School Law Matters

November 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

New SED Health Exam Guidelines Generate Concern about Care for Sick or Injured Students

By Michaela Perrotto, Esq.

The New York State Education Department (SED) recently published its "School Health Examination Guidelines" for school districts to use in developing effective procedures, policies, and follow-up with respect to health examination requirements. These Guidelines have raised some serious questions among school officials, not with respect to the health examination requirements themselves, but rather about whether school personnel are permitted to provide **any** health-related assistance to sick or injured students while they are in school custody.

Specifically, the Guidelines state that Education Law section 910 and Public Health Law section 2540 require parental consent for "health services, treatment and remedial care of students." It is further suggested (in a footnote to these Guidelines) that schools may obtain "passive parental consent" to provide care and treatment to students by sending "opt-out letters" to parents prior to the start of the school year. In other words, the school district would be notifying parents that they can "opt out" of permitting school personnel from providing **any** health-related assistance to their children regardless of the circumstances. Taken to its logical conclusion, such a practice could result in circumstances where school officials are required to stand back and offer no assistance to a sick or injured student on school premises, if the student's parents have opted out.

This is in direct conflict with a long-standing, legal obligation that school officials act "in loco parentis", i.e., in the place of the parents, while students are in their custody. This obligation requires district personnel to act with the same care as a prudent parent would with an ill or injured child. See Hoose v. Drumm, 281 N.Y. 54, 57–58, 22 N.E.2d 233 (1939).

The SED Guidelines appear to be basing the opt-out-notification requirement on two cases that have interpreted Education Law section 910 and Public Health Law section 2540: i.e., Alfonso v. Fernandez, 195 A.D.2d 146 (1993); and D.F. v. Bd. of Educ. of Syossett CSD, 386 F. Supp.2d 119 (E.D.N.Y. 2005), *aff'd*, 180 F.Appx. 232 (2d Cir. 2006), *cert. denied*, 549 U.S. 1179 (2007). In Alfonso, the court held that the school district was prohibited from dispensing condoms to unemancipated minor students without the prior consent of their parents or guardians, or without an opt-out provision. The basis of the ruling was that there is no judicial or legislative authority directing or permitting public school educators to dispense condoms to minor students without the knowledge or consent of their parents. In D.F. v. Bd. of Educ. of Syossett CSD, the court held that school districts should also obtain parental consent before providing psychological testing to minor students.

While it is true that Education Law section 910 allows for parental determination for health services, treatment and remedial care of students, both the Alfonso and D.F. v. Bd. of Educ. of Syossett CSD cases involved highly contro-

Continued on the next page

Attorney Spotlight

Michaela Perrotto

Michaela Perrotto is a 2008 graduate of Albany Law School, where she concentrated in labor and employment law. There, Ms. Perrotto received the Patrick McNamara Prize, awarded to the graduate having the highest GPA in the labor law concentration. Ms. Perrotto also attended the Pennsylvania State University, earning her undergraduate degree in Labor and Industrial Relations in 2005. Prior to joining our Firm, Ms. Perrotto was a Labor Relations Specialist for the Cayuga Onondaga BOCES, where she worked on matters pertaining to labor, employment and education law. Ms. Perrotto is admitted to practice before New York State courts and is a member of the Monroe County Bar Association and the NYS Ass'n of Management Advocates for School Labor Affairs.

In This Issue ...

Hot Topics

New SED Health Exam Guidelines Generate Concern about Care for Sick or Injured Students (cont'd)

versial topics, i.e., condom dispensing and psychological testing of students. The same cannot be said for providing basic first aid to an injured or ill student.

School officials need to understand that these Guidelines are not law or regulations but rather "best practice" suggestions from SED on this issue. Moreover, this is an evolving and, as yet, unpredictable area of the law. Accordingly, until there is a more definitive statement from the State Legislature, the court system and/or SED **requiring** school districts to notify parents of their right to opt out of permitting **any** care to their children who are ill or injured, school officials should proceed cautiously. We have advised clients that they are not required at this point to issue this notification. However, if you choose to send out such a notice, work closely with your school attorney in drafting that notice and implementing any new procedures related to it.

If you have any questions regarding the foregoing or parental opt-outs, in general, please contact our office.

Unemployment Insurance

Unemployment Insurance Reforms Penalize Employers for Late Responses to Inquiries and May Effect the Next Severance Agreement You Negotiate

The New York legislature recently enacted a number of unemployment insurance (UI) reforms designed to comply with new federal guidelines and to save the Agency some money. Two of these reforms are of particular importance to New York employers: 1) new penalties for failing to respond in a timely and complete fashion to requests for information by the New York State Department of Labor's Unemployment Insurance Division (Division) when it receives a UI claim; and 2) severance pay will be taken into consideration and may delay a former employee's receipt of UI benefits. The former change took effect on October 1, 2013 and the latter will become effective on January 1, 2014.

Late Responses to UI Inquiries

The first New York reform penalizes employers who provide incomplete information on -- or who are late with their responses to -- the Division's request for information. This request is a standardized form which is automatically sent out to the individual's former employer when the Division receives a UI claim. The form requests information about -- among other things -- the employee's previous pay and the circumstances of his/her separation from employment. The form generally must be completed and returned to the Division within 10 days. The Division bases its initial determination about whether an applicant is entitled to benefits, at least in part, on the information received from employers on that form. If the individual is initially awarded benefits, the employer has the right to appeal the decision and have the case heard before an administrative law judge (ALJ). Prior to the recent reforms, employers received a credit for any UI benefits paid to a former employee when the employer wins its appeal (i.e., when the Division's ALJ determines that the individual is ineligible for benefits or otherwise received a mistaken overpayment of UI benefits).

As of October 1, 2013, if an employer is late in responding to the Division's form or provides incomplete information, the Division will no longer credit the employer's account for these overpayments. In other words, even if the Division's ALJ decides that the former employee is not entitled to benefits or has been otherwise overpaid, the Division will not credit the employer's account; instead, that money will be paid into the State's general Unemployment Insurance Fund.

The bottom line for employers is if you plan to contest a UI claim, you need to make a timely and complete response to the Division's initial request for information.

Severance Agreements Effected

The second important amendment changes how UI benefits will be paid to individuals who receive severance payments from their former employer. Beginning January 1, 2014, if the Division determines that an individual is entitled to UI benefits but learns that the individual is also receiving severance payments (within 30 days of his/her separation from employment), the former employee may not be permitted to collect UI benefits immediately. Specifically, if the severance amount is greater than the maximum UI benefit rate, the UI benefits will not begin until the severance pay has been exhausted.

In other words, if you plan to give severance to a departing employee in exchange for a waiver and release of all claims against your District, for example, you may need to negotiate further with the outgoing employee to account for this delay in receiving UI benefits.

If you have any questions or need assistance with respect to the foregoing, please feel free to contact us.

Student Discipline

Who's Responsible for Student Suspensions from BOCES Program?

If a student is to be suspended from a BOCES program for more than five school days for misconduct that occurred at the BOCES, which entity should conduct the Superintendent's Hearing under Education Law section 3214 – the BOCES or the home school district?

The Commissioner of Education has held that both the home school district ***and*** the BOCES may suspend a student from BOCES programs sponsored by the District, so long as proper procedures are followed. Appeal of Bartlett, 33 Ed. Dept. Rep. Decision No. 13,036 (1993). Moreover, the Commissioner has held that the home school district may impose disciplinary sanctions for improper conduct occurring at a BOCES program. Appeal of June D., 38 Ed. Dept. Rep. Decision No. 14,104 (1999); Appeal of V.G., 44 Ed. Dept. Rep. Decision No. 15,171 (2005).

In our view, the best practice is for the home school district to conduct the Superintendent's Hearing, with the BOCES providing any supporting evidence or corroborating witnesses. This avoids the need for BOCES to conduct a second hearing. It is preferable for the BOCES and the home school district to have a previous understanding to follow this procedure.

However, if there is no such arrangement, and the BOCES wishes to suspend the student, like the home district, the BOCES must comply with the requirements of Education Law Section 3214. This means that the BOCES would be responsible for providing notice of -- and conducting -- the hearing as well as reaching a conclusion about the student's guilt and any appropriate disciplinary action taken. Appeal of a Student with a Disability, 33 Ed. Dept. Rep. Decision No. 12,992 (1993).

If you have any questions, please feel free to contact our office.

Overtime Pay Requirements

Overtime Obligations with Respect to Non-Instructional School Employees

We often receive questions from school officials about whether they are required to pay overtime to non-instructional employees who work more than 40 hours in a workweek while working two or more different jobs for the district/BOCES. Generally speaking, schools **are** obligated to pay overtime (i.e., not less than one and one-half times the employee's regular hourly rate of pay) to these employees under these circumstances. Moreover, the Fair Labor Standards Act (FLSA) and its regulations explicitly state that collective bargaining agreements cannot waive or reduce the Act's requirements in this regard. This means that school administrators must pay overtime to employees performing multiple jobs or duties for the district/BOCES (if they work more than 40 hours in a week), even if the district/BOCES and the employees' union have negotiated separate wage rates for any such additional duties or jobs.

In circumstances where a non-instructional, non-exempt employee performs differing jobs for a school district/BOCES and is thus subject to differing rates of pay, the calculation of overtime pay can get complicated. The New York State Department of Labor's (NYSDOL) regulations that state that "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in . . the Fair Labor Standards Act [FLSA]". (12 NYCRR 142-2.2.) The FLSA provides a number of methods for calculating an employee's regular rate of pay under these circumstances.

Perhaps the least complicated method is known as a "weighted average" calculation. Using this method, the employee's "regular hourly rate" of pay is a weighted average of the hourly wage rates for all the positions the employee worked during that workweek. That is, total straight-time earnings for the week are divided by the total number of hours worked at all jobs. (29 C.F.R. §778.115.) Once the weighted average (regular hourly rate) is determined, the district/BOCES must make sure that the employee receives at least one and one-half times that rate for each hour of overtime worked.

The other FLSA-approved methods for calculating overtime may require special agreements with employees and/or their union representatives and/or more complicated calculations.

If you have any questions regarding your District's obligation to pay overtime to certain classes of employees or questions regarding your overtime calculations, please feel free to contact our office.

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First Amendment

Balance is the Key to First Amendment Issues at Holiday Celebrations

With the winter holidays fast approaching, school districts once again are faced with balancing the learning opportunities and festive atmosphere of holiday celebrations against the legal restrictions on the interplay between the religious aspects of those holidays and the school's legal obligations. Holiday displays and concerts in schools often stir strong feelings amongst community members, as there are few things that concern people more than the instruction of their children and their religious beliefs.

The First Amendment to the U.S. Constitution establishes two principles that can seem contradictory: the Free Exercise Clause, which ensures that people can practice their faith freely, and the Establishment Clause, which prohibits the government—including public schools—from establishing or endorsing a religion. These competing interests can place pressure on school administrators from opposite sides of the issue. If the school permits overt religious displays, it runs the risk of violating the Establishment Clause, and restricting children from creating such displays can run afoul of the Free Exercise Clause.

The U.S. Supreme Court has taken several occasions to review this topic of great importance to communities across the nation. While the Court's rulings establish that schools may teach about religion and its cultural significance, and may use religious symbols and songs in teaching about religion, they may not carry out religious instruction and may not favor or denigrate one particular faith or belief. As long as a school maintains a neutral position on religion and is tolerant of all views, it is unlikely to violate the First Amendment.

The most successful approaches to reconciling the First Amendment's competing concepts allow schools to acknowledge and teach about these cultural traditions without endorsing any particular sect or religion. In practice, this may mean limiting or eliminating the use of overtly religious displays and references in favor of secular symbols of the holidays. If symbols or signs from a particular religious tradition are used, they should be balanced by those of other faiths, as well as appropriate secular signs. For example, a crèche or a menorah erected in isolation would likely be found unconstitutional if challenged. However, holiday displays that include a menorah, a star and crescent in recognition of the holy month of Ramadan, a Christmas tree topped with a star, and various secular decorations have been found to comport with both the Free Exercise Clause and the Establishment Clause. Additionally, attention should be paid to the context in which religious symbols are displayed or otherwise presented. Overemphasis of the religious aspect of a display may be seen as proselytizing or endorsing of a religion. The same reasoning has been applied to holiday concerts. Secular songs and themes are generally acceptable during these events. Religious music is also permitted at seasonal concerts, but should be balanced with those of other faith traditions and secular music. Again, balance and neutral appearance are the critical elements to avoiding a constitutional challenge.

In short, school officials should take care that the message conveyed by their holiday season activities remains educationally focused and avoids the appearance of endorsement of religion that the First Amendment prohibits.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Benjamin Ferrara	**11/15**	**Presentation on Contract Provisions and Superintendent's Duties; NYSCOSS Legal Counsel's Briefing at Herkimer BOCES**
Donald Budmen	**11/15**	**Presentation on Social Media and Defamation Issues, NYSCOSS Legal Counsel's Briefing at Herkimer BOCES**
Joseph Shields	**11/15**	**Presentation on New Laws and Court Decisions, NYSCOSS Legal Counsel's Briefing at Herkimer BOCES**
Marc Reitz Susan Johns Eric Wilson Heather Cole	**11/20**	**Ferrara Fiorenza Law Firm Breakfast Briefing on Recent Developments in School Law, Presented at St. Lawrence-Lewis BOCES Conference Center in Canton, NY**
Michaela Perrotto	**12/4**	**Client In-Service Presentation on DASA and Student Discipline**

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.