

School Law Matters

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Newsletter of the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
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Budget Process and Transparency Laws: Open Meetings and Freedom of Information

"Transparency" in government is often more a matter of political philosophy than legal mandate. Some governments work to get all information (good, bad and indifferent) out to the public quickly while others may be more balanced and some very tight-lipped. But in New York two laws - familiarly called Open Meetings Law ("OML") and Freedom of Information Law ("FOIL") - turn some aspects of the philosophy into a mandate. At this point in the school cycle it is wise to review how these laws apply to information generated in the budget preparation process. Here are some pointers concerning perennial questions:

Open Meetings Law Issues

- Board discussions of budget cuts, program reduction/elimination and layoffs must be held in open session. Although any discussion of the history or performance of individuals can be held in executive session, the Board should separate the discussion of job performance from position elimination discussions.
- "Work sessions" or "study sessions" of the board of education (or a committee of the board) are treated just like a full Board meeting under the Open Meetings Law.
- Ad hoc or advisory committees (like a Citizens Budget Task Force) composed of residents, employees and various other interest groups are not subject to the Open Meetings Law even if the committee includes some Board member(s). It is the District's decision whether to make these meetings open to the

Upcoming Training Opportunities

Our Firm's attorneys will be presenting webinar training sessions for superintendents, administrators and school board members on the following dates:

February 25, 2010

Noon - 1:30 PM

[Tenure Areas and Reductions in Force Webinar](#)

March 18, 2010

Noon - 1:30 PM

[Teacher Evaluations and Granting Tenure Webinar](#)

April 15, 2010

Noon - 1:30 PM

[Section 504 Webinar](#)

May 20, 2010

Noon - 1:30 PM

[Interviewing and Hiring Webinar](#)

public.

Remember that violations of the OML can result in a judgment against the District for costs and attorney's fees if the court determines that substantial deliberations occurred in private prior to a Board vote.

Freedom of Information Law

- Our courts construe FOIL liberally. If you are unsure as to whether requested records may be withheld, consult with your school attorney.
- Although "intra-agency" material is generally exempt from FOIL disclosure, any statistical or factual data in them must be provided if requested pursuant to FOIL. Even "draft" or "preliminary" budget worksheets are "FOIL-able" to the extent they are statistical or factual tabulations or data. This is to be distinguished from recommendations and opinions expressed by administrators and Board members, which may be withheld as intra-agency materials.
- Assume that all emails are potentially subject to FOIL like any other record. This will apply to Board Member's email as well, at least to the extent it deals with school business. Think before you touch the keyboard or tap the iPhone - do I want to see this as a headline in the local newspaper? Email will be treated like any other record for purposes of FOIL disclosure and/or exemption from disclosure.

Remember that our courts have held that disclosure under FOIL is not limited to records kept in the physical possession of the agency, but also includes records "kept for" the agency. Off site records, therefore, are available.

These laws are intended to reduce secrecy in government and expand public knowledge - a highly appropriate goal for teaching institutions. But if you have any questions about particular applications, be sure to call for legal advice.

Comptroller's Audits Reveal Problems with School District Reserve Funds

In 2004, the New York State Comptroller's Office initiated a program to audit school district finances/operations across the State. The Comptroller's office concluded its audits at the end of 2009. A common thread running through these audits is the Comptroller's criticism of how school districts use their reserve funds.

The Comptroller has advised that districts should balance the desirability of accumulating reserves for future needs with the obligation to make sure taxpayers are not overburdened by these practices.

Below is a brief summary of some of the Comptroller's most common recommendations and/or criticisms:

- Review all currently established reserves and determine if the balances are "necessary, reasonable, and in compliance with statutory requirements."
- Develop written policies and procedures regarding reserve funds and determine if these funds are properly established by

For more information and to register for these programs, go to our firm [website](#) or Delacroix Consulting Group's website at www.delacroixconsulting.com or click on the links above. You will also be receiving additional information on these programs in the next few weeks.

One Way to Avoid Major Headaches in Your Next Capital Project

Capital projects can be a nightmare; often marred by disruptive construction delays, costly change orders, disputes and even litigation over plans, drawings, materials, shoddy workmanship, etc. Is there any way of making these projects run smoother?

In our experience, many of these problems could be lessened or even avoided by ensuring that your contracts with architects, construction managers and contractors are properly drafted before you hold the school district referendum.

Oftentimes, school districts begin to work "informally" with an architect during the pre-referendum process. Typically, architectural firms charge a modest fee to guide you through this process. We recommend that school districts negotiate the contract with the architect and construction manager at the outset of the project. By agreeing to the terms up front, it clarifies parties' expectations and their

board vote and in compliance with statutory requirements. To date we have not seen guidance from the Comptroller on the substance of such policies.

- Certain reserve funds, such as the Property Loss and Liability Reserve fund, require voter approval before monies can be transferred.
- As a result of the Government Accounting Standards Board's (GASB) Statement 45, school districts are required to record and report annual post employment benefits (OPEB) such as retiree health insurance. Prior to Statement 45, typical school district accounting practices treated these expenditures as "pay-as-you-go". In an attempt to meet these requirements, some school districts reserved additional monies in their Employee Benefit Accrued Liability Reserve (EBALR) fund or carried unreserved fund balances in excess of the legal limit to cover these costs. Although the Comptroller himself has asked the Legislature to approve this practice, he has strongly criticized districts for doing so without legislation.
- In some instances, reserve funds such as the Insurance Reserve Fund and the Unemployment Insurance Fund were established; however, expenditures were budgeted and paid for from general funds.
- When a reserve fund has little or no activity this has triggered the Comptroller's criticism that the balances be decreased or discontinued and transferred to another reserve.
- For some reserve funds, such as the Unemployment Insurance Reserve, the General Municipal Law allows excess funds to be transferred to other legal reserves or transferred to the unreserved fund balance.
- When interest is earned, district officials should credit a pro rata share of the interest earned by each reserve fund to that reserve fund.
- In the case of what the Comptroller considered to be excess fund balances, he has suggested that these monies be put to other uses (where permitted by the statute) such as:
 - Increasing other necessary reserves
 - Paying off debt
 - Financing one-time expenses
 - Reducing district property taxes

The Office of the Comptroller has provided guidance on Reserve Funds that contains a summary of the many different types of reserve funds authorized by New York State law as well as descriptions pertaining to the types, purposes and special provisions applicable to those funds. The guide can be found at <http://www.osc.state.ny.us/localgov/pubs/lmg/reservefunds.pdf>.

Termination of Probationary Professional Staff

New York Education Law Section 3012 establishes a three-year term of probationary employment for teachers and other teaching staff members, as well as for principals, administrators, supervisors and other members of the supervisory staff. However, probationary appointments of professional staff may be terminated at any time on the recommendation of the school superintendent, provided that the recommendation is approved by a majority vote of the Board of Education. The Education Law does not require that probationary teachers, teaching staff, principals, administrators or supervisory staff be given a hearing in connection with the termination process, although

respective roles at the start of the project.

We also recommend inviting your school attorney and financial consultant to these initial meetings and involving your bond counsel as well. By assembling your team early, you can plan the project more accurately and cover all aspects of the planning at one time.

As soon as the referendum is approved, we recommend having your school attorney assist the architect in drafting the contractor's contracts and include them in the District's Request for Proposals (RFP). This will ensure that the contractors are fully aware of their roles at the outset as well.

These contracts and general conditions for the bidders appearing in the RFP are based on forms from the American Institute of Architects (AIA). These form documents, as written, do not adequately protect the school district's interests. It is critical to have your school attorneys review and modify these standard agreements. Issuing and RFP without modifying those agreements -- or relying solely on the architect's suggested revisions -- can lead to many headaches throughout the project.

Accordingly, we strongly recommend involving your school attorney in reviewing and modifying all of the standard contracts as

a so-called "name clearing" hearing may be required when circumstances surrounding a termination call into question the probationer's professional competence or impugn his or her professional reputation to the extent that it effectively precludes future employment.

However, the Education Law does create specific procedural and notice requirements that must be followed in connection with a recommendation that tenure be denied, or that a professional probationer's employment be terminated. A superintendent must give the probationer written notice of his or her intention to recommend that tenure be denied or that employment be terminated at least 30 days prior to the Board meeting at which the recommendation will be considered. Such notice triggers a probationer's right to request a written statement explaining the reasons for the recommendation, as well as the opportunity to respond in writing to the explanation given by the superintendent. In addition, if a Board accepts the superintendent's recommendation to dismiss, the probationer must be given 30 days written notice of his or her impending termination.

While a failure to comply with statutory procedural requirements will not necessarily result in an unintended grant of tenure, it may require the District to restart the termination process so that the right to notice of a termination recommendation, the opportunity to request an explanation for the recommendation, and the chance to respond to it are respected. In addition, back pay may be awarded if notice of the Board's acceptance of a termination recommendation is not timely given. Also, the terms of an individual employment contract may complicate the process of terminating a professional employee. For example, the New York Court of Appeals recently held that under certain circumstances a school district could, by contract, waive its statutory right to discharge a probationary school administrator during the three year term of probationary employment. In light of the intricacies of the termination process, and the problems that may arise if the requisite procedures and notice periods are not observed, school districts are advised to plan well in advance if the termination of probationary professional staff is anticipated, and to promptly consult with legal counsel if any questions or issues arise.

early in the project as possible. If you have any questions or need assistance in this regard, please contact us at 315-437-7600.