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

School Law Matters

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

Assistant Principal May Impose In-School Suspension

For many years the Commissioner of Education has held that an assistant principal (as opposed to an acting principal) may not impose an out-of-school student suspension. However, in a recent case handled by the ***Ferrara, Fiorenza Law Firm***, the Commissioner held that an assistant principal may impose in-school suspensions.

In this case, the student in question was given a three-day in-school suspension for refusing to wear his identification tag and for continuing to talk during a silent reading period even after a teacher's aide directed him to stop. On appeal, the parent argued that the assistant principal had no authority to impose an in-school suspension.

The Commissioner disagreed, stating that ***in-school suspensions are not governed by Education Law Section 3214***, the statute which deals with out-of-school suspensions. The Commissioner went on to state that:

> procedures governing in-school suspensions need only be fair and give students and their parents an opportunity to discuss the conduct being reviewed with the person or body authorized to impose the discipline.

In this case, the Commissioner ruled that the parent and his son were afforded adequate due process since they met initially with the assistant principal and then were allowed to meet with the middle school principal and ultimately appear before the board of education (*Appeal of M.C.*, Decision No. 14993 [December 8, 2003]).

Series of Light Penalties Does Not Justify Student Expulsion

The Commissioner of Education has ruled that a student who received numerous suspensions — of five days or less — over a two-year period should not be expelled for the accumulation of those incidents.

In this case, the student involved was found guilty of smoking marijuana on school grounds. The Commissioner commented that ***while such conduct is not to be tolerated, it does not, by itself, evidence an alarming disregard for the safety of others.*** The Commissioner also noted that there was nothing in the record to show that the extreme penalty of expulsion was necessary to protect other students.

While the District argued that expulsion was justified because the student had over 80 incidents of lateness, smoking, cutting class, using foul language, insubordination and disruptive behavior, including possessing a razor blade on school grounds, they did not now create a basis for expulsion when viewed with the current incident when none of these infractions were given more than a five-day suspension.

In light of this decision, districts would be wise to impose a series of progressive disciplinary penalties when students engage in repeated infractions if they wish to seek the ultimate penalty of expulsion.

(*Appeal of Y.M.*, Decision No. 14968 [October 9, 2003]).

Settlement Agreement Required District's ERIP to Include Teacher

A recent case illustrates the significance of the specific language used in a settlement agreement. See *Pfister v. Watertown City School District*, 100 N.Y.2d 610 (September 23, 2003).

A school district and a teacher agreed to settle an improper practice charge. The teacher agreed to retire. The settlement agreement stated that "the School District will allow [the teacher] to be eligible for and participate in the retirement incentive program" that was being considered by the State, in the event that the district opted to participate in the program. When the State passed a law authorizing the early retirement incentive, the district opted to participate in the program. However, the district targeted the incentive to cover certain positions that did not include the one held by the plaintiff.

A five-judge panel of the Appellate Division split 3-2 on how the agreement should be interpreted. The majority found that the language of the agreement was ambiguous, and therefore considered "parol" evidence, or evidence from sources outside the agreement. That evidence indicated that the parties only intended to ensure that the teacher would not be precluded from participating in any future early retirement incentive program by her resignation.

On the other hand, the two-judge minority found that the agreement was "clear, complete and unambiguous", and that it affirmatively required the district to permit the teacher to participate in the early retirement incentive program if the district opted to participate in it.

On appeal, the Court of Appeals reversed. It agreed with the two dissenting Appellate Division judges that the language of the settlement agreement was unambiguous. The court determined that, as a matter of law, once the district chose to participate in the State early retirement incentive program, it had no discretion to structure that plan in a manner that would deny the plaintiff the opportunity "to be eligible for and participate in" the program.

New York's Highest Court Will Not Second Guess Arbitrator

The New York State Court of Appeals has continued to articulate its view that, when the parties have agreed to arbitrate disputes, courts should only rarely intervene to prevent arbitration from taking place or to overturn the arbitrator's award. *United Fed. of Teachers v. Bd. of Ed. of City Sch. Dist.*, 2003 WL 22725405 (11/20/03).

A school district in New York City posted an announcement for vacancies in the position of "Per Session Teacher–Project Read After-School Program". The selection criteria listed included a preference for teachers holding Early Childhood/Reading Licenses. An elementary school principal selected six teachers based on their applications and experience. Only two of them had the preferred licenses. The principal did not select elementary school Teacher A, who also did not have that type of license. The District and the teachers' union agreed that Teacher A was "qualified" for the position. However, in the judgment of the principal, the six teachers who were selected were more qualified. The union contended that Teacher A should have been chosen, and filed a grievance. The parties submitted the grievance to arbitration. The arbitrator determined that the District violated a collective bargaining agreement provision requiring the selection decision not be "arbitrary or capricious." Consequently, she ordered the District to place Teacher A in one of the positions at issue, with back pay.

On appeal by the District, the Appellate Division vacated the arbitration award. It held that the award violated public policy by impermissibly infringing on the non-delegable responsibility of the district to maintain educational standards. In other words, the court thought that it ***should not second-guess the District's decision*** regarding which teacher is more qualified than another for a particular position. The court also determined that the arbitrator exceeded her authority under the specific language of the collective bargaining agreement.

However, the Court of Appeals unanimously reversed. It concluded that the award did not violate public policy and that the arbitrator did not exceed her authority under the contract.

The Court of Appeals declared that ***"the scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow".*** It cited the test used in its 2002 City of Johnstown case: (1) an arbitrator may not act

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New York's Highest Court Will Not Second Guess Arbitrator (continued)

when a law absolutely prohibits arbitration of the particular matter to be decided, and (2) an arbitrator may not issue an award which "violates a well-defined constitutional, statutory or common law of this State".

For many years, the Court of Appeals has held that public policy prohibits a board of education from bargaining away its ultimate responsibility to decide whether to grant tenure. However, in its opinion dated November 20, 2003, the court stated that ***it has never held that an award violates public policy simply because it affects teacher qualifications.*** In this case, the court said that the award did not force the District to select a non-qualified candidate for a teaching position. Rather, the arbitrator found that, by failing to select a particular qualified candidate, the District had used an arbitrary and capricious selection process.

The court found that public policy does not require that a school district's choice ***from among qualified candidates*** for after-school teaching positions be immune from review (or "second guessing") by an arbitrator. The court left open the question of to what extent public policy may limit the ability of an arbitrator to review a school district's decision regarding the qualifications for employing a teacher in a regular classroom setting. It suggested that it might consider that question in the future, in the context of another case with different facts.

The Court of Appeals also held that the arbitrator did not exceed the scope of her authority under the contract. In doing so, the court stated that it would not substitute its judgment for that of the arbitrator simply because the court might believe that its interpretation would be the better one, even if the arbitrator made an error of law or fact. The arbitrator determined that the dispute fell within the scope of a particular article of the contract, and that the principal's decision-making process was arbitrary and capricious. Even though the court thought that these findings were "highly debatable", it did not matter whether the judges agreed with the arbitrator.

One lesson for school districts from this case is to look carefully at what your contract requires with respect to the personnel selection process. If it requires that your selections not be "arbitrary or capricious" or if it requires that seniority (or some other single factor) governs the selection if all other factors are "equal," ***make certain that you clearly differentiate among the various candidates in connection with the evaluative criteria.*** In other words, if you are able to clearly demonstrate that the candidates selected were better qualified based on objective standards, you can avoid the "second guessing" of your selections.

If you need assistance in this area, please contact our office at 315-437-7600.

I-9 Mistakes: Fix Them — But Don't Cover It Up

The U.S. Citizenship and Immigration Services (USCIS), formerly the Immigration and Naturalization Service (INS), recognizes that employers will make mistakes on their Form I-9's (the Employment Eligibility Verification Forms). However, the USCIS looks favorably on employer efforts to rectify those errors. The USCIS encourages employers to conduct internal audits of their records and to make corrections where needed. However, if employers go back to make corrections as part of a "self-audit", efforts should be made to make sure that any updates or corrections are clearly identified.

Corrected I-9 Forms should never be backdated. Any and all corrections and additions should be initialed and dated by the person making the change. A memo can be also included with the I-9 files to summarize the steps that were taken to correct the Form.

No attempt should be made to fill in data that cannot be verified after the fact. For example, if the original I-9 did not indicate the date on which the form was completed, the employer should not guess or make up a date that cannot otherwise be independently verified. Those types of omissions simply cannot be corrected after the fact, and the employer is best served by demonstrating to the USCIS that corrective action was taken to avoid that type of mistake or omission in the future.

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Students Hurting Students: School District Liability?

Shoemaker v. Whitney Point Central School District, 299 A.D.2d 719 (3d Dept., 2002). Plaintiff brought an action to recover for injuries sustained by his son, Jeremy Shoemaker, during a December 20, 2000 altercation with a fellow student on the playground of Whitney Point Middle School. Following discovery, the District moved for summary judgment dismissing the complaint upon the ground that it was not negligent in its supervision of the students and that such negligence was not in any event a proximate cause of Jeremy's injuries because the altercation was an "unanticipated intervening act."

The Court refused to dismiss the case noting that plaintiff alleged evidence tending to establish that the aggressor pursued Jeremy for as long as two minutes while a schoolteacher watched from a nearby doorway. Given that evidence and the fact that no school personnel were present on the playground at the time of the incident, the Court concluded that there was an unresolved factual issue as to whether, had school personnel been in a position to intercede on Jeremy's behalf, such intervention may have prevented his injuries.

Marshall v. Cortland Enlarged City School Dist., 265 A.D.2d 782 (3d Dept., 1999). Plaintiff's daughter Melissa was murdered by fellow student Matthew Covington. At the time of the incident, Covington and Melissa were both special education students in their senior year at Cortland Senior High School in Cortland County. The tragedy took place during the students' lunch period, outside the school buildings in a wooded area of the school property. Melissa's parents sued the District alleging that it was negligent in failing to properly supervise the students. The District made a motion to dismiss the complaint.

The case was dismissed as the Court was unpersuaded that the evidence submitted by Melissa's parents created a factual issue as to whether Covington's past behavior put District on notice that he was dangerous and needed mental health counseling and monitoring. The Court was also unpersuaded by plaintiff's contentions that the District was on notice that the wooded area where Melissa was killed was inherently dangerous, thereby giving rise to a duty to provide additional supervision or security. Likewise, the District did not owe Melissa a heightened duty of care because she was a special education student.

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