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

School Law Matters

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

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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.

Gay-Straight Student Club Entitled to Equal Access, Federal Court Says

A federal court in Kentucky recently held that the Boyd County Board of Education violated the federal Equal Access Act (EAA) when it banned Gay-Straight Alliance (a student club) from meeting on school property. *Boyd County High School Gay Straight Alliance v. Boyd County Bd. of Education*, 2003 WL 1919323 (E. D.Ky., April 18, 2003).

The Gay-Straight Alliance (GSA) was initially approved as a club by the district but public protests against it caused the school board to suspend all clubs from meeting on school grounds. The GSA brought suit under the EAA after the district continued to allow several other student groups to meet on school grounds.

Under the EAA, if a public school (which receives federal financial assistance) has created a "limited open forum," it is unlawful for that school to deny equal access to, or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within such limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. 20 U.S.C. § 4071(a). According to the federal court, "A public secondary school has a 'limited open forum' whenever it grants an offering to, or opportunity for, one or more non-curriculum-related student groups to meet on school premises during non-instructional time."

The bottom line is ...

A district cannot deny access to a student group because student and community opposition substantially interferes with the school's ability to maintain discipline. The student group's own activities must be the source of the disruption in order to overcome the right of access granted by the EAA.

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Internet Filtering Law Upheld by U.S. Supreme Court

The Supreme Court in a 6-3 decision upheld the constitutionality of Children's Internet Protection Act (CIPA). The Court concluded that public libraries are not "public forums." Therefore, any restrictions on speech or expression in such forums are not subject to heightened or strict scrutiny.

As a result, any government attempt to restrict speech in public libraries is subject only to a "rational relationship" test. In other words, Congress needs only a rational basis on which to place restrictions on speech in libraries.

Applying that test, Chief Justice Rehnquist concluded that the small burden imposed on library patrons seeking legitimate Internet materials by filtering software was outweighed by the government's interest in protecting children from obscenity, child pornography and other materials harmful to minors. *United States v. American Library Association*, ___ S.Ct.___, 2003 WL 21433656 (June 23, 2003).

District May Be Liable for Injuries to Staff Inflicted by Students

Two recent court cases illustrate how a school district may be held responsible for injuries staff members suffer as a result of student violence. (*See Pascucci v. Board of Education of the City of New York,* 758 N.Y. S.2d 54 (1st Dep't, 2003); *Goga v. Binghamton City School Dist.,* 754 N.Y.S. 2d 739 (2d Dep't, 2003).)

In *Pascucci,* a teacher broke up a fight between two students in her classroom. One student, who the teacher had removed from the classroom, returned and tackled her, throwing her into a door. Prior to this, the teacher repeatedly called the school secretary for help at various times for at least fifteen minutes.

According to the court, generally government employers incur no liability for failure to provide police protection to employees. However, the court found that a "special relationship" existed which acted as an exception to this general rule. The district had trained its staff to contact the principal in emergency situations. Based on this training and the district's safety manual, the teacher understood that in a classroom emergency she was to contact the school secretary through the intercom system and the secretary would send a security guard or a principal to the classroom. Thus, the school district assumed an affirmative duty to protect the teacher based on the information the secretary received.

By contrast, the court in *Goga* dismissed a contract bus driver's suit against the school district for personal injuries sustained when she broke up a fight between students on her bus. She claimed the district was liable for her injuries because it failed to provide adequate supervision of the students. The court rejected the adequate supervision theory because it relates only to a school's duties to its students, not to third parties. Furthermore, the district as a public entity is not liable for the negligent performance of its governmental functions unless a "special relationship" is established. Goga did not demonstrate that a special relationship existed between her and the district.

Students May Pass Petitions BUT Cannot Interfere With Educational Goals

A third grader circulated a petition among her classmates protesting a class trip to the circus. Her teacher asked her to put the petition away after noticing a crowd gathering around the student's desk during a quiet reading time. The student organized another signature gathering on the playground and was stopped when a classmate slipped on a patch of ice near where the student was standing.

The elementary school principal allowed the student to distribute coloring books and stickers about animal rights after receiving complaints from the student's parents. Nevertheless, the parents filed suit claiming a violation of their child's First Amendment rights.

The Third Circuit Court of Appeals concluded that elementary students' constitutional rights are limited because instilling appropriate values, a primary goal of public schools, requires a greater level of guidance. The court held there is no constitutional right to circulate a petition during class or on an icy playground. However, the court made it clear that it was **not** saying there was never a right to gather signatures, even in an elementary school. Rather, when this activity interferes with the school's educational goals or the rights of other students, it may be restricted. *Walker-Serrano v. Leonard,* 325 F.3d 412 (3d Cir., 2003).

While the Third Circuit Court of Appeals does not have jurisdiction over New York, it is likely that New York courts would be persuaded by this decision. Consequently, districts should be cautious when limiting even an elementary student's exercise of his/her First Amendment rights.

Videotaping of Board Meetings OK'd by State Court

A board of education does not have the absolute right to decide when to prohibit and when to permit videotaping of its public meetings. The court noted that "[t]his is not to say that the Board lacks any authority to regulate the use of cameras at its meeting .... It certainly has the authority to impose reasonable regulations upon the public's use of cameras at its public meetings so as to ensure that cameras do not genuinely interfere with the work at hand. What the Board cannot do is prohibit the use of cameras outright…" According to the court, however, the Open Meetings Law implicitly confers upon the public the right to videotape such meetings. *Csorny v. Shoreham Wading River Central School District,* ___ A.D.2d ___, 759 N.Y.S.2d 513 (2 Dep't, 2003).

Watch Out For Pitfalls When Interviewing and Hiring Staff

"Interview Committees" or "Hiring Committees" are sometimes used as part of site-based management to involve building or departmental faculty in the interview process. Likewise, some collective bargaining agreements may have an impact on the composition and function of such committees. In some districts, they are an outgrowth of the shared decision-making team process and include parents as well as staff.

Special problems may arise when a school delegates interviewing or hiring responsibilities to a hiring committee.

The State's Human Rights Law makes it unlawful to ask a job applicant a question in an interview which "expresses, directly or indirectly, any limitation, specification or discrimination." In other words, that type of question is unlawful. (N.Y. Executive Law Section 296.1[d]).

Hiring committees must be ***trained*** about the permissible interview questions that may and may not be asked under federal and state civil rights laws.

The State Division of Human Rights has published a set of guidelines entitled, "Rulings on Inquiries," which states the Division's views as to what type of question may or may not be asked of a job applicant. Among the questions the Division would consider to be ***unlawful*** are:

(1) Is that an Italian name?

(2) How old are you?

(3) Have you ever been arrested?

(4) Do you wish to be addressed as Mrs. or Miss?

(5) Are you married, divorced, or single?

(6) What are your plans for starting a family?

(7) Are you in good health?

(8) What year did you graduate from high school?

Standardize Procedures

When confronted with claims that improper questions were asked or discriminatory statements were made during an interview, District officials often have difficulties remembering the applicant who was interviewed, much less what was said during the interview. It is difficult to contradict such claims. Accordingly, Districts should establish specific protocols for performing interviews which should be followed every time.

If you need assistance in establishing such protocols, please contact Michael Dodd of our office at 315-437-7600.

Failing to Submit to Medical Exam Halts Teacher's Pay Without Hearing

Under Education Law Section 913, a teacher may be required to submit to a medical exam if there is reason to question his/her capacity to perform his/her duties.

In *Grassel v. Board of Educ. of the City of New York, 753* N.Y.S.2d 138 (2d Dep't, 2003), a high school teacher exhibited "bizarre and irrational behavior." Consequently, the superintendent ordered the teacher to undergo a medical exam. When the teacher failed on three separate occasions to report for the medical exam, he was dropped from the payroll.

The teacher sued, but the Appellate Division sustained the board of education's refusal to pay him.

While a teacher may not be suspended without following procedures set forth in law and contract, in this case, the court found that the teacher was not suspended by an action of the board. Instead, according to the court, "[t]he sole reason that he was precluded from teaching was his own failure to comply with the Board's reasonable directives."

If you have any questions regarding this case please contact our office at 315-437-7600.

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Recent Commissioner's Decisions

Child Abuse in an Educational Setting

The Petitioner challenged certain actions taken by the Superintendent during an investigation of an allegation of child abuse in an educational setting. Specifically, petitioner claimed that a school principal abused her son when he had difficulty calming the student down in the school's time out room. The student's mother notified the school superintendent of the incident. Therefore, it was the superintendent who was required to complete a report form and determine whether reasonable suspicion existed to believe an act of child abuse occurred.

The Commissioner rejected petitioner's claim that the superintendent violated her rights by failing to supply her with a written copy of parental rights or the completed report form. The Commissioner found that the superintendent "...determined that there was no reasonable suspicion to believe that an act of child abuse had occurred. Therefore, he was not required to forward the report form to law enforcement authorities or to provide petitioner with a written statement setting forth parental rights, responsibilities and procedures...." *Appeal of S.S. (Candor CSD),* 42 Educ. Dep't Rep.___ , Decision No. 14,852 (March 20, 2003).

Class Rank Policy Excluding Courses at Other Schools Upheld

The Commissioner has upheld a school district's policy of excluding courses taken at other schools in calculating cumulative grade point averages. Only those students who had attended more than two years in the District's high school program were ranked under the policy.

The Commissioner stated that the determination of class rank is a decision for the local board of education which will not be altered unless arbitrary or irrational. The Commissioner also accepted the district's argument that it could not accurately assess and compare the academic rigor of the programs at the schools attended by students who have transferred to its high school. *Appeal of Lynch (Tarrytowns USFD),* Decision No. 14,892 (June 19, 2003).

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