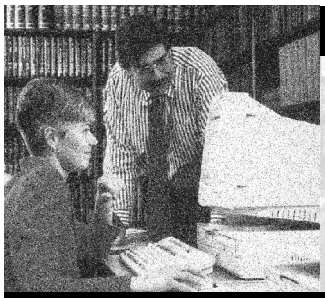

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

Latest legal developments and practical guidance for school officials & administrators **March 2006**

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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.

Annual School Budget – Presentation of Separate Propositions Called into Question by SED

The State Education Department (SED) Office of Counsel advises that Interim Deputy Commissioner, Jean C. Stevens, has recently issued a "guidance memorandum" stating that at the budget vote Boards of Education "should . . . avoid presenting separate propositions for items enumerated for inclusion in one of the budget components." In other words, SED believes Boards should not break the budget up among several propositions. The rationale is that "such practice makes it more difficult for taxpayers to understand the true cost of a district's educational program and has the potential negative effects" of limiting a future contingent budget.

Our office has previously given the opinion that a Board can legally present several propositions at the budget vote, if it wishes, and we continue to find statutory support for that opinion. Education law section 2022 specifically recognizes the discretionary authority of a Board to submit "additional items of expenditure to the voters for approval as separate propositions" and of the voters to petition for the same. The guidance memorandum does not address that statute. However, as the Commissioner has jurisdiction over such matters, prudence may counsel that Boards put their budget up to the voters as a single proposition. If a Board nonetheless decides to present separate propositions, then it would be wise to carefully draft the propositions to avoid the "potential negative effect" on a contingent budget identified by the Interim Deputy Commissioner.

If you have any questions regarding this matter, or need assistance in drafting propositions, contact us at 315-437-7600.

"Temp Agency" Contracts for Per Diem Substitutes Held Invalid

In December 2005, a State Supreme Court judge upheld an earlier decision by the Commissioner of Education which invalidated certain BOCES contracts with "temp agencies" for per diem instructional substitutes.

Background

In late 2004, the Commissioner ruled that a BOCES did not have the authority to enter into a contract with an outside employment service (such as Kelly Services) for the provision of per diem substitute teachers. See *Appeal of Sweeney*, 44 Ed. Dept. Rep. 176. In the *Sweeney* case, the contract between Erie 2 BOCES and Kelly Services provided that Kelly would:

- recruit, interview, select, hire and assign employees per diem substitute teaching services for BOCES;
- ensure that each per diem substitute met any applicable teacher certification and criminal background check requirements;
- pay the per diem substitute wages and benefits, and maintain personnel and pay records; and,
- ensure that the substitute teachers would remain Kelly's employees and would not be employees of the BOCES.

In his decision, the Commissioner held that BOCES did not have the authority under Education Law Section 1950(4) to contract with Kelly for what the Commissioner deemed to be instructional services. He cited previous decisions that held that a board of education

Continued on next page

"Temp Agency" Contracts for Per Diem Substitutes Held Invalid by State Court (continued)

lacked authority to provide instructional services through an independent contractor. (*See Appeal of McKenna*, 42 Ed. Dept. Rep. 54, and *Matter of Freidman*, 19 Id. 522.) In the Commissioner's view, a BOCES is a creature of statute and had no inherent powers and possessed only those powers expressly delegated by statute. The Commissioner pointed out that Education Law Section 1950(4)(h) specifically detailed the entities with which a BOCES may contract and the limited purposes of such contracts. He then stated that the contract in that case was simply not authorized by statute.

Court's Decision

Erie 2 BOCES then sought to overturn this decision by commencing an Article 78 proceeding in Supreme Court, Albany County. In its Article 78, BOCES claimed the Commissioner's decision was legally and factually incorrect. On December 28, 2005, the Court disagreed with the BOCES holding that the Commissioner's interpretation of the law was reasonable, and therefore, the contract was not permissible under Section 1950(4). Specifically, the Court stated that, "[t]he statute simply does not appear to permit a BOCES to enter into a contract with a for-profit corporation to supply per-diem substitute teachers."

Impact of Ruling

In light of this narrow interpretation of the Education Law, BOCES and school districts need to keep in mind that contracts with corporations or organizations that are not specifically mentioned in state law may not be authorized and, therefore, may be invalidated by the Commissioner or our courts.

If you are considering entering into any proposed contracts with corporations or organizations for the provision of various "educational services" where there may be some question as to whether those contracts are authorized, please feel free to contact us so that we may discuss the matter and review any materials and/or proposed agreement to see to it that it meets the requirements of state law and the decision in the *Sweeney* case.

Reasons for Refusing to Recommend a Teacher For Tenure Need Not Be Overly Specific

When a probationary teaching or administrative employee requests a statement of reasons why he/she is not being recommended for tenure, both the Commissioner and our courts have held that the reason supplied must be sufficiently specific to afford the employee an opportunity to make an intelligent and meaningful response to the stated reasons. However, in a recent decision, the Commissioner emphasized that this statement of reasons under the "Fair Dismissal Law" need only refer to basic deficiencies on the part of the employee. (*Appeal of Rubenstein*, 45 Ed. Dept. Rep. ___, Decision No. 15239, 11/23/05.)

In this case, the superintendent of the Garden City Union Free School District notified a probationary art teacher that he would recommend that the school board not grant her tenure. The teacher then requested a written statement of the reasons for the superintendent's recommendation, as was her right under the Fair Dismissal Law (Education Law §3031). The superintendent responded with four reasons: (1) failure to properly manage the classroom environment; (2) failure to work cooperatively with a special education aide; (3) failure to adequately supervise students; and (4) failure to address improper student behavior.

In the subsequent Appeal to the Commissioner, the teacher claimed that the superintendent's stated reasons were impermissibly vague. However, the Commissioner disagreed, stating that based on his review of the record, the superintendent's reasons were specific enough to permit the teacher to provide a detailed response.

It should be pointed out that both the Commissioner and our courts have held that vague statements such as "failure to meet the level of expectancy of the school district," "failure to exhibit superior teacher abilities," or "failure to function effectively in the school to which you have been assigned" are insufficient to allow employees to prepare a meaningful response.

If you are unsure as to whether your statement of reasons is sufficient to comply with relevant case law, or if you need assistance in formulating a statement of reasons, please contact us so that we may review your proposed statement to help protect your District's interests in the event of an Appeal to the Commissioner or the institution of an Article 78 proceeding in State Supreme Court.

U.S. Supreme Court to Determine Whether Parents Are Entitled to Reimbursement for Expert Witness Fees in IDEA Cases

The U.S. Supreme Court has granted review in a case involving the issue of whether parents are entitled to reimbursement for expert witness fees when they succeed in a legal claim under the Individuals With Disabilities Education Act ("IDEA"). (*Arlington Central School District Board of Education v. Murphy*, 402 F.3d 332 [2nd Cir., 2005], *cert granted*, ___ U.S. ___, January 6, 2006.) While IDEA provides for the awarding of attorney's fees to parents who successfully prosecute a claim under federal law, IDEA is silent regarding the awarding of expert witness fees. In a case from the Arlington Central School District, the U.S. Court of Appeals for the Second Circuit ruled last March that a prevailing party is entitled to recover expert witness fees under IDEA. The Court also ruled that applications for such fees normally will not be approved unless the application is accompanied by time records contemporaneously maintained by the person performing the services.

In the *Arlington* case, the parents sought recovery of fees of $29,250 for the services of an educational consultant. The Court concluded that these fees were compensable under IDEA. The U.S. Court of Appeals for the Second Circuit then affirmed the District Court's decision, concluding that prohibiting recovery of expert witness fees for prevailing parents would frustrate the purposes of IDEA. The Second Circuit's decision was at odds with several other circuits that ruled that the statutory language of IDEA does not specifically authorize the awarding of such fees.

Court Permits Teacher to Sue Principal for Defamation Over Principal's Accusation that the Teacher Violated District Policy

In late 2005, the Appellate Division, Third Department, ruled that a high school teacher could sue her building principal for defamation over an accusation he made that the teacher showed an R-rated movie to her students "in violation of district policy". *Clark v. Schuylerville Central School Dist.*, ___ A.D.3d ___ (3d Dept., 2005).

This case involved Linda Clark, a 10th grade English teacher in the Schuylerville Central School District, who showed her class an R-rated version of Shakespeare's Macbeth. Upon learning of this, the building principal allegedly informed the school superintendent, and others, that Clark had violated a district policy which prohibited showing R-rated films to students. As a result, Clark was suspended from teaching and placed on paid administrative leave for the remainder of the school year. The principal also sent a letter to the families of Clark's students informing them that Clark would not be returning for the remainder of the school year .

Clark sued both the district and the principal, claiming that: (1) the district committed libel in the letter that was sent to her students' families, and (2) that the principal's alleged statement that she had violated district policy was defamatory.

The Appellate Division, Third Department, sustained a lower court dismissal of Clark's libel claim against the District based on the letter. The Court ruled that the letter was "not susceptible of a defamatory meaning." According to the Court, "[n]othing in the letter impugns [her] abilities as a teacher or implies that she engaged in any misconduct..."

However, the Court reached a different conclusion with respect to the building principal's alleged statement that Clark violated district policy. This statement, according to the Court, has "a precise meaning that is capable of being proven true or false." Clark argued that the statement is false in that the R-rated version of Macbeth that she showed her class was a district-owned film, and that before showing the film, she obtained permission from the building principal

This cases highlights the fact that all administrators should be careful regarding statements made (and to whom they are made) before, during and after misconduct investigations.

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Reminder: Districts Must Have a "Local Wellness Policy" Beginning this Fall

The Child Nutrition and WIC Reauthorization Act of 2004 requires every school district to enact a "Local Wellness Policy", beginning with the 2006-2007 school year. Specifically, the law requires the Policy to include the following:

(1) district's goals for:

- nutrition education,
- physical activity, and
- other school-based activities that are designed to promote student wellness

(2) nutrition guidelines for all foods available on each school campus during the school day with the objective of promoting student health and reducing childhood obesity;

(3) assurance that guidelines for reimbursable school meals will not be less restrictive than regulations and guidance issued by the Secretary of Agriculture pursuant to the Child Nutrition Act and the Richard B. Russell National School Lunch Act, as those regulations and guidance apply to schools;

(4) plan for measuring implementation of the local wellness policy, including designation of one or more persons within the district or at each school, as appropriate, charged with operational responsibility for ensuring that the school meets the local wellness policy; and

(5) involves parents, students, representatives of the school food authority, the school board, school administrators, and the public in the development of the school wellness policy.

If you need assistance in drafting such a policy, please contact Michael Dodd of our office at 315-437-7600.

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