School Law Matters

March 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

Action Needed to Comply with New York State's New Gun Law

Henry F. Sobota, Esq.

New York's new gun control law (also know as the New York Secure Ammunition and Firearms Enforcement Act or the "NY SAFE Act") was passed by the State Legislature on January 15, 2013, and signed into law by Governor Cuomo on the same day. Some of its provisions took effect immediately; most provisions took effect on March 16.

One provision of the new Act makes it a felony for any person to possess a rifle, shotgun, or other firearm on school grounds or a school bus, effective March 16.

The new Act contains an exception, however, allowing an individual to possess a firearm in school without committing a felony, if he/she has "written authorization" from the school.

Prior to the NY SAFE Act, State law also prohibited the possession of firearms in schools. The old law likewise contained an exception that allowed an individual to possess a firearm in school without committing a felony, if he/she had "written authorization" from the school. But the old law also contained a broader, blanket exception or authorization that allowed school resource officers and other law enforcement officers to carry weapons in school; they did not need a specific "written authorization" from the school to do so. Unfortunately, a quirk in the way the new Act was drafted makes the old blanket authorization inapplicable.

The State Legislature would be wise to quickly address this problem with a statutory amendment. As the law now stands, most law enforcement officers will not want to enter school grounds or buses without some sort of written authorization.

In the meantime, though, we are recommending that Superintendents, District Superintendents or school boards should issue a blanket written authorization to the State Police and to each county and local law enforcement agency with jurisdiction over the school district or BOCES. This can be done in letter form. One letter would be sent to each such agency. If the board's policies do not specifically authorize the Superintendent or District Superintendent to grant such authorizations, the board should amend its policies to do so.

It would obviously be impractical for school officials to issue a written authorization each time a law enforcement officer needs to enter school grounds or a school bus. Therefore, we believe that it would be consistent with the new Act to issue this type of blanket authorization.

The letter should indicate that "the school district or BOCES hereby authorizes any sworn police officer, peace officer or other law enforcement officer employed by the agency to possess a firearm pursuant to his/her duties while in or upon any school building or grounds of the district or BOCES, or upon a school bus." Doing so will ensure that law enforcement officers will provide the level of protection that we all expect.

Attorney Spotlight

Henry F. Sobota is a 1974 graduate of Cornell University and a 1977 graduate of the Albany Law School of Union University. He served as Deputy Counsel for Labor Relations and Environmental Law while employed by the New York State School Boards Association for many years prior to entering private practice.

He frequently lectures to public and private sector employer representatives and school-related organizations across the State. He is also an author of numerous articles and publications which have received high acclaim by experts in the field. Mr. Sobota concentrates much of his practice in the representation of school districts, including a substantial amount of activity in the prosecution of disciplinary proceedings against school employees.

He has served as the State Bar Association's Legislative Chairman for its Municipal Law Section. He is a member of the New York State Association of School Attorneys, Inc., the NSBA Council of School Attorneys, NYS Management Advocates for School Labor Affairs (Director 1988-91).

In This Issue ...

Reductions in Force

Teacher Layoffs: Solving the "Schedule Shuffling" Problem

Teacher layoffs have unfortunately become more commonplace in recent years. The firm won a recent appellate decision that helps to uncomplicate the process a bit.

Most school officials are familiar with the basic rules that require them to: (1) designate the tenure area (e.g., English, foreign languages) where cuts will be made; and (2) first lay off or reduce the least senior teacher(s) in that tenure area. But complications can arise when attempting to follow the basic rules in some tenure areas, e.g., foreign languages and science, where teachers may not be certified to teach all of the courses in the tenure area. For example, school officials may need to cut a French position, but the least senior teacher in the foreign languages tenure area may not be a French teacher.

In the foregoing example, logic would seem to dictate that the District lay off the least senior French teacher. But decisions by the State's courts, dating back to the 1970's, tell us to take one more step prior to laying off the least senior French teacher. That is, the District is obligated to first adjust teachers' schedules so as to allow teachers to teach within their areas of certification. Early cases said that schools could lay off more senior teachers only if it was "impossible" to adjust senior teachers' schedules so as to allow them to teach courses without violating certification rules.

How far must a school district go in shuffling schedules? Stated differently, how "impossible" must it be? The more recent cases have limited the scope of the shuffling requirement. That is, they have declined to apply the principle in cases where a proposed schedule adjustment is technically possible (because it would be legally permissible), yet educationally unsound. Some cases have held that a school district is not required to assign teachers outside their area of certification, even if permitted by the Commissioner's incidental teaching rules, if it finds such incidental teaching to be educationally unsound.

The recent appellate decision in *Matter of Seney v. East Greenbush CSD*, 103 A.D.3d 1022 (3d Dept., 2/21/2013), is a new illustration of these principles. In that case, the school board reduced a French teacher by .2 FTE due to declining enrollments in French. The teacher whose hours were reduced was the District's least senior French teacher, but not the least senior foreign language teacher.

The French teacher sued the school board, claiming that it should have assigned its most senior French teacher to teach a .2 assignment in German, inasmuch as that teacher held dual State certification in both subjects. However, the school board was able to show that it would have been educationally unsound to force the senior French teacher to teach German. She had not taught the subject in 20 years, she had taught only a few sections of German throughout her career, had taught French exclusively for two decades, and had allowed her German skills to diminish to the point of ineffectiveness.

The court upheld our firm's arguments, and explained, "Tenure rights are not sacrosanct, ... and should yield to decisions based on economics and sound educational policy. [Although] The board of education bears the burden of proving that it was impossible to adjust schedules to retain the more senior teacher, and this burden can be met with proof that proposed schedules are not educationally or financially feasible."

If you have any questions about these rules or need guidance with respect to an impending or possible reduction in force, please contact our office.

Religion and Free Speech

School's Action to Remove Religious Content from Student's Speech Upheld

On January 30, 2013, the Second Circuit Court of Appeals issued a decision addressing the right of a school district to limit a student's religiously-based comments as part of an 8th grade "moving up" ceremony.

In *A.M. v. Taconic Hills Central School District,* the Court was asked to review whether the school district had impermissibly infringed upon a student's free speech rights when it required the student to remove a particular sentence from her moving up speech. The student was a co-president of the 8th grade class and was selected to speak at the moving up ceremony. Her proposed speech ended with the sentence:

> *As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up his countenance upon you, and give you peace.*

Upon review of the speech, staff expressed concerns with her concluding statement. Following further review by the principal, the Superintendent and legal counsel, a determination was made that the student would either have to remove the sentence or not speak. The sentence was removed from the speech and the parents later initiated this proceeding.

Under the traditional free speech analysis, the Court determined that the question in this instance was guid-

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Religion and Free Speech

School's Action to Remove Religious Content from Student's Speech Upheld (cont'd)

ed by the Supreme Court decision in *Hazelwood School District v. Kuhlmeier*, *i.e.,* that the speech was to be given in a school-sponsored context which gave the school district broader rights to control the content of the speech. The Court then investigated whether the school district's restrictions were based on the content of the speech or the viewpoint expressed by the student in the speech. The Court concluded that the restrictions were based on the religious content, and not the religious viewpoint, and held that any restrictions imposed by the school district only had to be *reasonable* in trying to achieve the objective. The Court stated that the avoidance of a potential establishment clause violation was a "legitimate pedagogical concern", particularly since the Court noted that the challenged sentence "consisted of a direct quotation from the Old Testament calling for a divine blessing of the audience." Based on this analysis, the Court upheld the school district's action.

There is no question but that issues like this arise with some frequency around graduation, and that school districts have the right to review speeches to be given at a school district graduation. Caution must be utilized to distinguish between "statements offering a religiously informed viewpoint on an otherwise secular subject matter" and encouraging religious acceptance or philosophy. While a student would likely be able to say "I want to thank the LORD for the support he has given me these years", he could not say "if you all will accept the LORD you too can succeed."

As these issues arise, not only will legal counsel help you to wend your way through this minefield, but it will also be an element of your defense if there is a legal challenge made to your determination.

If you have any questions about this court decision or dealing with religious speech in general, please feel free to contact us.

Human Resources Law Update

New I-9 Form Available and Required for New Hires

On March 8, 2013, U.S. Citizenship and Immigration Services (USCIS) (formerly the "Immigration and Naturalization Service" or "INS") released a new Employment Eligibility Verification Form I-9. Employers should begin using the new Form I-9 immediately for all new hires. The new form's revision date appears on the lower left corner of the new form as "(Rev. 03/08/13)N".

Some of the changes to the I-9 include:

- Amending the layout of the form in an effort to reduce clerical errors;
- Adding data fields for the employee's foreign passport information, email address and telephone number; and,
- Revising the form's instructions in the interest of greater clarity.

The USCIS is providing a 60-day transition period (or until May 7, 2013), during which employers may continue to use previously valid I-9 forms without penalty. This is intended to give employers time to train their personnel on completing the new Form and to modify their protocols and any applicable technology to accommodate these changes.

After the 60-day period, no prior versions of Form I-9 will be accepted. Thereafter, employers who fail to use the new form will be subject to costly penalties set forth in the law and regulations.

Employers can obtain the new I-9 Form online by visiting http://www.uscis.gov.

If you have any questions about the new form, please contact our office.

New FMLA Poster

Beginning March 8, 2013, employers are required to post a new Family and Medical Leave Act (FMLA) poster. It can be accessed at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf. The poster was revised to reflect changes made to the FMLA and its regulations. Specifically, the law and regulations were amended to extend military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses and expanded the definition of a serious injury or illness to include injuries or illnesses that result from preexisting conditions. They also expanded "qualifying exigency" leave to eligible employees with family members serving in the Armed Forces (but added a requirement that for all such leave the military member must be deployed to a foreign country).

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Purchasing Issues

Reminder: Beware of Form Contracts

Every year school district clients enter into thousands of contracts with vendors, professionals and other municipalities for goods and services. We strongly urge our school district clients to have strict protocols and procedures to ensure that each contract has been reviewed by the school district Business Office and school attorney before it is approved by the Board of Education or Superintendent of Schools.

Areas of particular concern involve fundraisers, student accounts and activity funds, as well as, the routine purchase of materials.

We strongly urge our school district clients to include their own contract when they issue any Request For Proposals for goods and/or services. By attaching the contract to the Request For Proposals, our clients ensure that the scope of duties, the fee arrangement and all other essential terms and conditions have been generated and approved by the school district rather than accepting the form contract from an outside vendor. Typically, the vendor contracts have clauses which favor the vendor rather than the school that is purchasing the services.

If you have any questions or need any assistance in reviewing and establishing these guidelines, please contact our office.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Mike Dodd	**3/28/13**	**Webinar—** Affordable Care Act " Pay-or-Play Rules": Know Your "Shared Responsibility"
Susan Johns	**4/22/13**	**In-Service Presentation on "**Hot Topics in Education Law"
Susan Johns	**4/24/13**	**Capital District School Boards Association**, presenting on Special Education, Watervliet High School, Watervliet, NY
Nicholas Fiorenza **Mike Dodd**	**4/25/13-** **4/26/13**	**Human Resources Conference: "**Navigating the Ever-Changing Landscape of Human Resources Law" **-** Turning Stone Resort, Verona, NY
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

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.