IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
SUBCHAPTERS 6-27 EDUCATION
AND 6-28 ADOPTION

CASE NO. SC08-1981

COMMENTS ON SUBCHAPTER 6-27 EDUCATION

The undersigned hereby objects to The Florida Bar's petition for an order amending the Rules Regulating The Florida Bar to approve a new certification area for education, and specifically to the criteria for determining certification thereunder.

The undersigned was a member of Florida Bar's Education Committee at the time certification was proposed, and is presently, and commented in writing to the committee at that time, although she was unable to participate in the in person committee discussions. The Education Committee made some language changes in response to the comments, which do not resolve the issues.

There is no objective evidence that the education certification will provide the public with the information the public needs; nor evidence that certification increases the likelihood that the public will receive competent counsel.

The certification standards proposed will not identify the most professional and skilled attorneys practicing education law, and will thus effectively mislead the public, having significant potential to further the discrimination against students with disabilities that is the last unconquered bastion of civil rights.

BACKGROUND

The Education Law Committee is largely made up of men and women who work for colleges and universities (40 public and 129 private), and additional technical training entities; school boards (67 counties + several entities); and government agencies supervising university and school boards or supervising or providing teacher training and/or certification. Approximately six of the current seventy-three committee members currently regularly practice education law for private clients and there may be others who are parents who have been involved in education law cases as clients or pro se. There are four more private attorneys on the committee now that there were when the committee developed the certification proposal in 2007. In Appendix D, p.4 of the petition before this court, the then-current chair of the Education Committee described whom had been consulted about the petition for education law certification, and it is heavily weighted towards those who represent educational institutions:

> ... In addition to the approximately 70 members of the Education Law Committee, we have also sought input and suggestions from university attorneys, community college attorneys, k-12 attorneys and other groups that work in education law through their list-serv's [sic]and regular meeting agendas.

Most of those who represent government entities involved in educational issues need to know public records and meeting laws, public financing, public contracting, public employment, and administrative law in order to give competent counsel to their public clients. The Bar already provides certification in Administrative Law and Government Law.

What is unique about Education Law are three areas. The first is a group of federal laws that directly affect educational institutions and benefit individual students[1]. The second is a group of federal and state laws which schools agree to follow when they accept federal and/or state funding, but for which there may be no private remedy. The third are state constitutional provisions and laws that deal with educational funding and services (Sections 1000-1013, Fla. Stat.) and the rights of students thereunder.

[1]The National School Board Association published in 2008 a list of nine federal laws under which school boards are required to give annual notice. There are at least four additional federal laws which do not require notices, but with which institutions have to comply.

While it is true that there can be litigation for a variety of reasons, those that are unique to education law usually concern the rights of students to educational services under the high quality provision of Florida's constitution, and under those federal and state laws. This litigation generally involves allegations that educational institutions have violated rights under The Rehabilitation Act of 1973 (hereafter "Section 504") or The Individuals with Disabilities Education Improvement Act (hereafter "IDEA2004"), or the Americans with Disabilities Act, or the disciplinary procedures in Section 1006.07-1006.147, Fla. Stats. and the First Amendment rights of expression or the Fifth Amendment rights not be deprived of state granted educational services without due process of the United States Constitution. In addition there are multiple federal laws which have no individual remedy but which may spawn administrative complaints and challenges.

There are over 381,000[2] students with disabilities (hereafter "SWD") in Florida, all but 9% of whom are other than "mentally handicapped". Yet only 37% graduated from high school in 2006[3], and 19% transitioned to college.[4] They

[2] Florida Department of Education "2008 SEA Profile" (Appendix, p. 2); contrast with "Students With Disabilities Enrollment 2007-2008"(Appendix p. 10), which reports a lower number. The explanation could be that the latter report may not includes SWD who are not deemed eligible for special education under IDEA 2004.

[3]2008 SEA Profile, Appendix p. 3

are suspended half again more frequently statewide than non-disabled students, and in 11.9% of the districts 3x more often.[5] This suggests that educational institutions are failing to meet their obligations under both federal law to provide free appropriate public education defined as the opportunity to master the general curriculum (which the law requires be done in the least restrictive environment) and successfully transition to the post secondary outcome of their choice.

Parents of SWD have generally assumed, like the public at large and courts, that school districts and colleges and universities are experts at finding the children who need accommodations and/or special education services and providing interventions that work.[6] It typically takes parents several years of working with schools because their child isn't learning before they begin to look for and find the research that is available and recognize that if their school knows what should be done to provide equal access for the child, they don't do it. The first time they are told that their child cannot go on a field trip unless they are able to come along, the parent will take the day off work to help: by the fifth time they may know that they do not have to lose their job for non-attendance because the school should have

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[4]Id. p. 4

[5]Id. p. 9

[6]See "Pre-K Can Work" by Shepard Barbash, City Journal, Autumn 2008 (Appendix, p. 11)

adequately trained and enough people to do it. It will take several suspensions for misconduct related to the disability or the lack of appropriate services needed because of the disability before parents realizes that the school staff just doesn't understand that discipline for such things is the same as punishing someone for needing a cane (and won't change the behavior anyway).

But eventually, parents no longer trust that the educational institution knows and will perform their legal obligations to their child. They may try state complaint procedures or mediation. If they can afford to they may leave public school for private schools, only some of which are obligated to comply with the same laws, and many of which are no better at doing so than the public system. They begin seeking someone to help them.

There are a few Florida advocates (fewer than twenty practicing as educational consultants or with other professional credentials, and a few more providing free assistance under the umbrella of non-profits or on their own — the latter category is usually parents who have learned the laws and show others how to learn it). There are three law school clinics helping parents with educational issues, in Jacksonville, Miami, and Tallahassee. Fewer than thirty attorneys practice in non-profit organizations like the federally funded Protection and Advocacy Center, Legal Services in various parts of the state, Southern Legal

Counsel, and Central Florida Legal Services. There are about twenty private attorneys regularly taking education cases for students in Florida, and that is up from about ten three years ago. And there are some attorneys who take one or two such cases before deciding that they cannot make a living doing so and/or the learning curve is too steep.

Therefore, even assuming parents can afford legal counsel and payment of expert fees (which are uniquely non-reimbursable among civil rights laws under IDEA2004 caselaw), they will be hard pressed to find any attorney. Thankfully the United States Supreme Court has said that parents have the right to represent themselves and their children in court pro se[7]. In addition, in at least one county, the local bar agreed several years ago to take disciplinary cases pro bono.

The result is that parents by themselves, and rarely with their attorneys --- many of whom are too new to the area of law to even be eligible for certification under the proposal --- find themselves dealing with institutional attorneys in both formal and informal settings. And just like everyone believing that teachers and other school staff are experts in education, people also believe that the school attorneys are "the" expert: courts, hearing officers, agency staff and mediators all defer to the institutional attorneys on that assumption.

[7] *Schaffer V. Weast* 546 U.S. 49 (2005)

ISSUES

I.

There Is No Objective Evidence That Certification Improves Results for Clients or the Public

In Paragraph 17 of its petition the Bar asserts, without providing any evidence, that "[t]he expansion of the certification plan to encompass these two new practice areas will benefit members of the public who have increasingly come to rely upon the experience and competence that this program assures."

The certification program has been in place for several years but there has been no data collection that this author is aware of about whether certification in any practice area improves effective representation, increases client satisfaction, reduces client costs, reduces litigation, improves the rate at which issues are resolved, prompts clients to select firms or attorneys, increases professionalism, or improves the rate at which problems are prevented. We don't know even know whether the process actually identifies the real experts in any given practice field.

Without any such evidence, the certification program is merely a feel good program, not demonstrably a program that "assures" competence.

And the cost incurred matters in the education practice field: (1) Public dollars fund educational institutions and their legal counsel. (2) Parent attorneys cannot expect full recovery under the law even when they prevail: when it comes, it is years after the expenditures. (3) The deference that erroneously continues to be shown to educational systems means that parents do not often prevail even when schools are in violation of the law.

The suggestion that the certification will "benefit the public" is wholly without evidence.

II.

Education Certification As Proposed Would Be Likely to Mislead the Public and Contribute to Discrimination

The proposal allows an attorney to show competence by earning fifty points in up to four groups of activities. The most points are given for litigation, at the rate of five for each litigation activity.

But in fact, if the institutional education attorney is really an expert, he or she would have counseled his institutional clients such that they provide research proven interventions in the least restrictive environment at the earliest possible time with sufficient intensity and fidelity, and required accommodations, and

would have provided training and help to do it. Instead of fighting parental requests for appropriate evaluations and services, truly expert education attorneys would be helping their clients figure out how to do it right the first time. The true expert attorney who is serving his client (ultimately the public, though nominally the educational institution), will rarely be in litigation at all because of the training and policies that he or she has developed for the entity and attorney refusal to be co-opted into encouraging or aiding less than full compliance with the laws or fighting rather than fixing problems.

Instead of defending retaliatory behavior, they would help administrators nip it in the bud. Instead of spending over $900,000 in three years like Florida School for Deaf and Blind has to defend discriminating against hearing impaired and blind students with behavioral challenges, truly expert counsel would help the entity spend that on instructional solutions. Instead of defending disciplinary proceedings when children are suspended or expelled for possession of pocketknives and table knives and then thrown away to alternative schools where they fall further and further behind, they will help principals develop instructional solutions because they will know that Florida Statute (1006.07(f) and (k), and 790.001 Fla. Stat.) specifically excludes such material in the definition of "weapons" triggering expulsion, which is repeated in a slightly different form in

IDEA2004. Since the proposal only allows an attorney to earn twenty-one total points at the rate of three points per activity for mediation in paragraph (3)(F) (p. 6), those attorneys who are really competent at resolving the issues under IDEA2004 at the earliest and least expensive time for their agency or parents (as Congress specifically intended to happen, having been lobbied hard by schools who wanted to limit litigation) will not qualify for certification.

Further, only government attorneys can ask for advisory opinion from all but Federal Department of Education under (3)(B). And the federal Department of Education has only propounded a handful of written responses to parent concerns in the last three years. So parent attorneys who have actively sought such advisory opinions, nevertheless do not qualify for points, not because they have failed to do the qualifying work, but because the agency has refused to respond.

The proposal does not appear to allow attorneys to earn points for participation in impartial due hearing procedures under Section 504 at all. In the past two years, the United States Department of Education Office for Civil Rights has found two school districts (Leon and Collier) in violation of Section 504 for failing to establish impartial hearing procedures under the Act. The author is aware of only a handful of educational institutions in compliance (most whom have determined to contract with the Division of Administrative Hearings for such 504

hearings). So she is not surprised that these types of proceedings (which would not be eligible for the highest points per activity because they are not conducted pursuant to the Administrative Procedures Act, Chapter 120, even if the proposal was interpreted to include them), are not mentioned in the proposal.

There are other similar problems, all of which lead to the inescapable conclusion that if the education law certification is established as proposed, this court will allow attorneys to be called "experts" who are not the real experts in education law.

The author fears that approval of this education law certification proposal will help maintain the current system of discrimination, deliberate indifference to the civil rights of students, and arbitrary and capricious education institutional actions to the detriment of students with disabilities and students of color[8], who are disproportionately disciplined and who disproportionately fail to benefit from current educational services. It is not in the public interest to do so because Florida cannot afford the juvenile justice programs, prisons, unavailable workforce, mental health and substance abuse facilities, and public welfare that result when students are not appropriately educated.

[8] Florida State School Accountability Report 2007-2008, Appendix p. 17

CONCLUSION

The author respectfully requests this Court to deny the petition for educational law certification. If the Court approves the petition, the author requests that the Court order that the committee that implements the certification be equally made up of attorneys that represent educational institutions and attorneys that represent parents and students, and include three non-attorney members: one a college student with disabilities, one the parent of a student with disabilities, and one a parent of a student who has been expelled from school. The Committee should also be ordered to have significant representation of people of color, which representation is not compromised by obligations to the attorney's employer.

WHEREFORE, the undersigned prays this court will decline to enter an order amending the Rules Regulating The Florida Bar to add 6-27, an Education Law Certification as requested by The Florida Bar.

Respectfully submitted this 24rd day of November 2008.

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this petition is typed in 14 point Times New Roman Regular type.

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Rosemary N. Palmer
Florida Bar Number 070904

CERTIFICATE OF SERVICE

I ADDITIONALLY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on this 24th day of November, 2008, to:
John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

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Rosemary N. Palmer
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