School Law Matters

May 2013

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

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

Hot Topics

Uninterrupted Scholars Act ("USA") Amends Family Educational Rights and Privacy Act ("FERPA")

Heather M. Cole, Esq.

Most school officials are aware of the the Family Educational Rights and Privacy Act, or "FERPA". It allows parents and eligible students to review a student's educational records and to request amendment of records which they feel are inaccurate. It also prohibits a school from disclosing a student's educational records without explicit written permission from the parent or eligible student, except in limited and specified situations. Those exceptions include, for example, disclosure to a school to which a student is transferring, to school officials with a legitimate educational interest, in compliance with a judicial order or subpoena, or in a true health and safety emergency.

However, in January 2013, a new exception was added, known as the "Uninterrupted Scholars Act," or "USA" (Public Law 112-278). This new exception permits schools to disclose a student's educational records without parental (or eligible student) authorization to child welfare agencies and recognized tribal organizations when the agency/organization is legally responsible for the care and protection of the student. The USA prohibits the agency/organization from disclosing information contained in the educational records, except to an individual or entity engaged in addressing the student's educational needs.

One question presented by the USA is its potential impact on a school district's ability to disclose educational records to Child Protective Services ("CPS"). The previously existing "health and safety" exception to FERPA allows schools to disclose educational information in connection with a true emergency, if disclosure is necessary to protect the student or other individuals. For some time now, this has been the exception invoked when school districts disclose educational records to CPS. It does not appear, however, that the USA was intended to supplant or expand a school's ability to disclose records to CPS. The USA does not define "child welfare agencies," but a review of the Congressional Record in connection with the USA's adoption reveals multiple references to the need for improved communication between schools and child welfare agencies that represent children in foster care. This, coupled with the memorandum referenced below, suggests that the term "child welfare agencies," as used in the USA, is intended to refer to the Department of Social Services, not Child Protective Services.

According to a recent memorandum from the Department of Health and Human Services, Administration for Children and Families, the USA should "enhance timely access to needed educational services and ultimately result in improved educational services for children in foster care." The U.S. Department of Education will be providing additional technical assistance for schools as to how to comply with the USA.

In the meantime, if there are questions regarding the USA's implications for disclosure of a student's educational records, please contact our office.

Attorney Spotlight

We are pleased to announce that **Heather M. Cole, Esq.** has joined the Firm as an associate attorney to assist in the firm's representation of school districts, municipalities and private sector employers.

Ms. Cole is a 2000 *magna cum laude* graduate of Boston College, and a 2004 *cum laude* graduate of the Syracuse University College of Law. Prior to joining the Firm, Ms. Cole was employed in both the private sector and by a Board of Cooperative Educational Services ("BOCES").

Ms. Cole's experience includes the representation of municipalities and other forms of local government, school districts, and private corporations. Her practice areas include general representation, zoning and land use, administrative proceedings, and matters related to the Freedom of Information Law and Open Meetings Law. She most recently focused her practice on labor relations and employment law matters.

Please join us in welcoming Heather to the Firm.

In This Issue …

Dignity for All Students Act

Commissioner's Regulations Modified by the Dignity for All Students Act

As we have previously reported, effective July 1, 2013, the Dignity for All Students Act ("DASA") mandates that school districts and BOCES implement new procedures and protocols to help stop bullying in the schools. (A summary of these changes was provided in our February 2013 newsletter.)

In addition to these statutory requirements, in April 2013, the Board of Regents adopted additional amendments to section 100.2(c), 100.2(l) and 100.2 (kk) of the Commissioner's Regulations, in order to implement DASA's 2012 statutory amendments.

The amendment to section 100.2(c) of the Commissioner's Regulations requires that instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation requires that instruction support development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.

The amendment to section 100.2(l) of the Commissioner's Regulations revises the regulations regarding the required provisions that must be contained in a school district's or BOCES' code of conduct. These include:

- provisions prohibiting harassment, bullying (including cyberbullying) and discrimination against any student by employees or students. These provisions must include acts of harassment and/or bullying that occur (i) on school property; or (ii) at a school function or (iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment; where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property; and
- provisions for responding to acts of harassment, bullying/cyberbullying, which incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses must be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate hostile environments.

The amendment to section 100.2(kk) of the Commissioner's Regulations revises DASA's reporting requirements by adding provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

- School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts must promptly, orally notify the principal, superintendent, or their designee not later than one school day after the employee witnesses or receives such a report, and must also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.
- The principal, superintendent or the principal's or superintendent's designee will be responsible for leading or supervising a thorough investigation of all reports of harassment, bullying and/or discrimination, and ensuring that such investigations are completed promptly after receipt of any written reports.
- When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee must take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.
- The principal, superintendent, or their designee must also notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.
- The principal is required to provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.
- Retaliation by any school employee or student is also prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

Please note that any changes to a school district's or BOCES code of conduct, with the exception of changing the Dignity Act Coordinator's names and contact information, requires at least one public hearing that provides for the participation of school personnel, parents, student and any other interested party.

For more information or if there are further questions, please contact Joseph J. Bufano at 315-437-7600.

Students With Disabilities

U.S. Dept. of Ed. Issues Guidance Regarding Disabled Student Access to Athletics

On January 25, 2013, the U.S. Department of Education's Office of Civil Rights ("OCR") issued a "Dear Colleague" letter about the importance of providing disabled students with access to athletic opportunities (http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html.). The letter appears intended to both inform and warn school districts about the importance of complying with federal legal requirements relating to a disabled student's right to participate in school sports.

The Dear Colleague letter discusses a school district's responsibilities under various federal statutes, including Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. The following is intended to provide a general overview of basic requirements under federal law, as outlined in the Dear Colleague letter.

Simply because a student is disabled does not mean that the student has a right to participate in a selective or competitive sports program offered by a school district. Federal law does not bar school districts from requiring a certain level of skill or ability in order to participate. However, the eligibility criteria for participating in a given sport or a given competition must not be discriminatory.

The OCR letter emphasizes the importance of not acting on generalizations and stereotypes about disabled students or particular disabilities when disabled students seek to participate in sports. The fact that a student is disabled cannot be the reason that a student is not allowed to try out for or participate in a given sports activity.

The OCR letter also notes that school districts must make reasonable modifications and provide aids and services necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would fundamentally alter its program, or violate a bona fide safety standard.

The key to complying with federal law is to undertake a careful *individualized* inquiry. OCR uses the example of a hearing impaired student who wishes to run track to explain a school district's obligations. If the student asks that a visual cue be used in conjunction with a starter pistol to trigger the start of the race, and doing so is possible through the use of available technology, this accommodation should be provided.

A school district need not provide an accommodation that would change a fundamental rule of a game. Hence, a school district need not lower the height of a basketball hoop as an accommodation. However, a school district or an athletic association may be required to alter less fundamental rules of a given sport in order to allow a disabled student to participate. OCR uses the example of a one-handed swimmer. If the student asked that a "two-hand touch" finish rule be waived to allow her to finish with a one-hand touch, this accommodation would have to be provided. OCR reached this conclusion because it found that the rule at-issue is not "fundamental" to the sport.

When responding to a request for an accommodation, school districts must carefully consider the importance of a rule that prevents a disabled student from participating. Whether a given rule is "fundamental" to a sport will inevitably be difficult to determine in some instances. Your school attorney should be consulted for specific guidance when necessary.

The OCR Dear Colleague letter also highlighted a school district's obligation in certain circumstances to provide separate or additional athletic opportunities to disabled students. OCR warns that this obligation must be carefully considered because the "provision of *unnecessary* separate or different services is discriminatory." Hence, a school district cannot avoid is obligation to provide reasonable accommodations for disabled students by creating a parallel athletic team or program for disabled students. It is only when a school district cannot provide disabled students with access to sufficient opportunities to participate in athletic activities through the use of reasonable accommodations that separate or different extracurricular activities are required.

In conclusion, the issue of access to athletics for disabled students appears to be a priority for OCR, and has recently received considerable media attention as a result. School districts need to be cognizant of their legal responsibility to provide reasonable accommodations to ensure that disabled students can participate in school sports, which can include changing certain rules for a given sport. Further, school districts need to ensure that where disabled students cannot participate in existing athletic activities with or without reasonable accommodations, alternative athletic opportunities are provided.

Should you have questions about disabled students and athletics, please feel free to contact Charles E. Symons, Esq.

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.**

Tenured Teacher Discipline

New Electronic Filing Procedures for Disciplinary Cases Against Tenured Teachers

The New York State Education Department now requires that all new discipline and discharge cases against tenured teachers and other certificated employees be administered through SED's online TEACH system. This system has been used for certification and fingerprinting. It is now being used for cases under Education Law Section 3020-a filed on or after April 1, 2013. Everyone involved in a case (the school district or BOCES, attorneys for the employer and teacher, hearing officer, American Arbitration Association (AAA), and court reporter) must have a TEACH user account.

When the Board of Education votes to bring 3020-a charges, the district will no longer mail copies of the charges to SED. Instead, the district is responsible for initiating the case through the TEACH system. This involves entering information about the parties and the case and uploading charges and other documents. (The law still requires, however, that the district serve a hard copy of the charges and other initial documents on the employee.)

When the district files the charges, one step is to indicate the law firm that will represent it in the case. If our law firm represents you in the case, you should select our firm's name from the list provided. Each law firm registered with TEACH designates an "administrator" for its account. (Craig Atlas currently has that role in our firm.) When charges are filed, the administrator is notified via email. The administrator indicates which specific attorney will handle the case. That attorney will then begin receiving emails about the case.

You should consult with the attorney before filing the charges and if you have any questions about the information to input. For example, you have to select a case type (standard, expedited failure to maintain certification, or expedited incompetence 3012(c)). It is necessary to enter the type of charges by checking the appropriate boxes.

If the teacher requests a hearing, the district must enter this in the system. You also include the law firm that represents the teacher, and whether there will be a three-member panel or a hearing officer. If you have any questions, ask your attorney.

The AAA provides a list of potential hearing officers. The attorneys for the district and the teacher are notified of this by email, and then they select a hearing officer. The hearing officer is notified, and either accepts or declines the appointment.

Persons authorized to electronically file matters related to a case can view information about the case online. However, the general public and the media are not given access to this information, as 3020-a proceedings are confidential (except for final decisions when the teacher is found guilty).

One of the purposes of electronic filing is to monitor compliance with the deadlines included when Section 3020-a was amended in 2012. These include the requirement that all evidence be submitted within 125 days after filing of charges (unless there are extraordinary circumstances beyond the control of the parties), and the time limit for the hearing officer to issue a decision. When you view the information about an active case, it tells you the days remaining until these deadlines. The system automatically "nags" the hearing officer and attorneys by sending reminder emails at certain intervals. If a deadline is exceeded, the hearing officer has to enter the reason for the delay.

If the case is resolved without a hearing, the district must enter this information. If the hearing officer or panel issues a decision, the hearing officer uploads the decision. The parties' attorneys are notified by email, and they can download the decision. SED will no longer serve hard copies of the decision.

For more information, you can contact our office or access the "TEACH Teacher Tenure User Manual - School District Role" and other materials on SED's website, at www.highered.nysed.gov/tcert/teach.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Henry Sobota	**5/31/13**	**In-Service Presentation on "Regionalization and Sharing of Services"**
Joseph Shields	**6/2/13**	**New York State Association of School Business Officials– 2013 Education Summit & Expo** "Successful Completion of Capital Construction Projects", The Saratoga Hilton & Saratoga Springs City Center, Saratoga Springs, NY
Susan Johns	**6/25/13**	**In-Service Presentation on Special Education Law**

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.