School Law Matters

July 2014

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

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

Hot Topics

SEC Warns that Violating its Disclosure Rules for Bonds and Notes Can Result in Severe Penalties for School Districts

The U.S. Securities and Exchange Commission ("SEC") will soon be taking a closer look at the disclosures made by school districts (and BOCES) seeking to issue bonds or notes. As most of you are aware, these borrowing instruments are typically used as a means of financing large purchases and/or capital projects. Beginning in early September, the SEC will be stepping up its enforcement efforts to ensure that school districts are complying with the federal laws that require them to disclose annual financial and operating information as well as timely notices of material events affecting their outstanding debts. This more aggressive approach has been prompted by concerns about reported widespread violations of these rules. From the SEC's perspective, if a school district fails to disclose this information about prior debts on a continuing basis as required, it could result in investors not being adequately informed about matters which might affect their decisions to invest in future district bonds/notes. New SEC rules will permit school districts to self-report past compliance failures. However, given the potential consequences associated with this self-reporting, districts should work closely with their attorneys and financial advisors in deciding the appropriate course of action in this regard.

By way of background, school districts are required to prepare an "Official Statement" for a bond or note sale. The Official Statement contains financial and other information that underwriting banks (which will be bidding on the debt) must review to determine if the debt is a suitable investment for their customers under the SEC's rules as well as the Municipal Securities Rulemaking Board's ("MSRB") rules. An Official Statement must also disclose anytime within the previous five years that the issuer (i.e., the school district or BOCES) failed to comply with Rule 15c2-12 of the SEC. This Rule requires on-going annual disclosures of financial and operating information as well as timely notices of material events affecting outstanding debts. In other words, a bank's review of the proposed bond or note issue will include a check of the Official Statement information about compliance with continuing disclosure requirements for previously issued bonds and notes, and include that compliance record as part of its consideration when bidding on – or privately negotiating – the purchase of the debt.

Rule 15c2-12 also mandates that any debt issuer who has failed to provide an annual update document, audit or material event notice in a timely manner must also file a notice of that failure itself and disclose that failure for five years in its future Official Statements. A new initiative by the SEC known as the Municipalities Continuing Disclosure Cooperation Initiative (the "MCDC Initiative") is being put in place to address possible violations of this Rule by school districts and municipalities and underwriters of municipal securities in representations made about these continuing disclosures. Thus, the MCDC Initiative seeks to address cases where a school district failed to file an annual report, an audit or material event notice in a timely manner, and then, in any subsequent Official Statements, did not disclose the failure.

Beginning on September 10, 2014, the SEC will begin reviewing reports and analyzing the disclosure compliance misstatements or omissions. In cases where potential failures are identified, it is likely that those bond or note issues will be investigated by the SEC for possible enforcement action. The SEC has stated that disclosure failures which are not self-reported by September 9, 2014 will subject school districts to severe sanctions and significant monetary penalties. However, self-reporting is not mandatory. Rather, it is an opportunity to clear up any inadvertent late or missed filings.

School and municipal officials should be aware that even self-reporting can have a cost. Failures which are self-reported will subject school districts and municipalities to certain non-monetary settlement terms, including: complying with a cease and desist order in which the issuer neither admits nor denies the findings of the SEC; implementing policies, procedures and training regarding continuing disclosure obligations; complying with all existing continuing disclosure undertakings; cooperating with any further SEC investigation; disclosing settlement terms in any final official statement issued within five years of the date of institution of the proceedings, and; providing the SEC with a compliance certificate regarding the applicable undertakings on the one year anniversary of the proceedings. It should be noted that by submitting a self-report questionnaire, you are consenting to these enforcement actions in advance.

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Hot Topics

SEC Warns Schools about Violating its Disclosure Rules for Bonds and Notes (cont'd)

As such, school districts should work with their bond attorneys and financial advisors to compile a list of any delays or failures to file annual financial information and operating data, audits or listed material events on an issue-by-issue basis. They should also check all Official Statements for bonds or notes issued in the last five years to see what was reported about prior disclosure failures. School districts should then check against the continuing disclosure agreement documents that were signed when a bond or note was sold to determine if the district was in compliance with these requirements. If, after consultation with their attorneys and financial advisors, a school district then decides to self-report a material failure, it should disclose on an issue-by-issue basis with the SEC by September 9, 2014.

The SEC has provided a self-reporting form which can be found at :http://www.sec.gov/divisions/enforce/mcdc-initiative-questionnaire.pdf. This form requests information including:

- identification and contact information of the self-reporting entity;
- information regarding the municipal securities offerings containing the potentially inaccurate statements;
- identities of the lead underwriter, municipal advisor, bond counsel, underwriter's counsel and disclosure counsel, if any, and the primary contact person at each entity, for each such offering;
- any facts that the self-reporting entity would like to provide to assist the staff in understanding the circumstances that may have led to the potentially inaccurate statement(s); and
- a statement that the self-reporting entity intends to consent to the applicable settlement terms under the MCDC Initiative.

If you have any questions regarding the foregoing or need assistance with these reporting requirements, please feel free to contact us.

Real Property Tax Issues

Be Prepared for the "Property Tax Freeze Credit" Coming this Fall

As part of this year's New York State budget, the Governor and Legislature have adopted a tax credit program that "freezes" real property taxes for homeowners for the 2014-15 and 2015-16 school years. The credit will be implemented as a rebate check to homeowners based upon the increase in the amount of property taxes levied by school districts and other municipal entities (e.g., towns, counties, etc.) in 2014-15 over what the homeowner paid in 2013-14.

For tax year 2014-15, eligibility to receive the credit is dependent upon two conditions: (1) the homeowner must be eligible to receive a STAR exemption for the property in question; and (2) the taxing entity for which the rebate would be issued must be in compliance with the applicable "tax cap".

For school districts, this means that residents eligible for the STAR exemption will receive a rebate based upon 2014 school taxes, but only if the District's 2014-15 budget complied with the tax cap conditions set forth in Education Law §2023-a.

School districts will thus be the first municipal entities directly affected by this program, since the rebate reimburses homeowners for the dollar increases in their 2014 school taxes. The program is designed to encourage compliance with the tax cap by making such compliance a condition of receiving the rebates. School officials in districts with non-cap compliant budgets are likely to receive questions from homeowners who would otherwise have qualified for the rebate; thereby placing further political pressure on school districts to comply with the cap.

Once tax cap compliance is established, the homeowner's rebate amount is either the increase in school taxes from 2013 to 2014, or a factor of 1.46% of the 2013 school taxes, whichever is greater.

An example of a potential credit calculation for a tax cap compliant district is:

- 2013-14 school taxes = $2,500.00
- 2014-15 school taxes = $2,550.00
- Total tax increase = $50.00
- 1.46% x 2013-14 school taxes = $36.50
- 2014 rebate amount = $50.00

The credit becomes more complicated for the 2015-16 tax year, because in addition to requiring tax cap compliance, the program adds a mandate that an "approved government efficiency plan" be established by each school district as of June 1, 2015. This requirement will be implemented in a new statute, Education Law section 2023-b, which defines "approved government efficiency plan" as "a plan that identifies cooperation agreements, shared services and/or mergers or efficiencies to be fully implemented by one or more eligible school districts that are signatories to the plan".

Not only must school districts create and file such a plan, but the plan must demonstrate that the school district will achieve savings and efficiencies equivalent to 1% of the 2014 school tax levy in each of the next three years, starting in 2016-17. The statute also includes detailed descriptions of what constitutes a "cooperation agreement" and "shared services", which must be understood by school officials in order to ensure compliance with this requirement.

Should you wish to learn more about the Property Tax Freeze Credit and the obligations it places upon school districts, please feel free to contact either of our offices for more details and/or assistance.

Administrative Cost-Cutting

Can One Principal Supervise Two or More Buildings? Only If You Follow SED's Variance Application Process

In an effort to save money, many districts have considered sharing administrative positions with another school district. This arrangement is expressly permitted by Section 1981 of the Education Law. However, districts should be wary of entering into arrangements whereby one principal is responsible for several buildings. By doing so, the District would effectively create a part-time principalship in each building. Section 100.2(a) of the Commissioner's Regulations ordinarily requires school districts to assign a duly certified full-time principal to head each school building. Specifically, Section 100.2(a) states, in relevant part:

> "The board of education of each school district shall employ and assign to each school under its supervision a full-time principal holding the appropriate certification as required pursuant to section 80.4(b) of this Title."

However, it may be possible for the District to obtain a variance from this requirement pursuant to the following language in Section 100.2(a):

> "Upon the submission of evidence that there are circumstances which do not justify the assignment of a principal to a particular school, or that another mode of building administration would be more effective, the commissioner may approve an alternative mode of building administration."

The Commissioner addressed this issue in *Appeal of Branch*, 41 Ed. Dept. Rep., Dec. No. 14,704 (2002). In that case, the Board of Education for the Olean City School District sought to have one person serve as the principal for two elementary schools. Although this appeal was dismissed on procedural grounds, the Commissioner made clear what the expectations were with respect to these matters, stating:

> "Although I am constrained to dismiss the appeals on procedural grounds, I must again comment on respondents' [Olean's] actions. Section 100.2 (a) requires a board of education to 'employ and assign to each school under its supervision a full-time principal holding the appropriate certification....'
>
> Under the regulation, the Commissioner may approve another mode of building administration 'upon the submission of evidence that there are circumstances which do not justify the assignment of a principal to a particular school, or that another mode of building administration would be more effective.' …. since there is no approved variance in place, respondent board is required to comply with §100.2(a) and to have a full-time principal in each school."

As such, districts must submit a variance request and receive approval from the State Education Department (SED) prior to implementing any change that would result in employing one Principal to serve in more than one school building. There is a specific School Leader Variance Application, which SED requires districts to submit. It can be obtained by requesting it from the following SED office:

> New York State Education Dept.
> Office of Curriculum, Assessment and Educational Technology
> 89 Washington Avenue
> Room 319 EB
> Albany, New York 12234
> Phone: (518) 474-5461
> Fax: (518) 473-2860
> E-mail: edtech@mail.nysed.gov

The variance application (entitled "Application for Variance from Section 100.2(a) of the Commissioner's Regulations") poses a series of questions regarding why the variance is being sought. It is a fairly difficult review process for any school district. It asks for information such as how the proposed new arrangement would promote effective teaching and learning in the buildings affected, and how it would promote collaboration with parents and the community. The application further asks for a description of the background and certification of each administrator involved in the new arrangement. Also, the application form states that, if a variance is granted, it will be good only for a maximum of three years.

In addition to the hurdles posed by the Commissioner's Regulations and variance process, districts should also keep in mind that their collective bargaining agreements with administrative units may also create certain obstacles with respect to the sharing of certain administrative positions. The unit representing the principal may also demand to bargain the impact of such a decision, e.g., by seeking additional compensation for the shared principal.

There are several considerations that a district must weigh in determining whether or not to seek a variance from SED. With the foregoing in mind, should a Board wish to pursue this avenue for the 2014-2015 school year, it should submit the variance application as soon as possible, as it took the Commissioner three months to rule on the variance application in the *Branch* case.

If you have any questions about or need assistance with the variance application process, please feel free to contact us.

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.**

Student Privacy

Students in Foster Care Benefit from the Uninterrupted Scholars Act

On January 14, 2013, President Obama signed the Uninterrupted Scholars Act ("USA"), also known as the "A+ Act," which amended the Family Educational Rights and Privacy Act ("FERPA"). The amendment benefits foster children who are educationally at-risk by allowing caseworkers or other State or local child welfare agencies or tribal organizations to access a student's education records; thus, ensuring students in foster care receive appropriate services in accordance with their educational needs.

This amendment comes after Congress passed the Fostering Connections to Success and Increasing Adoptions Act in 2008. The Fostering Connections Act required caseworkers and child welfare agencies to supervise the educational stability of students placed in foster care. However, the law was flawed as it did not override FERPA's "parental consent" requirement, which made it difficult for caseworkers to obtain the information they needed to make the Fostering Connections Act successful.

FERPA, among other things, gives parents the right to consent to the disclosure of personally identifiable information from their child's education records. This hindered child welfare agencies that were legally responsible for foster youth in their ability to access a student's education records as educational agencies and institutions required parental consent or judicial order before disclosure was permitted.

Without the requisite information, students were not receiving the appropriate educational services that fit their individual needs; therefore, foster youth "fell through the cracks" of the education system. Foster children were experiencing a loss of credits, unfit class placement and unnecessarily repeating grades, resulting in an increased drop-out rate. The USA was enacted to remedy the issue.

The USA amended FERPA's disclosure policy by permitting educational agencies and institutions to disclose a student's education records without parental consent. Now, caseworkers and child welfare agencies are provided easier access to personally identifiable information from the student's education records. With the proper information, caseworkers are better suited to act in the best interest of the child and more equipped to make knowledgeable decisions regarding the child's educational needs.

In addition, the USA does away with FERPA's requirement that schools provide notice to parents of any judicial order or subpoena that seeks the education records of their child, if the parent has already been notified by the court as a party to the proceeding, i.e. in cases of abuse, neglect or dependency. Under these circumstances, the school district does not have to provide additional notice to the parent.

With the USA in place, child welfare agencies and educational agencies and institutions are able to work efficiently in disclosing a child's education records, thereby allowing students placed in foster care to have an equal opportunity at academic excellence and life-long success.

Please call us with any questions you may have about the foregoing.

Upcoming Events

Attorney(s)	Date(s)	Event/Location/Program
Don Budmen	**July 8**	**Client In-Service Administrative Training** on ***"Student Discipline and Legal Update"***
Don Budmen	**July 10**	**N.Y.S. School Boards Assn. Summer Law Conference, Rochester, NY** presenting on ***"Opting Out – Legal Issues for a Not-So-Legal Act"***
Don Budmen **Michaela Perrotto**	**July 18**	**Client In-Service Administrative Training on "*Employee and Student Discipline"***
Eric Wilson **Heather Cole**	**July 22**	**Management Advocates for School Labor Affairs, 37th Annual Summer Conference, Lake Placid, NY** presenting on ***"Absenteeism: You Have To Be There To Be Competent"***
Don Budmen	**July 24**	**Client In-Service Administrative Training** on ***"Legal Update"***
		2014 CNY Education Law Conference, Doubletree Hilton, E. Syracuse, NY **For more information, contact Patricia Berry at 315-433-2629.**
Ben Ferrara	**July 31**	Program Chair for ***"Working Effectively with the Media: A Panel Discussion"***
Joe Shields		Presenting on ***"A Review of the New Best Value Purchasing Practices, Piggyback Purchasing and Basic Purchasing 101"***
Don Budmen		Presenting on ***"DASA: When Does Student Off-Campus Misbehavior Become Your District's Problem?"***
Colleen Heinrich		Presenting on ***"Residency Issues"***
Susan Johns		Presenting on ***"Special Education Update"***
Eric Wilson		Presenting on ***"Test Integrity and the Changing Landscape of 3020-a"***
Hank Sobota		Presenting on ***"Using Private Investigators and Electronic Surveillance in Schools"***

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.