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

School Law Matters

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

Route to:
Board ❑
Personnel ❑
Instruction ❑
PPS ❑
Business ❑
Other: _____

In this issue …

New State Law Allows for Student Members on Boards of Education

The New York State Education Law has been amended recently to provide that Union Free, Central and Small City School Districts may offer to the voters, once every two years, at the annual meeting, a separate referendum to decide whether the School District shall allow a student to serve on the School Board as an *ex officio*, non-voting member. If the Board of Education decides to submit this question to the voters and it is approved, the *ex officio* student member will be entitled to sit with the Board at all Board hearings and meetings. The student member would not have a vote, not be allowed to attend executive session, and would not be entitled to receive compensation of any form for participating at Board meetings.

The Law specifies which student shall be selected as follows:

- The duly elected student president of the high school;

The bottom line is ...

A new law allows certain Boards of Education to take on non-voting student members. It is our opinion that each Board has the discretion to determine whether or not to put the question before the voters of the District.

- In the absence of a duly elected student president, a representative chosen by the high school student government in a public ballot;

- In the absence of an elected student president or a student government, a student selected by the high school principal.

If the selection is made by the high school principal, the student selected would have to be at least 18 years of age, a senior, and have attended the high school for at least 2 years prior to selection.

It is our opinion that the Board has the discretion to determine whether or not to put the question before the voters of the District. According to news reports, Steven Saunders, Chairman of the Assembly Education Committee, indicated that the legislature thought it a good idea for the law to explicitly acknowledge that school boards are free to take on student members, and that having such a law might encourage Boards to do so.

If you have any questions about this new law, please contact Don Budmen at 315-437-7600.

Kindergartener Suspension for "Threat of Violence" Upheld

A federal appellate court has upheld a school district's three-day suspension of a kindergarten student for uttering the statement "I'm going to shoot you" to his friends at recess. Both the district court and the appellate court ruled that the student's First Amendment rights to free speech were not violated. The appellate court also held that the school district's disciplinary action of a short three-day suspension for threats of violence and simulated gun play was rationally related to the valid state interest in controlling student conduct in light of the shootings at other schools nationwide and recent incidents at this student's school involving threats of violence (*S.G. v. Sayreville Board of Education*, 3rd Cir. [NJ], 6/19/03).

Student Residency: Sleeping in the District is Not Enough

A school district has successfully argued before the Commissioner that a parent who rented a room in a district and slept there with her son did not demonstrate that she was a resident of that district where she spent the vast majority of her time outside the district at her boyfriend's home and had most of her residency ties at his address.

In this case, the Petitioner testified that she picked up her son from the babysitter at 4:15 P.M. each day and brought him to her boyfriend's home outside the district. Her boyfriend watched her son while she attended college in the evening. He then picked her up and they returned to his home for the remainder of the evening. At about 11:30 P.M., she drove to the district to a room she rented in the home of her boyfriend's grandparents, where she and her son slept.

With respect to other residency information the Petitioner admitted at the residency conference that she registered her automobile at her boyfriend's address and that most of her mail was sent there because she was afraid that her boyfriend's grandparents would misplace it. In addition, the Petitioner had not provided the district or the BOCES where her son attended with a home telephone number, only a cell phone number, and a telephone call to Petitioner's employer confirmed her address to be that of her boyfriend.

In his decision, the Commissioner held that the fact that the Petitioner rented a room in the district and slept there with her son was not a sufficient connection to establish residency, particularly in light of the other evidence presented.

If you would like more information regarding this case or student residency issues in general, contact Donald Budmen or Norman Gross at 315-437-7600.

Refresher: Procedures for Student Residency Determinations

The Commissioner of Education's Regulations provide that a Board of Education, or its designee, must determine whether a child is entitled to attend the schools of the District. These determinations are typically made by a Board designee appointed by Board resolution. The Regulations further provide that, prior to making a determination of entitlement to attend the schools, the Board or the designee must afford the child or parent an opportunity to submit information concerning the child's right to attend school in the District. Although not required, we suggest that a meeting be held for this purpose. A meeting provides a full opportunity for any areas of concern to be addressed and helps to create a full record in the event of an appeal to the Commissioner.

Written notice regarding District concerns over the claim of residency should be provided, identifying the date, time and place of the meeting. The notice should direct the parents and child to bring in whatever evidence they have to establish and support the student's residence within the District. Finally, we recommend that affidavits be enclosed with the notice for completion by the parents, anyone to whom they are purportedly transferring custody and control, or by the student if they claim to be emancipated. These affidavits may inquire into areas such as prior and current living address, reason for relocating into the District, other places that the student may live during the week or year, source of financial support, the individual(s) responsible for making decisions for the child regarding health, education, and welfare, etc. Well crafted affidavits are of great assistance in determining whether or not the requirements for residency have been met.

At the meeting, the parents or purported guardians and student should be asked to provide whatever evidence they have regarding the maintenance or establishment of residency within the District. The Board or its designee should ask the parents or purported guardians specific questions about the evidence that the District has suggesting that residency has not been maintained or established. After the evidence has been gathered and questions of concern addressed, the meeting should be concluded and the parents or purported guardians told that they will be notified in writing within 2 business days after a decision has been made.

The written decision must provide the basis of the residency determination, if the decision is that the student is not entitled to attend the schools, the date as of which the child will be excluded from school, or as of which tuition will be charged if the District has a policy that admits non-resident students, and finally, notice that the determination can be appealed to the Commissioner of Education.

Recent Public Employment Relations Board (PERB) Decisions

Negative Evaluation for Exercising Protected Union Activity Prohibited

In a recent case, the N.Y. State Public Employment Relations Board ("PERB") held that an employer violated the Taylor Law when it evaluated an employee negatively because of his exercise of his right to union representation. The employee's supervisor objected to his seeking the assistance of his union in any disputes that he had with the supervisor. The supervisor gave the employee a negative evaluation which criticized him for involving the union in matters that the supervisor thought should be discussed directly with management. As a result of the evaluation, the employee was informed that he failed probation and would be demoted to his former civil service position. That same day, he resigned from his employment.

PERB found that the employer violated the Taylor Law when it evaluated the employee negatively because of his exercise of protected rights. However, the three-member PERB panel reversed the remedy of reinstatement ordered by the administrative law judge. PERB found that there was no constructive discharge, as the employer did not deliberately make the employee's working conditions so intolerable that he was forced to resign.

State of N.Y. (SUNY Oswego), 36 PERB ¶3015 (April 4, 2003).

Failing to Provide Investigation Files to Union Grieving Discharge Violated Taylor Law

In another recent case, PERB required an employer to provide the union with copies of information about its investigation into alleged sexual harassment by an employee for use in an arbitration proceeding.

A deputy sheriff filed a grievance challenging his discharge for sexual harassment. His union asked the employer for a copy of the file of its investigations into the employee's conduct. The investigation had been conducted by the County Equal Employment Opportunity Office and the Sheriff's Internal Affairs Unit. PERB held that the county's refusal to provide the requested information violated the Taylor Law obligation to provide information which is relevant and necessary for the administration of a collective bargaining agreement, including the investigation of grievances. In the opinion of PERB, the need of the employee and his union to adequately prepare for arbitration in order to challenge the accusations against him outweighed the county's interest in protecting the confidentiality of the complainants against the deputy. PERB ordered the county to provide the union with factual information from the investigation files (but not the investigator's recommendations).

County of Erie and Erie County Sheriff, 36 PERB ¶3021 (May 7, 2003).

Evenhanded Verbal Abuse by Supervisor is Not Discrimination, PERB Says

A supervisor's verbal abuse may not be model behavior, but it is not illegal if he treats <u>everyone</u> badly and does not discriminate. So holds PERB in a recent case, rejecting an employee's argument that he was treated poorly because of his friendship with the local union president.

An employee was subjected to constant abuse by his supervisor. The employee alleged that this violated his rights under the Taylor Law. The supervisor said that his criticism of the employee was due to work performance issues.

The testimony at the hearing revealed that the supervisor was at times critical toward all employees, whether bargaining unit members or management. He verbally abused every employee with whom he found fault. Therefore, PERB determined that the actions of the supervisor were not the result of activity which is protected by the Taylor Law (i.e., his complaints to the union and his friendship with the local union president).

City of Rochester, 36 PERB ¶3025 (June 30, 2003).

If you have any questions regarding these PERB cases, please contact Craig Atlas at 315-437-7600.

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No Private Lawsuits Permitted to Enforce Provisions of No Child Left Behind Act

A federal district court has ruled that "Congress did not intend to create individually enforceable rights with respect to the notice, transfer and SES provisions contained in NCLB" (the No Child Left Behind Act). In short, even though the NCLB imposes obligations upon public schools concerning the students in their charge, the court ruled that this law does not give students and their parents the right to sue to enforce a district's obligations.

Instead the court ruled that the responsibility to enforce the law rests with the United States Department of Education and the U.S. Education Secretary who has the power to withhold federal funding from districts which do not comply with the NCLB's provisions. The court ruled that an implied private right of action cannot fairly be read from the NCLB's provisions.

Following the Supreme Court's analysis in its decision in 2002 in *Gonzaga University v. Doe*, concerning the lack of a private cause of action under the Family Educational Rights and Privacy Act (FERPA), the court ruled that the NCLB did not reflect in clear and unambiguous language the interest of Congress to create individually enforceable rights.

(*Association of Community Organizations for Reform Now, et al. v. New York City Department of Education, Albany School District, et al.*, 338 F.Supp.2d 269 (SDNY, 6/25/03).)

New Fitness Program Offer Requires Cautious Approach

We have been contacted by a number of our clients about a unique proposal they have received from the National School Fitness Foundation ("NSFF"). NSFF has developed a Fitness Program curriculum specifically designed for school age children, utilizing strength/cardio-training equipment which NSFF provides. While the cost of the program and equipment is in excess of $250,000, NSFF offers to reimburse Districts for the costs of the program provided that the Districts fully implement the program and provide user data to NSFF so they can conduct fitness studies. ***The unique nature, the cost, and the numerous contracts involved in the NSFF program raise novel legal issues under state law and regulation.*** If you plan to enter into a negotiation with NSFF, we encourage you to seek our involvement early in the process by contacting Don Budmen.

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