

School Law Matters

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

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Hot Topics

Attorney Spotlight

Open Meetings Law Amendment Creates New Document Disclosure Obligations for School Districts

Governor Cuomo recently signed a significant amendment to the Open Meetings Law ("OML"). Beginning February 2, 2012, the OML will require that when a Board of Education will be discussing documents at an open meeting, it must make the documents available upon request prior to or at the meeting, including by posting on the Internet "to the extent practicable". This only applies to records that are available to the public under the State Freedom of Information Law ("FOIL"). It specifically applies to proposed resolutions, rules, regulations or policies or proposed amendments to them, meeting agendas as well as other records scheduled to be discussed. Confidential personnel items, litigation items, or other items that are to be discussed in executive session would not be required to be provided ahead of time. Please note, however, that if after executive session the matters are to be voted on in open session then copies should be available.

As most of you know, FOIL generally requires public agencies, including school districts, to make available for public inspection records they maintain, except records that are subject to a specific statutory exemption, such as student records and records containing confidential personal information. Often, documents that are subject to public disclosure under FOIL are the subject of discussion at open meetings held by public agencies. In practice, most school districts and other public agencies do

not, in the absence of a specific FOIL request, make the records scheduled for discussion available to the general public in advance of the meeting at which they will be discussed. The recent OML amendment is designed to change that practice.

The soon-to-be-effective amendment will require that public agencies, including school districts, that are scheduled to discuss records or documents at "open meetings", make the records or documents available to the public prior to or at the meeting, upon request. Pursuant to the statute, this can be done by providing copies, for which a reasonable fee can be charged.

In addition, and perhaps more importantly, if a public agency maintains and regularly updates a website, and utilizes a high speed internet connection to do so, it must post the documents scheduled for discussion on its website, even in the absence of a request for the documents. Thus, school districts that maintain websites using high speed internet connections (which includes most school districts) will now have to identify what documents are expected to be discussed at the "open meeting" portions of school board meetings, and post the documents on their websites in advance of the meetings.

To date, there is no guidance as to how far in advance the documents must be made available to the public. Read literally, the law simply requires



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Mr. Budmen is a member of the New York State Association of School Attorneys, Inc., the National School Boards Association Council of School Attorneys, and the American Immigration Lawyers Association. Mr. Budmen serves on the Executive Board of the New York State Association of School Attorneys, Inc.

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Hot Topics**Open Meetings Law Amendment Creates New Document Disclosure Obligations for School Districts (cont'd)**

that the documents are available before the meeting. We will keep you informed as guidance on this issue becomes available from the Committee on Open Governments.

It remains to be seen whether requiring public bodies to identify and make available records scheduled for discussion at open meetings will reduce

the likelihood of FOIL requests for the records, as sponsors of the amendment contend. While the amendment provides that public agencies "may, but shall not be required to, expend additional monies" in implementing the amendment, agencies are also required to comply with the amendment's disclosure and posting obligations "to the extent practicable." It is

only a matter of time before the scope of a public agency's obligations under the statute becomes a subject of litigation.

Therefore, if you any questions about implementation of the OML amendment, which takes effect on February 2, 2012, please feel free to contact us.

Board Policies**Modifying your Anti-Discrimination and Harassment Policies? Imposing Higher Standards than the Law Requires Could Actually Reduce Your Liability Exposure**

Changes in the law, such as the Dignity for All Students Act, which creates additional "protected classes" of individuals, require school districts to periodically revise their anti-discrimination and harassment policies. While doing so, school districts should take the opportunity to consider other basic changes to their policies to ensure maximum flexibility to respond to personnel/student issues. Specifically, Boards should consider modifying their policies to minimize the likelihood that counseling or discipline issued pursuant to a policy will be deemed evidence of a violation of law should there be a subsequent legal proceeding. Revising policies to clarify that a district holds employees and students to a higher standard than a given state or federal law can be an effective way of accomplishing these objectives.

Having, adequately disseminating, and following reasonable anti-discrimination and harassment policies can, under certain circumstances, provide a shield against legal claims asserted against a school district. Unfortunately, there are also many circumstances where having an anti-discrimination and harassment policy will not provide any protection against a given discrimination or harassment claim.

While it will not always bar a legal claim, having and effectively distributing anti-harassment and discrimination policies to employees or students, as the case may be, puts them on notice of expected standards for acceptable conduct and may decrease the likelihood that individuals will view discriminatory/harassing comments or conduct as acceptable at school. Hence, enacting and properly distributing such policies makes sense from both a legal and a practical perspective because doing so may provide a legal shield against certain claims and is otherwise conducive to maintaining a civil and respectful school environment.

Anti-discrimination and harassment laws are complicated and what qualifies as "unlawful" conduct under a given statute is not always intuitive. Anti-discrimination and harassment laws are not "civility codes" and there is a wide range of rude and inappropriate conduct or comments that can contribute to an undesirable school environment, yet not constitute a violation of law. For example, under Title VII of the Civil Rights Law, a law which prohibits certain types of employment discrimination, race or sex-related comments must be "severe" or "pervasive" in order to violate the statute.

Policies should clearly state that comments or conduct need not constitute a violation of law in order to violate the policy. Language can be added to put employees and students on notice that the school district holds them to a higher standard than may be imposed under a given law. This is relatively easy to do and can serve to provide school districts with an extra tool for use in punishing or deterring unwanted boorish or rude conduct. At the same time, however, these provisions need to be crafted so as to avoid violating the Freedom of Speech requirements of the First Amendment.

Carefully drafted anti-discrimination and harassment policies can help prevent a "no good deed goes unpunished" type outcome by permitting a school district to explain that a decision to counsel or discipline an employee or student pursuant to a given policy is not tantamount to a finding of a violation of law, for which the school district may be liable.

Should you require assistance in reviewing or revising your school district's anti-discrimination or harassment policies, please feel free to contact our office.

Capital Project Cost Control**For Your Next Capital Construction Project, Consider a Retainer Agreement to Save on Legal Costs**

In order to assist school district and BOCES clients in their efforts to reduce expenses associated with much-needed capital construction projects, some school attorneys (including our law firm) have developed a new fee arrangement for legal services provided on such projects. Specifically, our firm has developed a new retainer agreement that will allow a school district to budget for its school district attorneys' fees much in the same way it does with its bond counsel, architect and construction manager. We believe that through this arrangement our clients will be able to avoid and/or resolve disputes in their construction projects without worrying about hourly attorney fees.

Our hope is that under this arrangement administrators will not be as reluctant to involve their school attorney early and often throughout the project, rather than waiting until a major problem has occurred and parties' positions have become cast in stone. By involving your attorney this way, you may be able to resolve issues quicker or correct the actions of non-conforming contractors to keep your project on-time and on-budget.

Discuss this type of retainer agreement with your school attorney. We recommend that you establish this relationship as soon as you are considering undertaking a capital project. Under our retainer arrangement, we will provide your school district with pre-referendum agreements with

the architect and construction manager and work with your school district to ensure that the SEQR process is properly completed prior to the board proceeding with the referendum. The retainer will also cover working with your school district to either issue Requests for Proposals for architects and construction managers or negotiate contracts with your existing architect and/or construction manager. Check with your school attorney for the existence of similar cost-saving arrangements.

If you have any questions about these retainer agreements for capital projects, please feel free to contact Joseph Shields at 315-437-7600.

Dignity for All Students Act**Take A Proactive Approach to the Dignity for All Students Act**

Upstate New York witnessed the tragic loss of yet another student earlier this school year when a 14-year old boy in suburban Buffalo killed himself after being subjected to persistent bullying by his classmates. The Dignity for All Students Act (DASA), arises out of a legislative concern for such tragedies. Signed into law on September 8, 2010, DASA prohibits harassment of students on school property or at school functions and designates many forms of bullying as "unlawful discrimination."

The Act's provisions address such harassment with respect to students' actual or perceived "race, color, weight, national origin, ethnic group, religion, religious practice, disability,

sexual orientation, gender or sex." The law also creates new "protected classes" such as weight and gender identity.

DASA imposes various affirmative obligations upon schools. Districts will now be required to: revise codes of conduct and adopt policies to create an environment free from harassment and discrimination; adopt guidelines to be used in school training programs to raise awareness and sensitivity of school employees regarding bullying and techniques for responding appropriately; ensure that one employee in every school is "thoroughly trained" to handle human relations issues involving the classes protected by DASA; file incident re-

ports with the State Education Department; and establish guidelines "relating to the development of non-discriminatory instructional and counseling methods."

We encourage a proactive approach to the problems of harassment and bullying. Establishing clear policies and providing quality training to staff will not only facilitate compliance with DASA, but will serve to minimize the negative consequences that occur when students are subject to bullying. While DASA will not take effect until July 1, 2012, we will continue to provide periodic updates as the effective date of the Act approaches.

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Tax Levy Cap Update**Some Tax Levy Cap Definitions Now Available, Others on the Way**

In December our firm held a series of briefings regarding "Life Under the Tax Cap". The briefings provided an overview of the tax cap law, a tutorial for calculating your tax levy limit, and a discussion regarding the impacts of the tax cap law. At the center of the briefings was the levy limit formula released by the State Education Department (SED). The formula provides that SED will define the "Capital Tax Levy". At the time of the briefings, the Department of Taxation and Finance had not released the tax base growth factors to use in the formula, nor had SED confirmed the definition of the "Capital Tax Levy".

The Department of Taxation and Finance recently released the tax base growth factors, which quantify the growth of taxable real property in each school district. The growth factors are listed on the New York Department of Taxation and Finance website, www.tax.ny.gov/pdf/publications/orpts/tbqf_sd.pdf.

The Tax Cap Law amended New York's General Municipal and Education law. These amendments included definitions for the terms included in the law. Notwithstanding these definitions, the formula provides that SED will define the "Capital

Tax Levy". SED has advised that they intend to issue further guidance regarding the definition of a the Capital Tax Levy. As of January 10, 2012, however, the guidance was not available. This guidance may also include use of or references to budgetary codes.

We will continue to keep you apprised as this information becomes available. If you have any questions regarding these definitions or the tax levy cap in general, please feel free to contact us.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
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.