



School Law Matters

Latest legal developments and practical guidance for school officials & administrators

April 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.

Commissioner of Education Clarifies "Budget Document" Requirements

As part of the "reform" of school district budget processes, the legislature and Commissioner of Education have specified various documents and information which must be made available to voters before the budget vote. A recent decision of the Commissioner clarifies the application of these "budget document" requirements. *Appeal of Herloski*, 15014, January 16, 2004.

In *Herloski*, a school district resident complained to the Commissioner that the district's budget presentation in public meetings (using overheads and slides), and in the budget newsletter, did not contain all of the information required to be included in the "budget documents." Specifically, he cited Section 170.9 of the Commissioner's Regu-

lations which requires that budget documents contain detail about revenues, expenditures, transfers, retained fund balance and appropriated fund balance, with a comparison of each of those items to the prior year. He also pointed out that Section 170.8 of the Regulations prescribes the format for the administrative, program, and capital components of the budget, in detail. Herloski claimed that because the newsletter was a "district-wide mailing", it had to have ALL of the information required by these Regulations.

The Commissioner ruled that the "budget document" requirement applies only to the "complete, official copy of the proposed budget", which is the document that is required to be made available to residents prior to the budget hearing and budget vote. The Commis-

sioner rejected the claim that "any documentation mailed to district voters related to the proposed budget must contain a complete proposed budget". As the Commissioner pointed out, "if I accepted petitioner's logic, a district could not even reference the word "budget" in a newsletter without publishing the entire proposed budget, nor could it send out a simple postcard reminding voters of the date and time of the budget vote without doing the same".

Finally, the Commissioner did clarify that the information required by regulations for the budget documents should clearly state the information for both the proposed budget and the prior year's budget in each category.

Reminder: Dept. of Social Services May Appeal Student Residency Determinations

The Commissioner of Education has held that the Department of Social Services (DSS), may have standing to appeal a residency determination made by a board of education. As a general rule, an individual may not appeal such determinations unless he/she is "aggrieved." to be "aggrieved", the individual must suffer personal damage or injury to his/her civil, personal or property rights. In

Matter of Kirby, 10 Ed. Dept. Rep. 138 (1971), a district's board of education held that a child placed in a foster home within the district was ineligible to attend the district's schools. The DSS appealed on behalf of the child. The record demonstrated that the child was abandoned by his parents and that, at the request of the child's stepfather, the DSS assumed responsibility for the child's welfare. The child was subsequently

placed in a foster home located within the Respondent's school district. In holding that the DSS had standing to bring an appeal on behalf of the child, the Commissioner of Education stated that: "[a]s the party responsible for the welfare of children discharged into its custody, the Department of Social Services is an aggrieved person within the meaning of Section 310."

District Health Insurance Available to Current/Retired BOE Members

In New York, school districts may allow current Board members and retired members with 20 or more years of service to participate in the District's group health insurance plans, including dental coverage, as long as the Board member (or retired member) pays the premium. General Municipal Law Section 92-a, author-

izes school districts to contract for medical, surgical and hospital insurance for officers and employees. Subdivision 4 of that section authorizes Board members to be eligible for this coverage provided that the total cost of participation for Board members and their families is borne by the Board members themselves. In addi-

tion, under subdivision 1-a of that section, school board members with 20 years or more of service qualify as "retired officers" for purposes of receiving coverage under this section. The State Comptroller (in opinion 83-195) also held that dental care may be included in a health insurance program adopted under Section 92-a.

Short-Term Student Suspensions: Don't Forget Notice and Informal Conference Requirements

The Commissioner has issued a number of decisions over the past few years admonishing districts to strictly comply with the notice and informal conference requirements of Education Law Section 3214(3)(b) and Section 100.2 (1) of the Commissioner's Regulations when they impose student suspensions of five days or less. In a recent decision, he again reminded districts of the following points:

(1) The notice and opportunity for an informal conference must be provided before the suspension unless the pupil's presence in school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process. The principal or superintendent may not suspend a student without compliance with the statute and regulation.

(2) Written notice must be provided by personal delivery, express mail delivery or equivalent means reasonably calculated to assure receipt of the notice within 24 hours of the decision to propose suspension. Sending the written notice by regular mail does not satisfy the regulation. In addition, oral communication with parents regarding a suspension is not a substitute for the required written notification.

(3) As associate or assistant principal may not impose an out-of-school suspension. He or she may, however, impose an in-school suspension.

(4) A parent has the right to request a parental conference with the principal at which the parent has the right to question complaining witnesses. Both the principal and the complaining wit-

nesses must be present at the conference, if requested. The notice to the parent must include not only a reference to the conference but to the right to question complaining witnesses as well.

(5) The purpose of the Commissioner's regulation is to make the parents of a student suspended for five days or less aware of the statutory right provided in the Education Law to question complaining witnesses in the presence of the principal who proposed the suspension in the first instance, and who has the authority to terminate or reduce the suspension. The procedure affords the principal the opportunity to decide whether his original decision was correct or should be modified.

Commissioner's Caution: District Website Link to PTA May Violate Advocacy Rules

The Commissioner has issued a caution to school districts whose websites have a link to a PTA or PTSA website which advocates a "yes" vote on a budget or referendum. In this Appeal the petitioners argued that since the District's web page included a link to the Parent Teacher Student Association ("PTSA") web-

site and because the PTSA website advocated a "yes" vote on its website, the District had engaged in "improper advocacy".

The Commissioner disagreed holding that the mere presence of the link on the District's site was not improper

since there was no evidence that the website affirmatively directed visitors to the link or that the link was otherwise inconsistent with the content of the District's site. However, the Commissioner urged the District to consider placing a disclaimer on the

Continued on next page

Commissioner's Caution: District Website Link to PTA May Violate Advocacy Rules (continued)

District's website to clarify that the District was not responsible for facts or opinions contained on any linked sites.

The Commissioner also rejected the argument that the informational materials (about a proposed budget vote) disseminated by the District constituted improper partisan advocacy. Among other things, the petitioners argued that

District, through use of videotape, informational mailings and District meetings, depicted the District's school buildings as old and outdated. The petitioners objected to the use of black and white photographs of each school with its date of construction, the persistent use of words like "modernize" and the concept of the passage of time having an impact on the schools. They further alleged that District's omission of in-

formation about past renovations presented a slanted view of the facilities. The Commissioner held that the whole record revealed that the materials challenged were primarily factual and informational in nature and could not be fairly construed as advocating a "yes" vote. (*Appeal of Hager and Scheuerman*), [Pittsford CSD], Decision No. 15019, 1/23/04).

Use "Best Estimate" of State Aid Available When Tax Warrants Issued, Says SED

In *Appeal by Muench* (Central Square CSD), the petitioner claimed that the Board violated §1318 of the Real Property Tax Law (the "RPTL") when it adopted the tax warrants and set the tax rates for the 2002-03 school year. This section requires that, at the end of each school year, all unexpended operating funds in excess of 2% of the amount of the budget for the upcoming school year must be applied to reduce the tax levy for the coming school year. The petitioner claimed that the District maintained an undesignated, unreserved fund balance (the "fund balance") which was more than the 2% limit.

The District's audited financial statements for 2001-02 showed that the total amount of the fund balance as of the end of that year was 1.91% of the 2002-03 budget. This was within the 2% limit. The Commissioner determined that the petitioner did not prove that the District had retained an exces-

sive fund balance. He recognized that districts need time after June 30 to finalize the fiscal year's accounts, and that it is permissible to use the final audited report, instead of only looking at the records which were in existence on the last day of the fiscal year.

The Commissioner also denied the petitioner's request that the State Education Department audit the District, based on allegations about a pattern of retaining excess surplus funds. The Commissioner found that he failed to prove any violation in 2002, admitted that there was no violation in 2001, and admitted that any claims about prior years would be untimely.

However, the Commissioner stated that, in determining the tax levy, school boards should use the best estimate of state aid that is reasonably available at the time that the tax warrant is issued. There was not accurate information about the final amount of state aid at

the time that the District prepared its budget for submission to the voters. However, by the time the Board met on August 26, 2002 to levy taxes and issue tax warrants, the state budget had been enacted.

The Commissioner declared that the Board should have considered this information at that time. Nevertheless, the Commissioner determined that there is no need to adjust the 2002-03 tax levy now, because the use of a low estimate of state aid should have resulted in a surplus at the end of 2002-03, which the District would have had to apply to reduce the tax levy for 2003-04 and/or transfer to reserve funds. The Commissioner ordered that the Board "henceforth utilize the best estimate of State aid that is reasonably available to respondent at the time it calculates the tax levy and issues tax warrants, and strictly comply with the requirements of Real Property Tax Law §1318".

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District Not Liable for Student Harassment Despite Ineffective Actions

A mother of an elementary school student brought a lawsuit against a School District, principal, superintendent, and lunch room monitor (in their individual and official capacities) (the “defendants”). She was seeking damages for alleged violations of her son’s constitutional rights resulting from their “non-action and acquiescence” to other students’ racially harassing her son on the basis of his Chinese ancestry.

The federal District Court for the Eastern District, held in part that:

(1) school officials were not “deliberately indifferent” to the stu-

dent’s complaints of racial harassment, so as to be liable for violating the student’s equal protection rights;

(2) ultimate failure of the School District’s punitive and preventative measures, and the District’s refusal to allow the student to either transfer schools or skip a grade, did not result in liability for alleged violations of the student’s right to equal protection; and,

(3) actions taken by defendants in response to reports of abuse were not so inadequate so as to “shock the conscience”, as required to support

liability for alleged violations of student’s due process rights.

In sum, the Court determined that the defendants acted reasonably in their attempts to stop the alleged student harassment. The fact that their actions were not successful did not result in automatic liability for the defendants.

Yap v. Oceanside Union Free School District, 2004 WL 231210 (E.D.N.Y. February 2, 2004)

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

URGENT NOTICE TO ALL EMPLOYERS!

1. Does your company offer employees a flexible spending account [FSA] or cafeteria plan that reimburses for medical (including prescriptions), dental or vision benefits?
2. Does your FSA or plan have more than 50 participants, *including dependents*? (Or, if it has fewer than 50 participants, do you contract with another organization to administer the plan?)

If you answered YES to Questions 1 and 2 above, you **MUST** comply with the new HIPAA Privacy Rule requirements by April 14, 2004! (If you are still not sure if your company is covered, check the following website and answer the questions provided: <http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/xmldecision.asp?decision=D3> .)

Delacroix Consulting Group, a leading HR Management consulting firm, is offering employers a HIPAA Compliance Packet for **\$189 plus tax and shipping**. The Compliance Packet contains all of the necessary HIPAA forms and detailed instructions on how to use them, including:

**Corporate Resolution Designating Your Company as a "Hybrid Entity" under HIPAA
Business Associate Contract Which Complies with HIPAA
Self-funded Benefit Plan Amendment Required by HIPAA
Certification of HIPAA Compliance
Notice of Privacy Practice**

The forms will be provided to you on CD-ROM in Portable Document Format (.pdf) (also known as Adobe Acrobat format) and in hard copy. **Orders received prior to April 12, 2004 will receive their HIPAA Compliance Packet on or before the compliance deadline of April 14, 2004.**

To order your HIPAA Compliance Packet complete the following form and return it to Delacroix Consulting Group at 5010 Campuswood Drive, East Syracuse, New York 13057 or fax it to 315-437-5617.

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Half-Day Workshop
on Managing
Chronically Absent
Employees
Effectively While
Complying with
Employment Laws

FMLA & ADA DILEMMA:



AN EMPLOYEE'S "BLANK CHECK" TO BE ABSENT FOREVER???

Employers are
NOT powerless
to combat excessive
absenteeism
associated with the
FMLA and ADA!
Come to this
workshop and

Half-Day Workshop Presented by Delacroix Consulting Group, LLC

The Delacroix Consulting Group, LLC is the human resources management consulting arm of the Ferrara-Fiorenza Law Firm located in Syracuse, New York. Delacroix provides its clients with day-to-day management expertise and strategies in all HR-related matters. We specialize in training employers — and their supervisors/managers — about effective employment practices designed to minimize the risk of costly employment litigation.

Why this Workshop is Different?

Most FMLA/ADA workshops and seminars focus only what the laws say you can't do when an employee is out of work for health-related reasons. This workshop is different because our presenters will provide participants with a step-by-step strategy for getting employees back to work quickly ... or replacing them, when necessary.

Who Should Attend?

All private and public sector employers, supervisors and managers (including business owners, human resources professionals, payroll professionals, accountants and supervisors).

Workshop Outline

- A. Family and Medical Leave Act (FMLA)**
1. Which employees are eligible for leave and which are not?
 2. How much leave does an eligible employee get?
 3. If an employee does not return after his/her FMLA leave has ended can he/she be terminated?
- B. Americans with Disabilities Act (ADA)**
1. What is a "disability"?
 2. How does the New York State law definition of "disability" differ from the ADA?
 3. How much leave can an employee take under ADA or New York State law?
- C. Attendance and Work Standards Policies: Can They Be Enforced?**
1. Are "No-Fault Attendance Policies" legal?
 2. Can disabled employees be held to the same work standards applied to other employees?
- D. Strategies for Minimizing an Employer's Pain Associated with an Employee's Medical Leave**
1. Does creating light duty jobs help?
 2. What information can I request from an employee while on leave?
 3. Can I reassign an employee on leave?
 4. What can I do if I think an employee is faking an illness?
 5. Can I temporarily replace an employee on leave?
 6. When can I permanently replace an employee on leave?
- E. Practice Examples/Discussion and Your Questions**

Dates, Times and Locations

Syracuse - May 27, 2004
8:30 AM — 12:30 PM

Wyndham Hotel
6301 Route 298, East Syracuse,
New York

Buffalo - June 3, 2004
8:30 AM — 12:30 PM

Buffalo Marriott Niagara
1340 Millersport Highway, Amherst, New York

Rochester - June 17, 2004
8:30 AM — 12:30 PM

Holiday Inn Rochester-South
1111 Jefferson Road
Rochester, New York

Tuition Fee

\$125 Per Participant

REGISTRATION FORM

Please return to: Delacroix Consulting Group, LLC, 5010 Campuswood Drive, East Syracuse, New York 13057 or fax to (315) 437-5617 Questions? Call (315) 234-3800

Please Circle the Location of the Workshop You Wish to Attend: Syracuse Buffalo Rochester

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