

ON THE LEGAL SIDE

Volume 2 Issue 1

New York City Board of Education

October 1999

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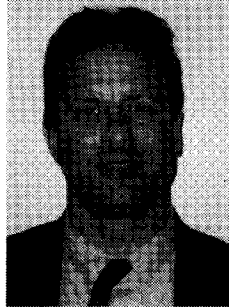
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The general number for the Office of Legal Services is 718-935-3690. For other extensions, dial 718 and the exchange 935.



A WORD FROM THE GENERAL COUNSEL.

I want to thank you for the smooth opening of schools. We hope you enjoy this, the second issue of our newsletter. It contains what we hope are interesting and salient articles for you in the field. In upcoming issues, we intend to solicit your opinions about a variety of matters by including a survey, but independent of the survey, let us know if there are any topics which you would like to see included in the newsletter. - Chad Vignola

UNIFORM STUDENTS

by Donna Carrier-Tal



On March 18, 1998, the Board adopted a mandatory uniform policy, effective September 1999, for all students in grades pre-K through 8 (excluding middle, intermediate, junior and high schools), to promote a more effective learning climate; foster self-esteem, school unity and pride; improve student performance; eliminate label competition; simplify dressing;

minimize costs; teach appropriate dress and decorum; and help to improve student conduct.

On December 4, 1998, Chancellor's Regulation A-665 was issued, implementing the mandatory uniform policy. Individual schools can opt out of the uniform requirement by vote of the school leadership team. Individual parents must be permitted to obtain exemptions. Disciplinary action for non-compliance with a uniform program may not include suspension, academic penalty or exclusion from extra-curricular activities.

Before the uniform policy was adopted, we needed to determine whether mandated dress would violate any Constitutional or state rights. For example, the First Amendment guarantees free speech and expression. Different types of speech warrant different levels of protection, from obscenity (considered to be of little or no value) to political expression (high value). In addition, some non-verbal conduct may qualify as "speech." The Supreme Court ruled in 1969 that black armbands, worn by students to protest the Vietnam War, were protected ex-

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RECYCLING VIOLATIONS

by William R. Joyce



Recycling has been mandatory in New York City for ten years. At home we are used to separating cans, bottles and newspapers; yet when it comes to the workplace we sometimes view recycling as someone else's job.

In fact, everyone has a part to play in recycling, not just the principal or custodian. Every school must have a recycling plan. The principal is responsible for ensuring that a recycling program is established and for designating a school-recycling liaison to monitor its implementation. The custodian has the duty to remove trash from the building and to ensure that the trash left for pickup is source-separated. The district recycling coordinator helps schools obtain recycling materials. But the principal, custodian and district coordinators need the full support of teachers, students and staff.

So what should your school be doing? First, get a copy of the guide to mandatory recycling in the New York City schools given out free by calling the NYC Department of Sanitation, Sanitation Action

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IT'S IN THE MAIL

by Katie R. Raab



Electronic mail ("e-mail") has fast become the substitute for telephone and written communication. So is there anything to worry about, you ask? The answer, of course, is YES. The unprecedented growth of e-mail within the business community has imposed potential legal risks. An e-mail network is a medium that allows employees to establish an informal social tone in the workplace. Since e-mail is hidden from public view and self-directed, it is inclined to be more "chatty" and less inhibited than business memoranda. Although a certain amount of electronic congeniality among employees is acceptable, unfortunately, the work environment may become hostile if e-mail becomes overly

intimate, derogatory or offensive. Accordingly, e-mail messages should be restricted to work-related matters. Common sense dictates that the use of profanity, obscenity and defamatory language in e-mail is inappropriate and should not be tolerated. Managers must prevent and promptly correct e-mail impropriety to avoid exposure to employment-related claims and lawsuits.

Recent newspaper articles about the Microsoft antitrust trial and other similar cases have brought attention to the use of e-mail in court cases. The Federal Rules of Civil Procedure provide for discovery of electronic records, including e-mail, software, voice mail and telephone records. Even though a single e-mail message would rarely be the cause of legal liability, the fact that it can be used against a party as evidence can clearly complicate the handling of any legal matter, whether it be antitrust, employee discipline, or employment discrimination.

Even more troublesome, the indiscriminate destruction of e-

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UNIFORM STUDENTS

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pression, but distinguished the armbands from general dress and appearance and said that its ruling did not relate to regulation of the length of skirts, type of clothing, hairstyle or deportment. Subsequent cases defined the factors for determining when non-verbal conduct is "speech:" (1) the actor's intent to convey a particularized message and (2) the likelihood that the message would be understood. (Examples: courts have ruled that there was little likelihood of a particularized message being understood by males wearing earrings and that sagging pants were not intended to convey a particularized message. Thus, no "speech" was at issue.)

Even if clothing is not considered "speech," it may invoke the personal liberty and privacy protection of the 5th, 9th or 14th Amendments if a "fundamental right" is involved. However, most courts have not recognized personal appearance as a "fundamental" right. Also, even a fundamental right can be regulated if there is compelling justification. In addition, courts have become increasingly reluctant to

interfere with the right of school boards to operate their schools on a day-to-day basis; some courts even dismiss challenges to dress regulations outright without any inquiry into the justification for the regulation.

New York's Education Commissioner has not addressed uniforms, but does require that dress codes be based on legitimate education concerns, and not on fashion or taste alone. We also canvassed other states with uniform programs. Many of the states credit their schools' uniform programs with reducing disciplinary problems, decreasing school violence, increasing attendance and improving performance.

On March 19, 1998, the Board's policy was challenged in federal court by a parent and child. The court ruled that the uniform policy rationally furthered the Board's education interests. The case is now on appeal.

Please address any questions regarding the Board's uniform policy that cannot be resolved at the school or district level to the Office of Community Relations, (718) 935-5311.

RECYCLING VIOLATIONS (continued from page 1)



Center, at (212) 219-8090. This guide provides simple step-by-step instructions on how to recycle in school, written in plain English (so you know a lawyer did not write it). Also, read and be familiar with the Chancellor's Regulation A-850 on recycling.

For easy identification, the recycling bins are labeled in blue (for cans and bottles) and in green (for paper). Bins with green labels (paper) should be placed in each classroom and office. Bins with blue labels should be placed in centrally lo-

cated areas.

The Sanitation Department has stepped up enforcement significantly. This fall, it will summon a school for failure to comply with the recycling law. Follow these steps if you receive a Notice of Violation:

1. Review your school-recycling plan, ensure that it adequately identifies the problems and then take immediate steps to correct them.

2. The principal should send a letter to the district recycling coordinator explaining what the

school has done to correct the problem and attach a copy of the violation.

3. The district recycling coordinator is responsible to confirm that the violation has been corrected.

4. The superintendent or district recycling coordinator, after verifying that the violation has been corrected, will forward a request to the Division of School Facilities, requesting that the violation be dismissed. The violation cannot be dismissed if you have not cor-

rected the violation.

5. School Facilities will periodically inform the district of the disposition of these violations.

Michael Grobshteyn, Waste Prevention and Recycling Coordinator for the Division of School Facilities Recycling, is available to assist the district recycling coordinators in addressing persistent recycling problems. Also, the Sanitation Action Center is there for technical assistance. Consider inviting officials from the Department of Sanitation to help you conduct a survey of your recycling program.

INFORMATION IS FREE

...at 25¢ per page

by Michael J. Valente and Ellie Mandell



The New York State Freedom of Information Law ("FOIL") provides for public access to government records. The NYC Board of Education's policy is to inform the public about the administration and operation of the public schools in accordance with FOIL. The Chancellor promulgated Regulation D-110, establishing the Board's process for administering requests from the public for access to records.

Generally, a requester sends a

written request to the Board's Central Records Access Officer (CRAO) at the Office of Legal Services. The requester must reasonably describe the records sought. The CRAO sends an acknowledgement letter within five business days informing the requester which office FOIL Designee will respond to the request and providing a date for compliance. If more time is needed, the FOIL Designee submits an extension letter directly to the requester, with a copy to the CRAO. A requester may also seek records maintained by a community school district by submitting a written request to the District's Records Access Officer.

FOIL requires that a

diligent search for requested records be made. Written indication must be given to the requester that the requested records either are not in the possession of the designated office or that, after a diligent search, the requested records could not be located.

FOIL provides for access to existing records only and does not require that specific questions be answered or that records be created. Certain records, however, must be maintained: (a) any final votes of Board members; (b) the name, public office, address, title and salary of every officer or employee; and (c) a current subject matter list of records. If the requested records are located, the requester must be allowed access unless the records are specifically exempted from disclosure. Common exemptions concern "an unwarranted invasion of personal

privacy" and "intra-agency materials." Denial of access to existing records may be appealed in accordance with Chancellor's Regulation D-110.

Student education records and personally identifiable information are deemed confidential by the Family Educational Rights and Privacy Act ("FERPA"), and are not accessible to the general public under FOIL. Requests from a parent or legal guardian for access to their child's education records must be made directly to the school of last attendance, and access is to be provided in accordance with Chancellor's Regulation A-820.

Michael J. Valente, Esq. is the Central Records Access Officer for the Board of Education. Ellie Mandell assists Mr. Valente with FOIL matters. Questions can be directed to Ms. Mandell at (718) 935-4085.



SUBPOENA POWER

by Judy Nathan and Jenny Soto

Do you know what to do if you receive a subpoena from a student's lawyer for the school records of another student? What if you receive a subpoena for records of a student who has transferred to another school? OLS can help you. Last year, the Office of Legal Services processed more than 12,000 subpoenas and 15,000 authorizations for documents and appearances. Because subpoenas and authorizations may involve documents and witnesses from anywhere in the school system, all personnel play a part in ensuring timely compliance. That said, responding to a subpoena or authorization has legal requirements,

and the legal office must be consulted. It is important that you have a procedure in place to make sure OLS knows about subpoenas you receive.

OLS reviews subpoenas to determine if they are proper and provides advice on compliance. Often we negotiate a narrower request. We may also challenge overly broad subpoenas or those that seek privileged records. Sometimes, the school identified in the subpoena is not where the student or employee's records are located, and OLS redirects the subpoena to the proper place. For example, when a student transfers schools, his/her records travel to the new school. Some employee records, such as personnel and payroll, are maintained centrally, not where the teacher works.

You should not accept

subpoenas for documents (also known as subpoenas duces tecum). Instead, the server of those subpoenas should be directed to OLS. Process servers may not always be cooperative. So, if a subpoena is served at your school, it is important that you contact OLS before you comply. OLS will guide you through the process of compliance, including satisfying confidentiality issues, or may tell you that the subpoena is overly broad and should not be complied with in its current form. It is important to act quickly. Subpoenas are legal documents, and a court can hold us in contempt for not responding.

Subpoenas for witnesses are different than subpoenas for documents. OLS will not accept service of subpoenas for witnesses. These must be served where the witness works, not at



110 Livingston Street (unless the person works there). It is not necessary for a teacher to be called out of the classroom to receive the subpoena personally, even if the process server insists. The law allows the subpoena to be left at the place where the witness works, and a separate copy to be mailed to him/her at work or home. Of course, it is critical to make sure the witness gets the subpoena right away since it is a legal document. We encourage witnesses to contact OLS or their union lawyer to discuss

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Board of Education of the
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We're on the Web: www.nycenet.edu.

LAW ON CALL

Write to this column with legal questions. We will publish selected questions and responses.

Q: Can we give our school yearbook to the police? They want it for identification because one of our students was a victim of a brutal assault, and she says that her attacker is a senior at the school, but that she does not know his name.

A: School yearbooks contain personally identifiable student information and, therefore, their release to third parties is subject to the Family Educational Rights and Privacy Act ("FERPA"). Absent parental consent or a lawfully issued subpoena, a school yearbook may be released to the police only if there is a health or safety emergency. Disclosure is appropriate when a situation presents imminent danger or requires the immediate need for information to prevent a disruption. Imminent danger may include any active investigation of a violent crime (such as homicide, arson, assault, robbery, sex offense, weapons possession) when there are reasonable grounds to believe that a current or former student is a suspect or has information concerning the investigation necessary to protect the health or safety of students or others. In making a decision as to whether a true health or safety emergency exists, the school should ask the following: What type of crime is being investigated? When did the crime occur? Why is the yearbook information necessary?

Finally, once a yearbook is released, it is the school's responsibility to place a notice in the file of each student whose picture appears in the yearbook indicating that the yearbook has been released.

Editors: Robin S. Greenfield
Donna Carrier-Tal

Thanks: Lydia Parra and Katie Raab

Printed by High School of Graphic Communication Arts

IT'S IN THE MAIL

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mail messages, once on notice of a formal investigation or litigation, can subject an employer to court sanctions.

E-mail is a powerful communications tool. It is a technology that will continue to advance at the Board. However, it is anticipated that as regulatory agencies, lawyers, arbitrators, and judges become more sophisticated in the area, extensive e-mail discovery requests will follow. To avoid potential legal difficulties, and protect our e-mail network, OLS will be working with the Chancellor during this school year to develop a clear and concise policy on appropriate e-mail use, security, storage, and retention. In the interim, questions regarding the legalities of e-mail issues can be directed to OLS at (718) 935-3690.

SUBPOENA POWER

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what to do in response to a subpoena. Sometimes we may be able to negotiate and avoid a personal appearance.

An authorization is a consent for



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Articles in this publication are for general information purposes only and are not to be relied upon as legal advice. Before the contact OLS for legal advice in specific situations.

the release of records, generally provided by an employee or, in the case of student records, by a parent or guardian. Authorizations for documents are less complicated because there is no court involved and no risk of contempt. But legal questions

can arise, so we still encourage you to contact OLS if an authorization for release of records if delivered directly to your school or office.

Jenny Soto in OLS handles most of the subpoenas and authorizations. She can be reached at (718) 935-3606.

Meet the Commercial Unit



Left to right: Katie Raab, Bill Joyce, Yvette Encarnacion and Michael Coneys (Adrienne Williams not pictured)

The Commercial Unit is responsible for drafting contracts of more than \$100,000 and, in conjunction with the Division of School Facilities, negotiating and drafting leases for new schools and offices. Requests for contract preparation should be directed to Bill Joyce, Deputy Counsel of the Commercial Unit.