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

School Law Matters

Latest legal developments and practical guidance for school officials & administrators November 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.

Symposium on Avoiding Costly Litigation to be Held December 8 in Syracuse

In early December, school officials in Upstate New York will have a unique opportunity to attend a symposium on avoiding costly litigation featuring nationally recognized school law attorneys. The symposium, entitled **"Avoiding the Costly Traps: A Practical Guide for Public Schools to Identify and Avoid Expensive Legal Problems"** will be held from 8:45 a.m. to 3:00 p.m. on December 8, 2004, at the Wyndham Hotel in East Syracuse. The event is sponsored by the Study Council at Syracuse University, School of Education at Syracuse University, Central New York School Boards Association, and Syracuse University Superintendents Alumni Association.

Among the guest speakers will be **Anthony G. Scariano, Esq.** Mr. Scariano is the founder of the law firm of Scariano, Himes, and Petrarca, Chtd. of Chicago, Illinois and is the current Chairman of the National Council of School Attorneys. He is also the attorney for the Northbrook, IL school districts recently in the national news because of the "Powder Puff" hazing incident involving their students. The program will also feature **Kenneth S. Ritzenberg, Esq.,** of Young, Sommer, Ward, Ritzenberg, Wooley, Baker & Moore LLC of Albany, New York, who represents both parents and schools in special education cases. Mr. Scariano and Mr. Ritzenberg will be joined by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. attorneys **Benjamin J. Ferrara, Marc H. Reitz, Dennis T. Barrett, Susan T. Johns and Henry F. Sobota.**

The symposium is divided into seven sessions. The first session on **"Child Proofing Your School: Avoiding Lawsuits Based on Student Injuries"** will focus on the legal standards that schools must meet in protecting children and how those standards are enforced when students are injured on a physical, mental/ emotional, or even constitutional basis.

Special guest speaker, Anthony G. Scariano, Esq., will then provide his perspective on **"When Off-Campus Conduct Warrants an On-Campus Response: Lessons Learned from the 'Powder Puff' Hazing Incident.**" He will teach participants the right way to deal with off-campus student misconduct.

The presenters will then focus on helping school officials avoid liability in the employment law setting. First, the **"Red Flag Audit: The Ten Most Common Employment Law Mistakes Made By Schools"** will guide participants through performing a self audit to determine whether they are at risk for employment-related lawsuits. Then, participants will learn the do's and don'ts of **"Investigating Employee Misconduct."** Understanding the rules pertaining to the collection of evidence and presenting it in either an administrative hearing or in a court setting are critical to making employee discipline stick.

In the afternoon session, the panel of speakers will be presenting two concurrent sessions. In **"Point, Counterpoint: Perspectives on Special Education Claims From Attorneys for Schools and Parents"**, special guest speaker Kenneth S. Ritzenberg, Esq., will provide his perspective on representing parents against school districts in special education claims and how to avoid such claims. He is joined by Susan T. Johns, Esq., for what should be a lively discussion from both sides of the aisle. The second concurrent session, "**Getting Your Ducks in a Row: Avoiding Pitfalls Involving School Finance and Business Practices,"** will sensitize administrators and business officials to the legal problems associated with the business operations of the school districts.

The last 30 minutes of the workshop will be dedicated to a **"Cracker Barrel"** session where our panel of experts will answer participants' questions.

If you have further questions, or wish to register for the symposium, contact The Study Council at Syracuse University at 315-443-4696. The ***registration deadline is December 3, 2004 or until program is full***. The fee for participating in the Symposium will be $200 for Study Council members, $220 for non-members.

Teacher Can Participate in After School Bible Club, Court Rules

A federal appeals court has held that an elementary school teacher can participate in an after-school religious club of children (such as the "Good News Club") even if the meetings are held at the same school where he/she is assigned to teach. *Wigg v. Sioux Falls School District*, __ F.3d __ (8th Cir. 2004).

In this case, the teacher was denied permission by school district officials to participate in meetings of the Good News Club at the school in which she taught, citing a potential violation of the First Amendment's Establishment Clause. While a federal district court denied the teacher's request to order the district to allow her to participate at her own school, it ruled that the teacher could participate in club meetings held at other schools. The district court reasoned that a reasonable observer would not view her as a teacher conducting another class but rather as a private citizen exercising her right to religious freedom.

On appeal, the United States Court of Appeals for the Eighth Circuit went beyond this holding, finding that no reasonable observer would mistake the teacher's participation (even at her own school) for the school district's endorsement of religion. The court noted that the school day will have ended before the club's activities begin and participation is limited to students who have parental permission to participate.

It should be noted that the decision does not mention or discuss the Equal Access Act, the federal legislation which governs meetings of voluntary and student-initiated religious clubs at the secondary level which meet during non-instructional time. That legislation provides that there may be no sponsorship of these meetings by a school district or its employees or agents, and that school district employees or agents may be present at these meetings only in a non-participating capacity.

Scope of FMLA Broadens … Again

A recent case highlights the fact that many lesser forms of adverse employment action can also result in employer liability under the Family and Medical Leave Act's less-publicized prohibition against "unlawful interference" with an employee's exercise of FMLA rights. In *Schmauch v. Honda of America Manufacturing*, a federal court concluded that an employer's actions in **extending the duration** of a disciplinary probationary period (due to attendance problems) could constitute a violation of the FMLA.

In *Schmauch*, Honda followed its attendance policy and placed an employee on "probation" because of his attendance. Under this policy, absences taken during that probationary period, including FMLA leave, extended the period by the number of days spent on such leave. Other categories of leave, however, such as leaves for bereavement, court appearances, etc. did not extend the probationary period. After returning from the FMLA leave but prior to the expiration of the extended probationary period, the employee had an unexcused absence. As a result, he was summarily terminated for violating his probation. The court in *Schmauch* found that the employer's probation extension violated the statute because it could have interfered with the employee's decision to exercise his rights under the FMLA.

In other words, any policy that potentially discourages an employee from exercising his right to FMLA leave may constitute unlawful interference.

Court Invalidates Parental Notification Requirement for Students Refusing to Recite Pledge of Allegiance

A federal appeals court has struck down a Pennsylvania law which, among things, required that a student's parents be notified when a student elected not to recite the Pledge of Allegiance based on "religious conviction or personal belief". *Circle School et al. v. Pappert*, ___ F3d ___ (3rd Cir. 2004). The United States Court of Appeals for the Third Circuit concluded that the requirement of parental notification constituted viewpoint discrimination for which the state had no compelling interest. The Court also held that the provision had the effect of coercing speech in contravention of the U.S. Supreme Court's 1943 decision in *West Virginia State Bd. of Education v. Barnette.* In that case, the Supreme court held that students cannot be compelled to recite the Pledge.

If you have any questions about this case, contact us at 315-437- 7600.

Department of Labor Issues First-Ever Military Leave Regulations

On September 20, 2004, the U.S. Department of Labor's (DOL) Veterans' Employment and Training Service issued proposed federal regulations under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). These are the first regulations issued under USERRA, which governs employee rights and employer obligations with regard to military leave.

The regulations, developed in consultation with the U.S. Department of Defense, are designed to bring greater clarity to USERRA by providing "clear and consistent guidance" regarding the statute's requirements for employers, veterans, and military reservists. For example, the proposal provides new guidance on situations where employees return from military leave to resume part-time, probationary, or seasonal positions, where the position formerly held by the employee is on layoff status and the employee is subject to recall, and where two or more returning service members claim reemployment rights to the same position. The regulations also clarify service members' benefits, such as health insurance coverage rights and benefits based on performance and/or seniority. The regulations also are intended to clarify USERRA's protections of returning service members against discharge as an exception to the employment-at-will doctrine. The proposed regulations invite public comments for a 60-day period. Following this 60-day period, the DOL plans to issue final regulations which would become effective 30 days from the date of that publication.

To obtain a copy of the proposed regulations, visit the DOL's web site at http://www.dol.gov/vets/programs/userra/main.htm.

Court Upholds School District's Exclusive "Pouring Rights" Contract With Coca-Cola

A New York State Court recently sustained the Commissioner of Education's decision to uphold the Fulton City School District's exclusive pouring rights agreement with Coca-Cola. American Quality Beverages v. Mills, ___ Misc.2d ___, No.6-03 (Sup.Ct., Albany Co., Oct. 7, 2004). This agreement made Coca-Cola the exclusive provider of soft drinks in the District's schools and at District-sponsored events.

In its case against the District, another beverage provider (American Quality Beverages) and a taxpayer/parent in the District challenged the District's agreement with Coca-Cola on the basis that it violated federal and state law. Specifically, they claimed it violated: (1) nutritional restrictions established by the U.S. Department of Agriculture and New York State Education Law, (2) New York State Board of Regents regulations against commercialism in public schools, (3) competitive bidding requirements under the General Municipal Law, and (4) the New York State Constitution, in that such agreements were not in keeping with "proper school purpose".

The Court disagreed. The Court noted that Education Law §1709(22) authorizes a Board of Education to provide cafeteria or restaurant service. Accordingly, an agreement with Coca-Cola to provide soft drinks is properly authorized. It also noted that the District properly followed the competitive bidding requirements of General Municipal Law and Education Law in "awarding a license, concession or franchise rather than . . . [running] a cafeteria or restaurant service." The Court found that Coca-Cola was the successful bidder in response to request for proposals.

The bottom line is ...

School district officials considering exclusive vending rights agreements should work closely with their attorney to ensure that their agreements can withstand these common legal attacks.

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Court Upholds "Pouring Rights" Contract (cont'd)

The Court also noted the following:

- The use of backlit vending machines does not violate the prohibition against commercial promotional activity being conveyed to students electronically under the Board of Regents regulations;
- The agreement provides that Coca-Cola must comply with the regulations related to commercialism in public schools and comply with the nutritional restrictions required by the U.S. Department of Agriculture and New York State Education Law;
- The agreement grants valid license or concession to Coca-Cola in the furtherance of a proper school district purpose for fair and adequate consideration and, therefore, is not violative of the New York State Constitution.

School districts considering similar contracts should work closely with their attorney to ensure that their agreements can withstand similar attacks. If you have any questions regarding this decision or need assistance with an exclusive vending agreement, please feel free to contact us at (315) 437-7600.

REMINDER: Public Music Concerts Have Copyright Implications

The live performance of a copyrighted musical work in a school's public concert is governed by Copyright Law, Section 110(4). This section requires that the school district notify the copyright owner prior to the performance and allow that owner an opportunity to object. If the owner does not object, the school district is free to perform the work without obtaining a license or paying royalties. If the owner does object, some license or other permission would need to be obtained.

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