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

School Law Matters

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

Referees Issue Report and Recommendations in *Campaign for Fiscal Equity* Case

On November 30, the Panel of Judicial Referees, appointed by State Supreme Court Justice Leland DeGrasse in the *Campaign for Fiscal Equity* school funding case, issued its unanimous "Report and Recommendations" to Justice DeGrasse concerning school funding, capital spending, accountability and other issues. In its report, the Panel concluded that the funding estimates (or "costing-out analysis" figures) submitted by the State were grossly inadequate to provide a "sound basic education" (mandated by the New York State Constitution) to students in the New York City school system.

Operating Aid

The Panel noted that the costing-out analysis was "heavily influenced by the per-pupil weight adjustments the State use[d] to account for the additional costs associated with educating low-income, ELL and special education students ...". Specifically, the State multiplied a 1.35 per pupil weight adjustment for such students. The Panel recommended using at least 1.5 as a conservative starting point in that formula. Using those adjusted figures, the Panel ultimately concluded that an additional $5.63 billion in operating aid would be necessary to properly educate the students in the New York City school system. It is interesting to note that these figures are nearly identical to proposals submitted by the *CFE* plaintiffs and various groups that supported CFE, including the Midstate School Finance Consortium (which includes, as members, many of the clients we serve).

Facilities Funding

The Panel also recommended an additional $9.2 billion for facilities improvement for new classrooms, libraries, laboratories and other facilities. It stated that the "BRICKS" plan proposed by the CFE plaintiffs was the most accurate estimate of the cost of ensuring the facilities necessary to provide a sound basic education for New York City students.

Timing of Changes

Significantly, the Panel recommended that the State would have just 90 days to make the necessary funding available to New York City's public schools. The Panel stated that a further delay would only worsen matters, and that any phase-in period would begin with the 2005-06 school year. As opposed to the State's five-year implementation proposal, the Panel's proposed funding increases account for inflation adjustments and specifically call for a 25%-50%-75%-100% four year phase-in. The four-year phase in plan would ensure that New York City's public schools receive an additional $1.4 billion for the 2004-05 school year.

Hope for Non-NYC School Districts

For upstate school districts, the Panel stated that while statewide education aid reform was beyond their jurisdictional mandate, it strongly supported such reform and the goal of statewide formula simplification. In addition, the Panel made clear that the Court does have the broad, equitable authority to implement a timely remedy in the event that the Legislature and the Governor do not act quickly to implement the necessary reform. The Panel cited numerous state and federal court decisions which detail the authority of the Courts to punish state governments that refuse to comply with directives to remedy violations of constitutional rights.

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Referees Issue Report and Recommendations in *Campaign for Fiscal Equity* Case (continued)

The Panel's recommendations are a positive sign for all districts that have been waiting patiently for promised statewide educational finance reform. We will continue to closely monitor this case for all our school district clients and particularly through our work for the Midstate School Finance Consortium. Hopefully, other districts will not have to take the same course of action as the plaintiffs in the *CFE* case to obtain sufficient funding to ensure a sound basic education for all their students.

A copy of the "Report and Recommendations of the Judicial Referees" can be found online at: http://www.cfequity.org/compliance/RefereesFinalReport11.30.04.pdf. If you have any questions about this case or the Referees' Report, please contact either Ben Ferrara or Norm Gross at our office.

Suspension of Students by BOCES and Home District

When a student is suspended for conduct occurring at BOCES, questions often come up regarding the roles of BOCES and the home school district. The suspension from the home school district should be imposed by the district. However, the Commissioner of Education has held that both the district and BOCES may suspend a student from BOCES programs sponsored by the district. *Appeal of Bartlett*, 33 Ed. Dept. Rep. 234, Decision No. 13,036 (1993).

Under Section 3214 of the Education Law, a hearing is required when a penalty of a suspension for more than five school days is sought. In our view, it is usually preferable for the home school district to conduct the hearing. This avoids the need for BOCES to conduct a second hearing. It would be best if BOCES and the District could reach an understanding that this procedure will be followed. However, the Commissioner has held that if there is no such agreement regarding this arrangement, BOCES remains responsible for providing notice and a hearing. *Appeal of a Student with a Disability*, 33 Ed. Dept. Rep. 101, Decision No. 12,992 (1993).

The New IDEA

On November 19, 2004 Congress passed legislation to re-authorize the Individuals with Disabilities Education Act or "IDEA". The President is expected to sign a new bill into law shortly.

The bill is over 300 pages long and addresses a significant number of policy areas. The new IDEA attempts to tie special educator "highly qualified" requirements to the subject matter requirements for general educators in the No Child Left Behind Act.

The New IDEA also addresses funding, performance goals and indicators, evaluations, IEP content and team attendance, student discipline and procedural safeguards.

The practical implications of the bill will not be fully known until final regulations are issued some time this Summer.

We will continue to provide updates and guidance once the legislation is finalized and the regulations issued.

School Retiree Not Entitled to Unemployment Insurance Benefits

A New York Appellate Court recently upheld the decision of the Unemployment Insurance Appeal Board disqualifying an employee of the Brighton Central School District from receiving unemployment insurance benefits because she voluntarily left her employment without good cause. *Berlowitz v. Brighton Central Sch. Dist.*, ___AD2d ___, 783 N.Y.S.2d 437 (3rd Dept. 2004). The employee had been employed with the District since 1984 as a tutor. She retired in August of 2003. Her motivation for retirement was an understanding that, as a retiree, she could collect her retirement benefits while earning additional income by continuing to work for the District for the 2003-2004 school year at the same rate of pay so long as federal funding for her program remained available.

The Court held that an individual who leaves employment, while continuing work is available, in order to obtain advantageous retirement benefits may be disqualified from receiving unemployment insurance payments on the ground that the resignation was for personal and non-compelling reasons. Since continuing work was available for the 2003-2004 school year, had the employee not retired, the Court held the employee voluntarily left her employment without good cause.

No Tenure Credit for Uncertified Substitutes, Says Appellate Court

The New York State Appellate Division, Fourth Department, recently upheld a lower court's ruling, under which a substitute teacher cannot earn "Jarema credit" (toward completion of the probationary period) if the teacher is not provisionally or permanently certified.

Jarema credit is authorized by a provision in Section 3012(1)(a) of the Education Law which states, in pertinent part:

> Teachers ... shall be appointed ... for a probationary period of three years, except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years ... the probationary period shall be limited to one year ....

This provision takes its informal name from its legislative sponsor, former Assemblyman Stephen Jarema.

Despite the reference in the provision to substitute service totaling "two years," the Commissioner has ruled that a substitute teacher can earn prorated Jarema credit for as little as one term or more, if it is in the same field in which he/she is later given a probationary appointment. Thus, one term of such substitute service results in a probationary period that must be shortened by one term.

However, in 2003, a State Supreme Court Judge in Monroe County ruled that Jarema credit could not be given to a regular substitute who did not possess a valid teacher's certificate. *Pierce v. Monroe 2 Orleans BOCES*, 195 Misc.2d 178 (2003). Normally, a School District is prohibited from employing an uncertified teacher. In that case, though substitute Pierce was lawfully employed because he held a series of temporary licenses. With the Jarema credit, Pierce would have earned tenure by estoppel. The BOCES Board's attempt to deny him tenure would have been ineffectual. Nevertheless, the Court ruled that a temporary license was not enough of a credential for Pierce to earn Jarema credit. The Court explained:

> "Only a person who is fully and properly qualified may obtain tenure. ... Otherwise [Pierce] would be the recipient of the anomalous result of earning tenure by estoppel prior to even obtaining a provisional teacher's certificate."

The Appellate Division, Fourth Department has now upheld the lower court's ruling. The Fourth Department's decision is very brief, stating only that its affirmance was "for the reasons stated in [the] decision at Supreme Court." *Pierce v. Monroe 2 Orleans BOCES*, __ A.D.2d __ (4th Dept., 11/19/04).

School Sued for Student's Dodgeball Injury

Parents of a 7-year old child commenced an action against a school district to recover damages for injuries the child sustained when she fell and fractured her arm while playing "multiple ball" dodgeball at school. *Lindaman v. Vestal C.S.D.* ___AD2d ___ (3rd Dept. 2004). The School District moved for summary judgment dismissing the complaint, asserting that the game was safe and adequately supervised by a teacher, and that the accident was unforeseeable. In opposition, the parents asserted that the game was inappropriate for 7-year old children, making it foreseeable that their daughter would be injured.

The Appellate Division, Third Department, affirmed the Supreme Court's order denying the School District's motion for summary judgment. In so holding, the Court relied on an affidavit of an expert in sports, recreation and educational safety. The expert asserted that, while there are no established standards of age appropriateness for dodgeball, it is recognized as a potentially dangerous activity, and has been banned by several school districts in New York and elsewhere. He also opined that the game of dodgeball is not appropriate for students below the 4th grade level and that the version of the dodgeball played in this case was particularly dangerous for younger children. The Court ultimately concluded that the expert's affidavit created a question of fact with regard to whether dodgeball was a safe and appropriate activity for the student at issue in this case.

SCHOOL LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Still Time to Register for Symposium

There is still time to register for the Education Law symposium, entitled **"Avoiding the Costly Traps: A Practical Guide for Public Schools to Identify and Avoid Expensive Legal Problems."** It 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. Mr. Scariano 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.**

To register for the symposium, contact The Study Council at Syracuse University at 315-443-4696. The fee for participating in the Symposium will be $200 for Study Council members, $220 for non-members.

Did you know...?

Did you know that if an employee files a lawsuit against its employer for discrimination and loses, employers are generally **not** entitled attorneys' fees? Courts will only award attorneys' fees to employers where the lawsuit is "frivolous, unreasonable, or without foundation." This is an extremely difficult standard to meet. In contrast, federal anti-discrimination statutes (e.g., Title VII of the Civil Rights Act of 1964) permit an employee who is successful in his/her suit to be awarded attorneys' fees without any showing that the employer's defense was unreasonable or frivolous.

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