School Law Matters

March 2012

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

New Guidance on What Documents Must Be Disclosed to the Public Prior to Open Meetings

Brian Hartmann, Esq.

In the January edition of our newsletter, we reported on a new amendment to the Open Meetings Law. As discussed in that article, Section 103(e) of the Public Officers Law now contains two requirements. First, upon request, any document subject to disclosure under the Freedom of Information Law ("FOIL"), as well as any resolution, law, rule, regulation, or policy scheduled to be discussed at an open meeting, must be made available, to the extent practicable, prior to or at the meeting. Second, documents scheduled to be discussed at an open meeting must be posted on the school district's website to the extent practicable, prior to the meeting at which they will be discussed. School districts must comply with this second requirement regardless of whether a request has been made for the documents.

Earlier this month, the Committee on Open Government released guidance regarding the application of this new law, which is available at http://www.dos.state.ny.us/coog/QA-2-12.html. That guidance attempts to answer questions that have arisen to date, and highlights the flexibility districts possess in complying with the statute.

The information provided by the Committee affirms what the statute makes clear: Section 103(e) does not expand the scope of documents that are available to the public. Documents exempt from disclosure under FOIL, such as inter- or intra-agency materials that consist of advice, opinion, recommendation, and the like, do not have to be released prior to meetings. Additionally, documents that are properly discussed in executive session need not be disclosed under the new law.

Many questions have arisen regarding the phrase "to the extent practicable." Unfortunately, the Committee does not provide any concrete answers regarding what is or is not practicable. Instead, the guidance document notes that the extent, manner, and timing of disclosure must be based on a "reasonable and 'practicable'" evaluation of the attendant facts and circumstances. For example, if a record scheduled to be discussed at a board meeting does not become available until a half hour before the meeting, it is unlikely that the district would run afoul of the statute if it did not post the record on its website prior to the meeting.

What is apparent, then, is that school districts will be required to make independent determinations as to what is "practicable." This is perhaps most apparent with respect to the timing of required disclosures. The statute is silent as to when materials scheduled to be discussed at an open meeting must be posted to a school district's website, except that they must be posted prior to the meeting. The legislature rejected proposed language from the Committee on Open Government which would have required government agencies to upload such information at least 24 hours before such a meeting. Consequently, a district will likely be in compliance with the statute if it makes documents available to the public the morning of a board meeting. However, willfully delaying the availability of materials in an effort to obscure an open meeting is clearly contrary to the stated purpose of the law as enacted.

Thus, although the law provides school boards with flexibility and does not broaden the scope of documents which must be disclosed, it also codifies a strong public policy in favor of transparency. In concert with this, our office advocates a common sense approach to disclosure. School boards should carefully consider which documents are important to withhold and determine whether those documents can lawfully be withheld under Section 103 (e). If materials scheduled to be discussed at an upcoming board meeting do not contain information which is sensitive, or if there is no applicable exemption under which they can be withheld, the information should be made available in a manner consistent with the statute.

In the same vein, districts should not wait until the eleventh hour to disclose

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Hot Topics

New Guidance on What Documents Must Be Disclosed to the Public Prior to Open Meetings (cont'd)

documents that must be made public. It is important to remember that the intent of the law is to afford community members the opportunity for meaningful participation in open meetings. School districts can ensure both compliance and confidentiality by reviewing and, if necessary, redacting documents in a timely fashion, and making such materials available at a time sufficient to ensure public access prior to the meeting.

Discerning what to disclose and when to disclose it under the new law will require an assessment of the individual documents, as well as the circumstances under which they will be discussed. If you have any questions regarding such matters, please feel free to contact our office for assistance.

Attorney Spotlight

Brian Hartmann is a graduate of Canisius College (B.A. 2006, *summa cum laude*) and the State University of New York at Buffalo Law School (M.A. 2008, J.D. 2011).

Brian supports the Firm's practice areas including education law, labor and employment law, constitutional law, and related civil litigation.

Special Education Issues

Requests for Use of Service Dogs in Schools Require Careful Consideration

The parents of a disabled student are requesting that your district permit their daughter to use a service dog at school. You learn that you have students and staff members with serious allergies to dogs. You are also concerned about whether the service dog might bite someone or pose sanitation problems. What are your options?

As discussed in detail below, under most circumstances a district will be required to permit the use of *bona fide* service dogs even if there are students/staff who are allergic to them. If, on the other hand, a particular dog is out of control or not housebroken, and the district has documented these facts, the animal may be excluded.

There are both federal and state laws that must be considered when confronted with a request to use a service dog at school. On the Federal side, schools must comply with the requirements of the Americans with Disabilities Act ("ADA"), the Individuals with Disabilities Education Act ("IDEA"), and Section 504 of the Rehabilitation Act. On the State side, schools must consider the potential impact of the New York State Human Rights Law.

Of particular concern are the recently enacted amendments to the regulations implementing the ADA. Effective March 15, 2011, a new section has been added to the regulations which expressly states that Title II entities, including public schools, "shall modify [their] policies, practices, or procedures to permit the use of a service animal by an individual with a disability." The regulations have also been amended to define "service animals" as dogs that are individually trained to do work or perform tasks for people with disabilities. This definition excludes other animals as well as dogs that do not perform tasks directly related to the person's disability or only provide comfort or emotional support.

While you may have concerns over permitting a service dog in your schools, the new regulations limit the circumstances under which schools can exclude these animals. Generally, service dogs cannot be barred from schools because of unsubstantiated health, sanitation, or safety concerns. Moreover, the dogs may go anywhere pupils are permitted, including classrooms, hallways, and cafeterias. For example, if a teacher or another student is allergic to dog dander, the U.S. Department of Justice ("DOJ") suggests that he or she be placed in a different classroom than an individual using a service dog.

In determining whether to permit or exclude a service dog, a school district is also limited as to the types of questions that can be asked of the individual making the request. Pursuant to guidance issued by the DOJ, the only inquiries a school can make are: 1) whether the dog is a service animal required because of a disability, and 2) what work or task has the dog been trained to perform. Consequently, if the dog is a *bona fide* service animal that has been trained to recognize when the student's disability is manifesting itself and to respond accordingly, the dog must be permitted to attend school with the child.

There are, however, certain isolated circumstances under which a service animal may be excluded. If the animal is out of control and the animal's handler does not take effective action to control it, or if the animal is not housebroken, the school need not allow it to accompany the student. Additionally, a district would not have to make accommodations for a dog which provides only emotional support or comfort, as it does not meet the definition of a service animal. Careful documentation should be made of these circumstances in order to be able to successfully defend against any potential ADA claims.

As the foregoing discussion suggests, the ADA will generally require you to grant a parent's request that his or her child be accompanied to school by a service dog. However, where appropriate, such requests should be addressed by the Committee on Special

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Special Education Issues

Requests for Use of Service Dogs in Schools Require Careful Consideration (cont'd)

Education as part of the child's IEP process. The importance of this point was made clear in *Cave v. East Meadow Union Free School Dist.* In this particular federal case, the parents of an autistic child sued their son's school district, alleging that the district violated the boy's rights under the ADA by refusing to permit his service dog to attend school with him. In resolving the dispute in favor of the District, the Second Circuit Court of Appeals found that the parents were, in fact, challenging the adequacy of their child's IEP, a violation of the IDEA. The court ruled that because the parents did not follow the administrative procedures required by the IDEA to challenge the District's decision, the case was dismissed.

The lesson to be learned from the *Cave* case is that while a district can require the student's parents to exhaust their administrative remedies under the IDEA and Section 504, this will not insulate the district from a lawsuit alleging ADA violations for excluding a service dog once those administrative procedures have been followed.

Additionally, parents may not be required to follow these procedures before suing the school district on a State law claim. New York's Executive Law expressly prohibits discrimination on the basis of a handicapped individual's use of a guide dog, hearing dog, or service dog. There is, however, disagreement among New York State's courts as to whether this law applies to school districts. In November 2011, the New York Court of Appeals agreed to hear a case (*Ithaca City School Dist. v. New York State Div. of Human Rights*) which should decide the matter. We will keep you informed as to the outcome of this case.

In short, the issue of service animals in school implicates a number of complex state and federal statutes that are constantly evolving. While it is clear that schools cannot summarily exclude these animals, any decision will necessarily require a careful analysis of the applicable laws, as well as the facts and circumstances involved.

Should you require assistance in addressing these concerns or revising your existing policies to comply with the new ADA regulatory requirements, please contact our office.

School Financial Issues

Trends and Options for Districts Seeking Cost Savings in Tough Financial Times

In recent years with the economic downturn and dwindling state aid, we have seen school districts eliminate programs, layoff staff, close schools and deplete reserve funds in an effort to limit property tax increases. Under the new tax cap law and ongoing economic downturn, many school districts will be facing even more difficult decisions. This has led to a trend among school districts towards shared services and reorganization as a means to address budget shortfalls. In this article, we will explore this trend and some of a school district's options, including shared services, reorganization, regional schooling and funding for studies of same.

Shared Services

BOCES may be one of the most common ways for school districts to share services. The State Education Department's Proposed Regents State and Federal Legislative Priorities for 2012 identified the creation of BOCES as regional leaders as a legislative priority under discussion. Under discussion is the implementation of legislation expanding the ability of BOCES to provide services to entities other than their component school districts, thereby becoming regional leaders in education. The proposal under discussion addresses not only the expansion of BOCES' authority, but also incentives for multi-district consolidations and inter-municipal cooperation.

Aside from BOCES, the law specifically authorizes the use of inter-municipal agreements for certain shared services. There are also laws governing the use of shared transportation services. However, state aid may vary based on the type of shared service and whether the service is offered through a BOCES.

Reorganization

The main types of reorganization include centralization, annexation/dissolution, and consolidation. School districts' options for reorganization are controlled by whether they are common, union free, central, or city school districts.

Centralization is the most common form of reorganization. Under this form of reorganization, a central school may be formed from any type of school district with the exception of city school districts. Under centraliza-

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School Financial Issues

Trends and Options for Districts Seeking Cost Savings in Tough Financial Times (cont'd)

tion, a new school district is created encompassing the entire area of the school districts to be merged. The Commissioner of Education lays out the territory of the new district, however this is after extensive study, an affirmative vote of the School Boards, and a positive advisory vote from the districts' communities. Under centralization a majority of the voters in each affected school district must approve centralization after the new district has been laid out by the commissioner.

Annexation and dissolution of school districts are distinguishable from centralization in that a new school district is not formed. Under annexation, the school district to be annexed dissolves into another school district. Different provisions under the Education law govern the annexation of school districts depending on whether schools are annexed to central school districts or union free school districts. For any annexation to occur school districts must be contiguous and the voters of each district must approve the annexation.

Regional High Schools

This concept has spawned studies across the state, including Wayne County, Monroe County, Ontario County, St. Lawrence County, and Lewis County. In Ontario County, a preliminary study alleges the formation of five to six regional high schools will result in multi-million dollar savings and a reduction in the inequalities among the nine high schools within the county.

Establishing regional high schools is another form of reorganization; however this option is not authorized under the Education Law (with the exception of Nassau and Suffolk County). In 1917, the legislature first authorized the use of central high schools to provide education to students from two or more school districts. In 1944, the central high schools were deemed unsatisfactorily and new legislation prohibited further formation of central high schools. At that time, only Nassau County had central high schools. In 1981, the legislature again authorized the use of central high schools, but only for Suffolk County.

The New York State legislature is currently considering bills which authorize two or more school districts to form regional high schools. The State Education Department's Proposed Regents State and Federal Legislative Priorities for 2012 also supports the concept of regional high schools.

Funding For Studies

The Local Government Efficiency (LGe) Grant Program administered through the New York Department of State provides grants for the "development of projects that will achieve savings and improve municipal efficiency through shared services, cooperative agreements, mergers, consolidation and dissolutions". Application for these grants can be accessed on the Department's website: http://www.dos.ny.gov/lg/. The website also provides links to reports from school districts that have examined cost saving measures including shared services between school districts or between a school district and town, annexation, consolidation, centralization, and regional high schools.

Each school district has unique contractual obligations and other factors which must be considered in evaluating steps to reduce expenses, including shared services and reorganization. The foregoing provides very general information regarding some of the available options. We strongly encourage you to contact your attorney to discuss this information in greater detail and determine the best options for your specific school district.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Dennis Barrett	**3/31/12**	**Monroe County School Boards Association presenting program on *School Law for Board Candidates* — Holiday Inn Airport, Rochester, NY**
Joseph Shields	**4/20/12**	**New York State Association of School Business Officials, Webinar on *Policy and Procedure Case Law***
Ben Ferrara	**4/21/12**	**National School Boards Association Council of School Attorneys, 2012 School Law Seminar, presenting on *Cheating/Improper Assistance on Tests: The New York State Experience*, Sheraton Boston Hotel, Boston, MA**
Eric Wilson	**6/4/12**	**New York State Association of School Business Officials, Annual Conference 2012 - Charting a Course for the Future presenting *Legal Updates,* Saratoga Springs, NY**