School Law Matters

May 2010

Newsletter of the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive, East Syracuse, New York 13057 Tel. 315-437-7600
2858 Delaware Avenue, Kenmore, New York 14217 Tel. 716-875-1406
www.ferrarafirm.com

In This Issue ...

Recent Legal Battles End in Victories for Firm's School District Clients

In an effort to keep our clients and friends better informed on Firm news, we will periodically report on significant decisions we have helped our clients obtain in various legal settings. The following are summaries of some of those decisions.

Hearing Officer's Lenient Penalty on Teacher Overturned by Court

In this case, the School District commenced a disciplinary (or "Educational Law section 3020-a") proceeding against a tenured math teacher for viewing and e-mailing pornographic materials on a School District issued laptop and through the School's computer network. The teacher also used the School District laptop for online gambling. At the conclusion of the 3020-a proceeding the Hearing Officer found a six-month suspension without pay to be an appropriate penalty. The decision stated that the suspension period would be served on a consecutive basis at dates determined by the School District. During such period, the Hearing Officer also ordered the School District to provide the tenured teacher with health insurance coverage at its expense on the same basis as provided to the teacher during his suspension with pay. He noted that the School District's maximum obligation was governed by the Collective Bargaining Agreement between the School District and the Teacher's Association.

Upon receipt of the Hearing Officer's decision, the School District

FREE Clients and Friends Webinar on Health Care Reform Laws

Wednesday, June 23, 2010
12:00 noon -1:30 pm

The debate is over but many questions still remain. Health care reform is now law. Now, every employer must be prepared to deal with the sweeping changes created by the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA).

These two laws, which combined are more than 950 pages in length, will have a dramatic impact

commenced legal action to overturn the decision on various grounds. The Supreme Court judge determined that "it is clear that the portion of the arbitrator's determination requiring the District to provide health insurance for the [teacher] during the period of his suspension is illegal and in excess of his power pursuant to Education Law Section 3020-a(4). The requirement that the School District provide medical insurance during the period of the [teacher]'s suspension is not specifically authorized by Education Law and cannot be considered to be "remedial." Therefore, that portion of the arbitrator's determination was vacated by the Court.

The Court went on to find that the arbitrator's determination, that a six-month suspension constituted sufficient discipline for the series of offenses, "shocked the conscience" of any reasonable person and certainly shocks the Court's conscience. The tenured teacher had stored and shared sexually graphic images using the school's e-mail system. The Court concluded its opinion by noting that "punishment by dismissal, as advocated by the District, **would not be shocking** to this Court. However, since the arbitrator, and not this Court, must properly determine the sanction to be imposed, the Court must remit the matter of the proper sanction to the arbitrator for determination."

The Court also concluded that the District demonstrated by clear and convincing evidence that the tenured teacher perjured himself before the Hearing Officer, and that his perjured testimony resulted in his acquittal on one of the charges against him. Accordingly, that part of the Hearing Officer's decision acquitting the Respondent was vacated based on "corruption, fraud or misconduct in procuring the award."

After the Court's decision, the teacher resigned.

Convicted Teacher Denied Recovery of Wages Withheld During Disciplinary Proceeding

Onondaga County State Supreme Court Justice, Anthony J. Paris, recently dismissed a suit brought by a former teacher who was terminated in August 2009 after a Hearing Officer found him guilty of sexually abusing elementary school students. The former teacher sued seeking wages that had been withheld by the School District when formal disciplinary charges were filed against him in September 2007.

Prior to a recent amendment, New York's Education Law allowed an unpaid suspension only if a tenured teacher was convicted of a felony sex crime involving a minor, as was the case here. (The law now allows for the immediate termination of a teacher under these circumstances.)

The teacher claimed that because his first criminal conviction was set aside due to jury misconduct, the District should have paid him the wages that had been withheld up to that time. However, in addition to setting aside the jury's conviction, the criminal court also ordered that a new criminal trial be conducted. Following a second trial, the teacher was again convicted of the same crimes.

Justice Paris granted the District's motion to dismiss this case because it was not commenced in a timely fashion. The Court rejected the teacher's argument that he should be given more time to file a lawsuit because of the time taken to complete the School District's disciplinary proceedings against him.

The decision should benefit other school districts in cases where plaintiffs seek to avoid statute of limitations defenses by claiming that

on employers, employees and their group health plans. Failure to comply with the new requirements can lead to substantial penalties. But you cannot comply until you understand the essential elements of the new laws. We have put together this "clients and friends" program to help with your compliance efforts.

Join us for this 90-minute FREE web-based conference designed to make these extraordinarily complex laws easy to understand.

There is **no registration fee** for this program. Please register as soon as possible. For more information and/or to register for the program most convenient for you, please follow the link provided above, email njgross@ferrarafirm.com or call 315-437-7600.

CLIENT ALERT: Be Prepared for Medicaid Billings Audits

The New York State Office of the Medicaid Inspector General ("OMIG") is beginning audits of District School Supported Health Services ("SSHS") billings for the period January 1, 2009 through December 31, 2009. In response to the audits, Districts are required to provide copies of their policies and procedures with respect to Medicaid billing. Some of the information is similar to

the pendency of a §3020-a proceeding, which can take years to complete, tolls the time limits for filing a notice of claim or filing suit.

Tenured Teacher Dismissed for Sexual Misconduct and Ethnic Slur

This 3020-a decision involved the dismissal of a tenured high school physical education teacher for "conduct unbecoming a teacher, immoral behavior and otherjust causes for discipline." Specifically, the teacher was charged by the District for inappropriately touching a female student on the breasts during gym class, and for making an ethnic slur ("Hey Hispanic kid, run like you are running for the border') to a student in gym class. The teacher had been previously formally reprimanded for making sexually inappropriate comments to female students.

Based on the testimony of student eyewitnesses, the Hearing Officer, James Markowitz, found the teacher guilty of the charges against him. He further held that termination of Respondent's employment as an appropriate penalty and dismissed the employee.

Arbitration Won Over Removal of Hockey Coach for Abusive Language

The School District removed a varsity hockey coach from his position and all future coaching positions as the result of his profanity laced address to the hockey team in the locker room, which was videotaped by a player/student. The address to the students contained a long litany of profanity, vulgarity, abusive language and comments that could clearly be considered racist.

The coach, who had won numerous state championships at the school, filed a grievarce asserting that the District violated the Collective Bargaining Agreement by removing him from his coaching position. The arbitrator held that the District proved by clear and convincing evidence that the Coach has used inappropriate, demeaning and derogatory language towards the student athletes he was coaching, as well as using inappropriate racial stereotypes. As a result, the arbitrator agreed with the District that removal and a ban from any further coaching activity was appropriate.

The arbitration decision in the District's favor has recently been confirmed by a State Supreme Court judge over opposition by the teacher who had sought to have the award overturned.

If you have any questions regarding these or any other cases, please contact our offices at 315-437-7600 or 716-875-1406.

Annual State and Federal Notification Requirements

A number of state and federal laws compel school districts to send annual notifications to the parents and guardians of their students on a variety of issues, from the rights of parents to control information about their children, to the removal of asbestos from school buildings. Failure to comply with these requirements can result in stiff penalties, including loss of federal funding for the offending districts. It is important, then, that school districts convey the following information to the parents and guardians of their students.

Under Title VI, Title IX, Section 504, Age Discrimination Act and Title II

documents school districts were required to provide as part of the State Education Department's corrective action review. It is important, however, to ensure your District has all of the supporting documents for claims on hand to avoid the disallowance of claims by the OMIG.

In order to prepare for the upcoming audits and preserve School District Medicaid funds, it is encouraged each District review its Medicaid billing policies and procedures. Steps should be taken to ensure the elements of your Medicaid Compliance Plan are being implemented. Moreover, districts must maintain contemporaneous records demonstrating the district's right to receive payment for each and every claim submitted. The records must be maintained for a period of six years from the date services are furnished. Since this is a new area for many of our districts, we are happy to assist you in preparing for the audits by working with your designated Medicaid Compliance Officer.

If you have any questions with respect to the foregoing, please do not hesitate to contact Colleen W. Heinrich, Esq. at 315-437-7600.

Discontinuing Services of Probationary Teachers

Granting tenure requires

of the Americans with Disabilities Act, school districts are required to notify employees and the parents and guardians of students with a notice that the district does not discriminate on the basis of race, color, national origin, creed, religion, marital status, sex, age, sexual orientation or disability in admissions, participation or employment. Additionally, the notification should take note of the grievance procedures to be followed in case of a violation, and the contact information of the district's compliance coordinator.

The Family Educational Rights and Privacy Act (FERPA) establishes two notification requirements. First, the district must notify parents and guardians (as well as students over the age of 18) of their rights to review their child's (or their own) educational records, and that the information will remain private unless disclosure is authorized by the parent or guardian (or student who has reached the age of 18). Second, school districts must notify parents and guardians of the information that it does release, and allow them to object in writing to the disclosure of that information (which includes "directory information" such as the student's name, address, and phone number).

Federal law (under the Protection of Pupil Rights Amendment) also requires that districts notify parents and guardians of their student privacy policy, and offer them the chance to exclude their children from activities or surveys which would identify personal information, beliefs, or behavior. Closely related to this, school districts must also notify parents and guardians of their rights to refuse the release of a child's name, address, and telephone number to military recruiters.

A number of federal notification requirements are contingent upon the status and activities of school districts. Districts which qualify as "covered entities" under the Health Insurance Portability and Accountability Act (HIPAA) must provide parents and guardians with notice of its privacy practices with respect to health and medical records. Additionally, districts receiving federal funds for free- or reduced-price meals must distribute information regarding the program and its requirements to parents and guardians. Furthermore, the No Child Left Behind Act places a number of notification requirements on school districts, particularly those receiving Title I funding. These requirements vary by district and are often contingent upon the classification of the school or schools and the amount of funding received.

In addition to these federally-mandated notifications, districts must also provide parents and guardians with plain-language summaries of the district's attendance and conduct policies. And, lastly, districts are also required to provide notice of asbestos management plans and pesticide application notices.

School districts are reminded that many of these requirements can be fulfilled by placing these notifications in a regularly published and distributed district bulletin such as the school calendar. If you have specific questions about any of these annual notices, please feel free to contact Andrew Freedman by telephone at 716-875-1406 or 315-437-7600 or email him at ajfreedman@ferrarafirm.com.

Notice to Substitutes Can Reduce Unemployment Insurance Costs

A school employee is ineligible to receive unemployment insurance benefits between academic years or terms (e.g., semesters) if the

both the Superintendent's recommendation and approval by the Board. A probationary teacher's services may be discontinued during the probationary period, on the recommendation of the Superintendent, by a majority vote of the Board. Section 3031 of the Education Law (the "Fair Dismissal Law") requires a school district or BOCES to follow several steps to deny tenure or dismiss a probationary teacher.

When the Superintendent recommends that the services of a probationary teacher be discontinued, the teacher must be notified at least 30 days before the Board meeting at which the recommendation is to be considered. Up to 21 days before the meeting, the teacher may request a written statement of reasons for the recommendation. The District must provide the reasons within 7 days. The teacher may file a written response with the District Clerk up to 7 days before the Board meeting.

If the Superintendent recommends that tenure be granted, but the Board votes to reject the recommendation, the Board must give the teacher a 30-day notice. The teacher may request the Board's reasons for its intended action before the Board takes a final vote.

The reasons need not be highly detailed. However, they should be specific enough so the teacher is

employee has reasonable assurance that he or she will perform services in the same or a similar capacity during the next academic year or term. For example, a school employee who will be returning to work in the fall is generally ineligible for unemployment benefits during summer vacation.

Thus, when a person has worked as a substitute during one school year, and the District reasonably expects that it will have work for this person in the following school year, it is generally a good practice to send a letter of reasonable assurance of continuing employment.

"Reasonable assurance" exists only if the economic terms and conditions of the job offered in the second period are not substantially less than those of the job in the first period. The New York State Department of Labor uses a 90% test in determining what "substantially less" means. In other words, can the individual reasonably expect to earn at least 90% of what he or she earned in the prior term or year?

It is helpful if the circumstances under which a substitute will be called for work in the coming year have not changed from the previous year, and the District anticipates the same need for services.

reasonably able to respond to them.
After the Board makes a final decision to discontinue the teacher's services, Section 3019-a of the Education Law requires that the teacher be given written notice at least 30 days before the effective date of termination. In February, the N.Y. State Court of Appeals held that if the District does not provide this 30-days notice, the teacher is entitled to a day's pay for each day that the notice is late, even during summer vacation.

If there are any local notice requirements in a collective bargaining agreement, these must be followed, too.