



# School Law Matters

Latest legal developments and practical guidance for school officials & administrators

May 2006

**Route to:**

- Board
- Personnel
- Instruction
- PPS
- Business
- Other: \_\_\_\_\_

**In this issue ...**

- District Policy Requiring Parents to be Informed of Child's Pregnancy Upheld
- **IMPORTANT DEADLINE APPROACHING**  
Final Building Project Reports (aka "Final Cost Reports") Due June 30
- Clearing Up Confusing Doctor's Notes for FMLA Purposes
- Purchase of School Buses with General Funds Belongs in Capital Component of Budget
- Federal Appeals Court Holds Administrator's "Speech" About Hazing Incident Protected
- Board Members Must Clarify That They Are Speaking as Individuals Rather Than on Behalf of the Board When Asking for Voter Support

**Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.** provides comprehensive legal representation to school districts/BOCES throughout Upstate New York in all aspects of education law, employment law and labor relations.

## District Policy Requiring Parents to be Informed of Child's Pregnancy Upheld

The Federal District Court for the Eastern District of New York recently upheld a school district's policy which required a student's parents be informed if a district staff member learns that the student is pregnant. *Port Washington Teachers' Association v. Board of Education of the Port Washington Union Free School District*, 361 F.Supp.2d 69 (E.D.N.Y. 2006).

Specifically, the school district had a policy which required that staff members who learned of a student's pregnancy to report it to a school social worker. The policy then required the school social worker to meet with the student and encourage her to voluntarily disclose her pregnancy to her parents. If the student told the social worker that she intended to inform her parents, the policy required the social worker to confirm that such a disclosure was made. If, on the other hand, the student refused to voluntarily inform her parents, the policy required the social worker was required to offer to assist the student in telling her parents. If the student continued to refuse, the social worker was required by the policy to inform the student that she/he will inform the

parents. After consultation with the Principal and Superintendent, the social worker would then be required to inform the parents of their daughter's pregnancy.

In 2002, the Superintendent of Schools issued a staff memorandum which set forth guidance regarding the "right and responsibility" of District

parents to due process, privacy, and equal protection. The union argued that the policy violated what the U.S. Supreme Court has recognized as a right to privacy for females in making health decisions, including those involving pregnancy, prenatal care, and abortion. The court disagreed, noting that:

**The bottom line is ...**

*Boards of Education are permitted to enact policies requiring that parents be notified if a staff member learns that the student is pregnant. Nevertheless, such policies need to be carefully drafted to avoid possible constitutional challenges similar to the one brought in this case.*

staff, including school nurses, under this policy. The memo reminded District staff that a student's disclosure of her pregnancy to any staff member is "not a communication protected by legal privilege," and that in fact, such a disclosure may trigger legal reporting obligations.

In 2004, the teachers' union filed a complaint in federal district court, alleging that the District's policy violated the students' constitutional rights

The Policy at issue here does not even address abortion, but rather merely provides for notification of a student's pregnancy. Plaintiffs may not stretch the protections that apply to a minor seeking an abortion to cover the disclosure of her pregnancy to her parents. No Court has created a right to privacy for minors for such a situation and the Court here declines to do so as well .... Indeed, it is the school's unquestioned obligation to inform parents of the conditions that affect the health, safety, and welfare of their child. 8 N.Y.C.R.R. §136.3(a)(5) .... Failure to comply with this obligation that results in harm to

*Continued on next page*

## District Policy Requiring Parents to be Informed of Child's Pregnancy Upheld (continued)

the child—whether deliberate or negligent—would clearly be grounds for legal claims against the District.

The union also argued that by requiring school social workers to disclose “confidential” information given to them by students the policy would, in essence, force the school social workers to violate their professional “duty of confidentiality.” Again, the court disagreed noting that there is an important legal distinction between private, licensed medical or psychological professionals and school employees. The court held that:

it matters not that New York law may provide for a duty of confidentiality for private social workers. See N.Y. C.P.L.R. §4508

(McKinney 2005) (“A person duly registered as a certified social worker... shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment”). As the Court clearly stated in *Board of Educ. of N.Y. (Philip Stern)*, 31 Ed. Dep't Rep. 378, 380 (1992), “Plaintiff's reliance upon [C.P.L.R. §4508] is misplaced. The school social worker is a paid employee of the school district who does not receive compensation from students or their parents. No decision of the courts or the Commissioner of Education has yet granted privilege status to communication between a student and school personnel.”

Based on this case, Boards of Education are permitted to enact policies requiring that parents be notified if a staff member learns that the student is pregnant. In fact, as noted by the District Court, Section 136.3(a)(5) of the Commissioner's Regulations specifically requires parents to be notified of “the conditions that affect the health, safety, and welfare of their child” and failure to make such notice could result in increased liability for a school district. Nevertheless, such policies need to be carefully drafted to avoid possible constitutional challenges similar to the one brought in this case.

If you have any questions regarding this case or need assistance in drafting a similar policy, please contact our office at 315-437-7600.

### **IMPORTANT DEADLINE APPROACHING** **Final Building Project Reports** **(aka “Final Cost Reports”) Due June 30**

The due date of **JUNE 30, 2006** for all Final Cost Reports (FCR) that were substantially complete in 2004 is quickly approaching. The State Legislature set up this schedule to “close the books” for past years.

***If your district has completed its construction project(s), we can't say it strong enough - DON'T DELAY! Please send in your FCR as soon as possible so you can get your aid.***

It is the District's responsibility to make sure all FCR's are submitted on time. ***Failure to submit your report on time will result in the loss of building aid for that project, including the repayment of any aid, which may already have been received.***

Extensions beyond the June 30 deadline can be granted for extenuating circumstances, such as litigation. To obtain such an extension, the District must submit a written request to the State Education Department's Facilities Planning Division, as soon as possible.

As a general rule, however, school districts should schedule final cost reports for new projects six months after the submission of the final substantial completion form. The law allows up to a one-year extension of this six months or a total of 18 months to send it in.

If you have any questions or need assistance in this regard, call Joseph Shields of our office at 315-437-7600.

### **Clearing Up Confusing Doctor's Notes For FMLA Purposes**

Employers are required by law to determine whether an employee's absence is covered by the Family and Medical Leave Act (FMLA). However, when they ask employees for medical documentation to aid in making such determinations, employees often supply confusing and/or extremely vague doctor's notes which are of little or no assistance. To avoid this problem, the U.S. Department of Labor provides a form which is designed to simplify this process for employers, employees and health care providers. This form, known as a “Certification of Health Care Provider” can be obtained — and even completed — online at [www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf](http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf). Call our offices if you have any questions regarding this form.

## Purchase of School Buses with General Funds Belongs in Capital Component of Budget

In our March newsletter, we informed you that the State Education Department recently issued a guidance memorandum stating that at the budget vote, boards of education "should ... avoid presenting separate propositions for items enumerated for inclusion in one of the budget components." The Commissioner has now rendered a decision in which he admonished a school district for improperly placing a purchase of school buses and a maintenance vehicle with general funds in a separate proposi-

tion. (*Appeal of Hubbard*, Decision No. 15,392, dated March 30, 2006.)

In this case, the petitioner argued that the purchase of these vehicles with general funds should have been included in the budget. In his decision, the Commissioner agreed with the petitioner that when using general funds to purchase vehicles, those funds should be included in the capital component of the district's budget and should not be set out as a separate proposition to be approved by the voters at the annual

meeting. The Commissioner emphasized that separate propositions to authorize bus and other vehicle purchases should only be used when specifically required by law, such as in the case of installment purchase contracts or when the issuance of bonds are involved.

*At future annual meetings, boards should not to present separate propositions for the purchase of vehicles except where bonding is being requested or where the district is utilizing an installment purchase contract.*

## Federal Appeals Court Holds Administrator's "Speech" About Hazing Incident Protected

The federal Court of Appeals with jurisdiction over New York recently overturned a lower court's dismissal of an athletic director's claim that a school district terminated his position in retaliation for speaking out in public about a hazing incident at the school. The Court found that such speech was protected under the First Amendment to the U.S. Constitution. *Cioffi v. Averill Park Central School Dist. Bd. of Ed.*, 2006 WL 853259 (2d Cir. 2006).

In this case, Mr. Cioffi wrote to the Board of Education criticizing the Board for its handling of a hazing incident involving members of the school's football team. He also restated his previous complaints about the football coach's lack of supervision of the team and alleged encouragement of its athletes to use creatine,

a performance-enhancing substance. Cioffi later held a press conference expressing these same views after he learned that the Board planned to eliminate his position.

In order for a public employee to prove retaliation, the court must find that 1) the speech in question involved a matter of public concern; 2) there was an adverse employment decision; and 3) there is a causal relationship between the speech and the adverse decision, so that it can be said that the speech was a substantial motivating factor in the decision.

The Court found that Mr. Cioffi's speech involved a matter of public concern because it concerned the health and safety of public school students. There was no question that the employment decision was adverse. On

the issue of causal connection, Mr. Cioffi showed that the speech might be causally related to his termination because of the short amount of time between the speech and the Board's elimination of the position. The Court also found that it was questionable whether the Board would have saved money by eliminating Mr. Cioffi's position as alleged by the District.

Accordingly, the Court remanded the case to the District court to determine whether a causal connection existed between the speech and the termination.

*This case should serve as a cautionary tale to school districts about considering the timing of employment decisions and carefully documenting the financial (or other) needs underlying those decisions.*

SCHOOL LAW MATTERS is published by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, [www.ferrarafirm.com](http://www.ferrarafirm.com). © Copyright 2006 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part for other than internal use is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

### **Board Members Must Clarify That They Are Speaking as Individuals Rather Than on Behalf of the Board When Asking for Voter Support**

The Commissioner has traditionally held that while it is improper for a board of education, as a corporate body, to be involved in partisan activity in the conduct of a school district election and budget vote, individual board members are entitled to express their personal views about issues concerning the district and engage in partisan activities, provided school district resources are not used. In a recent decision, the Commissioner refused to remove a president and vice president of a board of education for writing letters which were published in a local newspaper that urged passage of a proposition before the voters in their district.

In this case, the petitioner objected to four letters signed by the president and vice president, which were published in newspapers in the BOCES region, in 2005. The letters advocated that residents vote in favor of a proposition authorizing the BOCES to sell a parcel of land. In the final paragraph of one of the letters, the president and vice president stated that: "The BOCES board strongly believes that it is our responsibility to move forward on a plan that is mutually beneficial to all of its school dis-

tricts. We encourage voters to support this proposal on Tuesday April 5."

The BOCES board president contended that the letters were not written on behalf or at the behest of BOCES, that the BOCES did not authorize the preparation or publication of the letters by resolution or otherwise, and that no BOCES resources were used in the preparation or publication of the letters. She further contended that she and the vice president wrote the letters themselves, as individuals, and that the language contained only their words and thoughts. The petitioner presented no evidence to the contrary. Accordingly, the Commissioner ruled that the petitioner failed to meet his burden of proving that public funds were improperly used. However, the Commissioner did comment on the language used in the letters, stating that in the future, the BOCES board members "would be very well served to avoid confusion and any hint of impropriety in future publications by clearly distinguishing their personal views from those of the boards they represent." (*Appeal of Johnson*, Decision No. 15,384, March 21, 2006.)

**Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.**  
**5010 Campuswood Drive**  
**East Syracuse, New York 13057**