

Ava G. Byrne, Deputy Superintendent
Office of Professional Development

SUBJECT: ADMINISTRATIVE UPDATE ON BOARD ITEM B-5 – JULY 13, 2005: THAT THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA DIRECT THE SUPERINTENDENT TO REVIEW THE LEGAL ISSUES INVOLVED TO DETERMINE WHETHER IT IS NECESSARY AND FEASIBLE FOR THE DISTRICT TO MODIFY OR SUPPLEMENT PACES

COMMITTEE: SCHOOL SUPPORT ACCOUNTABILITY

Background

The School Board of Miami-Dade County, Florida, on July 13, 2005, deliberated and approved Board Item B-5 sponsored by School Board Member, Ms. Perla Tabares Hantman, which directed and authorized the Superintendent to:

1. Retain intellectual property counsel to review, evaluate and report upon the legal status of Miami-Dade County Public Schools (M-DCPS):
 - a. as to M-DCPS' rights to modify and use PACES, and
 - b. as to M-DCPS' right to market and license the PACES system.
2. Determine the desirability and feasibility of modifying PACES to achieve compliance with Florida law as opposed to acquiring a replacement system.
3. Report to the Board at its October 19, 2005 meeting.

In response to the above referenced directives, the Administration provides the following information for the Board's consideration:

Retention of Intellectual Property Counsel

As directed and authorized by the Board, the Administration acquired the legal services of Lott & Friedland (L&F) of Coral Gables Florida to opine on the issues delineated in Board Item B-5 (July 13, 2005). Lott & Friedland is an intellectual property law firm specializing in patent law, trademark law, copyright law, Internet law, and entertainment law. Founded in 1983 by Leslie J. Lott, Lott & Friedland concentrates its practices on intellectual property law and related litigation, including patents, trademarks, copyrights, trade secrets, entertainment law, and Internet law, including domain name disputes. Lott & Friedland services intellectual property clients throughout the United States, Latin American, Europe, Asia, and South America.

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Legal Considerations Regarding District's Right to Modify and/or Market PACES

As directed by the Board, the Administration engaged the law firm of Lott & Friedland to research and opine on the District's right to modify the Professional Assessment and Comprehensive Evaluation System (PACES). The particular question posed to the firm was: "[W]hether M-DCPS can revise the PACES Manual, or incorporate portions thereof into a new work, without the permission or cooperation of Dr. Ellett or CDE."

In response to the District's query, L&F began its analysis by determining in fact, what the District does NOT currently possess – an exclusive copyright. To this end, L&F provided statutory provisions that must be met in order to transfer an exclusive copyright. L&F noted, "that as a general rule, an exclusive copyright may only be transferred in writing pursuant to 17 U.S.C. § 204(a)." In the District's case, there is no such written provision regarding PACES and therefore no exclusive copyright exists.

in order to provide the District with a comprehensive look at this issue, L&F proceeded to further analyze whether a non-exclusive copyright right exists between Dr. Ellet and the District. The opinion reads:

"However, it is well settled that non-exclusive copyright rights may be conveyed either orally or by implication. *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) M. Nimmer and D. Nimmer, *Nimmer on Copyright*, § 10.03. An implied non-exclusive copyright license exists if the following three requirements are met:

- (1) the licensee requests the creation of a work;
- (2) the licensor creates the requested work and delivers it to the licensee;
and
- (3) the licensor intends that the licensee have certain copyright rights in the work."

After an enumeration of the facts applied to the standard above, L&F concluded that "a strong legal case can be made that MDCPS has been granted by CDE an implied non-exclusive copyright license covering the PACES Manual." The outstanding issue for District consideration is the scope of the implied license. There seems to be legal consensus that the necessary copying and dissemination of the PACES Manual is proper under the implied license scenario, but movement beyond these actions, seem to allow the District to become vulnerable to liability by the contracted-creator of PACES, Dr. Chad Ellet and CDE.

L&F continues, "[W]e conclude that M-DCPS has a strong legal case for the existence of an implied non-exclusive copyright license which would permit it to revise the PACES Manual as needed in order to maintain the manual current and to comply with state law requirements. However, not having found any case law in line with the facts present here, we caution that there is a moderate risk that MDCPS' revision of the PACES Manual could lead to liability to Dr. Ellett or CDE for copyright infringement or for breach of the implied copyright license."

"We caution that in the absence of an express license (as is the case here) the author of a work enjoys a presumption that no license exists. Therefore, should litigation ensue, MDCPS will bear the initial burden of rebutting this presumption and establishing that an implied license exists."

Feasibility or Desirability to Modify PACES vs. Acquisition of a Replacement Evaluation System

In order to provide the Board with an informative perspective on amending/altering PACES or replacing PACES, the Administration reviewed the following documentation:

- January 22, 2003, Legal Memorandum prepared by Mr. Johnny Brown, former School Board Attorney, Professional Assessment and Comprehensive Evaluation System (PACES) Ownership Rights.
- June 22, 2005, former Office of the Inspector General, Final Revised Report on PACES, CDE Research Associates and Dr. Chad Ellett.
- September 25, 2005, Legal Memorandum prepared by Mr. Ury Fischer of Lott and Friedland.

After reviewing the materials referenced above and conducting comparative research on the latest developments on instructional assessments and appraisal tools, the Administration highly recommends that M-DCPS explore the acquisition of a replacement evaluation and performance appraisal system for instructional personnel. This recommendation is based on the following professional observations and considerations:

A survey of the literature regarding performance appraisal systems reveals that teacher evaluations have traditionally been based solely on the act of teaching and documented, almost exclusively, through classroom observations. In fact, 99.8% of public school administrators in the U.S. use direct observation as the primary method to collect data on teacher performance. However, the reliance on formal observations in evaluating teacher performance is flawed because observation provides a small performance sample with limited validity based on the skill and objectiveness of the observer and the scope of focus is too narrow.

A more balanced approach suggested by literature on performance appraisal involves the assessment of the act of teaching and results of teaching. Credible data on the results of teaching must be gathered in order to identify factors of performance that must be improved and measures by which instructors may gauge their success.

According to FLDOE administrators, districts will be required to submit performance appraisal systems for instructional personnel during spring 2006. Based on the established criteria found in 1012.34 F.S., it is anticipated that M-DCPS' system will require revisions in the areas of student performance, parental input and school improvement planning.

Based on this information, it is highly recommended that M-DCPS implement a performance appraisal system that adopts a balanced approach, collecting data from multiple resources including formal and informal observations, portfolios and student achievement data. The system should incorporate formalized goal-setting and ongoing

progress monitoring that has clear measurable outcomes and adheres to a continuous improvement model.

In light of the anticipated expenditure of resources and time that would be required to develop a new performance appraisal system, it is further suggested that M-DCPS adopt a performance appraisal system that has been properly developed and successfully implemented in another school district. The search for a viable performance appraisal system should include school districts within and outside of Florida. To this end, the Office of Professional Development is currently surveying school districts in Florida and out-of-state school districts to locate the most appropriate performance appraisal system that could be used in M-DCPS.

We believe this approach will also assist the District in expeditiously responding to anticipated changes in submission schedules set by the Florida Department of Education (FLDOE). State officials have indicated that timelines for the submission of district performance appraisal systems, that require review for approval, must be submitted during Spring, 2006. In addition, the Commissioner of Education for the State of Florida has indicated that required performance based pay plans for instructional personnel will also need to be submitted to FLDOE for review during 2006. Accordingly, the performance appraisal system adopted by M-DCPS should be aligned with the performance based pay system implemented by the District.

The identification and selection of a suitable performance appraisal system to replace PACES will be conducted in collaboration with the M-DCPS/UTD Joint Committee on Standards for Educational Evaluation. The Committee reflects broad representation from several M-DCPS offices and divisions and the United Teachers of Dade. Following the identification of a prospective replacement performance appraisal system, the proposed alternate system must be approved by the affected collective bargaining unit as required by FLDOE. In addition, in accordance with Florida Statutes section 1012.34(7), the School Board must approve the proposed system. A
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The District has planned for the alterations and necessary improvements to the performance appraisal system and has set aside \$300,000 in the 2005-06 budget. It should be noted that the District does not anticipate that the entire amount budgeted will be expended for the acquisition of a replacement system. Contractual agreements relating to the purchase of a replacement performance appraisal system will be submitted to the School Board for review and approval. In addition, the School Board will receive monthly updates regarding the District's progress in identifying a suitable replacement system. It should also be noted that until directed by the Board as to its desire to revise the current performance appraisal system or the acquisition of a replacement system, the exact cost is indeterminable at this time. R
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RECOMMENDED:

That the School Board of Miami-Dade County, Florida:

1. Authorize the Superintendent to pursue the acquisition and implementation of a new performance appraisal system for instructional personnel to replace the Professional Assessment and Comprehensive Evaluation System (PACES).
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4. Direct the Superintendent to provide the Board with a monthly update as to the progress with identifying, acquiring and implementing a replacement performance appraisal system via Board memorandum.

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