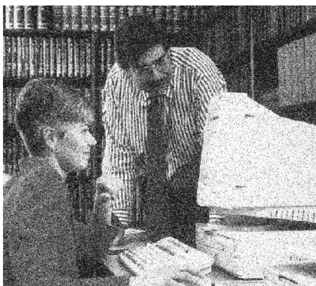

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

Latest legal developments and practical guidance for school officials & administrators July 2005

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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.

Supreme Court Rulings in New "Ten Commandments Cases" Do Not Change Law Pertaining to Schools

In 1981, the United States Supreme Court held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public school classroom. (*Stone v. Graham*, 449 U.S. 39) In that case, the Court found that in the classroom context, the Kentucky statute had an impermissible, plainly religious purpose in violation of the "Separation of Church and State" principles embodied in the "Establishment Clause" of the First Amendment. On June 27, 2005, the Supreme Court issued two new rulings involving the display of the Ten Commandments which reached opposite results based on the facts of each case.

In the first case, *McCreary County Kentucky v. American Civil Liberties Union of Kentucky, et al.,* the Supreme Court ruled that two large county courthouse displays of the Ten Commandments did not have a truly secular purpose based on their history and context and, therefore, violated the Establishment Clause. The Court found that these displays shared many similarities with the classroom Ten Commandments display invalidated in the Kentucky case.

The bottom line is ...

In seems clear that after these latest decisions from the Supreme Court, our courts will continue to closely scrutinize any Ten Commandments or similar religious displays in the school environment.

In the second case, *Van Orden v. Perry*, the Supreme Court ruled that a Ten Commandments display on the grounds of the Texas state capital did not violate the Establishment Clause. Chief Justice Rehnquist's opinion carefully distinguished the Court's prior holding in the Kentucky case, stating that it was based on "the particular concerns that arise in the context of elementary and secondary schools." It also stated that nothing in that case mandated that its holding be extended to the state capital grounds. According to the Court, the placement of the Ten Commandments monument on the Texas state capital grounds "is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."

In seems clear, therefore, that after these latest decisions from the Supreme Court, our courts will continue to closely scrutinize any Ten Commandments display in the school environment on a case-by-case basis.

June 1st Deadline for "Dual Enrollment" – Enforced

In a recent case on appeal before the Commissioner of Education, a private school student applied for admission to a BOCES career education program – one of the programs open to private school students under the dual enrollment statute (New York Education Law section 3602-c). Her application to the BOCES was made in March 2005. She was accepted on June 10, only to be rejected later because she did not apply to the home district by June 1 as required by statute, and the district would not waive the late filing. On appeal the Commissioner upheld the district action, finding that the parents' ignorance of the deadline was no excuse. Moreover, the fact that the BOCES did not accept her into the program until after the deadline was of no effect. *Appeal of Austin*, __ Ed. Dept. Rep. __, Decision No. 15,195.

IDEA Changes Effective July 1, 2005

Many of the changes set forth in the reauthorized Individuals with Disabilities Education Act (IDEA) became effective on July 1, 2005. The State Education Department has issued a revised procedural safeguards notice which incorporates the changes in federal and state law (a copy can be found at www.vesid.nysed.gov/specialed/publications/policy). The notice must be provided to parents: 1) one time a year; 2) upon initial referral for evaluation or upon re-evaluation; 3) with each notice of a CSE/CPSE meeting; 4) upon a request for an impartial due process hearing; 5) upon a decision to suspend or remove a child for discipline reasons constituting a change of placement; and 6) whenever a parent requests a copy.

The State Education Department has also prepared a revised sample Due Process Complaint notice which can be found at its website. This notice also incorporates changes to the IDEA. School Districts must immediately provide information to parents about the availability of this form. Parents and/or their attorneys may choose to provide the information in another format. Failure to provide all of the required information, however, may result in a delay of a resolution of the hearing issues and a reduction in attorneys fees if awarded by a court.

If you have further questions, please contact Susan Johns of our office.

Conflicting Voter Propositions? Board Can Decide

A recent decision by the Commissioner of Education answers the question of what to do when you have voter propositions. (*Appeal of Devine*, __ Ed. Dept. Rep. __, Decision No 15,173, February 16, 2005.) In this case, a duly signed voter proposition to increase the board from 7 to 9 seats was filed with the Clerk on February 18. Two weeks later, another duly signed proposition to reduce the board from 7 to 5 seats was also filed with the Clerk.

The Board met (in executive session) and decided to present the first-filed proposition to the voters, rejecting the second (and also rejecting the idea of putting up a third proposition to keep the board at 7 seats).

On appeal, the Commissioner upheld the authority of a board to "try to eliminate confusion prior to a vote" and ruled that any rational means of choosing among the competing petitions would be acceptable (apparently even drawing from a hat).

BOE Increase of Section 75 Penalty to Termination – Upheld on Appeal

In a recent case appealed to the New York State Appellate Division, Third Department, the Court upheld a Board of Education's decision to increase a "recommended" Section 75 penalty to a termination of employment. *Foster v. Saratoga Springs CSD*, 16 A.D.3d 824 (3rd Dept., March 10, 2005).

In *Foster*, the Saratoga Springs Central School District employed Jon Foster as a mechanic. It brought charges against him for refusal to follow a work order and for disrupting office operations. Specifically, he came to the district office and engaged in a tirade over the work order, had a heated debate with another supervisor, complained to the Superintendent of Schools about the work order despite instructions to the contrary. He failed to return a table saw to the district, despite a direction that he do so. He also threatened to "get" the director of facilities, and eavesdropped on a meeting of his supervisors by hiding himself in an unoccupied adjoining room.

The hearing officer found him guilty of all charges and recommended a two-month suspension and written reprimand. The school board instead terminated Foster.

On appeal, the Court upheld the termination, finding that termination was not grossly disproportionate to the facts, "particularly given his untrustworthy act of deliberately eavesdropping on his supervisors."

Hearing Officer's Decision Allowing Drug-Possessing Dean to Return to Work Vacated by Court

The Appellate Division, First Department, in a rare move, vacated a hearing officer's decision (under Education Law Section 3020-a) that would have let a Staten Island school administrator — who was arrested on drug charges — return to work. *Campbell v. City School Dist. of the City of New York*, ___ A.D.3d ___ (Slip Op. 05868, 1st Dept., July 7, 2005). In a 5-0 decision, the Court ruled that returning Michael Campbell, the Dean of Students for Intermediate School No. 72 , to his job as Dean and to his role running the school's "Safe Cities-Safe Streets" programs would be "irrational" and would "defy common sense."

Assignment As Co-Principal Is Permissible

In a recent decision, the Commissioner upheld a school district's reassignment of a tenured secondary principal as a co-principal of the district's high school. The petitioner in this case was appointed on July 1, 1998 as a middle school principal. In this school district only two tenure areas existed for secondary building administrators, "secondary principal" and "secondary assistant principal". The petitioner was granted tenure as a secondary principal effective January 19, 2001.

At its May 25, 2004 meeting, the board appointed the petitioner as a "co-principal" of its high school. It also appointed its current assistant high school principal as interim middle school principal. On June 8, the petitioner received a letter from the superintendent advising her of her appointment as co-principal. The letter further stated that she would maintain tenure in the secondary principal tenure area, that the current principal of the high school would be the "principal in charge." She was further instructed that it was expected that she would fulfill those duties previously carried out by the assistant principal. The petitioner then commenced an appeal to the Commissioner arguing that she had been involuntarily transferred from her secondary principal tenure area to a secondary assistant principal tenure area.

In his decision, the Commissioner dismissed the appeal, concluding that the petitioner had failed to demonstrate that she had been involuntarily assigned outside her tenure area, and that it was "clear that petitioner will maintain tenure in the secondary principal tenure area as a co-principal". The Commissioner also relied on an affidavit from the superintendent that the actual duties to be performed by the petitioner during the 2004-2005 school year would be developed during the school year based upon some division of responsibilities between the co-principals as the need arose. Lastly, the Commissioner rejected the argument that the transfer was a disguised disciplinary measure.

Commissioner Upholds Student Discipline for Off-Campus Hazing

Both New York courts and the Commissioner of Education have traditionally held that students may be disciplined for off-campus misconduct which endangers the health and safety of students in the school system or which adversely affects the educational process. In four recent decisions involving the same incident, the Commissioner addressed this issue in the context of off-campus hazing. (*Appeal of G.S.; Appeal of J.W.; Appeal of S.W.; Appeal of K.M.*; Decision Nos. 15224 - 15228, dated May 12, 2005)

These cases involved a "Freshman Friday" hazing ritual in which high school juniors engaged in, among other things, the paddling of eighth graders. The students who engaged in the actual paddling were suspended from school and from participation in extracurricular activities for five months. Another student who participated in the incident, although not a paddler, was given a one-month suspension. The parents of the students appealed to the Commissioner claiming that the penalties were excessive in light of the fact that only one student received treatment for injuries.

In his decision, the Commissioner upheld all the suspensions, stating that they were not excessive. In doing so, he issued the following strong statement about hazing of students generally:

> The nature of this incident, in which intimidation and physical violence was used by high school juniors to "initiate" middle school eighth graders, is a threat to both the safety and security of school children. School officials must take any type of hazing seriously and act to eliminate the practice. Under these circumstances, I find that the penalty is not irrational or unreasonable and is within respondent's discretion.
>
> I note that the school administration in this case appropriately considered these hazing activities serious offenses that cannot be tolerated. The high school principal is to be commended for intervening when he learned what was about to take place. Hazing is a growing problem and adults must make clear to students through words and actions that there is no place for such behavior.

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I-9 Form Rebranded But Still Same Old Cow

In order to reflect the official demise of the Immigration and Naturalization Service, the newly organized U.S. Citizenship and Immigration Services have "rebranded" the employment eligibility verification form (Form I-9). All that the rebranding has done is eliminate outdated references to the former Immigration and Naturalization Service and its parent agency, the Department of Justice.

The new form has an edition date at the bottom right-hand corner "(Rev. 05/31/05)Y" and can be downloaded from www.uscis.gov. Employers may use this new form or forms with edition dates "(Rev. 05/31/05)N," or "(Rev. 11/21/91)N" in the lower right hand corner.

Although the new form need not be used, it is a good reminder that I-9s must be completed for all employees hired after November 6, 1986. These forms must be kept on file for three years from the date of hire or one year from the date of cessation of employment, whichever is later. Failure to properly complete an I-9 and retain it on file can result in substantial fines in the event of an audit.

We strongly recommend that clients conduct self-audits to ascertain that properly completed I-9s are on file for all required employees. If that audit reveals otherwise, contact Donald Budmen of our office at 315-437-7600 for compliance assistance.

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