

# School Law Matters

OCTOBER 2014



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

Route to: Board  Personnel  Instruction  PPS  Business  Other: \_\_\_\_\_

## Hot Topics

### Firm to Present School Law Briefing in the North Country; Register Today!

The Ferrara, Fiorenza Law Firm will be presenting its latest “School Law Briefing” on Tuesday, November 18, 2014 from 9 a.m. – 11 a.m. This is a value-added service we offer to our clients, at different locations throughout upstate New York, at least twice a year. The Indian River Central School District has graciously authorized us to use their “Large Group Instruction Room” in their High School located at 32925 US Rt. 11, Philadelphia, New York for this event. The topics to be addressed will include: 1) Testing Procedures and Irregularities; and 2) Child Abuse in an Educational Setting.

#### Testing Procedures and Irregularities

As most of you are aware, the Commissioner of Education’s Regulations have been amended to: 1) clarify the meaning of “testing misconduct” committed by employees of school districts and BOCES; 2) provide for mandatory reporting of such misconduct; and 3) provide “whistleblower” protection for employees who report testing misconduct. Attend this Briefing to learn about procedures to identify the issues and the investigation that will necessarily accompany any allegations of testing irregularities.

#### Child Abuse in an Educational Setting

It is a tragic reality that sometimes children are mistreated while at school. School officials must be prepared to respond to these situations quickly and in accordance with state law. Article 23-B of the Education Law requires the reporting of allegations of child abuse in an educational setting. The

law establishes a reporting process that must be followed. Remember, there are serious civil and even criminal penalties for failing to follow these rules. Join us on November 18, to learn more about

- Legal Definition of Child Abuse and Neglect
- Mandatory Reporting Obligations
- Tips for Handling Disclosures of Abuse
- How to Avoid Allegations of Misconduct

#### Who Should Attend?

This presentation is intended for Board Members, Superintendents, Principals and other school administrators. While registration is free, space is limited. Accordingly, please register (as described below) no later than November 16, 2014, indicating whether you, and/or any other officials from your district, will be able to join us.

#### Register Today

To register, please visit our website at [www.ferrarafirm.com](http://www.ferrarafirm.com). Simply click on “School Law Briefing (Indian River)” 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. If you have any questions, please feel free to contact our Syracuse office at 315.437.7600

#### Watch Your Email for Information on December School Law Briefings

Please note that the Firm is planning additional Breakfast Briefings in Rochester and Utica in December. Watch your email for further details!

## Attorney Spotlight



**Eric J. Wilson** graduated *cum laude* from Marist College in 1988 and received his law degree *cum laude* from Albany Law School in 1991 where he was a member of the Albany Law Review and Justinian Society.

Prior to joining the Ferrara, Fiorenza Law Firm, Mr. Wilson was the Director of Personnel and Labor Relations for the Onondaga Cortland Madison BOCES and previously was the School Attorney for the Syracuse City School District. Mr. Wilson is a member of the New York State Bar Association, the Onondaga County Bar Association, the New York State Association of School Attorneys, the New York State Association of School Personnel Administrators and Management Advocates for School Labor Affairs.

Mr. Wilson’s practice concentrates in the areas of Public Sector Employment Law and Education Law.

### In This Issue ...

- Firm to Present School Law Briefing in the North Country; Register Today!
- Attorney Spotlight
- Maximizing Return on Anti-Discrimination Training
- Student Privacy Concerns with “Cloud-Based” Software Use
- The Limits of Teachers’ Free Speech Rights to Denigrate Common Core or APPR
- Upcoming Events

**Employment Discrimination****Maximizing Your District's Return on Anti-Discrimination Training**

It is crucially important to provide staff with quality training about a school district's anti-discrimination policies and procedures, and related federal and state laws. Carefully tracking the types of training provided can prove invaluable in responding to discrimination claims, in prosecuting employee disciplinary proceedings, in managing public relations, and in evaluating whether it may be time for additional training.

Anti-discrimination training fosters a positive work environment by reminding employees of the prohibition against conduct or comments that are, or may be perceived to be, discriminatory in nature. Employees who receive such training are "on notice" of the requirements and prohibitions established by law and by school district policies. Further, such employees are also "on notice" of the steps they are directed to take to report violations of the law and a school district's anti-discrimination policies.

**Training Auditor:** Assigning a specific employee responsibility for cataloging employee training can prove very effective in maximizing the benefits associated with such training. This employee should keep a copy of all instructional material presented in each training session, along with a record of the employees who received the training, the date it was provided and a brief description of

the type of training provided. If handouts are provided, a copy should be retained; if employees are shown a PowerPoint presentation, ask the presenter for a copy of the presentation. These relatively simple steps can provide substantial benefits going forward.

**Defense to Legal Claims:** Discrimination claims can be difficult to defend. It is important that school districts use training to reduce the likelihood of such claims. When such claims do arise, be prepared to take advantage of legal defenses provided to employers who have acted proactively to reduce the likelihood of discrimination in the workplace. Maintaining a good record of when training was provided, what it consisted of, and to whom it was provided is an effective way for a school district to ensure that it obtains proper credit from courts and administrative agencies for steps taken to prevent discrimination in its workplace.

**Managing Public Relations/ Perception:** Being able to promptly show that it provided quality anti-discrimination training at reasonable intervals will also help a school district defend itself in the court of public opinion if accused of condoning or being indifferent to discrimination.

**Facilitating the Prosecution of Disciplinary Action:** It is far easier for an

employer to respond aggressively to violations of its anti-discrimination policies if the employer can show that the employee in question was provided with quality training in the not-to-distant past. Whether it is a Civil Service Law Section 75 hearing or charges brought pursuant to Education Law Section 3020-a, the ability to prove an employee was "on notice" regarding what constitutes unacceptable conduct in the workplace can be crucially important to successfully imposing appropriate disciplinary sanctions.

**Evaluating Whether Additional Training is Warranted:** Cataloging the types of training provided will also help determine if it may be time to schedule additional training on a particular topic. The legal and practical benefits derived from a given training session dissipate over time. Without knowing what type of training was provided, when it was provided and to whom it was provided, a school district will not be able to make a fully informed decision about whether it may be time for additional training in a given area.

Should you have questions about how your school district can maximize the benefits associated with anti-discrimination training, please feel free to contact Charles E. Symons, Esq. at our Syracuse office.

**Student Privacy****Student Privacy Concerns with "Cloud-Based" Software Use**

Many professionals, including professional educators, use the Google Docs, Google Sheets, and Google Slides applications, or "apps," in order to prepare documents, spreadsheets, and presentations. For those who are less tech-savvy, these three Google products are apps for word processing, the creation of spreadsheets (similar to Microsoft Excel), and the creation of presentations (similar to Microsoft PowerPoint). The apps allow users to create and edit documents online, or with a mobile device, in real time, with other

users. When a file is created with one of these apps, it is saved to Google Drive, a storage and synchronization service – commonly called a "cloud." Use of these apps can be powerful and time-saving technological tool for professionals.

What, however, about the privacy and confidentiality of the information contained in the files? Educators should be aware that if a teacher or administrator uses an app such as Google Docs, and includes information that constitutes a student rec-

ord as defined by the Family Educational Rights and Privacy Act [20 U.S.C. Section 1232(g), 34 C.F.R. Part 99, "FERPA"] in that document, there may be some very real concerns regarding FERPA compliance. As most of you know, FERPA is a federal law which prohibits disclosure of student education records to anyone other than an eligible student or parent, except under certain limited circumstances. FERPA broadly defines "education records" as records

*Continued on the next page*

**Student Privacy****Student Privacy Concerns with “Cloud-Based” Software Use (cont’d)**

that are directly related to a student, and are maintained by an educational agency. With technology advancing faster than the law can keep up, it is important to consider FERPA obligations when utilizing apps as part of school-related work.

Google in particular offers a service known as “Google Apps for Education,” of which Google Docs is a component. The Google Apps for Education Terms of Service specifically addresses FERPA compliance, and notes that “to the extent that Customer Data includes FERPA records, Google will be considered a ‘School Official’ (as that term is used in FERPA and its implementing regulations) and will comply with FERPA.” Thus, if use of an app is used via Google Apps for Education, there is an acknowledgment by Google itself that student education records are subject to FERPA.

It should be noted, however, that a federal lawsuit is pending in which users of Google Apps for Education allege that Google utilized the content of emails sent via Apps for Education to create user profiles and provide targeted advertising, in violation of the Federal Electronic Communications Privacy Act (“ECPA”) (See In re Google Inc. Gmail Litigation, No. 13-MD-

02430.) While the lawsuit focuses on ECPA compliance, the United States Education Department’s Privacy Technical Assistance Center issued guidance reminding schools that FERPA would prohibit an app provider, such as Google, from using data about individual student preferences gleaned from scanning student content to target ads to individual students. Thus, if Google is indeed “mining data” via the Apps for Education program, as alleged by the plaintiffs in the In re Google Inc. Gmail Litigation, Google may be violating FERPA - despite its assurances in its Terms of Service.

Moreover, if an app such as Google Docs is not being used as part of Google Apps for Education, there is no suggestion by Google that use of the app will be FERPA-compliant at all. When these online programs are used separately from Google Apps for Education, the user acknowledges that by uploading content to Google, the user has granted Google with a “worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content.” Google

cautions users to “[m]ake sure you have the necessary rights to grant us this license for any content that you submit to our Services.”

Of course, Google is not the only app provider that markets to educators. Microsoft’s Office 365 is a Google competitor, which provides similar products.

Regardless of the app used, educators must be aware that uploading anything that would constitute a student educational record to a cloud-based software potentially has FERPA implications. There is no FERPA exception that would allow disclosure of student educational records via an app. Therefore, educators should be just as careful about this content as they are about information that could be available in hard copy form, or transmitted via district-based email. If disclosure of a hard copy of information or if attaching a document to email would result in a FERPA violation, uploading that same information to an app may also result in a FERPA violation. Once the content has been uploaded, the app user generally loses control over the ability of others to gain access to the information. In so doing, the app user also loses the ability to ensure compliance with FERPA.

**Freedom of Speech****The Limits of Teachers’ Free Speech Rights to Denigrate Common Core or APPR**

Many educators have very strong feelings about the Common Core and APPR. Some educators, teachers and administrators have been vocal in opposition to Common Core and APPR. In fact, some have opted out their own children from State assessments. Recently, we have received a number of questions from our clients asking us to evaluate varying circumstances under which an employee’s duty to the district has to be balanced against the employee’s First

Amendment right to free speech. The legal analysis involves ascertaining if the employee is expressing his/her opinion as a private citizen or as a public employee. As you might expect, when teachers act as private citizens, they enjoy greater constitutional protection.

The Supreme Court of the United States has held that statements made by public employees in their official ca-

capacity are not protected by the First Amendment and the Constitution does not insulate them from employer discipline (*Garcetti v. Caballos*, 126 S. Ct. 1951 [2006]). Clearly, educators have a duty to support the mission of the district and consequently its curriculum and evaluation procedures. *Garcetti* stands for the proposition that

*Continued on the next page*

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](http://www.ferrarafirm.com). © Copyright 2014 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part for other than internal use is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

**Freedom of Speech**

**The Limits of Teachers’ Free Speech Rights (Cont’d)**

public employees acting in their official capacity are not speaking as citizens but rather as employees.

Educators’ disparaging remarks about Common Core and APPR to students or parents in the context of their school duties are not protected speech. Districts may direct employees to refrain from negative or critical comments regarding Common Core or APPR while the employees are acting in their official capacity. Employees may be subject to disciplinary action if they ignore the dis-

trict’s directive.

The legal analysis is fairly straightforward in the context of the classroom, parent-teacher conferences or staff development. The line is not quite so bright in other contexts such as Board of Education meetings, social networking or speech outside of the employee’s official capacity.

As noted above, the legal analysis involves ascertaining if the employee is expressing his/her opinion as a private citizen or as a public employee. For

instance, a letter to the editor may be protected speech if the employee does not identify himself/herself as an educator either in the body of the letter or the signature. However, the speech may not be protected if the educator identifies his/her job title and employer. Each situation is very fact specific and relies heavily on an analysis of context.

If you have any questions or need assistance with a similar matter, please feel free to contact us.

**Upcoming Events**

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Location/Program</u>
Joe Bufano	October 24	Client In-Service, “Dignity Act Training for Athletic Coaches”
Susan Johns	October 24	Client In-Service, “Student Discipline”
Colleen Heinrich	October 24	NYSIR Subscriber Meeting, “Legal Update on Educational Issues”
Joe Bufano	October 29	OHM BOCES, “Dignity Act Certified Training” for candidates seeking NYSED certification
Joe Bufano	October 30	OHM BOCES, “Dignity Act Certified Training” for candidates seeking NYSED certification
Heather Cole Don Budmen	November 10	Client In-Service, “Copyright for Librarians”
Wayne Vander Byl	November 12 <b>(WEDNESDAY)</b>	<b>“Never Settle for Second Best: Building a Staff of Elite Educators in a Tenure Culture”</b> , 400 Meridian Centre Blvd., Suite 110, Rochester, NY, Workshop #3 entitled “Effective Evaluation of the Problem Teacher – Part 1”
Wayne Vander Byl	November 13	<b>“Never Settle for Second Best: Building a Staff of Elite Educators in a Tenure Culture”</b> , 5015 Campuswood Drive, East Syracuse, NY , Workshop #3 entitled “Effective Evaluation of the Problem Teacher – Part 1”
Susan Johns Heather Cole Don Budmen	November 18	<b>School Law Briefing</b> , Indian River High School, Large Group Instruction Room, 32925 US Rt. 11, Philadelphia, NY, “Testing Procedures and Irregularities” and “Child Abuse in an Educational Setting”
Hank Sobota	November 18	Client In-Service, “Data Privacy and Security”
Joe Bufano	November 19	OHM BOCES, “Dignity Act Certified Training” for candidates seeking NYSED certification
Colleen Heinrich Heather Cole	November 19	NYSOSS, The Council’s Legal Workshop, Herkimer BOCES, “Practical Tips on How to Conduct a Thorough Investigation of Employee and Student Misconduct”
Susan Johns	November 19	NYSOSS, The Council’s Legal Workshop, Herkimer BOCES, “Legal Update”
Joe Bufano	November 20	OHM BOCES, “Dignity Act Certified Training” for candidates seeking NYSED certification
Wayne Vander Byl	December 9	<b>“Never Settle for Second Best: Building a Staff of Elite Educators in a Tenure Culture”</b> , 400 Meridian Centre Blvd., Suite 110, Rochester, NY, Workshop #4 entitled “Effective Evaluation of the Problem Teacher – Part 2”
Wayne Vander Byl	December 11	<b>“Never Settle for Second Best: Building a Staff of Elite Educators in a Tenure Culture”</b> , 5015 Campuswood Drive, East Syracuse, NY , Workshop #4 entitled “Effective Evaluation of the Problem Teacher – Part 2”

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.