



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 Testing Misconduct Rules Include Mandatory Reporting Requirements

Michael L. Dodd, Esq.

The New York State Education Department (SED) Commissioner'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 employee who report testing misconduct.

Background

This amendment came about as a result of a 2012 report by Board of Regents and Commissioner-appointed Special Investigator (Henry Greenberg) who performed an in-depth review of SED's processes and procedures for handling and responding to reports of misconduct related to the administration and scoring of New York State assessments. The Board accepted all of the Special Investigator's recommendations, including the recommendation to amend Section 102.4 of the Commissioner's Regulations to prohibit certain testing misconduct and include specific concrete examples of what constitutes "testing misconduct."

The new regulations, which became effective on May 14, 2014, prohibit school district and BOCES staff members from engaging in, "...assisting in the engagement of, or soliciting another to engage in testing misconduct, and/or the knowing failure to report testing misconduct..." (Commissioner's Regulations sec. 102.4(b).) Moreover, if the misconduct is committed by a certificated teacher or school leader, it "... shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and shall be subject to

referral to the Office of School Personnel Review and Accountability at the State Education Department to the extent provided in Section 83.1 of this Title." (Id.) In other words, the employee will be investigated by SED's Office of School Personnel Review and Accountability which has the authority to remove the employee's certification under those circumstances. If the misconduct is committed by a non-certificated employee, they will be subject to disciplinary action by the district or BOCES (under Education Law section 225).

Examples of "Testing Misconduct"

The new regulations provide the following specific examples of reportable testing misconduct:

1. Accessing secure test booklets and/or answer sheets prior to the time allowed by New York State testing rules;
2. Duplicating, reproducing, or keeping any part of any secure examination materials without obtaining prior written authorization from the State Education Department;
3. Reviewing test booklets prior to test administration in order to:
 - (i) determine and record correct responses for use during testing;
 - (ii) create pre-test lessons or discussions with students about concepts being tested; and/or
 - (iii) create a "cheat sheet" for students to use during any State assessment, including but not limited to, sharing formulas, concepts, or

definitions, necessary for the test;

4. Providing students clues or answers during test administration, including, but not limited to, one or more of the following actions:

(i) coaching students about correct answers;

(ii) defining terms and concepts contained in the test;

(iii) pointing out wrong answers to a student and suggesting that the student reconsider or change the recorded response;

(iv) reminding students during testing of concepts they learned in class; and/or

(v) making facial or other non-verbal suggestions regarding answers.

5. Allowing any student more time to take an examination than is allowed

Continued on the next page

In This Issue ...

- New Testing Misconduct Rules Include Mandatory Reporting Requirements
- New "Parents Bill of Rights for Data Privacy and Security" to be included on Each District's Website
- Least Restrictive Environment Requirements Apply to Extended School Year
- Upcoming Events

Hot Topics**New Testing Misconduct Rules Include Mandatory Reporting Requirements (cont'd)**

for that student;

6. Leaving any materials displayed in the room containing topics being tested;
7. Writing test specific formulas, concepts, or definitions on the board prior to and while a State assessment is administered;
8. Reviewing a student answer sheet for wrong answers and returning it to a student with instructions to change or reconsider wrong responses;
9. Altering, erasing, or in any other way changing a student's recorded responses after the student has handed in his/her test materials; or
10. Rescoring portions of the test solely to add or find points so a student will pass the test or earn a higher score on the test, other than legitimate rescoring activities authorized by the superintendent of a public school district or chief administrative officer of a nonpublic or charter school or by the State Education Department; and/or

11. Encouraging or assisting an individual to engage in the conduct described [above]. (Commissioner's Regulations sec. 102.4(c).)

Mandatory Reporting

The regulations also require each school district and BOCES to report to SED any known incident of testing misconduct "by a certified educator or any known conduct by a non-certified individual involved in the handling, administration or scoring of State assessments...." (Commissioner's Regulations sec. 102.4(d).) Moreover, as noted above, failure to report is a form of testing misconduct under section 102.4. Thus, employees must report (according to directions and procedures that have yet to be created by the Commissioner), if they know of another employee who has engaged in any testing misconduct or failed to report knowledge of such misconduct.

Whistleblower Protection

Section 102.4(e) prohibits taking adverse action against employees for fil-

ing a mandatory report. Specifically, it states that:

In accordance with section 75-b of the Civil Service Law, a school district or board of cooperative educational services shall not dismiss or take other disciplinary or adverse action against an employee because he/she submitted a report pursuant to ... this section. Any such adverse action by an individual holding a teaching or school leader certificate shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and may be referred to the Office of School Personnel Review and Accountability at the State Education Department.

As with other violations of these rules, a violation of this "whistleblower protection" section could result in a certified employee losing his/her certification.

If you have any questions with regard to these new rules, please do not hesitate to contact one of our offices.

Privacy**New "Parents Bill Of Rights for Data Privacy and Security" to be Included on Each District's Website to Avoid Disclosure of Student and Other Records**

As a part of the Common Core Implementation Reform Act of 2014, New York State Government enacted a new requirement for school districts to publish and supplement a "Parents Bill Of Rights for Data Privacy and Security." This bill of rights is a part of an overall strategy designed to prevent — and address the consequences of — an inadvertent release of personal information about students, as well as teachers and administrators.

Specifically, the new law created Section 2-d of New York's Education Law entitled "Unauthorized Release of Personally Identifiable Information." The information intended to be protected

include: 1) "Student data," which means personally identifiable information from student records held by or created by a district; and 2) "Teacher or principal data," which means personally identifiable information from a district's records relating to the annual professional performance reviews (APPR) of classroom teachers or principals that is confidential and not subject to release by law.

One of the ways that the law purports to protect this material is by informing parents of their rights vis-à-vis this information in the form of a bill of rights to be published on each district's website and included with every contract a

school district enters into with a third party contractor where the third party contractor receives student data or teacher or principal data.

While the statute does not make it clear, it appears that a Commissioner-appointed "Chief Privacy Officer" (a State Education Department [SED] position created by the law) will develop a form bill of rights for school districts to use. The document must include the following information at a minimum:

1. A student's personally identifiable information cannot be sold or re-

Continued on the next page

Privacy**New “Parents Bill Of Rights for Data Privacy and Security” to be Included on Each District’s Website (cont’d)**

- leased for any commercial purposes;
2. Parents have the right to inspect and review the complete contents of their child’s education record;
 3. State and federal laws protect the confidentiality of personally identifiable information, and safeguards associated with industry standards and best practices, including but not limited to, encryption, firewalls, and password protection, must be in place when data is stored or transferred;
 4. A complete list of all student data elements collected by the State is available for public review at (insert website address here) or by writing to (insert mailing address here); and
 5. Parents have the right to have complaints about possible breaches of student data addressed. Complaints should be directed to (insert phone number, email and mailing address here). N.Y. Education Law § 2-d(3) (b).

In addition, school districts will be required to include with the bill of rights supplemental information for each contract it enters into with a third party contractor where the third party contractor receives student data or teacher or principal data. Such supplemental information will have to be developed by the district from time to time and will have to include the following:

1. the exclusive purposes for which the student data or teacher or principal data will be used;
2. how the third party contractor will ensure that the subcontractors, persons or entities that the third party contractor will share the student data or teacher or principal data with, if any, will abide by data protection and security requirements;
3. when the agreement expires and what happens to the student data or teacher or principal data upon expiration of the agreement;
4. if and how a parent, student, eligible student, teacher or principal

may challenge the accuracy of the student data or teacher or principal data that is collected; and

5. where the student data or teacher or principal data will be stored (described in such a manner as to protect data security), and the security protections taken to ensure such data will be protected, including whether such data will be encrypted. N.Y. Education Law § 2-d(3)(C).

These new requirements are to become effective as of July 31, 2014. Accordingly, we expect that districts will either receive additional guidance from SED (hopefully including a form Parents Bill Of Rights for Data Privacy and Security for districts to use) or that implementation of the law will be delayed until further information is made available. We will keep you informed of any development that we learn in this regard.

In the meantime, if you have any questions regarding this new law, please feel free to contact us.

Special Education**Least Restrictive Environment Requirements Apply to Extended School Year**

The federal appellate court with jurisdiction over New York (i.e., the Second Circuit Court of Appeals) recently issued a decision containing important guidance regarding least restrictive environment (“LRE”) requirements for extended school year (“ESY”) programs. The case, *T.M. ex rel. A.M. v. Cornwall Central School District*, definitively states that the LRE requirements of the Individuals with Disabilities Education Act

(“IDEA”) apply to summer school, just as they do to the regular school year. In other words, if a district cannot meet the LRE requirements for a student with a disability during summer school, they may be required to pay for such placements elsewhere. This is a dramatic departure from past New York State Review Officer (“SRO”) decisions.

Past SRO decisions have found that LRE requirements in the summer school context are necessarily limited by what programs the school district offers. A 1998 SRO decision (No. 98-24) held that a nearby BOCES program for disabled students was an appropriate ESY placement for an elementary student with a severe form

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. © 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.

Special Education

Least Restrictive Environment Requirements Apply to Extended School Year (cont'd)

of cerebral palsy whose IEP placed her in regular education classes during the school year. The SRO based the decision on that fact that the school district in which the student was enrolled did not operate its own summer program, and cited earlier SRO decisions stating that districts are not required to establish their own summer program to comply with ESY standards. The SRO interpreted U.S. Department of Education's guidance that school districts are not required to establish a full spectrum of LRE placements solely to provide ESY services to mean that LRE requirements applied in a more limited sense to the ESY context than to the school-year context.

In *Cornwall*, the Second Circuit found that neither a BOCES special education program, similar to the program in the 1998 SRO decision, nor the district's own summer program exclusively for disabled students was an appropriate

placement for an elementary student with autism (whose IEP placed the student in regular education classes). The Court agreed that a school district is not required to offer a continuous spectrum of LRE placements, but that if an offered placement was not an adequate LRE for a student, the district would have to place the student at a local, appropriate program or reimburse parents for such a placement.

The focus of the LRE provisions of the IDEA, the Court stressed, is on "the child's abilities, not the school district's existing programs," and therefore ESY programs cannot be limited by what programs a district offers. Instead, LRE requirements apply to ESY programs the same way they do to school-year education. A school district must provide students with appropriate placements, at the district or another local program. If the district fails to provide such a placement, a student's par-

ents may be able to privately place the student in an appropriate program and seek reimbursement from the school district.

Whether parents are entitled to reimbursement depends on the traditional three-part test for school-year reimbursement: (1) whether the school district's proposed placement violated the IDEA, (2) whether the parents' alternative private placement was appropriate, and (3) whether equitable considerations favor reimbursement. After *Cornwall*, school districts may no longer draw a distinction between ESY and school-year programs for the purposes of LRE placements.

If you have any questions about this case or LRE requirements in general, please do not hesitate to contact our offices.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Location/Program</u>
Don Budmen	June 9	N.Y. Ass'n of School Business Officials, 2014 Education Summit & Expo, Saratoga, NY presenting on " <i>Alternative Sources of Revenue</i> "
Ben Ferrara Don Budmen Eric Wilson	June 11	C.N.Y. School Boards Ass'n, New Board Member Governance Training, OCM BOCES Rodax Center presenting on " <i>Board Authority and Ethics</i> "
Don Budmen	June 26	Client In-Service Faculty Training on " <i>Dignity for All Students Act</i> "
Joe Bufano	June 26	Client In-Service Faculty Training on " <i>Dignity for All Students Act</i> "
Don Budmen	July 8	Client In-Service Administrative Training on " <i>Student Discipline and Legal Update</i> "
Don Budmen	July 10	N.Y.S. School Boards Ass'n Summer Law Conference, Rochester, NY presenting on " <i>Opting Out – Legal Issues for a Not-So-Legal Act</i> "
Eric Wilson Heather Cole	July 22	Management Advocates for School Labor Affairs, 37th Annual Summer Conference, Lake Placid, NY presenting on " <i>Absenteeism: You Have To Be There To Be Competent</i> "
Don Budmen	July 24	Client In-Service Administrative Training on " <i>Legal Update</i> "

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.