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

# School Law Matters

Latest legal developments and practical guidance for school officials and administrators June 2003

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## Religious Services on School Property OK'd by Second Circuit

The U.S. Court of Appeals for the Second Circuit (the federal appellate court with jurisdiction over New York) has held that a board of education policy or regulation which prohibits the use of school buildings for religious worship services during non-school hours is unconstitutional. (*Bronx Household of Faith v. Board of Education of City of New York*, ___ F.3d ___ [June 6, 2003].) This decision, focusing on a New York City Board of Education regulation, was handed down earlier this month.

In a 2-to-1 decision, the Court ruled that it was bound by the U.S. Supreme Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Good News*, the Supreme Court ruled that it was unconstitutional for a board of education to prohibit the use of its school buildings by a religious group (the "Good News Club") based upon the religious viewpoint expressed by the group during its use. Specifically, the Club claimed to be teaching elementary-age children morality from a Christian perspective. The Court found that since the District allowed other organizations (like the Boy Scouts and Girl Scouts) to teach morality from a secular perspective, excluding the Good News Club would be unconstitutional "viewpoint discrimination."

### The bottom line is ...

***It now appears that courts will not treat religious worship services as an inherently different type of activity for purposes of building use policies. Accordingly, districts should review their building use policies to ensure that religious worship is not singled out as a prohibited activity.***

In *Bronx Household of Faith*, the Second Circuit ruled that there was no meaningful difference between the religious instruction to elementary-age children in the *Good News* case and the religious worship services involved in this case.

The Court of Appeals agreed with the District Court that the Board did not have a valid objection to these activities under the Establishment Clause because the proposed meetings: (1) occurred on Sunday mornings during non-school hours; (2) are not endorsed by the District; (3) are not attended by any school employee; (4) are open to all members of the public; and (5) there was no evidence that any school children would be on the premises on Sunday mornings or would attend the meetings.

The Court pointed out that the current policy permitted social, civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community so long as these uses were non-exclusive and open to the public. Because of this, the Court reasoned that there was a substantial likelihood that Plaintiffs would be able to demonstrate that the Board was engaging in unconstitutional viewpoint discrimination.

It now appears that after the *Good News Club* case, and this decision, our courts will not treat religious worship as an inherently different type of activity for purposes of building use policies. Accordingly, districts should review their building use policies to ensure that religious worship is not singled out as a prohibited activity. Districts are still free, of course, to prohibit the use of their buildings for legitimate, non-discriminatory reasons on weekends or particular weekend days.

# Bus Drivers Convicted of Drunk Driving May Still Be Allowed to Drive a Bus, DMV Says

If a school bus driver has his/her driver's license suspended due to a conviction for drunk driving, you would assume that the driver would not be permitted to drive a school bus. Right? Not so fast, says the New York State Department of Motor Vehicles ("DMV").

Recently, a bus driver for a school district had her driver's license suspended as a result of a DWAI ("driving while ability impaired") conviction. The Judge who imposed the suspension issued a "Certificate of Relief from Disabilities" ("Certificate") intended to permit the individual to continue to drive a school bus.

The issuance of such a Certificate appeared to be in conflict with a November 2001 amendment to New York's Vehicle and Traffic Law (Section 509-cc[g]). Specifically, Section 509-cc[g] automatically disqualifies a driver from driving a school bus for a period of not less than six months where the individual's license has been revoked or suspended for either a DWI ("driving while intoxicated") or DWAI conviction. Moreover, the legislative history of Section 509-cc[g] indicates that the State Legislature intended the amendment to stop courts from issuing such Certificates under these circumstances.

Based on this new law, the District refused to recognize the Certificate and thus, refused to reinstate the driver to her duties. However, the local DMV office informed the District that based on guidance it had received from the General Counsel's office of the DMV in Albany, the DMV would honor the Certificate. In other words, they would permit the convicted individual to drive a school bus. The internal DMV guidance document (dated November 8, 2002) seemingly ignores Section 509-cc[g] and explains how a Certificate must be completed by a judge in order to be "acceptable" to the DMV.

The School District then asked the DMV's General Counsel regarding its interpretation of Section 509-cc[g]. They were told that the DMV General Counsel views Section 509-cc[g] as "defective" as it does not include words to the effect of "notwithstanding any other provision of the law." Since judges, under other provisions of the Vehicle and Traffic Law, are permitted to issue these Certificates, the absence of the phrase "notwithstanding any other provision of the law" in Section 509-cc[g] means that the new law has no effect, according to Counsel. Unless the law is amended to fix the "defect," DMV will continue to honor such Certificates.

This does not mean, however, that a school district cannot choose to discipline a bus driver ***for the inappropriate conduct which lead to the drunk driving conviction. (Remember that state law prohibits discrimination on the basis of the conviction itself.)*** The automatic disqualification merely made the disciplinary process less complicated and less expensive for districts. If your district is confronted with this situation, please contact our office for assistance.

## The bottom line is ...

***If a bus driver obtains a Certificate of Relief from Disabilities from a judge following a drunk driving conviction, the driver may not be automatically disqualified from driving a bus. But, the district may still choose to discipline the driver for inappropriate conduct.***

## Update on No Child Left Behind Act Requirements for Paraprofessionals

The New York State Education Department (SED) issued a field memo on June 11 regarding an "Update on the NCLB's Requirements for Title I Paraprofessionals." The memo provides questions and answers on a variety of issues related to paraprofessionals under the No Child Left Behind Act (NCLBA) . For example, the guidance answers the question "Is there a New York State assessment for Title I paraprofessionals?"

The answer is yes. The New York State Assessment of Teaching Assistant Skills (NYSATAS) is designated by SED as a State assessment that will meet NCLBA requirements.

National Evaluation Systems (NES) has developed the NYSATAS for candidates who apply for a State teaching assistant certificate after February 1, 2004 and for NCLBA purposes. The first NYSATAS administrations will be on June 21, 2003 in Albany, Syracuse, Rochester, Buffalo and Plattsburgh and on August 2, 2003 in the same sites except Plattsburgh.

SED is not, however, mandating the use of the NYSATAS. School districts may also use a local assessment that meets certain basic requirements.

All of the SED's NCLBA field memos about teachers and paraprofessionals and related information can be found at http://www.highered.nysed.gov.

# Federal Judge Upholds Tough Terms of Principal's Suspension

A Federal District Court Judge has ruled in favor of the Cooperstown School District and against one of its Principals in a case relating to disciplinary action taken against the Principal.

In 1998 and 1999, Cooperstown's Superintendent of Schools had warned the Principal that staff members and students viewed his relationship with a female student as creating an appearance of impropriety. The Principal regularly called the girl out of class to come to his office; caused her to be late for class; and frequently had conversations with her in his office with the door closed. Teachers and other staff members began to express concerns over the relationship between the girl and the Principal. The Superintendent directed him to limit his contact with her only to necessary school-related purposes.

Nevertheless, the Principal continued to have frequent conversations with the girl. On one occasion, he stood outside her classroom and held up signs saying, "I miss you" and "Sorry." Finally, in April of 1999, he was observed hugging the girl in a vacant classroom.

He was eventually brought up on disciplinary charges and, pending the hearings, suspended from his duties. During the suspension, the Superintendent ordered the Principal to stay off of school property, except with her express permission. The Principal was given an alternate assignment, which he was to perform off of school property. The Superintendent also directed him to cease all contact with the girl, and to avoid doing anything to harass or retaliate against her or any teacher or student involved in the case, or their friends or relatives.

The Principal brought a lawsuit to challenge the terms of his suspension, pending the disciplinary hearing. A Federal Judge has now rejected all of the Principal's arguments. The Judge explained that the Principal's due process rights were not violated, as alleged, because there was no law giving him the right to access school property.

The Judge also rejected the Principal's free speech and association claims because his alleged right to engage in casual conversation with teachers, students and their friends and relatives was not protected by the First Amendment.

Finally, the Judge concluded, the school's restrictions on the Principal's speech were reasonable and narrowly tailored to further the school's legitimate goals.

The case is entitled *Pearlman v. Cooperstown Central School District, et al.* (U.S. District Court, Northern District of New York, McAvoy, J., Dkt. No. 01-CV-504, decision dated June, 11, 2003).

# Bomb Threat Rumor Spread on Computer Bulletin Board Earns Student Three-Month Suspension

In *Appeal of T.N.* [Baldwin Union Free School District], a student heard a rumor concerning a possible bomb threat to a district high school on October 17, 2001. Instead of notifying a school staff member, the student posted a message on a computer bulletin board on September 24, 2001 which stated there would be a bomb threat on October 17, 2001, and that she would not be going to school on that day.

As a result of the student's posting, the bomb threat rumor was disseminated throughout the school community, and approximately one-half of the middle and high school students in the district did not attend classes on October 17, 2001. The student who spread the rumor was suspended from school and her parents challenged the severity of the discipline imposed.

Upon appeal, the Commissioner of Education held that the three-month suspension imposed by the District upon the student was not so excessive as to warrant the substitution of the Commissioner's judgment for that of the school district.

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# Funding Opportunities

July is the final month to submit grant applications under several competitive programs offered by — or through — the U.S. Department of Education.

For example, the ***Community Technology Centers Program*** assists in the creation or expansion of community technology centers that will provide disadvantaged residents of distressed urban and rural communities with access to information technology and related training. For fiscal year 2003, the competition for new awards gives absolute priority to those who focus on the academic achievement of low-achieving high school students. Eligible applicants include faith-based and community organizations, states, districts, institutions of higher education, and other non-profit groups (closes July 7).

The ***Jacob K. Javits Gifted and Talented Students Education Program*** supports students under-represented in gifted and talented programs, particularly economically disadvantaged, limited English proficient, and disabled students—to diminish the achievement gap at the highest levels of performance. Eligible applicants include states, districts, institutions of higher education, and Indian tribes (closes July 7).

The ***Arts in Education Model Development and Dissemination Grant Program*** funds efforts to (1) integrate arts into the core elementary and middle school curricula, (2) strengthen arts education in these grades, and (3) improve students' skills in creating, performing, and responding to the arts (closes July 10), while ***Professional Development for Arts Educators*** implements high-quality professional development programs in dance, drama, music, and visual arts (closes July 10). Both of these programs require partnerships.

The U.S. Department of Education's website (http://www.ed.gov/GrantApps/) lists all the competitions that are currently underway and provides links to electronic application packages, forms, and other key information.

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