School Law Matters

March 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

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

Law Firm's Attorneys To Brief School Administrators on Student Discipline and Counseling School Employees on March 15

The Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. will be presenting the next installment of its "School Law Briefing Series" of workshops on March 15, 2007. The **"Winter Session 2007"** briefing will feature firm attorneys **Donald E. Budmen, Esq., Colleen W. Heinrich, Esq.** and **Henry F. Sobota, Esq.** presenting on topics related to student discipline and counseling school employees. The workshop will be held from 8:00 a.m. to 11:30 a.m. at the Desmond Hotel and Conference Center, 6600 Albany Shaker Road, Albany, New York. At every workshop, the Firm's attorneys present participants with an analysis of — and strategies for addressing — timely legal issues facing school administrators.

"Winter Session 2007" will provide participants with an overview of student discipline including the procedural requirements and pitfalls involved in student suspensions. It will also provide administrators with a detailed guide on how to write a counseling memorandum for employees with performance problems. Specifically, the Firm's Attorneys will present the following:

- **"Fundamentals of Student Discipline"**

Donald Budmen, Esq. will discuss the legal rules governing student discipline which are often complex and can seem overwhelming for many school administrators. This portion of the program is designed to provide participants with a practical guide for performing the necessary functions of this highly-regulated — and often litigated — activity.

- **"Special Education Considerations in Student Disciplinary Cases"**

Colleen Heinrich, Esq. will be presenting on the many issues that must be considered when disciplining students with disabilities so that the student's right to a "free and appropriate education" (FAPE) is not violated. The Individuals with Disabilities Education Act (IDEA) and New York law include several rules unique to the discipline of students with disabilities, including students who are "presumed" to be disabled. Issues involve, for example, when and what to consider in making a manifestation determination; how to deal with students with drugs or weapons or who inflict serious bodily injury; and what to do with students who are believed to be "dangerous."

This portion of the program will guide you through this maze of laws and regulations to help you avoid the costly litigation that often results from noncompliance.

- **"Documentation in a Nutshell: How to Write a Good Counseling Memo"**

In the final session of the morning, Henry Sobota, Esq., will cover how to write a good counseling memo to a teacher or other school employee without running afoul of the requirements of the law, Commissioner's and court decisions or the collective bargaining agreement. This session will also examine the rules governing investigation of incidents and questioning of employees, including what to do when an employee refuses to answer a supervisor's questions or "takes the Fifth." The session will also explore the difference between formal and informal evaluation, and will examine the use of evaluation documents in the remediation process.

Registration for the Event

There is **NO REGISTRATION FEE** for Winter Session 2007. Please register at our website **www.ferrarafirm.com**. Simply click on the item "School Law Briefing on Student Discipline and Counseling Employees" from the Events Calendar on our firm's home page, then click on "Register Now" and complete the online form. Click Submit and you're registered.

You may also register by telephone or email (as indicated below) by providing your name, the name of your school district or organization and the names of all participants who will be attending. **To Register:**

- By telephone — Call **315.437.7600.**
- By e-mail — Send your information to **njgross@ferrarafirm.com.**

In This Issue …

Ferrara-Fiorenza Law Firm Welcomes New Partners and Associates

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. in East Syracuse takes great pleasure in announcing that **Miles G. Lawlor** and **Michael L. Dodd** have been elected Partners of the Firm.

Mr. Lawlor, of Manlius, devotes a substantial portion of his practice to employment and labor relations matters, including the representation of school districts and other employers in the public and private sector. He also writes extensively with respect to employer obligations under various laws, and preventive maintenance techniques.

Mr. Dodd, of Liverpool, works with the Firm in the day-to-day representation and counseling of public and private sector employers. He is a member of the New York State Bar Association and the Onondaga County Bar Association.

The Firm is also pleased to announce that **Kristin B. Greeley**, **Katherine E. Gavett** and **Daniel J. Petrone** have become associated with the Firm.

Ms. Greeley, of Syracuse, currently concentrates her practice on representation of school districts in various matters. She serves on the Board of Directors of the Onondaga County Bar Association, and is treasurer of the Onondaga County Bar Foundation. In June 2006, she began her first term representing the Fifth Judicial District in the New York State Bar Association House of Delegates.

Prior to joining Ferrara, Fiorenza, **Ms. Gavett,** of Camillus**,** concentrated her practice in civil litigation. Her current practice focuses on representation in contract, employment and education law matters. She is a member of the New York State Academy of Trial Lawyers and Onondaga County Bar Association.

Mr. Petrone, of Camillus, graduated from the State University of New York at Buffalo School of Law in 2006. While at Buffalo, Mr. Petrone clerked for the Erie County Family Court and also worked for a private firm concentrating in education law. He works with the Firm in the representation related to education, employment and labor relations matters.

Other Changes At The Firm

As you may have noticed, we have redesigned our Firm's Newsletter. We have also redesigned our website, www.ferrarafirm.com. Please visit the site and feel free to email us your comments and suggestions regarding both changes.

Inappropriate Staff/Student Relationship Warrants Stronger Penalty, Court Says

Teachers who have inappropriate relationships with students should not be given a "second chance" with other students, according to a New York appellate court. *Binghamton City School District v. Peacock,* 33 A.D.3d 1074 (3d Dep't 2006), *appeal dismissed by* __N.Y.3d __ (2007). In this case, a 32-year old married male teacher had a personal relationship with a 16-year-old student both in and outside of school. This was in spite of the fact that he was directed by school officials to stay away from the student.

The hearing officer presiding over the teacher's ensuing disciplinary hearing (under Education Law section 3020-a) found that the teacher, over a six-month period, called the student over 1,500 times on his cell phone. The teacher and student were also alone frequently at school, even though she was not in any of his classes. The student told her mother that the teacher said he loved her and would leave his wife to be with her when she turned 18. The incidents culminated in the teacher leaving school without permission during final exams, and driving the student to his house at a time when he knew his wife would not be home. They remained in his home, alone, for six hours, until the student's mother arrived and demanded that the girl come out.

The hearing officer imposed a one-year unpaid leave. He did so because, although he found that there was an inappropriate relationship, there was not enough evidence to prove that the relationship was sexual in nature.

The District appealed the hearing officer's decision to the Broome County Supreme Court. The Court overturned the decision, holding that the penalty was "shockingly lenient," given the potential liability the District would face if the teacher began another similar relationship with a student in the future. The Court sent the case back to the hearing officer for a new penalty. After taking no additional testimony, the hearing officer imposed a two-year unpaid leave. In the meantime, the teacher appealed the Supreme Court's rejection of the initial penalty. The District then appealed the two-year suspension to the Supreme Court as well.

The Appellate Division, Third Department, found that the one-year suspension violated the "strong public policy" to protect children from harm by adults. The suspension not only failed to protect the student in question from harm, but also failed to protect future students. After the Appellate Division issued its decision, the Supreme Court in Broome County found that the two-year suspension was similarly insufficient to protect students.

This decision illustrates the fact that school districts have legal alternatives when hearing officers impose "shockingly lenient" penalties, especially in situations involving inappropriate relationships between staff and students.

Ten-Week Suspension Upheld For Student Who Failed to Report a Bomb Threat

While bomb threats will certainly warrant long-term student suspensions, a recent decision by the Commissioner of Education indicates that failing to report a bomb threat can result in similar consequences. (*Appeal of A.S.*, 46 Ed Dept Rep ___, Decision No. 15,514, dated December 28, 2006.)

In this case, M.S., a seventh-grade student, witnessed a fellow student writing the words "bomb threat" on the mirror in the girls' bathroom. After the writing was discovered, the school was evacuated and searched, but no bomb was found. When the students returned to their classrooms, the principal made an announcement over the P.A. system directing students with information concerning the incident to come forward. M.S. failed to come forward.

Thereafter, the assistant principal identified M.S. on a videotape leaving the bathroom with another girl at the time of the writing. M.S. was subsequently questioned about the incident; M.S. stated that the words were already written on the mirror when she entered the bathroom and that she did not know who wrote them. Later the student who wrote the words came forward and admitted to doing so; only after this did M.S. admit to having witnessed the writing. As a result, M.S. was suspended for five days by the principal and was later found guilty by the superintendent of endangering the health and safety of students and staff and insubordination. M.S. was suspended for ten weeks and subsequently appealed.

As you probably know, Education Law section 3214 authorizes a superintendent of schools to suspend a "pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others." In all cases of student discipline, however, the sanction imposed must be proportionate to the severity of the offense involved. The test that the Commissioner will apply in reviewing any such penalty is whether it is so excessive as to warrant the substitution of the Commissioner's judgment for that of the school district.

In this case, the Commissioner held that M.S.'s penalty was proportionate to the severity of the offense and thus was not excessive. In doing so, The Commissioner noted that there was sufficient evidence to support the finding that M.S. was guilty of insubordination and a reporting violation because she admitted to witnessing the writing, acknowledged the fact that she heard the announcement and acknowledged that she knew the announcement was made in response to the incident she had witnessed. Under these circumstances, the Commissioner held that the ten-week suspension was proper.

Please note that in arriving at such a decision the Commissioner made special mention of the District's Code of Conduct definition of "insubordination" and their Code section entitled "Endangering the Health and Safety or Yourself and/or Others." Specifically, he noted that the District's Code imposed an affirmative duty to report violations of the Code of Conduct to a teacher, counselor or administrator. ***In light of this decision, school districts may wish to consider including a similar affirmative duty in their Codes of Conduct.***

Federal Court Holds Administrator's "Speech" About Hazing Incident Protected

A federal Court of Appeals recently held that a school district may have improperly terminated its athletic director in retaliation for speaking out in public about a hazing incident at the school. The Court found that such speech was protected under the First Amendment to the U.S. Constitution. *Cioffi v. Averill Park Central S.D. Bd. of Ed.*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 382 (2006).

In this case, Mr. Cioffi wrote a letter to the Board of Education criticizing its members for their handling of a hazing incident involving the school's football team. He also complained about the football coach's lack of supervision of the team and alleged encouragement of its athletes to use creatine, a performance-enhancing substance. While a recent U.S. Supreme Court decision (*Garcetti v. Ceballos*, 126 S.Ct. 1951 [2006]) held that a public employee's criticism of his/her superiors as part of his/her "official duties" is **not** necessarily "protected speech", Cioffi did not stop with the letter to the Board. Rather, he held a press conference expressing similar views. This speech **was** protected from retaliation, the Court held.

In order for a public employee to prove retaliation, he/se must show: 1) the speech involved a matter of public concern; 2) there was an adverse employment decision; and 3) a causal relationship between the speech and the adverse decision, so that it can be said that the speech was a substantial motivating factor in the decision.

Continued on next page

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

Federal Court Holds Administrator's "Speech" About Hazing Incident Protected (cont'd)

The Court found that Mr. Cioffi's speech involved a matter of public concern because it concerned the health and safety of public school students. There was no question that the employment decision was adverse. On the issue of causal connection, Mr. Cioffi showed that the speech might be causally related to his termination because of the short amount of time between the speech and the Board's elimination of his job. The Court also found it questionable that the Board would have saved money by eliminating Mr. Cioffi's position as was alleged by the District.

Based on this this case, school officials should be mindful of the timing of their employment decisions so as to avoid similar retaliation claims.

"Taylor Law" Does Not Require Union Rep Presence at Investigation, New York High Court Says

In 2002, the New York State Public Employment Relations Board (PERB) held that New York Civil Service Law, Article 14 (referred to as the Taylor Law) gives public employees the right to union representation during questioning by their employer that could lead to disciplinary action. This is often called a *Weingarten* right, after a decision by the U.S. Supreme Court holding that private sector employees who are covered by the National Labor Relations Act (NLRA) have this right. The New York State Court of Appeals has now overturned PERB's 2002 decision. This is because the *Weingarten* case was based on a statement in the NLRA that employees have the right to "engage in concerted activities for ... mutual aid or protection". Since the Taylor Law does not include this language, the court held that it does not include this right. *N.Y. City Transit Authority v. PERB*, 2007 WL 505418 (February 20, 2007).

While this is a victory for public employers, it may be short-lived. Within days of the Court's decision, bills were introduced in the State Senate and Assembly to amend the Taylor Law to expressly include this right.

You should remember that school employees may have other rights which are not affected by this decision:

1. Employees covered by Section 75 of the Civil Service Law have the right to union representation during investigatory interviews.

2. Some collective bargaining agreements may provide a contractual right of union representation.

3. If there has been a past practice of permitting union representation during investigatory interviews, PERB could determine that it is improper for an employer to discontinue this practice.

4. The Commissioner of Education and the courts have held that a tenured teacher may not be disciplined for refusing to answer an employer's questions.

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