

School Law Matters

MARCH 2011



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

Route to: Board Personnel Instruction PPS Business Other: _____

Hot Topics

Attorney Spotlight

CSEA FOIL Request for Employee Names may be Denied

Craig M. Atlas, Esq.

The Civil Service Employees Association (the "CSEA") has made a request under the Freedom of Information Law ("FOIL") to school districts and BOCES throughout the state. Among other things, it requests specific information about employees who are not represented by a union. In our view, a recent decision by New York State's highest court supports the right of a public employer to deny a list of names of employees, when the purpose of the request is to solicit employees to become members of a union.

In New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d 560 (2010), NYSUT made FOIL requests to several charter schools. The New York State Court of Appeals held that the schools were not required to provide the full names of individual teachers. The court determined that, under the circumstances, the teachers' names were exempt from disclosure under FOIL.

Under Section 87(2)(b) of the Public Officers Law, a public body may deny access to records that "if disclosed would constitute an unwarranted invasion of personal privacy". When the FOIL requests in that case were made, Section 89(2)(b)(iii) of the Public Officers Law defined this as including the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". The court explained:

Giving the term "fund-raising" its "natural and most obvious meaning". . . , it is evident that NYSUT's intent in requesting the teacher names is to expand its membership and, by extension, obtain member-

ship dues. . .

It appears. . . that NYSUT seeks the teachers' names as a convenient mechanism for contacting prospective members. Although NYSUT certainly possesses a right to seek dues-paying members, it may not rely on FOIL to achieve that end.

The court noted that the language of FOIL was amended in 2008 to change the word "commercial" to "solicitation". However, the new language did not apply to that case, because the FOIL requests had been made while the old language was still in effect.

In our view, the amendment did not take away the FOIL exemption for this type of request. In fact, it may be argued that, since the amendment, it is even more clear that the State Legislature intended to allow public employers to deny requests for names of public employees, when the purpose of the requester is to use the list for solicitation or fund-raising purposes. The 2008 amendments also added the following new language to FOIL:

An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes.



Craig M. Atlas received a B.A. in 1980 and a Master of Labor and Industrial Relations in 1981 from Michigan State University, and his J.D. *cum laude* from SUNY Buffalo in 1986.

He was employed as Law Clerk for the N.Y.S. Public Employment Relations Board (PERB) in Buffalo while attending law school. He is a member of the Labor and Employment Law Section of the New York State Bar Association. He is also a member of the National School Boards Association Council of School Attorneys, New York State Association of School Attorneys, New York State Association of Management Advocates for School Labor Affairs, and the Labor and Employment Relations Association.

Mr. Atlas devotes a substantial portion of his practice to employment and labor relations matters, including the representation of school districts and other public employers in proceedings before PERB. He counsels and represents public and private employers in court and before administrative agencies. He also has extensive experience and background in the general representation of school districts and BOCES.

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Hot Topics

CSEA FOIL Request for Employee Names may be Denied (cont'd)

The New York State Committee on Open Government has expressed the opinion that:

If the applicant fails to provide such certification, the agency has the authority to deny access to the names and addresses based on an unwarranted invasion of personal privacy.

N.Y. State Committee on Open Government, FOIL-AO-17477 (December 31, 2008), available at www.dos.state.ny.us/coog/ftext/f17477.html.

Therefore, in our opinion, a public employer may deny a request for a list of individual employees who are not represented by a collective bargaining agreement, when the list would be used for solicitation or fund-raising purposes, on the grounds that disclosure would constitute an unwarranted invasion of personal privacy. (Public Officers Law §§ 87(2)(b) and 89(2)(b)(iii).) The FOIL request by the CSEA is signed by its Deputy Director of Organizing. Thus, it would be reasonable to assume that the

CSEA is seeking the information for the purpose of organizing employees who are not currently represented by the CSEA. We recommend that, if the request is denied, the response cite the decision of the New York State Court of Appeals in New York State United Teachers v. Brighter Choice Charter School, 15 N.Y.3d 560, 915 N.Y.S.2d 194 (2010).

Please note that, while FOIL allows a public employer to decline to provide this information, FOIL does not prohibit the disclosure of this information. Therefore, each employer, in its discretion, may decide how to respond to this request.

Also, FOIL does not require a public agency to create a new record. Therefore, if a school district or BOCES does not maintain a list of employees who are not represented by a collective bargaining agent, the response may state this.

The CSEA's FOIL request also seeks information about vacancies in unrepresented positions. This information may be provided, to the extent that there are existing records about this. For exam-

ple, you could provide copies of existing advertisements and/or postings of current vacancies in unrepresented positions.

The CSEA requests copies of collective bargaining agreements currently in force (except for contracts with CSEA or AFSCME locals). These should be provided.

Finally, the CSEA requests copies of any contracts currently in force with any private or corporate entity contracted to provide services of the school district. Again, contracts that have been approved and entered into are a matter of public record and should be provided.

Please note that, if any of the records being provided include portions that are exempt from disclosure under FOIL, those parts may be redacted. (For example, personal information such as Social Security numbers and home addresses may be redacted.)

Please feel free to contact us if you have any questions about how to respond to this FOIL request.

News for Superintendents

Governor Proposes Cap on Superintendent Salaries

Governor Andrew M. Cuomo announced on February 28 that he will submit a program bill to cap the salaries of school superintendents across the state. The cap would be based upon student enrollment and if approved, the Governor claims, would save the State a combined \$15 million.

In the Governor's press release, he is quoted as stating:

"We must wake up to the new economic reality that government must be more efficient and cut the cost of the bureaucracy. We must streamline government because raising taxes is not an option. Reducing back-office overhead, administration, consultants, and encouraging consolidations are the best targets to find savings."

As most of you are aware, there is already a salary cap in place for BOCES district superintendents. The BOCES cap sets a single flat salary level regardless of the number of students enrolled in the school.

The proposed cap would impose salary limits based on enrollments as follows:

Tier	School District Enrollment	Superintendent Salary Cap
1	0 - 250	\$125,000
2	251-750	\$135,000
3	751-1,500	\$145,000
4	1,501-3,000	\$155,000
5	3,001-6,500	\$165,000
6	6,501+	\$175,000

The Governor's office has stated that the proposed cap would only apply to school superintendents and would be applied prospectively as existing contracts expire. The program bill reportedly will also give local communities the ability to override the salary cap under certain circumstances. Specifically, district residents would have to vote to lift the cap at the district's annual budget vote.

While this is still only a proposal, we will keep you informed as to any developments associated with its possible enactment. For further information on this or other pending legislation, please do not hesitate to contact us at 315-437-7600 or 716-875-1406.

Special Education News**Court Orders School District to Pay Tuition Directly to Private School**

In a case of first impression, the United States District Court for the Southern District of New York ordered that a school district pay tuition directly to a private school where: 1) the district's IEP did not offer a free appropriate public education, 2) the private school selected by the parent was appropriate and 3) equity favors the payment of tuition. Mr. A. v NYC Dept. of Educa-

tion, 2011 WL 321137 (S.D.N.Y., 2/1/11)

In this case, the parent had enrolled the student at the "Rebecca School" with an annual tuition of \$84,900. Due to the parent's financial means, the parent paid only \$1,000 of that tuition and was in debt to the Rebecca School for the remainder. The Court rejected the school district's argument that the parent's remedy was limited to reimburse-

ment of monies actually paid. Amicus curiae filings were made by eight groups presumably favoring the parent's position.

If you would like additional information regarding this case and its implications for your District, please contact us at either 315-437-7600 or 716-875-1406

Commissioner's Decisions**Recent Decisions by Commissioner of Education**

Attorneys in our law firm regularly represent school district clients in appeals to the Commissioner of Education. In the last few months, we have received several decisions involving student issues.

In two related cases, the Commissioner upheld the suspension of students who admitted bringing a marijuana pipe to school. At one Superintendent's hearing, the student admitted that he had brought a marijuana pipe to school and heated it in an attempt to smoke marijuana residue. At the hearing for the other student, there was testimony that the pipe contained marijuana residue, and that there was a smell of marijuana in the area. The Commissioner rejected arguments by both students' attorneys that the notices charging the students with "using marijuana" did not give sufficient notice that the allegations about their conduct involved "use of a device". The notices were sufficient for the purpose of student disciplinary proceedings. The Commissioner upheld suspensions until the end of the school year (about seven months). However, he found that the suspension

of one of the students for one calendar year would have been excessive under the circumstances, based on the student's record of little prior discipline. Appeal of A.B., Decision No. 16,147, and Appeal of T.A., Decision No. 16,148 (September 2, 2010).

The Commissioner dismissed another appeal as moot. A procedural error had occurred, and the Superintendent addressed it by expunging two short-term suspensions. In addition, the district scheduled a workshop for all administrators in the district to be trained by an attorney from our law firm on disciplinary procedures under New York and Federal law. The Commissioner found that the district acted reasonably in expunging the suspensions, and took proper steps to ensure that the legal requirements would be followed with respect to short-term suspensions of five days or less in the future. Appeal of J.H. and T.H., Decision No. 16, 189 (January 10, 2011).

In another decision, the Commissioner upheld a district's determination that a student was not a resident of the dis-

trict. The student's mother leased an apartment in the district for one year. The mother said that she and her son would live there during his senior year in high school. Her husband would continue to live in the family's home in another district. The mother said that the purpose of this arrangement was so the student could attend a particular school for his senior year, for social and academic reasons. At a meeting with the Superintendent, the mother said that she intended to return to the residence in the other district after her son's graduation from high school. The Commissioner upheld the district's determination, on the grounds that the mother had not established that she intended to permanently reside in the district. The Commissioner also explained that, when making residency determinations, a school district is not limited to the information initially submitted by a parent or guardian. The district has the right to seek and consider additional information. Appeal of Friedman, Decision No. 16,173 (December 7, 2010).

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Commissioner's Decisions

**Recent Decisions by Commissioner of Education
(cont'd)**

Another decision of interest, not involving our firm, dismissed a challenge to the decision of a board of education in Rockland County to close a school building. The Commissioner reiterated that school boards have broad discretion to make decisions about the reorganization or closing of school buildings. Such decisions will not be set aside unless they are shown to be arbitrary, capricious or contrary to sound educational policy. The Commissioner dismissed the appeal because the Board had thoroughly studied the issue before making its decision, and gave a rationale based on educational and economic factors.

However, he urged the Board to make future decisions on school reorganizations or closings "through an orderly, deliberative process that includes adequate opportunity for public participation and input".

The Commissioner's decision discussed Section 402-a of the Education Law. That section authorizes a Board to establish an advisory committee on school building utilization to investigate the educational impact of a closing. However, the Commissioner also pointed out that the decision whether to establish this type of committee, an-

other kind of advisory committee that does not follow the provisions of Section 402-a, or no committee at all, is within the discretion of the Board. Appeal of Luciano and Hatton, Decision No. 16,153 (September 15, 2010).

For further information on these or other decisions of the Commissioner, please do not hesitate to contact us.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Donald Budmen	3/23/11	Client In-Service Program on <i>Cyber-technology Issues in the Schools</i>
Michael Dodd	3/25/11	Client In-Service Program on <i>Workplace Harassment and Harassment of Students</i>
Joseph Shields	4/2/11	Monroe County School Boards Association - <i>Candidate Training Session</i>

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Firm School Law Briefing — Recent Developments in School Law and Protecting Your Tax Base

Henry Sobota Joseph Shields Eric Wilson	5/3/11	Albany (8:30AM—10AM)
	5/3/11	Utica (1:30PM—3PM)
	5/10/11	Syracuse (8:30AM—10AM)
	5/10/11	Watertown (1:30PM—3PM)
	5/12/11	Buffalo (8:30AM—10AM)
	5/12/11	Rochester (1:30PM—3PM)

This program will cover variety of topics of critical importance to Board Members, Superintendents, Personnel Directors and Business Officials. Specifically, participants will learn the most recent developments associated with:

- New APPR legislation and regulations
- New York's Wage Theft Prevention Act and its implications for schools
- What school administrators need to know about protecting their District's tax base in tax certiorari cases

You will be receiving additional information regarding the program as well as registration and location details in upcoming weeks. But for now, save the date and time for the location most convenient for you.

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.