

# School Law Matters

SEPTEMBER 2013



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

### Remember Your District's Mandatory Annual Notifications to Parents and Students

Brian Hartmann, Esq.

Each year, various laws and regulations require school districts to notify parents and students on topics ranging from the Family Educational Rights and Privacy Act (FERPA), to school lunches, to the application of pesticides on school grounds. Since these notices are not mandated by a single statute or regulation, district officials are often concerned about whether their districts are in full compliance with all of these diverse requirements. In the interest of relieving these concerns, the following is a list and brief explanation of the notifications we advise our clients to include with their school calendar or monthly newsletter near the beginning of each school year:

**Notice of Non-Discrimination.** Under federal civil rights and anti-discrimination laws, as well as the Dignity for All Students Act, school districts are required to notify students, parents, and others that it does not discriminate on the basis of actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sex, sexual orientation or gender (including gender identity and expression) in admissions, participation or employment. The notification must also include the identity and contact information for coordinators designated to handle complaints under Title IX, the ADA, and the ADEA, and should specify the grievance procedure to be followed if an individual believes that there has been a violation of the district's non-discrimination policies.

School districts must also provide notice that they grant equal access to the use of school property for the Boy Scouts and other designated youth groups. The U.S. Department of Education has advised that the required notification under this

statute can be combined with the notice of non-discrimination used in complying with the civil rights legislation described above.

**FERPA.** Under the Family Educational Rights and Privacy Act (FERPA), districts must provide parents/guardians and students 18 years old or older with annual notice of their rights to inspect and review education records, amend education records, consent to disclose personally identifiable information in education records, and file a complaint with the U.S. Department of Education. The notice must include the procedure to request and review education records, as well as a statement that records may be disclosed to "school officials" (which must be defined in the notice) without prior written consent when there is a "legitimate educational interest" (this phrase must also be defined in the notice). Finally, districts must provide notice to parents of the types of student information they release publicly without prior consent as "directory information" (e.g., in yearbooks, sports programs, etc.) and offer them a chance to object to such releases in writing.

**PPRA.** The Protection of Pupil Rights Amendment (PPRA) requires that districts notify parents of their student privacy policy. Among other things, the notice must offer parents the opportunity to opt their child out of participation in any survey that reveals information on certain types of personal behavior and/or political beliefs. Parents must also be notified of and given the opportunity to exclude their child from any activities in which personal information will be gathered from students and used for marketing purposes.

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., is pleased to announce that Wayne A. Vander Byl, Esq. and Michaela Perrotto, Esq. have joined the Firm. Mr. Vander Byl has joined in an Of Counsel capacity while Ms. Perrotto has joined as an associate attorney. Both attorneys will assist in the Firm's representation of school districts, municipalities and private sector employers.



Wayne A. Vander Byl

**Wayne A. Vander Byl** has been a school attorney since 1979 and regularly served over a dozen school districts in the Rochester area in the full range of school legal matters. Mr. Vander Byl has represented school clients in both New York State and Federal courts, in grievance arbitrations, in appeals to the Commissioner of Education, in both Education Law Section 3020-a and Civil Service Law Section 75 employee discipline proceedings, in proceedings before the Public Employment Relations Board, the State Division of Human Rights, the Equal Employment Opportunity Commission, and the US Department of Education. He also has extensive collective bargaining experi-

*Continued on the next page*

### In This Issue ...

- Remember Your District's Mandatory Annual Notifications to Parents and Students
- Attorney Spotlight
- Leasing Unused School Space to Others Comes under Review by Commissioner
- Transgendered Student Issues May Present Complex (and Expensive) Legal Problems
- A Brief Review of Procedures Necessary for Determining Student Residency
- Upcoming Events

**Hot Topics****Remember Your District's Mandatory Annual Notifications to Parents and Students (cont'd)**

**Child Nutrition Programs.** Pursuant to the National School Lunch Act and regulations promulgated by the U.S. Department of Agriculture, school districts must provide both parents and the public with information about free and reduced price meals and/or free milk. Districts must also provide parents with an application form for free and reduced price meals and/or free milk.

**Disclosure to the Military.** Parents of high school students must be notified of their right, and the right of their child, to request that a district not release the child's name, address, and telephone number to military recruiters without prior written consent.

**Attendance.** Each district is required to send a plain-language summary of its attendance policy to parents at the beginning of the school year.

**Code of Conduct.** A plain-language summary of the code of conduct must be provided annually to all parents. This summary along with a copy of the complete code must be made available upon request.

As with the requirements under various federal civil rights provisions, the Dignity for All Students Act requires Districts to provide parents and students with the name and contact information of each Dignity Act Coordinator. Many districts have found it useful to include such information in their code of conduct summaries.

**Asbestos Notice.** Written notice must be provided annually to parents, teach-

ers, and employee organizations of the availability of asbestos management plans, any current or planned asbestos inspections, response actions, and post-response actions.

**Pesticide Application Notice.** Written notice must be provided to all students, parents/guardians, and staff at the beginning of the year that pesticide applications may take place during the school year, with an offer for an opportunity to register to receive a written notice at least 48 hours prior to such application. This notice must also give the name of the school representative to contact for further information.

**Notification of Homeless Student Policy.** Under the McKinney-Vento Homeless Assistance Act, homeless student liaisons are required to provide public notice of the education rights of homeless students. These notices may be placed in locations including but not limited to: homeless shelters, medical clinics, post offices and local Social Service offices.

It should be noted that many school districts give public notice of the requirement that they identify, locate, and evaluate all children with disabilities who are in need of special education and who reside within their borders. While there is no specific requirement that school districts publish such notice, it is good practice to inform parents of school districts' "child find" obligations.

If you have any questions about the manner in which these notices must be provided, please do not hesitate to contact our office.

**Attorney Spotlight (cont'd)**

ence on behalf of employers with NYSUT, CSEA, and SAANYS units.

Mr. Vander Byl is a member and past president of the New York State Association of School Attorneys and a member and former chair of the School Attorneys Committee of the Monroe County Bar Association. He has been the program chair and a frequent presenter at law conferences sponsored by both organizations. Mr. Vander Byl also was an adjunct instructor of Education Law for SUNY College at Brockport for many years. He also has done training and consulting on teacher tenure and discipline issues, teacher evaluations and improvement plans, and superintendent and board relations throughout the State.



Michaela Perrotto

**Michaela Perrotto** is a 2008 graduate of Albany Law School, where she concentrated in labor and employment law. There, Ms. Perrotto received the Patrick B. McNamara Prize, awarded to the graduate having the highest GPA in the labor law concentration. Ms. Perrotto also attended the Pennsylvania State University, earning her undergraduate degree in Labor and Industrial Relations in 2005.

Prior to joining our Firm, Ms. Perrotto was a Labor Relations Specialist for the Cayuga Onondaga BOCES, where she worked on matters pertaining to labor, employment and education law. Ms. Perrotto is admitted to practice before New York State courts and is a member of the Monroe County Bar Association and the N.Y.S. Ass'n of Management Advocates for School Labor Affairs.

**Leasing School Property****Leasing Unused School Space to Others Comes Under Review by Commissioner**

Declining enrollments and financial concerns have led many school districts to consider leasing unused space in school buildings. A recent decision from the Commissioner of Education examined one such lease and clarified the process that school boards must follow when pursuing these lease opportunities.

Appeal of Forrest (Dec. No. 16,501) involved the East Ramapo Central School District's leasing its Hillcrest Elementary School to a local religious group. The Commissioner annulled the lease after finding that the Board had not followed all of the procedures set forth in Education Law §403-b. Specifi-

cally, this section requires a board that proposes to lease school property to: 1) take all reasonable steps necessary to determine the property's rental value; and 2) ensure that the proposed lease provides the school district with the best possible deal. The

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**Transgendered Student Issues****Transgendered Student Issues May Present Complex (and Expensive) Legal Problems**

In recent years, the issue of how to address transgender students' unique concerns has become a growing concern for many school administrators and teachers. Certainly, New York's Dignity for All Students Act signals a change in the responsibilities and expectations of school districts and has raised awareness regarding the bullying and harassment that many transgender students face. The Act, however, provides little guidance on practical matters such as: what name to call a transgender child, what restroom or locker room the child should use, what athletic teams the child may be eligible to compete on, or how to handle situations where a parent and student do not agree on the child's gender identity.

In 2013, a number of states, agencies, and organizations passed laws or made determinations on issues affecting transgender children. California passed legislation allowing students in its schools to compete on sports teams and use facilities based on their gender identity rather than their assigned sex at birth. The Maine Principals' Association has, similarly, adopted a policy permitting transgender athletes to play interscholastic sports based on their gender identity. And, in a recent administrative decision, Colorado's Civil Rights Division determined that a school district

discriminated against a transgender elementary school student by refusing to let her use the girls' bathroom, even though she identified as female.

To date, however, New York has not adopted comprehensive legislation accommodating transgender individuals or otherwise addressed these issues. However, the U.S. Dept. of Education, Office of Civil Rights, issued a "Dear Colleague Letter" on October, 26, 2010, which provides some guidance for schools. Specifically, the Letter stated that:

"Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX." (p. 8.)

Bearing in mind that the U.S. Dept. of Education has indicated that transgendered students are protected by Title IX, school boards and administrators must determine how to handle these

complex and often controversial situations while avoiding possible claims of discrimination. What is the appropriate response where, for example, a male-to-female transgender student has requested that she be permitted to use the girls' locker room? While permitting the child to use that changing room despite her differing anatomy may make parents of other students uncomfortable, a district may open itself up to claims of discrimination if it only offers a gender neutral room in which the child can change.

Given the complex legal issues involved, the sensitive nature of the topic, and the importance of these matters to the child, his or her family, and the school community, such questions should be handled on a case-by-case basis in consultation with the school attorney.

If you have concerns regarding how these issues should be addressed, or if a transgender student has made a request regarding his or her accommodations or how he or she is to be addressed, please do not hesitate to call our office.

**Leasing School Property****Leasing Unused School Space to Others Comes Under Review (cont'd)**

Commissioner noted that East Ramapo did not actively market Hillcrest to establish its rental value and the Board did not obtain an appraisal of the property to be leased. Even though the Board technically negotiated the lease with the group, that fact alone did not satisfy the requirement to establish the property's market value.

The overarching theme of the Commis-

sioner's analysis in Appeal of Forrest emphasized the need for Boards of Education to develop and review independent evidence of the market value of school property to support the economic terms of a proposed lease agreement. Such evidence might come in the form of an expert's report analyzing the market for similar properties, an appraisal or from listing the property with a realtor. While each

lease agreement will present unique facts and circumstances, this general principle must be followed to avoid potential problems.

Should your district be considering a lease of school property, please feel free to contact our office to discuss this and other potential legal issues that can arise.

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**Student Residency**

**A Brief Review of Procedures Necessary for Determining Student Residency**

Now that a new school year has begun, it is a good time for school administrators and board members to review the procedures for determining whether a child is a resident of their districts, and therefore entitled to tuition-free attendance in their schools.

Generally speaking, a child is presumed to be a resident of the school district in which his/her parent resides. That presumption can be rebutted if it is established that the parent has permanently relinquished control of the child.

Section 100.2(y) of the Commissioner's Regulations specifies the procedure to be followed in determining student residency. The determination is to be made by the Board of Education or its designee. If the Board has not expressly designated someone to make this determination, it must be made by the Board.

Prior to making a final determination of entitlement to attend the schools without tuition, the child's parent or person in parental relation to the child, as appropriate, must be given the opportunity to submit information concerning the child's right to

attend school in the district. The information submitted may be in the form of written documents or oral statements.

We recommend that the parent or other interested person be given an opportunity to meet with the Board or its designee to present any evidence to support the child's residence in the District. At that meeting, evidence in the District's possession suggesting that the residence is elsewhere should be presented to the parent so that he/she has an opportunity to refute or explain it. If, based upon all information submitted, it is determined that the child is not a resident of the district and is not a homeless child, the Board or its designee has two business days to provide written notice of that determination to that child's parent.

The Regulations specify that the notice must contain the following information:

1. That the child is not entitled to attend the public schools of the district.
2. The basis for the determination of the child as neither a resident of the school district nor entitled to attend its schools

pursuant to the sections of the Commissioner's Regulations regarding homeless children.

3. The date on which the child will be excluded from the schools of the district.

4. That the determination may be appealed to the Commissioner of Education, in accordance with Education Law §310, within 30 days of the date of this determination, and that the procedure for taking such an appeal may be obtained from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York, 12234, or by calling (518) 474-5807.

In addition, where the Board has not appointed a designee and the initial determination is made by someone other than the Board, the notice must advise the parents regarding the procedure by which to obtain review by the Board.

If you have any questions about these procedures or need assistance in this process, please do not hesitate to contact our office.

**Upcoming Events**

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Event/Program/Location</u>
Donald Budmen	9.13.13	Presentation to Client District's Parents on Social Media-Technical Issues
Donald Budmen	9.14.13	Presentation to Client District's Students on Social Media-Technical Issues
Donald Budmen	9.17.13	Client In-Service Presentation on Social Media-Technical Issues
Donald Budmen	9.17.13	Client In-Service Presentation on Student Discipline Hearing Workshop
Joseph Bufano	9.18.13	Client In-Service Presentation on Dignity Act Coordinator Training
Michael Dodd	9.27.13	Client In-Service Presentation on Workplace Harassment
Joseph Bufano	10.8.13	Client In-Service Presentation on Dignity Act Coordinator Training

*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.*