

School Law Matters

DECEMBER 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

Freedom of Information Law Compliance Can Require Providing Redacted Copy of Record

A recent decision by the New York State Court of Appeals provides a strong message to school districts and BOCES about complying with the letter and spirit of the Freedom of Information Law (FOIL). In *Matter of Schenectady County Society for the Prevention of Cruelty to Animals v. Mills* (decided 10/25/11), the Court held that an agency responding to a demand under FOIL may not withhold a record because some of the information in that record is exempt from disclosure. The Court noted that “[w]here it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.”

In the *Schenectady ASPCA* case, the ASPCA made a FOIL request to the State Education Department for a list of names and business addresses of licensed veterinarians in Schenectady County. The Department offered to provide names and cities, but refused to provide street addresses explaining that “[a]s our computerized files are currently configured, we are unable to distinguish a licensee’s business address from a residential address”. However, in the subsequent FOIL litigation, the Court of Appeals rejected this argument out of hand, stating that,

“It seems obvious to us that, if the Department does not want to supply home addresses, it should simply delete them from the list. It says that its computer database does not distinguish between home and business addresses, but it does not claim that it would be hard to find out, by communicating with the licensees, which addresses are homes and which

are businesses. This should not be a burdensome task, because the number of licensed veterinarians in Schenectady County is unlikely to be very large; it was represented at oral argument that the number is 72.”

The Court concluded that the Department had the choice of producing the existing record in full or removing the information that it did not want to produce and that the ASPCA did not demand. The Court then sent a clear message to all State agencies and municipalities about handling FOIL requests without going to court:

“We are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours effort, and at negligible cost. Instead, lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years. It is our hope that the Department, and other agencies of government, will generally comply with their FOIL obligations in a more efficient way.”

As a reminder, here are some of the FOIL basics with which school districts and BOCES must comply:

Handling the FOIL Request

1. Grant or deny access in whole or in

Continued on the next page



Christopher M. Militello, who recently rejoined our firm, is a graduate of St. Bonaventure University (B.A. 1990), Canisius College (M.S. 1992) and Syracuse University College of

Law (J.D. 2000). While at Syracuse, Mr. Militello was the Notes & Comments Editor for the *Syracuse Law Review*. He is admitted to practice in all New York State Courts.

Prior to joining Ferrara, Fiorenza Law Firm, Mr. Militello was the Principal Law Clerk to a New York State Supreme Court Justice and a Support Magistrate for the 6th Judicial District. Mr. Militello has also served as a staff attorney for the Utica National Insurance Group. His current practice includes representing school districts and private employers in labor relations, construction, real property tax and general litigation matters.

Mr. Militello is a member of the New York State and Oneida County Bar Associations.

In This Issue ...

- FOIL Compliance Can Require Redacting Exempt Information from Record
- Attorney Spotlight
- *** FREE Webinar on Mandatory Reporting Requirements for Superintendents — 12/28/11 ***
- State Establishes Diversion Program for Teens Caught Sexting
- Booster Clubs and Foundations Can Provide Support But Make Sure to Follow the Rules
- Upcoming Events

Hot Topics

FOIL Compliance Can Require Providing Redacted Copy of Record (cont'd)

part within five business days;

2. If more time is needed, acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when you will grant or deny the request. The date must be reasonable under the circumstances of the request and in most cases this will mean an additional 20 business days.

3. If more than 20 additional days are needed, provide an explanation and the timeframe within which the request will be granted or denied (in whole or in part). That date must also be reasonable in consideration of factors like the volume/complexity of the request, the need to search for records or the obligation to review records to determine rights of access and confidentiality.

4. If a school district or BOCES fails to respond to a FOIL request within the timeframe provided by law, this failure is deemed to be a constructive denial of the records which can be appealed.

5. A school district or BOCES also may inform the person requesting the records that the request does not reasonably describe the records sought, including direction to the extent possible, that would enable the requestor to reasonably describe the records sought. The Court of Appeals, our state's highest court, has held that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the records sought" (*Konigsberg v. Coughlin*, 68 NY2d 245.)

6. Remember that FOIL requires that school districts and BOCES adopt regulations detailing the procedures by which individuals may review records. The regulations must specify the times and places where records are available, the names and titles of persons responsible for providing records, and

any fees for copying records.

If a school district or BOCES Records Access Officer denies a FOIL request, he or she must do so in writing and must provide an explanation for the decision. The written denial must also include notice to the requestor of the right to appeal the Record Access Officer's decision together with the name, title, business address and telephone number of the person or body designated to determine FOIL appeals on behalf of the district or BOCES. The Records Access Officer cannot serve as the Appeals Officer.

While a school board or BOCES may determine FOIL appeals, many choose to designate an individual such as the superintendent, district superintendent, deputy or assistant superintendent or the school attorney to serve as the Appeals Officer. When a person's FOIL request has been denied, that person has 30 days in which to appeal the denial to the Board or Appeals Officer. The individual is not required to provide an explanation as to why the records must be disclosed.

The Board or Appeals Officer must either make the requested records available or fully explain the reasons for denial within 10 business days of its receipt of the appeal. Under a 2005 amendment to FOIL, a failure to determine an appeal within 10 business days of receipt constitutes a denial of the appeal and permits the requestor to go directly to Court without waiting any further.

Remember that FOIL requires that school districts and BOCES transmit copies of all FOIL appeals when received plus copies of the subsequent determinations to the Committee on Open Government.

If you have any questions about FOIL or about the handling of a specific FOIL request/appeal, please contact us.

Firm Events

Free Webinar on Mandatory Reporting Requirements For Superintendents

December 28, 2011 at 11:00 AM

It is a tragic reality that sometimes children are mistreated while at school. Superintendents 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. As recent headlines remind us, there are serious civil and even criminal penalties for failing to follow these rules.

Join us on **December 28, 2011 at 11:00 AM** for an hour-long webinar addressing Mandatory Reporting Requirements for all Superintendents. Specifically, the program will focus on:

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

There is **NO REGISTRATION FEE** for the webinar. Please register at our website www.ferrarafirm.com. Simply click on the event from the Events Calendar on the far right column of our Firm's home page, then click on "Register Now" and complete the online form. Click Submit and you're registered.

You may also register by telephone by calling 315-437-7600 and providing your name, the name of your school district or organization and the names of all participants who will be attending.

Social Media Issues**State Establishes Diversion Program for Teens Caught Sexting**

A new law may help ease some concerns school officials have about reporting "sexting" cases to local law enforcement agencies. As you are probably aware, students caught sexting (i.e., using technology like cell-phones and the Internet to send and receive sexually suggestive pictures) face serious criminal charges that could potentially result in years in prison and placement on the State's Sex Offender Registry. The recently enacted "Cyber-Crime Youth Rescue Act" is intended to mitigate the potentially life-changing consequences for certain minors who are deemed "eligible" by the law. The Act goes into effect on March 21, 2012.

The Act specifically provides for the development and implementation of an educational diversion program overseen by the Office of Children and Family Services (OFCS) for "eligible persons." "Eligible persons" are defined as individuals engaged in sending or receiving

obscene or nude pictures where both sender and the receiver are under the age of 20 at the time of communication, but not more than five years apart in age.

Through this diversion program, OFCS will provide these eligible persons with instruction regarding: 1) the legal and non-legal consequences of sharing sexually-suggestive materials; 2) how the unique characteristics of the Internet can exacerbate these negative effects; and 3) the potential connection between sexting and cyber-bullying. The Act further provides that eligible persons may be ordered to attend such programs as a condition of imposing a lesser criminal punishment or dismissing the action altogether.

It should be noted that the Act is not intended to diminish the seriousness of -- or otherwise excuse -- sexting. Nothing in the Act requires that an eligible

person be ordered to attend a diversion program; criminal penalties are still available to prosecutors and judges in all cases.

Administrators, teachers, and all other school officials should continue to exercise extreme caution in handling these situations. The appropriate course of action for school officials who discover students engaged in sexting should be to immediately turn the matter over to law enforcement officials for investigation and other action. Still, the existence of an alternative outcome for children who act impulsively or simply exercise poor judgment should help alleviate concerns that contacting the police in these situations is appropriate.

If you have any questions about this new diversion program or any issues related to this topic, please feel free to contact us.

Booster Clubs**Booster Clubs and Foundations Can Provide Support But Make Sure to Follow the Rules**

With the ever-increasing financial pressure on school districts, private groups such as booster clubs and foundations often play an important role in supporting districts' ability to offer extracurricular activities and to enrich students' overall educational experience. School boards and administrators must remain aware of the proper role of these entities, and ensure that proper procedures are in place for dealing with them.

It is important for administrators and board members to remember that booster clubs and foundations are inde-

pendent entities. Most booster clubs and foundations are organized as domestic, not-for-profit corporations which maintain their own officers and directors and manage their affairs and finances independent of the school district. These groups usually exist to raise funds and support school programs through the donation of money to fund program operations, as well as sometimes providing logistical support for events. But, any financial support from these groups provided directly to the district must be treated as a gift.

The interplay between these groups and the board of education, must be closely monitored to ensure that each entity is performing its proper role. It is of particular importance for the board of education to maintain independence from such groups in the board's decision-making. It is equally important that the board of education refrain from exercising control over the internal operations of the boosters or foundation.

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 2011 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.

Booster Clubs**Booster Clubs and Foundations Can Provide Support
But Make Sure to Follow the Rules (cont'd)**

A board of education is permitted to accept gifts of money or property to be used for specific programs, but it may not delegate to a third party (1) its responsibility for determining whether or not to offer such programs; or (2) any control over the manner in which the programs are to be offered. Conditional gifts must be closely scrutinized to determine if the conditions are legally acceptable and, if so, whether they are acceptable to the district. Conflicts of interest can arise when members of the Board of Education also serve as officers or directors of a booster club or foundation.

The specific activities of booster clubs and foundations are also subject to some limitations when they are held in conjunction with school events. Booster clubs may generally conduct concession sales or solicit donations on the site of school events, provided that a board policy permitting such activities has been established. However, gate fees charged for admission to school events, such as athletic contests or concerts, may not be shared with a booster club. The receipts are school district funds which may, in turn, be used directly by the school district to support the program for which the receipts were obtained.

Booster clubs and foundations can play an important role in supporting school district's programs. The relationship between such groups and the board of education should be driven by the board of education's independent decisions on district programming, with the booster groups providing necessary support to assist in the successful implementation of such programs.

If you have any questions or would like assistance in working with a booster club or foundation, please contact us.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Marc Reitz	12/12/11	Client In-Service Program on <i>Implementation of the Dignity for All Students Act: Important Steps to Take to Protect Your District</i>
Eric Wilson	12/12/11	Client In-Service Program on <i>Labor Contract Modifications in Difficult Times</i>
Eric Wilson	12/19/11	Client In-Service Program on <i>Gender-Specific Discrimination</i>
Marc Reitz Eric Wilson	12/21/11	Client In-Service Program on <i>Handling Claims of Abuse: Past & Present</i>
Colleen Heinrich	12/28/11	Client and Friends <i>FREE</i> Webinar on Mandatory Reporting Requirements for Superintendents (details on page 2).
Marc Reitz	1/11/12	Client In-Service Program on <i>Handling Claims of Abuse: Past & Present</i>
Don Budmen Joe Bufano	1/24/12	Crowne Plaza, Syracuse, NY — NYS Council of School Superintendents' "Surviving the Superintendency: Tips from Legal Experts" - presentation on <i>Student Discipline and Student Rights: Developments, Reminders and Reinforcements</i>
Eric Wilson Katherine Gavett	1/24/12	Crowne Plaza, Syracuse, NY — NYS Council of School Superintendents' "Surviving the Superintendency: Tips from Legal Experts" - presentation on <i>When You're in the Public Spotlight: Legal and Practical Aspects of Dealing with the Media and Other Sensitive Matters</i>
Joe Shields Charles Symons	1/24/12	Crowne Plaza, Syracuse, NY — NYS Council of School Superintendents' "Surviving the Superintendency: Tips from Legal Experts" - presentation on <i>Liability Insurance Coverage for School Districts: What You and Your Board Should Know</i>
Mike Dodd	1/27/12	Client In-Service Program on <i>Harassment of Employees and Students</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.