/archives/304394-more-money-sought-for-school-legal-fights> last visited January 26, 2020.

The Evolving Laws Following the Marjory Stoneman Douglas Public Safety Act and the Impact on Students and Families

by Stephanie Langer

Florida's new school safety law is being used as a model for the rest of the country**.** On February 14, 2018, a 19-year-old, former student, walked into Marjory Stoneman Douglas High School in Parkland, Florida and shot 34 people. In less than four minutes, the gunman shot and killed 17 people and left another 17 injured. It was the deadliest school shooting since the December 2012 Sandy Hook Elementary School shooting in Connecticut that resulted in the death of 28 people. The Parkland shooter was 19 years old and used a legally purchased AR-15 semi-automatic rifle during the shooting spree. This was the same type of firearm used during the Sandy Hook shooting and the Pulse Nightclub shooting in Orlando that left 49 dead and 53 injured on June 12, 2016.

While this was not the first or last mass school shooting, this incident garnered national attention in part because the students at Marjory Stoneman Douglas High School were outspoken and savvy with their use of social media, but also because Florida's legislature acted swiftly after the shooting. Just twenty-three days after this tragic incident, Florida's legislature passed a sweeping new law titled the Marjory Stoneman Douglas High School Public Safety Act, CS/SB 7026. Florida is being watched closely by the rest of the country to see if its law should be replicated in other states.

The law has several important measures that are supported by gun violence prevention activists, such as raising the minimum age to purchase a firearm in Florida to twenty-one, limiting the sale of bump fire stocks and clarifying and strengthening the three-day wait period. The law also includes a provision known as a "red flag law" which allows law enforcement to obtain a risk protection order which empowers law enforcement to temporarily remove firearms and ammunition from a person who is deemed by a court to be a danger to themselves or others. This is a civil process similar to a domestic violence protection order.

This law, however, goes much further. The law includes new requirements for armed law enforcement or guardians to be on all school campuses, new training provisions, new reporting provisions, mandatory shooting drills in schools and the creation of several new departments.

Within the Florida Department of Education, the law establishes the Office of Safe Schools (OSS) and within the Florida Department of Law Enforcement the Marjory Stoneman Douglas (MSD) Safety Commission. The OSS is a central repository for best practices, training standards and compliance oversight in all matters related to school

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safety and security.[1] The MSD Safety Commission also known as the School Safety Commission was formed to analyze the Parkland shooting and other mass violence in Florida and make recommendations for system improvements.[2] The Guardian Program, also known as the Coach Aaron Feis Guardian Program, trains and arms school personnel to help aid in the prevention and abatement of active assailant incidents on school premises.[3] Coach Feis was a football coach at Marjory Stoneman Douglas High School and was killed during the Parkland shooting by using himself as a shield to protect his students. The law allocated 67 million dollars for the guardian program, 97.5 million for the OSS and 98 million to "harden" the physical security of school buildings.

The Marjory Stoneman Douglas (MSD) Safety Commission also known as the School Safety Commission is housed within the Florida Department of Law Enforcement. The majority of people who sit on this commission are law enforcement. The commission is made up of 16 voting members, and four non-voting members who were all appointed by the governor. The Commission began meeting in April 2018 and meets each month. The commission will be in place until 2023.

The original purpose of the commission was to review what happened at Parkland and provide recommendations as to what changes could be made to the system to prevent future school shootings. The Commission issued an initial report on January 2, 2019. The initial report was 458 pages and made recommendations for improvements in eleven different areas.[4] The report was critical of the Broward County school district and law enforcement. There was also a lot of public pressure put on the school districts to comply with certain provisions of the new law.

As a result of the Commission's recommendations the Florida legislature amended the law in 2019. The second version of the MSD Safety Act (SB 7030) builds on the first. This second iteration of the law makes some significant changes. First, the law now allows school districts to arm teachers. Twenty-one school districts now allow school employees to be armed. Second, the law required the creation of a Centralized Integrated Data Repository to be up and running by August 1, 2019, before the start of the 2019-2020 school year. It also expanded who would have access to this information. Third, districts are required to utilize and advertise "FortifyFL" – a reporting app to allow adults and students to report threats or suspicious student behavior. It went live October 2018. Fourth, it created a uniformed threat assessment tool called the Florida Safe Schools Assessment Tool. This assessment tool is twenty-two pages. It assesses the student as well as the family. Fifth, the new version of the law now requires more reporting of incidents to law enforcement. In the first edition of the law, petty acts of misconduct and misdemeanors did not need to be reported to law enforcement at the discretion of the school administration. Only those which were "serious" were required to be reported. This new version removed the word serious and removed the misdemeanor and minor offense exclusion. Now all such incidents must be reported to law enforcement. Most, if not all, discretion has been taken away from school administrators. Sixth, was a clarification of required active shooting drills in school. Finally, the law now allows for the superintendent's salary to be withheld for noncompliance.

A second commission report was issued on November 1, 2019. It is 389 pages and also contained recommendations for changes in policies and procedures. These changes are being addressed to the Florida Legislature during the current legislative session, which began on January 14, 2020. More changes to the law can be expected.

The Centralized Integrated Data Repository includes internet and social media posts, the mobile suspicious activity tool (FortifyFL), school incident reporting data known as School Environment Safety Incident Reporting (SESIR), school discipline records, threat assessments, information from the Department of Children and Families, Department of Law Enforcement, local law enforcement and the Department of Juvenile Justice. The changes allow for a social media monitoring tool, revising the content of student records related to student behavior and services and establishing timely transfer of student records between schools. They also require improved school safety incident reporting and expanding data sources to be included in the centralized data repository. There is a requirement for information to be included but does not appear to include a mechanism to make corrections or deletions. There is no ability for a parent or student to review what is in the database or correct the information if it is wrong or incomplete. There is no evidence that such a database will be able to predict the next shooter, so is this heighten scrutiny necessary?

The Statewide Grand Jury was impaneled on February 25, 2019. At the same time the Commission was issuing its scathing report about noncompliance, the governor empaneled a Statewide Grand Jury to hold those failing to comply with the new law criminally responsible. The Grand Jury was impaneled in Broward County, Florida where the Parkland shooting took place but will review actions and inactions of school districts across the entire state. The grand jury issued their first report on July 19, 2019. The report, while mostly confidential, was also scathing. It was issued just twenty-four days before the start of the 2019-2020 school year. Districts, while not individually named, were publicly shamed for failing to comply with the provisions in SB 7026 and SB 7030. The Grand Jury found that that law enforcement and school district officials have had "sufficient time" to bring their

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districts into compliance with these laws, and stated "we fully expect that these officials will use the remaining days before the first day of the 2019-20 school year to do whatever it takes to bring these districts into full compliance." This Statewide Grand Jury will continue to investigate, monitor and exercise its authority to ensure full compliance with SB 7026 and SB 7030. Districts fear not only public shaming but criminal prosecution. Does this fear make students safer?

This law is having a great impact on discipline in schools. Before this law went into effect, discipline already had a disproportional impact on students with disabilities. Safety will trump disability protections. Nationally, children with disabilities make up 12% of the public-school student population but make up 28% of students referred to law enforcement.[5] This number does not include those students who have 504 plans. It is expected that the disparity would be even higher if 504 students were included. Students with disabilities make up 26% of all students who receive one or more out-of-school suspension.[6] Students with disabilities make up a shocking 71% of students placed in seclusion or involuntary confinement, and 66% of those physically restrained at school to immobilize them or reduce their ability to move freely.[7] Twenty six percent of students expelled from school have a disability. The new law requires even more law enforcement involvement and less discretion by school administrators. What is not yet know is what kind of disparate impact, if any, the implementation of the new law is having on students with disabilities. Anecdotally the impact has been swift, widespread and devastating for students in Florida.

Several examples of these impacts include a thirteen-year-old who was interrogated and then involuntarily committed under the Baker Act for drawing a picture at school.[8] Another student who was in a photograph, which was taken by someone else and posted by someone else, showed him holding a toy gun while on spring break. He was suspended from school and forever removed from his magnet school program. Neither of these students had a history of discipline referrals or had ever before been in trouble at school or at home. Criminal charges were not filed in either case. In both cases the children are still suffering from the consequences of this discipline. Before this new law was passed neither of these students would have had law enforcement involvement and both would have been handled at the discretion of the school administrators. I suspect that neither student would have been removed from the school through suspension or Baker Act.

While these new laws enacted after Parkland may have been drafted with good intentions, it is not yet known whether they will actually keep students safer. Between February 2018 and February 2019, there were nearly 1,200 gun violence deaths of victims eighteen and under. In the year following Parkland there was a school shooting, on average, every twelve days. Of the thirty-one school shootings, three of those were in Florida. Will these laws prevent the next shooting?

Historically students with disabilities are disproportionately impacted by zero tolerance type policies. The trauma of zero tolerance-type policies, removal of any discretion from school administrators, heightened surveillance of our students and increased law enforcement involvement in every aspect of public school life has created more fear and anxiety in students and families, especially for those students with disabilities. Will it have been worth it? Only time will tell.

Stephanie Langer *is a staff attorney with Disability Independence Group, Inc. (DIG). DIG is a nonprofit whose mission is to expand opportunities for persons with disabilities through advocacy, litigation, education and training. Stephanie has been practicing law since 1998 and representing families in education cases since 2006.*

Endnotes

1 *See* Fla. Stat. § 1001.212; www.fldoe.org/safe-schools/.

2 www.fdle.state.fl.us/MSDHS/Home.aspx.

3 Fla. Stat. § 30.15.

4 Initial Commission Report at pg. 5., *available at* http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf.

5 *See U.S. Department of Education Office for Civil Rights Civil Rights Data Collection:* 2015-16.

6 *Id.*

7 *Id.*

8 *See* Fla. Stat. § 394.451, *et seq.*