



# School Law Matters

Latest legal developments and practical guidance for school officials & administrators

February 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.

## Board of Regents Adopts Middle School Reform

On January 20, 2005, the State Board of Regents issued a policy statement which approved an important change in middle school education to improve student achievement. The new policy allows some middle schools more flexibility in offering particular courses based on three "models". However, schools would still have to offer all State tests to measure how well students are achieving the Regents learning standards. The three models that middle schools can adopt are as follows:

### Model A — Comply with existing regulations.

The district would continue to comply with the current regulations making use of the existing flexibility provisions in the regulation.

### Model B — Strengthen the academic core.

Schools that have large numbers of students not meeting the Regents Learning Standards, as well as newly formed schools, would be able to propose a program that strengthens core academic subjects and increases extra help to students to improve achievement. Schools would not have to conform to the prescribed time requirements for units of study in exploratory courses. Exploratory courses are in tech-

nology education (one unit), health (½ unit), home and career skills (¾ of a unit), library and information skills (one period per week), and a second language (one unit of study by the end of grade 8), and the arts (½ unit of visual arts and ½ unit of music). A unit equals one year of coursework.

Model B schools must be in need of improvement or in corrective action and must use the flexibility granted to improve the core academic program (English, math, science, history and social studies) and increase student interest in learning, while still ensuring that students receive opportunities to achieve the other learning standards.

Each school's proposal would have to be approved by the State Education Department. These schools would have to ensure that all students receive opportunities to achieve all of the learning standards.

### Model C — Develop Next Generation Schools or Programs.

With approval, new schools or schools that meet State standards could restructure the entire educational program and be granted relief from prescribed time requirements for units of study in all subject areas. A maximum of 30 schools could get approval to do this.

Alternatively, schools could create specific curriculum and program changes and be granted relief from prescribed time requirements for units of study in exploratory courses. A maximum of 45 schools could get approval to do this.

Each school's proposal would have to be approved by the State Education Department. These schools would have to ensure that all students receive opportunities to achieve all of the learning standards.

Schools that want to adopt Model B or C would have to consult with their local shared decision-making committee, and conduct a self-evaluation of their current program.

According to a SED press release, the three-model strategy was put in place because the Regents determined that no single model for middle-level education would work with all schools in the State.

A copy of the Regents' Policy Statement can be found at [www.regents.nysed.gov/2005Meetings/February2005/0205emscvcsesida1.htm](http://www.regents.nysed.gov/2005Meetings/February2005/0205emscvcsesida1.htm).

If you have questions or need further information, please feel free to contact us.

## “Constitution Day” Instructional Program Now Required by Law

Beginning September 17, 2005, and every year thereafter, schools which receive federal funds must offer students an instructional program about the United States Constitution. This new mandate was created by an amendment inserted by Senator Robert C. Byrd (D-W.Va.) into the 3,000-plus-page, \$388 billion federal Omnibus Appropriations spending bill, passed by Congress in late 2004.

Specifically, the amendment (Section 111(b) of H.R. 4818/ H. Rept. 108—792) requires that “[e]ach educational institution that receives Federal funds for a fiscal year shall hold an educational program on the United States Constitution on September 17 of such

year for the students served by the educational institution.” As you may be aware, this “Constitution Day” observance marks the anniversary of the signing of the U.S. Constitution on September 17, 1787 by the 39 delegates to the Constitutional Convention.

While Sen. Byrd’s amendment does not specify how the instruction should be carried out, the Department of Education is expected to issue guidance to schools in the coming weeks. We will publish that information when it is available.

Ironically, this new requirement comes dangerously close to violating the Constitution it intends to celebrate. As crit-

ics of the measure point out, the amendment could set a precedent for future Congresses to issue additional mandatory curricular requirements. Such requirements would violate the traditional interpretation of the 10<sup>th</sup> Amendment of the Constitution which leaves public education to state governments, not the federal government. Proponents of the measure counter these arguments by suggesting that the substance of the instructional content for Constitution Day will be left to state and local officials.

If you have any questions about this or any other legislation, please contact our office at 315-437-7600.

## Commissioner Upholds Use of Alan Jackson Song in 9/11 Memorial

The Commissioner of Education has upheld the use of the song “Where Were You When the World Stopped Turning”, including its references to Jesus, God and the Bible, as part of a memorial program in Mexico Middle School on September 11, 2002. This song was included as a part of the 9/11/01 memorial program. The program also included moments of silence, a gift of thanks to local firefighters, the playing of “Proud to be an American” and the national anthem, along with encouragement to join in the singing of such songs.

In this case, handled by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., the Commissioner found in favor of the School District by applying the three-part test first set forth by the U.S. Supreme Court in the case *Lemon v. Kurtzman*, 403 U.S. 602. In that decision, the Court stated that in order to determine whether a governmental

practice is consistent with the Establishment Clause, the Court must answer three questions: (1) does it have a secular purpose?; (2) does it have a principal or primary effect that neither advances nor inhibits religion?; and (3) does it foster an excessive government entanglement with religion?

With regard to the first prong of the test, the Commissioner noted that the Governor requested that all schools in New York State observe moments of silence on the anniversary of the tragic events of September 11, 2001. Mexico’s middle school administration decided that playing songs on the public address system following the moments of silence would “further this secular purpose by aiding students’ reflection.”

In regard to the second prong of the test, the Commissioner stated that:

As the title suggests, the song questions the individual experience

of its audience on September 11, 2001. While the songwriter, Alan Jackson, may seem to profess his own religious belief, the lyrics do not suggest that such belief was or should be a universal response ...

Concerning the third prong of the test, he found that there was no evidence that the middle school administration had any contact with church authorities concerning the commemorative event, and there is no assertion of any other type of entanglement.

The Commissioner’s decision in this case follows an earlier decision in 2002 (*Appeal of Cayot*) in which he upheld the singing of “God Bless America” for a 9/11 memorial.

*Appeal of Passer*, Decision No. 15,159 (January 6, 2005)

DEVELOPING YOUR SCHOOL CALENDAR:**January 2, 2006 Deemed "Legal Holiday" By Education Department**

According to a recent notification received from the New York State Education Department (SED), Monday January 2, 2006 of the upcoming school year is a legal holiday on which school districts should not be in session.

According to SED, "[a]s a legal holiday, January 2, 2006 will not be counted as a day of session toward the required 180 days of instruction."

The explanation for this directive was as follows:

As a condition of the apportionment of State funds, pursuant to

NYS Education Law §3604 8, "No school shall be in session on a Saturday or a legal holiday, except general election day, Washington's birthday and Lincoln's birthday, and except that driver education classes may be conducted on a Saturday." Pursuant to NYS General Construction Law §24, if a legal holiday such as New Year's Day falls on a Sunday, the next day becomes the legal holiday. Therefore, school districts should not be in session on January 2, 2006.

School districts should consult with their school attorneys about

consequences under other laws, such as the Civil Service Law, if they were to operate on a legal holiday.

The "consequences" referred to in the notice above appear to refer to the Taylor Law provisions of the Civil Service Law. In other words, school districts may have negotiated collective bargaining agreements which require observance of "legal holidays." Failure to do so could result in union grievances.

If you have any questions about this matter, please contact our office at 315-437-7600.

## Short-Term Student Suspensions Can Be Appealed Directly to Commissioner

In a decision handed down in November 2004, the Commissioner reaffirmed an earlier holding from 1999 that students who are suspended from school for less than five days may appeal their suspension directly to the Commissioner. However, if a school district has adopted a policy that clearly requires students to appeal short-term suspensions to the board of education before appealing to the Commissioner, no such right of direct appeal would exist.

In the 1999 decision, the Commissioner emphasized that language in a board policy that simply states that a

student or parents "may" appeal to the board of education is not sufficient to deny the direct appeal to the Commissioner. Therefore, if a board of education wishes to require students to appeal their short-term suspensions to the Board prior to appealing to the Commissioner, the District policies and codes of conduct should be reviewed to determine whether the language in those policies meets this requirement.

It should be noted, however, nothing in this most recent Commissioner's decision, or in any earlier decisions of the Commissioner, indicates that a school board is required to adopt a policy per-

mitting such appeals. The decision whether to institute such a process remains within the discretion of each board of education. Understandably, some boards may not wish to hear such appeals, since they are already required by law to entertain appeals concerning long-term suspensions of more than five days.

If you need assistance in reviewing or amending your current student disciplinary policies, please feel free to contact us.

*Appeal of S.C.*, Decision No. 15134 (November 10, 2004).

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## Judge Adopts Referees' Recommendations in NYC School Funding Case

State Supreme Court Justice Leland DeGrasse of Supreme Court, New York County, has now adopted each of the recommendations issued by the Panel of Judicial Referees dated November 30, 2004 in the *Campaign for Fiscal Equity (CFE)* school funding case. As we reported to you in the December 2004 issue of *School Law Matters*, the Panel made several important recommendations, including:

- The use of at least a 1.5 per pupil weighted adjustment for additional costs associated with educating low-income English Language Learners (ELL) and special education students. The Panel ultimately concluded that an additional \$5.63 billion in operating aid would be necessary to properly educate these students in the New York City school system.
- The Panel also recommended \$9.2 billion for facilities improvement for new classrooms, libraries, and other facilities. It stated that the "BRICKS" plan proposed by the *CFE* plaintiffs was the most accurate estimate of the funds necessary to improve facilities in order to provide a "sound basic education" for New York City students.
- The Panel recommended that the State have just 90 days from the date of the Court order to make the necessary funding available to New York City's public schools.

The Panel's proposed funding increases provide for inflation adjustments of 25%-50%-75%-100% over a four-year phase in.

- The Panel stated that, while *state-wide education reform* was beyond their jurisdictional mandate, *it strongly supported such reform and the goal of state-wide formula simplification*. It also made clear that the Court has broad authority to implement the recommendations in the event that the Legislature and Governor do not act quickly to carry out the necessary reform.

In his decision, Justice DeGrasse also rejected New York City's "hold harmless" argument that the Court should prohibit the State from requiring the City to pay any portion of the additional \$5.63 billion in funding recommended by the referees. Instead, the Court stated that the Legislature must determine how school funding should be divided between the two. Finally, Justice DeGrasse also refused to issue a civil contempt order against the State as requested by the *CFE* plaintiffs, holding that it was not within his authority, **at this point**, to do so.

It is expected that the Governor will appeal Justice DeGrasse's Order to the Appellate Division when a final Order is issued.

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