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

School Law Matters

Latest legal developments and practical guidance for school officials & administrators February 2004

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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.

"Individualized Suspicion" Required for Intrusive Searches of Students

Our federal courts have often stated that when school officials search students for evidence of wrongdoing, the Fourth Amendment of the U.S. Constitution (which guarantees freedom from unreasonable searches by government officials) mandates that the more intrusive the search, the higher degree of suspicion needed by the officials. In other words, it would be "unreasonable" for an official to perform a very intrusive search without having a well-founded basis for believing that the individual being searched possesses the evidence sought. A recent decision from a federal district court in Ohio provides a good illustration. *See Watkins v. Millennium School*, — F. Supp.2d —, 2003 WL 22705745 (S.D. Ohio, Nov. 18, 2003)

In the *Watkins* case, a teacher discovered ten dollars missing from her desk. The money belonged to another student who had brought it to school for a field trip and had placed it in the teacher's desk for safekeeping. The teacher decided to question three third-grade students who happened to be present in her classroom when the money was discovered missing. In the teacher's classroom, the girls were requested to empty their pockets. When the money was not found, the teacher requested that all three girls to turn down the waistbands of their pants out so she could check their waistlines for the missing money. All three girls complied. One girl was then asked to accompany the teacher to a supply closet, where she was asked to pull out her pants, so that the teacher could look down into them for the missing money.

The bottom line is ...

Any intrusive search of a student will likely require "individualized suspicion" that the student is guilty of misconduct.

In the subsequent federal civil rights lawsuit, the federal district court ruled that the teacher's request that the students turn down their waistbands did not require individualized suspicion of wrongdoing to satisfy constitutional requirements because of the "minimal" nature of its intrusiveness. However, the same could not be said for the subsequent request for the student to hold open her pants so that the teacher could look inside; such a search required individualized suspicion. In other words, the teacher needed only "reasonable suspicion" for the initial search of all three students but "individualized suspicion" for the additional, more intrusive search of the one student.

The court also noted that this case did not present circumstances warranting a quick response by school officials, such as suspected possession of drugs or weapons. In such cases, more leeway is given to school officials in order to ensure student safety. The court stated that "[T]he theft of ten dollars is obviously distinguishable from a student suspected of drug use or weapon possession."

The court went on to rule that a jury would have to decide whether the teacher should have known that she was violating the third grade student's privacy rights by requiring her to hold open her pants. Because of this, the court refused to rule favorably on the teacher's claim that she had a qualified immunity defense to the student's civil rights claims. Thus, the teacher could potentially be held individually liable for the search.

Student Discipline Hearings: Make Sure the Tape Recorder Works

The Commissioner has held on numerous occasions that a board of education may not properly decide an appeal from a decision suspending a student unless it reviews the entire record of the hearing. The Commissioner has now emphasized that if there are problems with the tape recording of the disciplinary hearing, a district may not substitute a written summary of testimony for the complete record.

In this case, the district admitted that a portion of the superintendent's hearing was not recorded. The district acknowledged that the hearing lasted several hours, yet the recording device only recorded about 1 hour and 25 minutes. Because there were several breaks in the recording, it was unclear exactly how much was not recorded. However, a portion of the parent's testimony and all of the student's testimony were missing. Therefore, neither the superintendent nor the board of education had a complete record to review.

The district argued that the defect in the recording was remedied because the parent was permitted to describe the missing portions of the tape to the board of education and to submit a written summary that her daughter read at the end of her hearing testimony. The Commissioner stated that any reconstruction after the fact was not sufficient for review either by the board or by the Commissioner. While the student had already served her suspension and graduated, the Commissioner sustained the appeal to the extent that the student's record was ordered expunged.

(*Appeal of A.R.* [North Salem CSD], Decision No. 14,996, 12/8/03)

Clarification on Pre-Employment Questions About Military Status

In a previous edition of our newsletter, we reported on a new state law which prohibits employers from discriminating against prospective or current employees on the basis of their military status. One of the more perplexing provisions of the new law involves a prohibition against certain "pre-employment inquiries" regarding a job applicant's military status. Specifically, the new amendment to the Human Rights Law (N.Y. Executive Law §§296 et seq.) provides that it is unlawful:

> For any employer ... to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, **military status**, sex, disability, genetic predisposition or carrier status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification..... N.Y. Executive Law §296(1)(d) (emphasis added).

Prior to the inclusion of "military status" in this list of prohibited pre-employment inquiries, the New York State Division of Human Rights (NYSDHR) interpreted this section to mean that even asking a question about one of listed characteristics violated the Human Rights Law. In other words, if an employer asked an applicant his or her age or marital status, for example, either on a job application form or during a job interview, the employer would be automatically liable for discrimination.

Understandably, both public and private sector employers were concerned about the inclusion of "military status" in this list. Under the NYSDHR's old interpretation, even a question about an employee's employment history (if he/she served in the military) might be considered an "indirect" inquiry about the applicant's military status.

In an effort to get the NYSDHR's current interpretation with respect to pre-employment inquiries regarding military status, our law firm requested a formal opinion from the General Counsel's office of the NYSDHR. The response we received indicates a shift in the NYSDHR's position regarding these inquiries. In her opinion letter, General Counsel Gina M. Lopez Summa states that:

> ...the mere asking of a particular question in a pre-employment context, without a causal connection or relevant relationship to a claim of discrimination under the Human Rights Law did not violate the provisions of Executive Law §296.1(d), as the inquiry would thus not constitute either a direct or indirect "limitation, specification or discrimination" as to any of the protected bases of discrimination, as required by the law.
>
> Thus, as long as an employer does not use the information so ob-

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Clarification on Pre-Employment Questions About Military Status (continued)

tained to discriminate against persons with military status, as prohibited by §296.1 such inquiries, would not appear to violate the employment provisions of Human Rights Law §296.1(a)(d). Nor would a person without military status qualify as a protected person under this section of the Human Rights Law.

As a practical matter, however, this interpretation still presents problems for employers. For example, let's assume that an employer receives information on an applicant's military or veteran status either on an application or during an interview. If the employer chooses not to hire the applicant for reasons unrelated to that status, the applicant may still believe that employer discriminated against him/her and sue the employer for a violation of the Human Rights Law. In order to reduce the potential expense of defending such claims, employers should carefully document their reasons for not hiring applicants who provide this information. This documentation should clearly indicate that the applicant's military status was not a factor in the decision.

The Who and When of NCLBA "Report Cards"

Under the No Child Left Behind Act, (NCLBA) all States and school districts receiving Title I, Part A funds must prepare and distribute "report cards." These report cards were designed to help the general public see where schools and districts are succeeding under the NCLBA mandates and where there is still work to do. States have the responsibility for producing and distributing State report cards and may, as is the case in many States, prepare and produce district report cards on behalf of their districts. If a district has the responsibility for producing and disseminating its own report card, the State must ensure that the report card meets all the statutory requirements.

The report cards must be issued annually. While states/districts have the flexibility to determine the exact time during the year when they will issue report cards, the Department of Education (DOE) recommends that they issue report cards as early as possible, so that schools have critical information for improving instruction and parents have critical information to make decisions regarding public school choice and supplemental educational services options. Recognizing that all the necessary data may not be available prior to the beginning of the school year, the DOE suggests issuing a two-part report card, with some data elements available earlier than others. For example, the first part could include assessment data and schools identified for improvement, while data on teacher quality might be provided later in the second part.

Full-Year Substitute Entitled to Credit Toward Tenure Despite Minor Absences

Teachers who serve in a position as a regular substitute teacher for a term (semester) or more, which flows into a probationary appointment in the same tenure area, are entitled to what the Commissioner and our courts have called "Jarema" credit toward completion of the probationary period. The Commissioner has now held that a teacher is entitled to Jarema credit for individual terms where the teacher is appointed to fill a particular term or school year, regardless of whether he/she is absent a few days during the term or terms.

The Commissioner distinguished this situation from instances where teachers do not start their teaching assignments until after the terms began. In other words, if the appointment is not for a true full semester vacancy, the teacher does not receive Jarema credit. By contrast, where the teacher is appointed for a true full term vacancy, the teacher still receives credit despite some absences for medical or personal reasons, for example. However, the Commissioner was careful to point out that under traditional case law, individual unpaid days of leave do not count in determining total seniority and must be excluded in making these individual determinations. (*Appeal of Goldman* [Lawrence UFSD], Decision No. 15011, 1/8/04).

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Dismissal of Bus Driver Who Threatened Coworker Upheld

An appellate court has reinstated the dismissal of a bus driver who threatened a fellow driver for reporting her poor driving to their supervisors. In May 2002, a school bus driver employed by the Saratoga Springs City School District was reported by another driver for driving erratically. A few days later she confronted the driver who reported her and verbally berated him. She also told a different co-worker that she was going to "get a hit out" on the other driver because he reported her.

In the subsequent disciplinary hearing brought under Civil Service Law Section 75, the hearing officer sustained the charges that the petitioner had driven a school bus erratically, had used threatening and obscene language against another driver and had threatened "to get a hit man" to kill the driver. He recommended that the petitioner be dismissed. The Board adopted the findings of fact of the hearing officer and the recommended penalty.

A lower court ruled that terminating her employment was a harsh and excessive punishment given her clean employment record for 13 years, and directed the Board to impose a different penalty. However, the Appellate Division, Third Department, reinstated her dismissal, stating the following:

> Here, while it is true that petitioner was employed by the District for 13 years as a bus driver and instructor without any prior incidents of misconduct reported in her record, we cannot say that the penalty of termination is so shocking to our sense of fairness that it must be set aside. Notably, the Board premised its termination decision upon, *inter alia*, petitioner's poor judgment and lack of remorse, the disturbing nature of her comments, various safety issues and the District's strict policy concerns regarding threats of violence. Even assuming that a lesser penalty may have been more appropriate, it is not proper to substitute our judgment for that of the Board. (*Bottari v. Saratoga Springs CSD*, ___ A.D.2d ___ [3d Dep't, 1/29/04].)

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SPECIAL INSERT

SCHOOL LAW MATTERS

This just in …

Commissioner's Decision:

Counseling, Community Service and Drug Screening May NOT be Offered to Reduce Length of Student Suspension

The Commissioner has long held that a Superintendent or Board of Education may not unilaterally impose community service, counseling or drug screening in a student disciplinary proceeding brought under Education Law Section 3214. However, many school administrators and school attorneys believed that this option could be offered voluntarily as part of an agreement with parents to give an opportunity for a student to return to school earlier than the period of suspension imposed. The Commissioner has now held that this option may not be offered.

The Facts

In this case, the student was found guilty of giving another student Paxil, a prescription drug. The student was suspended for 20 weeks. However, the superintendent's letter notified the student that she had the opportunity, if she wished, to "earn back" up to 13 weeks suspension time provided certain criteria were met. The criteria included 35 hours of community service, three negative drug screens, a drug assessment and weekly meetings with a guidance counselor. The parent appealed the suspension to the board of education, which upheld the suspension. On May 27, 2003 the student was readmitted to high school based on her decision to participate in the District's program to "earn back" long-term suspension time.

The Problem

In the subsequent Appeal to the Commissioner, the parent argued that the District impermissibly conditioned her daughter's return to school upon her participation in counseling and completion of community service. The Commissioner agreed, stating that conditioning the student's return after a shorter suspension on community service, drug screening and counseling was improper.

An Acceptable Alternative

However, the Commissioner did emphasize that it is still permissible to enter an agreement to return a student to the classroom on "probation", with the understanding that any violation of school rules that apply to all students would result in the reimposition of the original suspension without the need for a new hearing. In such a case of a subsequent violation, the student need only be provided with "minimal due process procedures". These include written notice and the right to request a conference (with the superintendent before reimposition of the original penalty) to contest a determination that the student violated the conditions of his/her probationary reinstatement.

Caveat

It appears, therefore, that the Commissioner will continue to adhere to his traditional view that counseling and community service ***are not available as a remedy*** in student disciplinary cases, even where parents and students are agreeable to this option as an alternative to a longer suspension. A statutory amendment to Education Law Section 3214 may be necessary to allow what would seem to be beneficial to both districts, students and their parents.

In the meantime, districts should limit themselves to the imposition of a suspension or to the option of probation outlined above which has been approved by the Commissioner (*Appeal of L.H.*, Decision No. 15005, December 23, 2003).