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School Law Newsletter

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S.C. Court of Appeals Holds That Courts Have No Place In School Grading Policy

In *Palms v. Greenville County School District*, the South Carolina Court of Appeals reaffirmed that courts should not interfere with matters committed to the discretion and judgment of school districts unless there is evidence they have acted corruptly, in bad faith, or committed an abuse of power. The case dealt specifically with a school's resolution of a transfer student's grade point average ("GPA") discrepancy under the Uniform Grading Policy ("UGP").

As background, in the fall of 2012, "L.P." transferred from Riverside Military Academy ("RMA") in Georgia to Southside High School in Greenville County to begin his junior year. School administrators initially calculated L.P.'s GPA using the grades shown on his transcript from RMA, after which L.P. was ranked first in his junior class. However, a notation on L.P.'s transcript showed that RMA had given L.P. a 5-10 point final grade "bump" for each honors or AP class – a built-in bonus unavailable to Southside High students. When his RMA-weighted honors and AP final grades were plugged into the UGP grade conversion chart upon transfer, L.P. obtained, from Southside's perspective, an unfair "double bump" for his advanced courses at RMA. To remedy this discrepancy and "level the playing field," Southside officials obtained L.P.'s pre-weighted final averages from RMA and used those numerical averages to recalculate his GPA. Upon recalculation, L.P.'s class rank dropped from first to sixth.

L.P.'s parents filed a lawsuit seeking a writ of mandamus, an extraordinary remedy which allows a judge to enforce a clear legal duty of a public body to perform, or stop doing, some specific act. The lawsuit requested that the trial judge order the school district to apply L.P.'s "bumped" RMA grades, instead of end-of-course averages, and restore his top class rank. Specifically, L.P.'s contention was that the UGP required the District to accept the final, bumped RMA grades and the school had no discretion to consider and resolve obvious inconsistencies between RMA's grading policy and the UGP that unfairly impacted other students. L.P. also attacked the fairness of the process by which the school district had revised his grades and GPA and argued that other parents had unduly influenced school officials. The trial judge agreed with L.P. and restored his RMA final, bumped grades and top class ranking. The school district sought an expedited appeal, and the Court of Appeals reversed the trial court's decision the final week in May, specifically permitting the school district to promptly recalculate grades in time for graduation the following week.

The Court of Appeals cited prior decisions in which the S.C. Supreme Court had granted deference to school districts in student discipline and personnel matters, and noted that resolution of grading and class rank disputes were a core school district function even more worthy of deference than discipline or personnel issues. The Court of Appeals also rejected L.P.'s undue influence and procedural unfairness claims. Relying on the trial judge's finding that the school district had made a well-intentioned effort to achieve fairness to all students, including L.P., the Court of Appeals found that there was no evidence that the district had acted corruptly, in bad faith, or abused its power when it recalculated L.P.'s GPA and ranking.

The student may still file a petition for review by the South Carolina Supreme Court. Nevertheless, the Court of Appeals' broader ruling is that school districts' decisions

regarding student, operational, and personnel matters are entitled to significant deference from the courts and will not be disturbed if they are made in good faith.

While judicial challenges to school district decisions will continue, the *Palms* case should make legal challenges to decisions best suited to school administrators less difficult and less expensive to defend.

S.C. Supreme Court Rules On FOIA Case, Amending Meeting Agendas

On June 18, 2014, in *Lambries v. Saluda County Council*, the South Carolina Supreme Court ("Supreme Court") held that the South Carolina Freedom of Information Act's ("FOIA") notice provision found in S.C. Code § 30-4-80 did not require an agenda to be issued for a regularly scheduled meeting. Further, the Court held that FOIA contains no prohibition on the amendment of an agenda for a regularly scheduled meeting. The Supreme Court's decision reverses the previous holding issued on June 13, 2012, where the South Carolina Court of Appeals interpreted FOIA to require agendas for regularly scheduled meetings and prohibit public bodies from amending published agendas during session.

S.C. Code § 30-4-80(a) requires "written public notice" of the meetings of public bodies as follows:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their *regular meetings* at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, *if any*, for *regularly scheduled meetings* must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings.
>
> All public bodies must post on such bulletin board public notice for any *called, special, or rescheduled meetings*. *Such notice* must be posted as early as is practicable but not later than twenty-four hours before the meeting. *The notice* must include the agenda, date, time, and place of the meeting. *This requirement* does not apply to *emergency meetings* of public bodies.

(emphasis added).

In the June 13, 2012, decision, the Court of Appeals interpreted the "if any" language to refer only to instances where there were no formal actions to be taken at a particular meeting, but that an agenda would be required where formal action would be taken. The Supreme Court found this reasoning unpersuasive, and noted that FOIA makes it clear that "meetings" are not limited to instances where action is taken. The Supreme Court held that FOIA only requires the posting of an agenda twenty-four hours prior to called, special, or rescheduled meetings, and that no agenda is required for regularly scheduled meetings.

The Supreme Court then turned to the authority of public bodies to amend an agenda if one has been posted pursuant to FOIA's notice provision. First, the Supreme Court recognized that the purpose of FOIA's notice provision is to prevent government business from taking place in secret and noted that no member of the public is prevented from finding out the actions of the board where the amendment to the agenda is raised and voted upon in public and recorded in the minutes of the meeting. The Supreme Court found that since the County Council posted the regularly scheduled meeting at the beginning of the year and posted a discretionary agenda at least twenty-four hours prior to the meeting, it complied with FOIA's notice requirements. Ultimately, the Supreme Court declined to impose a restriction on the amendment of an agenda for a regularly scheduled meeting in light of the fact that it is clear that no agenda is required.

The Supreme Court's decision does leave open the possibility for future courts to find a FOIA violation if an amendment to an agenda is made to intentionally skirt FOIA's notice provision. While the Court has determined that FOIA does not require an agenda for a regularly scheduled meeting, if a public body does intend to use agendas for regular meetings, which is common practice, agendas should continue to be posted pursuant to § 30-4-80(a) at least twenty-four hours prior to the meeting.

Impact of *Riley v. California* on Cell Phone Searches in Schools

On June 25, 2014, the United States Supreme Court issued a unanimous ruling in *Riley v. California*, holding that police officers must generally secure a warrant before conducting a search of a cell phone.

In *Riley*, California police stopped David Riley for a traffic offense, and upon finding two illegally concealed firearms under the hood of his car, arrested Riley for possession of concealed and loaded firearms. A search incident to arrest revealed gang related items and a cell phone, which police searched and found further evidence in text messages, photos, and video linking Riley to an earlier gang-related shooting. Riley was charged in connection with the shooting and subsequently moved to suppress the evidence found as a result of the warrantless cell phone search.

The Court concluded that, with the exception of exigent circumstances, officers must generally obtain a warrant before searching a cell phone. As stated in Chief

Justice Robert's opinion, a cell phone is essentially a "minicomputer" with a large storage capacity and an array of sensitive, personal information stored in digital form, the search of which would typically reveal more about a person than even the most exhaustive search of a house. In other words, the search of a cell phone invokes privacy concerns far beyond those of a typical search incident to arrest.

School officials are authorized to conduct searches of students and their property based on the "reasonable suspicion" standard set forth in *New Jersey v. TLO* and as outlined in State law. The reasonable suspicion standard allows school officials greater latitude than law enforcement officers who must have probable cause to perform a search. Nevertheless, the notion that cell phones contain a larger capacity of sensitive information than would be revealed in a typical search of a student's property remains relevant, and schools should use caution when faced with this issue.

Exit Exam No Longer Required For High School Graduation

On July 1, 2014, Act 155 became effective, eliminating the exit exam as a requirement for graduation beginning with the graduating class of 2015. The law is also retroactive to 1990, meaning students who earned the required number of high school credits to graduate, but did not pass the Exit Exam (either HSAP or BSAP) between 1990-2014 may petition the District to determine if he/she is eligible to receive a high school diploma.

It is important that all school districts have procedures to facilitate these petitions. The former student receiving a diploma under Act 155 should have met all graduation requirements except passing the exit exam for the year the student would have graduated. After a school board has received a petition and verified that the student now qualifies for a high school diploma, it should forward the petitioner's information to Act155diplomas@ed.sc.gov immediately, with all petitions required to be filed by **December 31, 2015.** Completed diplomas will be mailed to the district.

The Act specifically states that persons receiving diplomas under Act 155 will not be counted as graduates for determining graduation rates of schools and districts. Students in the graduating class of 2014 who have completed the required credits to graduate but have not passed the exit exam may take the summer HSAP. If they pass, these students will receive a diploma under the current 2013-14 requirements and will count for the high school's 2014 graduation rate. If these students do not pass or take the summer exit exam, they may petition for a diploma under Act 155 as soon as they are no longer enrolled in public school.

Beginning in the 2014-15 school year, eleventh graders will be required to take two tests. Passage is not required to receive a high school diploma. One test will be ACT WorkKeys, which awards job-skills credentials that students can provide to employers. The other, which has not been selected, will test for college readiness. There is no information available yet regarding how these tests will apply to the state's accountability standards for schools.

Affordable Care Act Update

On February 12, 2014, the IRS issued final rules on the "Employer Mandate" or "Pay or Play" provision of the Patient Protection and Affordable Care Act ("ACA") – the provision that subjects applicable employers to monetary penalties for failing to provide "minimum value" and "affordable" health insurance to full-time employees.

Under the final rules, the effective date for compliance is January 1, 2015, or the beginning of the employer's plan year in 2015 or 2016, depending on the size of the employer. In addition, the final rules provide clarification on various employee categories and other provisions addressing employee status determinations, safe harbors, and transition relief. Also noteworthy, the IRS has issued final regulations that place significant reporting requirements on employers that start in the 2015 calendar year. These requirements are very detailed in the amount and type of information that is to be reported. Therefore, it is strongly recommended that school districts have appropriate systems and data gathering processes in place by the end of the 2014 calendar year. In addition, school districts should continue to keep records of employees that decline insurance offered by the district in order to defend against employee tax credit/subsidy claims.

New Charter School Legislation

The South Carolina Legislature amended the Charter Schools Act, effective on June 12, 2014, refining the procedures of starting and closing public charter schools in South Carolina with a clear focus on student achievement. With regard to the application process, this amendment requires new charter schools applying to open for the 2015-16 school year to submit a letter of intent to the board of trustees or area commission from which it is seeking sponsorship and to send a copy to the South Carolina Department of Education at least ninety days before submitting an application. The new school seeking a charter will then complete a charter school application, based on an application template with compliance guidelines developed by the State Department of Education. The board of trustees or area commission from which the applicant is seeking sponsorship will rule

on the application for a charter school in a public hearing, upon reasonable public notice, within ninety days after receiving the application. This amendment allows a sponsor to deny an applicant if it is determined the charter committee does not have the capacity to establish a viable school. Other adjustments made to the charter application process include the elimination of the Charter Advisory Committee ("CSAC") and the July 1 submission deadline. Under this amendment, applications should be submitted directly to the charter school sponsor, and applicants are responsible for contacting the sponsor for the sponsor's specific submission deadline.

In addition to changes to the application process, charter schools are now required to adopt national industry standards of quality charter schools and are mandated to implement practices consistent with those standards. If a charter school receives the lowest performance level rating as defined by the federal accountability system for three consecutive years, beginning with student achievement data from the 2013-14 school year, the school is required to close. Further, a sponsor summarily may revoke any charter school that is determined by the sponsor to pose an imminent threat of harm to the health or safety of students, or both, based on documented and clear and convincing data. Under this amendment, in the event of a charter school closure, the sponsor is required develop a protocol to ensure timely notification to parents, orderly transition of students and student records to new schools, and proper disposition of school funds, property, and net assets.

Finally, the new legislation authorizes the development of alternative education charters for students most at risk of not completing high school. Specifically, an Alternative Education Campus ("AEC") is a charter school with an explicit mission to serve an enrolled student population with: (1) severe limitations that preclude appropriate administration of the assessments administered pursuant to federal and state requirements; (2) fifty percent or more of students having Individualized Education Programs ("IEPs") in accordance with federal regulations; or (3) eighty-five percent or more enrolled students meeting the definition of a 'high risk' student as defined by S.C. Code Ann. § 59-40-111. Automatic closure due to three years of lowest performance level rating as discussed above does not apply to any charter school serving fifty percent or more students with disabilities or any charter school designated as an AEC by its sponsor.

In sum, this amendment creates greater accountability for all charter schools while encouraging the development of alternative education charters for students most at risk of not completing high school.

Federal Nutrition Regulations Take Effect

The Smart Snacks in Schools nutrition program, which took effect July 1, 2014, as part of the Healthy Hungry-Free Kids Act of 2010, is tightening restrictions on snacks and beverages sold to students during the school day. The new standards are expected to change some vending machine choices and specialty meal offerings for students, as well as snacks distributed at class celebrations and items sold for school fundraisers.

"Back to the Basics In Education"

Signed by Governor Nikki Haley on June 9, 2014, the "Back to the Basics In Education Act of 2014" mandates each school district, effective with the 2015-16 school year, to provide instruction in cursive handwriting and multiplication tables so that by the end of the fifth grade, all students can legibly write using cursive and effectively multiply numbers. The State Department of Education is responsible for assisting school districts in identifying appropriate means for integrating this requirement into existing curriculums.

Announcement

We are pleased to announce that Mary-Allison Caudell has joined the firm as an Associate. Mary-Allison was admitted to the South Carolina bar in 2013. She received her J.D. from the University of South Carolina School of Law in 2013 and her Bachelor of Arts in Political Science from Clemson University in 2009.

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