



School Law Matters

Latest legal developments and practical guidance for school officials & administrators August 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.

Commissioner Upholds Stiff Penalty for Student Involved with Bomb Threat

In a recent decision, the Commissioner of Education upheld a school district's suspension of a student from late October 2004 for the remainder of the 2004-05 school year for her part in a bomb scare. (*Appeal of M.H.*, Decision No. 15254, 7/15/05.) In this case, a fifth grade student and another student allegedly wrote a bomb threat on a stall in the fifth grade girls' bathroom. The superintendent adopted the hearing officer's findings that the student was guilty of reckless endangerment, insubordination, disruptive behavior and writing part of the bomb threat. The student was suspended from October 27, 2004 for the remainder of the 2004-05 school year.

On appeal, the parent of the student argued that her daughter was unable to fully understand the consequences of her actions. She also asserted that the district failed to follow its own policy that stated that discipline will be progressive, as a general rule, and that the student's age, the nature of the offense, and circumstances that led to the offense would be considered in determining the penalty.

The district argued that it had experienced a number

of bomb threats over the past several years and that it adequately informed both students and parents of the consequences in participating in a bomb threat. It also argued that the student admitted to contributing to the bomb threat and that her suspension, given the circumstances, was proper.

The bottom line is ...

Districts should emphasize with parents and students that bomb scares will be treated seriously, that student suspensions for such scares will be considerable, and that the district will cooperate fully with law enforcement.

In his decision, the Commissioner found substantial evidence in the record to support the finding of guilt and the appropriateness of the penalty. The Commissioner stated that the student admitted her involvement in writing the bomb threat. Less than a month before this incident, there were three other bomb threats in this district. The Commissioner noted that the district notified parents and students that bomb threats would not be tolerated and would have serious consequences. Letters from the superintendent were sent home to parents informing them of the prior incidents

and stating that law enforcement officials were actively pursuing the person or persons responsible. In addition, the parent/student handbook provided to every student stated that "bomb scares" are treated seriously and that the District would prosecute all perpetrators to the fullest extent permitted by law.

Lastly, the Commissioner pointed out that as a result of the October 2004 incident, students were relocated, the school was searched, and dismissal time was delayed. The threat caused a loss in instruction time for students and distress and inconvenience to district staff, students and parents. Based on all of this, the Commissioner found that the penalty imposed was not unreasonable and was within the district's discretion.

In light of the Commissioner's decision, districts should emphasize with parents and students that bomb scares will be treated seriously, that student suspensions for such scares will be considerable, and that the district will cooperate with law enforcement to see that students are punished to the fullest extent permitted by law.

Procedural Changes for Schools Filing PINS Petitions

Changes to the provisions of the Family Court Act involving the filing of Person in Need of Supervision (PINS) petitions went into effect on April 1, 2005. Under the revised law, a school district filing a PINS petition must describe and set forth within the petition the steps the district has taken to improve the attendance and/or conduct of the student who is the subject of the petition. Prior to filing a PINS petition, a school district must confer with either

the County Probation Department or Department of Social Services (DSS) for the purpose of providing diversion services. A district must attach as part of every PINS petition documentation from the County Department of Probation or DSS indicating that there is no substantial likelihood that the student and the student's family will benefit from further diversion attempts. School districts failing to include a

statement from Probation or DSS will be referred by the Family Court to the appropriate agency to determine whether the student and the student's family should receive diversion services. Since these procedures may delay the ultimate resolution of attendance or conduct concerns, districts should consider referring students for diversion services at the earliest opportunity.

Protect Your Tax Base

July 30 is typically the last day for real property owners to file tax certiorari proceedings against school districts. In these proceedings (also known as Article 7 Proceedings) the property owner seeks a reduction in the real property taxes which may impact the school district's real property tax revenues. We recommend that our school district clients intervene into the larger proceedings to ensure that your tax base is protected. With smaller proceedings,

we recommend calculating the school district's exposure and place that amount in reserve accounts to protect future budget shortfalls.

Over the past several years, we have taken an active role in the defense of the larger proceedings and worked with the town attorney or as lead counsel to protect the school district's interests. You should be aware that typically a school district has 66% of the exposure in a tax certiorari pro-

ceeding and the town and county have the remaining 34% of tax dollars at risk. As school districts may have the most to lose in a proceeding, we recommend that school districts take steps to ensure they "have a seat" at the settlement table.

If you would like our office to assist you in analyzing your school district's exposure in pending tax certiorari proceedings, please contact Joseph Shields of our office at 315-437-7600 or jshields@ferrarafirm.com.

Unemployment Insurance Denied for Teacher's Aide with Negative Criminal Background Check

An appellate court has upheld a decision of the Unemployment Insurance Appeal Board (UIAB), which ruled that a teacher's aide was disqualified from receiving unemployment insurance benefits because she was terminated from employment after an unsatisfactory criminal background check. (*In re Williams*, 798 N.Y.S.2d 546 [3d Dept. 7/7/05].) In this case, the claimant was hired as a teacher's aide by a school district to work with special needs students. Her employment was conditioned upon a satisfactory criminal background check. In April 2003, the district was advised by the State

Education Department that the teacher aide's criminal background check was unsatisfactory and that she was being denied clearance. Based on this denial, the district was required to terminate her employment. The claimant ultimately admitted that in July 2001, she was arrested on criminal charges that were still pending at the time the clearance was denied. After various proceedings, the UIAB disqualified her from receiving unemployment benefits on the grounds that she voluntarily engaged in the conduct which led to the denial of her clearance and, thus, provoked her discharge.

In its decision, the Appellate Division, used the doctrine of "provoked discharge", which applies in circumstances where the employer has no choice but to discharge an employee where the employee's acts were voluntary. The Court stated that the district was legally obligated to terminate the claimant's employment after she was denied clearance due to the unsatisfactory criminal background check. Since the claimant did not challenge the denial and voluntarily engaged in the actions that resulted in the filing of the criminal charges, the UIAB's finding was upheld.

Recent Dress Code Cases: When is Dress Considered "Speech"?

***Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005).**

A federal appeals court ruled that a Kentucky middle school's dress code did not violate a student's right to freedom of expression or substantive due process rights. The court also held that the code did not violate a parent's substantive due process right to control his child's dress.

Highlands Middle School (Highlands) adopted a dress code in order to improve safety, discipline, promote unity and academic achievement. Robert Blau sued the Fort Thomas School District (District) on behalf of himself and his daughter Amanda, a Highlands student. Mr. Blau alleged that Highlands' dress code violated Amanda's right to freedom of expression and substantive due process right to dress as she chooses, as well as his own substantive due process right to control her dress.

With respect to the freedom of expression challenge, the court concluded that the First Amendment does not cover this kind of claim. The court stated that, "the Blaus have not met their burden of showing that the First Amendment protects Amanda's conduct—which in this instance amounts to nothing more than a generalized and vague desire to express her middle-school individuality."

The court then addressed whether the dress code nonetheless was unconstitutionally overbroad on its face because it suppressed a substantial

amount of protected conduct engaged in by those other than the Blaus. The court found that the dress code satisfied the U.S. Supreme Court's three-pronged test for upholding regulations restricting expressive conduct. The court noted that

Under the traditional test for assessing restrictions on expressive conduct, a regulation will be upheld if (1) it is unrelated to the suppression of expression, (2) it "furthers an important or substantial government interest," ..., and (3) it "does not burden substantially more speech than necessary to further [the] interest[]." The Blaus cannot satisfy this test, much less show that the dress code suppresses a "substantial" amount of protected conduct.

***Jacobs v. Clark County School District*, 373 F.Supp.2d 1162 (D. Nev., 2005).**

A federal district court upheld the majority of a District's mandatory uniform dress code policy. It did, however, invalidate two of its provisions as "unconstitutional prior restraint on speech".

This case arose from Liberty High School's attempt to enforce a mandatory dress code on one of its students (Liberty High 11th grader, Kim Jacobs). It centers on the question of whether a Nevada law allowing for the creation of a mandatory dress code, a Clark County School District regulation adopted in accordance with the Nevada law, and the enforcement of a

mandatory school uniform policy constitute impermissible restraint on speech under the First Amendment.

Specifically, Liberty High had implemented what it defined as a "Campus Wardrobe," requiring students to wear Khaki pants and either red, white, or blue shirts without any printed material thereon. Ms. Jacobs was warned, reprimanded, and suspended over a six-week period for failure to abide by Liberty High's Campus Wardrobe policy, culminating in her indefinite suspension on October 27, 2004.

As a threshold matter, the court found that only those students who refused to wear a uniform as a means of conveying a particularized message were entitled to First Amendment Freedom of Speech protection. Otherwise, student dress does not constitute "speech" under the First Amendment.

Having determined that student clothing may constitute "speech", the Court turned its consideration to whether Ms. Jacobs' clothing possessed sufficient communicative elements to implicate the First Amendment. Since Ms. Jacobs wore shirts bearing religious messages, the court concluded that she intended to convey her religious affiliation and/or beliefs through wearing those shirts, and to convey that Liberty High's enforcement of its Campus Wardrobe policy precluded her wearing of such shirts. Consequently, the court found that Ms. Jacobs' "clothing constitutes speech within the ambit of First Amendment protection."

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Recent Dress Code Cases: When is Dress Considered “Speech”? (cont’d)

Even though her clothing constituted speech, the court held that the mandatory uniform code and its enforcement was not an unconstitutional regulation of that speech. As noted above in the *Blau* case, a regulation will be upheld if it (1) furthers an important or substantial government interest; (2) if the interest is unrelated to the suppression of student expression; and (3) if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest. Applying this traditional test, the court concluded that:

(1) improving the educational process and concerns for the health, safety, and order of public schools, as addressed by the school uniform requirement, are important and substantial government interests; (2) those interests are unrelated to the suppression of student expression and are viewpoint neutral; and (3) the school uniform-induced restriction on First Amendment activities is not more than is necessary given that students may wear what they will after school hours and students may still express their views through other mediums during the day, and are otherwise free to engage in the "personal inter-

communication among students" that the *Tinker* Court indicated is a necessary aspect of an effective educational process.

However, the court did strike down two provisions in the Campus Wardrobe Policy as unconstitutional prior restraint on speech. "In both sections, school administrators [we]re given unfettered discretion to determine whether and under what circumstances individuals should be required to wear the mandatory uniform." The first involved exceptions for religious purposes. In the court's opinion, the policy lacked adequate factors and procedures to prevent abuses of discretion which might favor one religion over another. The second granted exceptions for "spirit days, special occasions, or special conditions." The court viewed these exceptions as unconstitutional viewpoint discrimination. The Constitution requires all such exceptions to be "viewpoint neutral."

While these cases are from courts without jurisdiction over New York school districts and BOCES, they provide some insight into how courts are currently handling dress code/uniform challenges.

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