

School Law Matters

JANUARY 2013



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Route to: Board Personnel Instruction PPS Business Other: _____

Firm Event

Firm School Law Briefing in Rochester January 15:

Attorneys to Present on Hot Topics Related to Student Discipline, Evaluation/Discipline of Probationary Personnel and Protecting Your Tax Base

On Tuesday, January 15, from 8:30 a.m. to 11:00 a.m., attorneys of the Ferrara, Fiorenza, Law Firm will be presenting the next installment of the Firm's series of informational workshops for its clients and friends at the Holiday Inn, 911 Brooks Avenue, Rochester, New York. At this School Law Briefing attorneys Colleen Heinrich, Eric Wilson, Joseph Shields and Donald Budmen will be presenting the following programs: 1) "3020-a Reform and the Impact of APPR on Probationary Employees"; 2) "Understanding your School District's Relationship with the Local IDA and Ways to Protect your Tax Base"; and 3) "Technology and Student Behavior — Risky Business". The Briefing details are as follows:



3020-a Reform and the Impact of APPR on Probationary Employees

8:30 AM — 9:30 AM

Colleen Heinrich, Esq.
Eric J. Wilson, Esq.



This session will provide an overview of the evolution of 3020-a and the impact of the 2012 statutory reforms on discipline of tenured teachers together with an exploration of the impact of APPR on employment rights of probationary employees.



Understanding Your School District's Relationship With The Local IDA and Ways To Protect Your School District Tax Base

9:30 AM — 10:00 AM

Joseph G. Shields, Esq.

In these difficult financial times, be certain that you understand your District's legal rights when dealing with your local Industrial Development Agency (IDA). This discussion will focus on:

- the relationship between the IDA and the school district; and
- steps you may take to protect your school district tax base and revenue stream.



Technology and Student Behavior — Risky Business

10:00 AM — 10:30 AM

Donald E. Budmen, Esq.

Handheld technology and social networking have opened world-wide access to our students. These advancements are both wonderful and frightening, as are our children's uses of these new communication platforms. This presentation will explore legal implications for students engaged in misuse of the technologies, including cyberbullying, and for school districts confronted with these cyber issues.

Questions and Answers 10:30 AM — 11:00 AM

There is **NO REGISTRATION FEE** for attending the program. However, space is limited and registration is necessary. Please register at our website **www.ferrarafirm.com**. Simply click on "School Law Briefing (Rochester)" from the Events Calendar on the far right column 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 (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:

- Online: www.ferrarafirm.com
- By telephone: Call 315.437.7600

In This Issue ...

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- Recent Residency Decisions Highlight Surveillance Benefits and Pitfalls
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Board Member Issues**Board Member Notes and Other “Informal” Communications May Be Subject to Public Disclosure under Freedom of Information Law (“FOIL”)**

Board members should be mindful of the fact that New York’s Freedom of Information Law (“FOIL”) (N.Y. Public Officers Law §§ 84-90) can subject their notes and other communications (including e-mail and text messages) about board business to public disclosure upon a proper request.

FOIL generally presumes that the public is entitled to access and review the “records” of New York’s public agencies, including school districts. The law’s definition of “records” is quite broad, and has generally been interpreted to include any recordings of the business activities of municipalities. The determination of whether certain sensitive documents are “records” and therefore subject to disclosure under FOIL is fact-specific. Accordingly, it is a good idea to review such requests with counsel before deciding on a response.

Board members should not assume that their e-mails or text messages discussing board business are not “records” within the meaning of FOIL, even when sent from a personal cell phone or e-mail account. When board members communicate about school business, in writing, with one another or with others, any such communications may constitute agency records that fall within the framework of FOIL,

even though the “records” may be kept at locations other than school district offices.

While New York courts have yet to issue a definitive ruling on the subject, Robert Freeman, the Executive Director of the Committee on Open Government, whose opinions the courts sometimes use as a guideline in deciding cases under FOIL, has taken the unequivocal position that such communications are available under FOIL. With this in mind, school districts (and other public agencies) should consider developing protocols for retention and destruction of such communications.

Personal notes taken by a board member regarding matters discussed in open sessions of board meetings are also likely subject to disclosure upon a FOIL request. Opinions by Executive Director Freeman and at least one New York court indicate that a board member’s personal notes (even though they are not the official meeting “minutes”) do constitute an agency “record” which is subject to disclosure under FOIL. As with most FOIL requests, the specific facts will matter greatly in deciding the appropriate response to a request for disclosure of a board member’s notes.

Finally, despite opinions to the contrary from the Committee on Open Government, the Commissioner of Education

has held that board member discussions and comments made during executive sessions of regular board meetings remain confidential and are likely not obtainable under FOIL. (Appeal of Nett, [Decision No. 15,315].) The Commissioner noted that public disclosure of information discussed in an executive session violates the duty imposed upon public officials in General Municipal Law section 805-a and may also be a violation of the board member’s fiduciary duty to act constructively to achieve the best possible governance of the school district. In other words, the discussions and any personal notes taken in these sessions by board members are generally held to be confidential to the persons present. The confidentiality of these sessions is designed to enable public officers to deliberate freely and speak frankly in ways they might not if those discussions were held in full public view.

In conclusion, board members must remain acutely aware of their status as public officials when communicating about board business, as even communications that seem “personal” to the board member may be subject to public disclosure under FOIL.

Should you have questions or need further information about this subject, please feel free to contact our office for assistance.

Student Residency**Recent Residency Decisions Highlight Surveillance Benefits and Pitfalls**

The residency of a student is presumed to be that of the student’s parents or legal guardians. Residency is determined by physical presence and intent to reside in a particular school district. A school district’s residency determination will only be overruled if the Commissioner of Education finds that it was “arbitrary and capricious.”

Conducting surveillance of a student’s alleged in-district residence or a sus-

pected out-of-district residence when making a residency determination is a relatively common practice. However, over-reliance on such evidence can be problematic.

In a recent appeal from a school district’s residency determination, the Commissioner found that the school district had wrongfully removed a 10th grade student based in large part on a seeming over-reliance on surveillance

evidence. (See Commissioner’s Decision No. 16,318). Surveillance of the out-of-district home was conducted repeatedly, always early in the morning. On each occasion, the student, other siblings, her mother and a vehicle belonging to the student’s mother were observed at the out-of-district home.

The student and her parents claimed that the parents were separated,

Continued on the next page

Student Residency**Recent Residency Decisions Highlight Surveillance Benefits and Pitfalls (cont'd)**

though not legally divorced, for several years and that the student resided in an apartment in the district with her mother. The student's mother claimed that the student's father lived in the out-of-district home with his girlfriend.

The mother claimed that she would often drive her children to their father's house early in the morning so that her disabled son could receive therapy using specialized equipment located in that house. She also claimed that she would sometimes go to the father's home very early if there was some type of problem involving a sibling who lived with the father. The Commissioner found this explanation for what was observed by the school district's surveillance to be credible.

In ruling that the school district's determination was arbitrary and capricious, the Commissioner noted that no surveillance was conducted after school. In light of the parent's explanation, which was also corroborated by the father's girlfriend, the surveillance evidence was deemed insufficient to warrant removing the student from school. The Commissioner also faulted the school district for failing to properly explain the basis for the residency determination to the family

in writing as required by the Commissioner's regulations.

Another recent decision by the Commissioner illustrates the successful use of surveillance and other investigatory information. (Decision No. 16,432). In that case, a family, consisting of grandparents and three students, purchased a house in the Webster Central School District. However, surveillance and interviews with multiple neighbors revealed that the family was actually living in a home in the city of Rochester. Surveillance was conducted many times over several months. The surveillance showed the students being driven to the in-district residence and dropped off in time to catch the bus to school.

Multiple neighbors were interviewed and provided statements, oral and written, asserting that apart from being dropped off and picked up before and after school, the family was rarely present at the in-district home.

The custodial-grandparents claimed that they operated a 24-hour childcare service in the out-of-district home and spent "a great deal of time" there. However, they claimed that the students lived with them in the in-district home. The family produced the deed for the

home, mortgage documents indicating that the in-district home was their primary residence, and utility bills and mail sent to the residence. Significantly, one of the bills that was submitted by the family showed a three month water bill in the amount of just \$12.63.

In upholding the school district's determination, the Commissioner noted that purchasing a home in a school district is not sufficient to entitle one's children to attend school in that district, regardless of the amount of property taxes paid. If surveillance is going to be used as part of an investigation into residency, it should be conducted on multiple occasions *at varied times of day*. If a parent or guardian presents a plausible explanation for what is observed by surveillance, additional surveillance or alternative evidence should be obtained to inform the residency determination. Once all of the evidence has been gathered, if a school district decides to remove a student, it must clearly explain the basis for its determination in writing in accordance with the Commissioner's regulations.

Should you have questions about student residency investigations or appeals, please feel free to contact Charles E. Symons, Esq.

Student Bullying**Case Provides Cautionary Tale for Districts Dealing with Race-Based Student Bullying**

In recent years, the severity of student-to-student bullying and the dire effects it has on children have attracted the attention of federal, state and local officials. This growing concern is reflected in New York's passage and implementation of the Dignity for All Students Act (DASA), as well as in a 2010 "Dear

Colleague" letter from the U.S. Department of Education's Office of Civil Rights (OCR). While DASA does not provide any specific penalties for school districts which fail to properly address student harassment at school, the OCR's "Dear Colleague" letter warns school district officials about the potential federal consequences associ-

ated with improperly resolved (or unresolved) student bullying based on federally protected characteristics, such as race. One recent case highlights just how important it is to be cognizant of these obligations under federal law.

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Student Bullying

Case Provides Cautionary Tale for Districts Dealing with Race-Based Student Bullying (cont'd)

On December 3, 2012, the Second Circuit Court of Appeals (which has jurisdiction over New York State) affirmed an award of \$1 million plus costs and fees to a bi-racial student who had endured persistent harassment on the basis of his race over the course of three-and-a-half years. The opinion in *Zeno v. Pine Plains Central School District* recounts the student's torment in detail: from the time he moved into the largely white school district he faced the contempt of his classmates who threatened his life, threatened his sister, physically attacked him, filled his locker with garbage, and repeatedly used racial epithets in talking to him. The victim of this harassment, Anthony Zeno, left the district with an IEP diploma after refusing to spend more time at the high school to try and obtain a Regents diploma.

While the extent of the harassment was severe, the District's reaction was not atypical. It addressed each specific incident of harassment by disciplining the students responsible. After being disciplined, many of the students reformed their behavior. When Zeno sued, the District argued in court that it was not "deliberately indifferent" to the harassment and, thus, was not liable to Zeno. Both a jury and the Second Circuit disagreed.

The Court noted that the manner in which the District responded to specific incidents did not deter other students from engaging in serious and offensive racial conduct. It also found that the District's attempts at implementing anti-harassment programs occurred long after the harassment became serious and were insufficient to address the situation. It further noted that the Dutchess County NAACP offered to provide the District with racial sensitivity programs, which the District refused. Considering these factors, the Court found that "the [District's] actions could not have plausibly changed the culture of bias at [the high school] or stopped the harassment directed at Anthony" and were "clearly unreasonable in light of the known circumstances."

This opinion is significant insofar as it highlights the obligations of school districts under federal law when the student harassment is based on race. As alluded to above, this decision states in no uncertain terms that it is not enough to simply deal with individual instances of harassment; federal law requires school districts to take affirmative steps to change the culture of a school when harassment is pervasive.

This case also provides a striking ex-

ample of the consequences for failing to meet these obligations. The burden of this decision on the Pine Plains District is aggravated by the fact that the \$1 million verdict does not include costs and fees, which have accumulated over the course of four-and-a-half years and could be significant. Moreover, as a general rule, insurance policies generally will not cover the costs involved in defending or addressing intentional acts of discrimination.

In short, *Zeno v. Pine Plains Central School District* reinforces the message that New York State and the federal government have been trumpeting over the past few years: bullying and other forms of harassment are serious matters and a failure to adequately address these problems can result in serious consequences for school districts.

Implementing policies and procedures to prevent or address widespread harassment should be done with care. Should you need assistance in these matters, please contact our office.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Program/Location</u>
Colleen Heinrich Eric Wilson Joseph Shields Donald Budmen	1/15/13	Firm School Law Briefing (see detailed information on Page 1), Holiday Inn, 911 Brooks Avenue, Rochester, New York
Susan Johns	1/15/13	Client In-Service Program on Student Discipline for Students with Disabilities
Marc Reitz	1/24/13	Client In-Service Program on Investigation Techniques

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.