



School Law Matters

Latest legal developments and practical guidance for school officials and administrators

May 2003

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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.

Rehab Act Protects Those Who Are Perceived as Disabled

Recently, the Second Circuit Court of Appeals ruled that the Rehabilitation Act (Section 504) prohibits discrimination not only against those who suffer from a disability, but also those who are perceived as suffering from a disability, even if that perception is wrong.

In this case, a guidance counselor was known to have certain medical problems. One Saturday night, she joked to another guidance counselor that she could commit suicide with a gun belonging to her husband, who was a police officer. At school the following Monday, the second counselor mentioned the conversation to the school psychologist, who became alarmed and reported it to the administration. The principal held a meeting with the guidance office staff, telling them that the counselor had undergone a mental breakdown and was being reassigned to admin-

istrative duties at the district office for health reasons. One month later, after three doctors expressed the opinion that she was not suicidal and could resume her regular counseling duties, the district allowed her to return to the guidance office. Two months after that,

Law. The U.S. Court of Appeals for the Second Circuit held that, since the employer perceived her as suffering from a mental impairment that made her suicidal, she was a protected individual with a disability and should be allowed to pursue her claims.

The bottom line is ...

Section 504 of the Rehabilitation Act prohibits discrimination not only against those who suffer from a disability, but also those who are perceived as suffering from a disability, even if that perception is wrong.

the superintendent told the guidance counselor that she would not recommend her for tenure because of problems with her performance.

The counselor sued the District for discriminating against her in violation of Section 504 of the Rehabilitation Act and the N.Y. State Human Rights

The counselor also sued the principal for defamation, based on his transmitting a list of her alleged deficiencies to the superintendent and telling the guidance staff that she was suicidal. The court found that the principal had a "qualified privilege" to "make a bona fide communication upon a subject in which he [had] an interest, or a legal, moral or social duty to speak" Accordingly, the defamation claim was dismissed.

Peters v. Baldwin Union Free School District, 320 F.3d 164 (2d Cir. February 12, 2003).

Repaying New Drivers for Fingerprinting Fees Need Not be Bargained

The N.Y. State Public Employment Relations Board (PERB) recently held that a demand that a school district reimburse the cost of fingerprinting for newly hired bus drivers is a non-mandatory subject of bargaining under the Taylor Law. This is because the

fingerprinting is mandated by state law and the fee is paid by all applicants, whether or not they are hired by a particular district. The Appellate Division has now upheld PERB's decision noting that this case did not involve whether reimbursement of fingerprinting costs for current employees is

a mandatory subject of bargaining. (However, in our opinion, PERB would be likely to determine that such a demand is mandatorily negotiable.) *Newark Valley Cardinal Bus Drivers v. PERB*, ___ A.D.2d ___, 36 PERB ¶7005 (3d Dept. March 13, 2003).

Not Assigning Particular Bus Run to Driver is Not Section 75 Discipline

Civil service employees who are covered by Section 75 of New York's Civil Service Law may not be disciplined or discharged without notice of charges and the opportunity for a hearing. Last year, the Franklin Central School District decided not to reassign a school bus driver to a particular bus run. The run was assigned on a yearly basis, and had been an additional assignment on top of the driver's regular duties for which he received additional compensation.

The court found that:

Although the additional run was not reassigned to petitioner because of his conduct toward certain students the previous year, petitioner was not dismissed ... did not suffer a reduction in title, grade, regular annual salary or benefits ... and was not otherwise subject to disciplinary action, such as suspension.

Accordingly, the District's action did not constitute discipline, and it did not have to follow the procedures under Section 75. *Nydam v. Franklin Central School District*, ___ A.D.2d ___, 755 N.Y.S.2d 324 (3d Dept. March 6, 2003).



Even though Section 75 does not cover this situation, school districts may still need to comply with any applicable collective bargaining agreement provisions in this regard.

New Chickenpox Vaccination Requirements

By now your school nurse should have received a memorandum from State Health Commissioner Dr. Antonia Novello about an amendment to Public Health Law Section 2164. The new law requires parents of children who were: 1) born on or after January 1, 1998 and 2) entering kindergarten in September 2003, to provide evidence of varicella (chickenpox) immunization.

The memorandum notes that the "routine vaccination schedule" calls for one dose of chickenpox vaccine to be administered on or after a child's first birthday up to 18 months of age. However, the new school entry requirements can be satisfied by giving the vaccine to children over the age of 18 months but prior to entering kindergarten, preschool or day care.

As indicated in Dr. Novello's memorandum, exemptions from this requirement include the following:

- A history of chickenpox as documented by a health care provider. Parental recall of disease history is

not sufficient, and will not be accepted as evidence of immunity.

- A religious exemption written by a parent or legal guardian, which states a sincere and genuine religious belief contrary to the practice of immunization. Secular principles, including philosophical exemptions are not allowed.
- A letter from a physician licensed to practice in New York, stating chickenpox immunization may be detrimental to a child's health. Reasons for not vaccinating would include contraindications as listed in the Report of the Committee on Infectious Diseases, Red Book 2002, 25th Edition.

Districts may want to inform parents of incoming kindergarten students of this new requirement in the near future to avoid admission difficulties in September.

If you have specific questions on this subject, please feel free to contact our office at 315-437-7600.

Ban on Confederate Flags Upheld

The 11th Circuit Court of Appeals has upheld a high school principal's unwritten ban of Confederate flags on school grounds. The court noted that since the principal had determined that the symbol caused racial tensions at the school, the ban was not an unconstitutional restriction of students' free speech rights. School officials presented evidence of racial tensions existing at the school, including testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying the case.

The Court stated that "... one only needs to consult the evening news to understand the concern school administrators had regarding the disruption hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provide"

Scott v. School Board of Alachua County, 324 F.3d 1246 (11th Cir., 3/20/03).

Employee's "Last Chance Agreement" Limits Union's Ability to Arbitrate Later Disciplinary Action

An employee and an employer signed a "last chance agreement," which stated that any future violations of the employer's code of conduct, regardless of the gravity of the offense, would result in immediate dismissal without any right to grieve the action. Almost seven years later, the employer terminated the employee, allegedly for not following safety rules and leaving work early without approval. The union filed a demand for arbitration under the collective bargaining agreement. The employer sought a court order staying arbitration, on the grounds that, by signing the last chance agreement, the employee had waived any right to arbitration.

Initially, a N.Y. State Supreme Court judge granted the employer's petition for a stay. However, the Appellate Division reversed. It determined that the last chance agreement settled the issue of what the penalty should be. If there was a finding that the employee had committed any violation of the code of conduct, an arbitrator would not have the authority to overturn the penalty of discharge.

On the other hand, the agreement did not address who was to determine whether a violation of the code of conduct had occurred. Since the collective bargaining agreement otherwise allowed arbitration of disciplinary mat-

ters, the court held that the union had the right to pursue arbitration in this case, limited to the issue of whether the employee did, in fact, violate any provision of the code of conduct.

Von Roll Isola USA, Inc. v. Int'l Union of Electronic Workers, ___ A.D.2d ___, 2003 N.Y. Slip Op. 12932 (3d Dept. April 10, 2003).

Major Changes Ahead for the IDEA

The U.S. House of Representatives on April 29, 2003, passed a bill to reform the Individuals with Disabilities Education Act ("IDEA"). We expect the Senate to introduce a similar bill sometime this month. If the Senate bill passes, both bills will go to conference committee and a final bill may be adopted before the summer recess. The House bill includes sweeping reforms to IDEA procedures such as mandatory meetings with district officials before a parent can proceed with due process, limiting the time period in which a parent can initiate a due process hearing, elimination of short term objectives on a student's IEP and dramatically changing the procedures for disciplining a disabled student. We will be tracking the legislation and will keep you apprised of the final version.

Immunity for Erroneous Child Abuse Report

In a recent Appellate Division, Fourth Department decision it was held that a School District is entitled to immunity from liability for its good faith report of suspected educational neglect of a 13-year-old child. *Sclar v. Fayetteville-Manlius School Dist.*, 300 A.D.2d 1115 (4th Dept., 12/30/02)

The Court noted that even though the charges later proved to be false, the parents failed to present sufficient factual allegations that the report was motivated by actual malice. Thus, the school officials who made the report were "entitled to immunity from liability for their good faith compliance

with the reporting requirements ..." of Social Services Law, Section 419. The parents also brought an action for slander and libel, but failed to allege facts sufficient to defeat the qualified privilege protecting officials' statements. The parents also failed to allege conduct sufficiently outrageous in character to support the cause of action for intentional infliction of emotional distress or conduct that endangered their physical safety or caused them to fear for their physical safety to support the cause of action for negligent infliction of emotional distress.

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PERB Reiterates Requirements for "Past Practice"

The New York Public Employee Relations Board (PERB) reversed the decision of an administrative law judge and dismissed an improper practice charge filed by CSEA which alleged that the School District had violated the Taylor Law when it unilaterally discontinued a practice of permitting unit employees to borrow District tools and equipment for personal use.

In this case, the tools and equipment were loaned to only a few unit employees, based upon the subjective assessment of the Superintendent of Buildings and Grounds as to whether the employee was trustworthy and experienced in the use of the tool or piece of equipment. However, the Superintendent of Buildings and

Grounds had no authority to loan the equipment and tools. Moreover, the Superintendent of Schools was unaware of the practice and had not acquiesced to it.

PERB found that, while the alleged practice had been in place for some time, it was *not unequivocal and unit-wide*. Accordingly, employees in the unit could not reasonably expect the practice to continue unchanged. The charge was, therefore, dismissed. (*CSEA., Local 1000, AF-SCME, et al and Sherburne-Earlville Central School District, U-22985, 2/28/03*).

Commissioner Upholds Rule Prohibiting Parents From Escorting Children to Class

In *Appeal of Havens*, a school district principal established a rule

which permitted parents to drop their children off at the foyer of the school building at the beginning of each school day, but prohibited parents from escorting their children directly to their classrooms. The rule was approved by the school district due to increased safety and security concerns after 9/11. The parents of a child at the school challenged the rule, and sought the adoption of a policy permitting parents to escort their children to their classrooms. The school district denied the parents' request.

The Commissioner dismissed the parents' appeal, holding that the District was authorized to implement the challenged rule under Education Law Section 1709, which permits a school district to establish rules and regulations concerning order and discipline in its schools.