School Law Matters

April 2008

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

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

School Districts Must Balance Duty to Accommodate Employee's Religious Practices With Establishment Clause

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of religion, "unless an employer demonstrates that [it] is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business". (42 USCS § 2000e(j)). Under the statute, religion is defined as including "all aspects of religious observance and practice, as well as belief."

As a public employer, public school districts have to balance this duty to accommodate under Title VII with its duty to avoid Establishment Clause violations (i.e., "separation of church and state"). That is, District policies and actions must have a secular purpose, must not have the primary effect of advancing or hindering religion, and must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The Seventh Circuit Court of Appeals has recently reasserted the public employer's burden of keeping an appropriate balance between these sometimes competing legal requirements.

The case involved a public school guidance counselor whose contract was not renewed at the end of her three-year probationary term of employment. *Grossman v. South Shore Public School District*, 507 F.3d 1097 (7th Cir., 2007). The guidance counselor argued that her contract was not renewed because the District was hostile to her religious beliefs.

The School District justified its decision not to renew the guidance counselor's contract because soon after she began her employment (and without consulting her supervisors), she discarded literature instructing students on the use of condoms and replaced them with pamphlets that advocated abstinence. There were also reports of the counselor praying with students when they came to her with difficulties. The School District sought and was granted summary judgment in district court dismissing the guidance counselor's religious discrimination claim.

Looking at the facts, the district court found that the plaintiff was unable to show that the District's decision not to renew her contract was motivated by any administrator's opinion or feelings about her religious beliefs. The Court found that the decision was based on the guidance counselor's problematic approach to performing the functions of her job, and not her underlying religious beliefs.

The Seventh Circuit Court of Appeals affirmed the lower court decision, finding that the counselor was fired because of her conduct, and not because of her religious beliefs. In so finding, the appellate court reaffirmed the legal principal that "teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause."

Balancing these legal and constitutional requirements can be a difficult task. If you have an employee who engages in religious practices at work or requests religious accommodations which could be viewed as "excessive entanglement" with religion, we strongly recommend contacting us as soon as possible to discuss the best course of action for maintaining the appropriate balance.

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Remember: Parent Meeting Before Imposing Short-Term Suspensions

A recent decision of the Commissioner of Education serves as a reminder to school districts that where a student is suspended for five days or less -- except when a student's presence in school poses a continuing danger or an ongoing threat of disruption -- the District must give the parent and student the opportunity to have an informal conference with the principal prior to the actual suspension. *Appeal of T.L.*, 47 Ed. Dept. Rep. ___, Decision No. 15717 (February 1, 2008).

In this case, a student was suspended on March 27, 2007 after being involved in a fight on the school bus. The student received a letter from the principal on that same day informing the parent that his son had been suspended from March 27, 2007 through March 30, 2007 and also stated that he and his son were being offered the opportunity for an informal conference, including the opportunity to question complaining witnesses. In overturning the student's suspension, the Commissioner stated in part, as follows:

> [The District] did not comply with [Education Law §3214[3][b][1] and Commissioner's Regulations, 8 NYCRR §100.2[1][4])]. As noted, except in the case in which a student's presence in the school is considered a continuing danger or ongoing threat of disruption to the academic process, written notice and an opportunity for an informal conference, at which complaining witnesses may be questioned, must take place before imposition of the suspension. [The District] does not dispute that written notice of the right to an informal conference and to question witnesses was provided to petitioner on March 27, 2007—the first day of the suspension. Furthermore, it does not appear, nor does [the District] argue, that the student's presence in the school was considered a continuing danger or ongoing threat of disruption.

If you have any questions regarding the proper procedures for short or long-term suspensions, please contact our office at 315-437-7600.

Avoiding Liability for Harassing Acts of Employees = Quick Response

New York's Human Rights Law does not impose liability on employers for discriminatory or harassing acts of its employees absent a showing that the employer became a party to the discriminatory conduct. As such, an employer cannot be held liable for an employee's actions unless the employer "encourages, condones or approves" of the act. However, it is important to note an employer may be held liable for its omissions as well as its actions. In other words, an employer can be liable where it was aware of the objectionable conduct and did nothing. Courts will consider this inaction as condoning the conduct.

A recent decision, *Clayton v. Best Buy Co., Inc.*, 851 N.Y.S.2d 485 (1st Dept. 2008), provides an example of a good course of action to take when confronted with harassing conduct by an employee. In this case, the court held there was no evidence that the defendant, Best Buy Co., encouraged, condoned or approved any harassing conduct because the it immediately acted and reprimanded the employee on the same day the incident occurred. The employer also warned the employee that another similar incident would result in the employee's dismissal.

If you need assistance with respect to a similar situation in your District, please feel free to contact us.

Home-Schooled Students Not Authorized to Receive Special Education Services

In a recent memorandum to school districts, the State Education Department advised that students with disabilities, who are home school educated pursuant to 100.10 of the Regulations of the Commissioner, are not authorized to receive special education services from a public school under IDEA or New York State Law. The memorandum was released as the result of a June 2007 State Review Officer decision, *Application of a Child with a Disability*, SRO Appeal No. 07-043. This decision, however, is being appealed in federal district court.

The federal IDEA does not require

Home-Schooled Students Not Authorized to Receive Special Education Services (cont'd)

schools to provide special education or related services to home-schooled children unless state law specifically requires it or unless state law treats home schooling as a form of non-public school. New York law does not recognize home schooling as a non-public school.

The SRO, in Appeal No. 07-043, applied the IDEA in this regard, stating that home schools are not recognized in New York as private or public schools pursuant to Section 3602-c of the Education Law. Accordingly, the SRO ruled that special education or related services are not required to be provided to home-schooled students. Moreover, given the absence of a state law authorizing the receipt of such services by home-schooled students, school districts are without authority to provide those services to them.

It is important to note that although the State does not recognize home schools as public or private schools, "child find" requirements still apply to home-schooled students with disabilities. In this regard, local educational agencies must still ensure that, if parental consent to evaluate is obtained, home-schooled students must be evaluated and an IEP developed so parents can be advised of services which would be available if they choose to enroll their child in a public school. Parents should also be advised to review and revise their child's Individualized Home Instruction Plan to address the child's special needs.

At this time, unless and until there is a judicial decision or legislation to the contrary, as the State Education Department has advised public schools not to provide special education services to home schooled students.

We will keep you advised as to the status of the appeal in this matter as well as any further guidance provided by SED in this regard. Call us a 315-437-7600 with any questions.

School Districts Encouraged to Begin Developing RtI Programs

In another communication to all school districts in New York State, the State Education Department (SED) encouraged districts to begin taking necessary steps to implement "response to intervention" ("RtI") programs in their schools. RtI is a multi-tiered, problem-solving approach that identifies general education students struggling in academic and behavioral areas early and provides them with systematically applied strategies and targeted instruction at varying levels of intervention.

According to SED, RtI represents an important educational strategy to close achievement gaps for all students, including students at risk, students with disabilities and English language learners, by preventing smaller learning problems from becoming insurmountable obstacles to a good education.

SED has established a policy framework for RtI in regulations including school-wide screenings, minimum components of RtI programs, parent notification and use of RtI in the identification of students with learning disabilities. Districts are encouraged to begin developing RtI programs in order to position themselves to improve results for students and to meet the learning disability (LD) determination criteria by 2012.

SED will be issuing additional guidance on RtI and plans to establish a NYS Technical Assistance Cener on RtI (RtI-TAC) to assist school districts in their development of such program. We will keep you informed of these developments.

Questions regarding RtI programs can be directed to the Office of Special Education at 518-486-7462 or 518-473-2878 or contact our office at 315-437-7600.

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Student Adjudicated Juvenile Delinquent for Racial Slurs and Threats

The Appellate Division, Third Department, recently upheld the adjudication of a student in a Family Court as a juvenile delinquent where the student was found to have engaged in racial harassment and threats against another student. *Shane EE v. Flash*, ___ A.D. 3d ___, (3d Dept. 2008).

Over the course of two months, while riding on the same school bus, the student involved called the victim several names. Some of those names indicated a bias against her based on her race, color and gender. At one point, the student told the victim, "I've got a gun with your name on it." Another time, he told her, "we shoot n*****s like you in the woods."

Based on these incidents, the county commenced a juvenile delinquency proceeding in Family Court, alleging that the student committed acts which, if committed by an adult would constitute the crime of aggravated harassment in the second degree. Following hearings, Family Court adjudicated the student as a juvenile delinquent.

The student's family appealed claiming, in part, that the student's racial slurs were protected speech under the 1st Amendment to the U.S. Constitution. The Appellate Division, Third Department, disagreed stating that the Family Court decision was supported by legally sufficient evidence. The Appellate Court stated that while no physical contact occurred, the student's statements constituted threats of harmful physical contact which fit the definition of aggravated harassment. The Court also stated that although the victim testified that she did not fear that the student would actually shoot her, no particular feelings on the part of the victim were required to prove the criminal charge. In addition, the Court rejected the student's argument that his threats and racial slurs constituted protected speech under the 1st Amendment.

This decision gives school district officials another means of maintaining order and civility in their schools beyond suspension and expulsion. In other words, when confronted with circumstances similar to those outlined above, district officials may seek to have the offending student adjudicated as a juvenile delinquent.

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