

# School Law Matters

JULY 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

### Dramatic Changes to Required Annual Teacher and Principal Performance Review Procedures

Eric J. Wilson, Esq. and Joseph J. Bufano, Esq.

The State Legislature in 2010 adopted a new law (Education Law § 3012-c) providing for dramatic changes in how school districts and BOCES will evaluate teachers and principals. A number of significant changes will take effect with Annual Professional Performance Reviews (APPRs) this upcoming school year.

In addition, on May 13, 2011, Governor Cuomo sent a letter to the Chancellor of the Board of Regents requesting further changes to the new evaluation system to improve and accelerate the performance evaluation process. As a result of the Governor's recommendations, the Board of Regents further amended its regulations to comport with the Governor's request.

Under the new APPR evaluation system, New York State will differentiate teacher and principal effectiveness using four new rating categories and APPRs will now result in a single composite effectiveness score between (0-100), which will reflect multiple measures of teacher and principal effectiveness.

As the 2010-2011 school year comes to a close, school districts and BOCES should begin to prepare for the timelines and bargaining issues presented by these new laws and regulations.

For example, as soon as September 1, 2011, school districts and BOCES must adopt these new APPR plans for its teachers in the subjects of English language arts or mathematics for students in grades 4-8 and building principals of

schools in which these teachers are employed.

By no later than September 10, 2011, or within 10 days of adopting the APPR plan whichever is later, the new APPR plans must be approved by the governing body of the school district or BOCES, filed in the district office and made available on the district's website and for review by any individual upon request.

As a general overview, the statute and regulations require these new APPR plans to include:

- A description of the process for ensuring that NYSED receives accurate teacher and student data and verification of rosters and course linkage data including enrollment and attendance data;
- A description of how the District or BOCES report to NYSED the sub-component scores and total composite effectiveness score for each teacher and principal;
- A description of the assessment development, security, and scoring process utilized;
- A description of the details of the evaluation system, which shall include, but are not limited to:
  1. the local measures of student achievement used for the evaluation of teachers and principals;



**Joseph J. Bufano** is a graduate of Syracuse University and the Hofstra University School of Law. His practice is devoted to representing and advising both private and public sector clients, including school boards and their administrators, corporations and non-profits, as well as municipalities on various general, business, contract, and employment law matters.

In addition to the wide range of legal services offered to our Firm's clients, Mr. Bufano lectures on various topics of interest including employment law matters, cyber-bullying and constitutional law issues.

Mr. Bufano is admitted to practice before New York State courts and is a member of the New York State and Onondaga County Bar Associations.

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**Hot Topics****Dramatic Changes to Required Annual Performance Review Procedures (cont'd)**

2. the name of the approved teacher and/or principal practices rubric that shall be used or proof of a variance;
  3. any other instruments that will be used to evaluate teachers' or principals' performance for the remaining 60 points of the evaluation; and
  4. the scoring methodology for the assignment of points for the locally selected measures of student achievement and other measures of teacher or principal effectiveness.
- A description of how timely and constructive feedback will be provided to classroom teachers and building principals on their APPR; and

- A description of the appeals procedures that will be used.

A number of these issues must be bargained and situations may vary depending on the school district/BOCES. Moreover, implementing these requirements may prove to be a difficult task over the summer months ahead. If nothing else, during this time, school districts/BOCES should seek to:

- Schedule bargaining sessions or, at a minimum, offer dates during which the school district/BOCES is available to bargain.
- Agree upon an SED approved rubric (Rubrics should be available by mid-July).
- Agree upon local assessment procedures and choose local assessment (s) (SED approved third-party assessments should be available by

mid-July).

- Choose and begin training for evaluators and lead evaluators.

These issues are further complicated by the fact that the New York State United Teachers ("NYSUT") recently filed a lawsuit claiming that the new regulations violate state law and exceed the Regents' authority. We will keep you informed about any new developments regarding this litigation.

In the meantime, our office has prepared guidelines and time tables to assist school boards with implementing these new APPR plans. If you have any further questions about these issues or about how to implement and bargain these new APPR plans, please feel free to contact us at (315) 437-7600.

**Title IX Guidance****New U.S. Education Dept. Guidance Regarding Sexual Harassment of Students**

On April 4, 2011, the Office of Civil Rights of the United States Department of Education ("OCR") issued a 19 page "Dear Colleague Letter" guidance document dealing with Title IX's requirements concerning sexual harassment, including sexual violence, in the school environment. The guidance was generated primarily for purposes of protecting against gender-based discrimination and impermissible perceptions in schools. In particular, the guidance focuses on Title IX's requirements related to student-on-student sexual harassment and explains a school district's responsibilities to take effective steps to end the harassment. According to the OCR guidance, if a school district knows or reasonably should know about student-on-student harassment that creates a hostile environment for a student or students, Title IX requires the school district to take immediate action to eliminate the harassment, prevent its recurrence and address its effects.

While the OCR guidance is too lengthy for an extensive, detailed analysis here, it does contain a number of important points that should be used by districts in developing policies and procedures on sexual harassment and the handling of sexual harassment complaints. They include the following:

**Notice of Nondiscrimination**

Title IX requires that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities. The notice must state that inquiries concerning the application of Title IX may be referred to the District's Title IX coordinator or to OCR. The notice should include the name or title, office address, telephone number and email address of the district's Title IX coordinator. The notice must be widely distributed to all students, parents of all students, employees and applicants for

admission and employment. OCR also recommends that the notice be prominently posted on the district's website.

**Grievance Procedures**

Title IX's regulations require all recipients to adopt and publish grievance procedures which provide for the prompt and equitable resolution of sex discrimination complaints. In its original 2001 Guidance, OCR identified a number of elements in evaluating whether a school district's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. In this latest guidance document, OCR states that the following elements are critical to achieving compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance

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**Title IX Guidance****New U.S. Education Dept. Guidance Regarding Sexual Harassment of Students (cont'd)**

procedures, including where complaints may be filed;

- Application of the procedures to complaints alleging harassment carried out by employees, other students or third parties;
- Adequate, reliable and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Definitive and reasonably prompt time frames for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint; and
- An assurance that the school district will take steps to prevent the recurrence of any harassment and to correct any discriminatory effects on the complainant and others, if appropriate.

OCR will evaluate whether a school district's grievance procedures specify the time frames for all major stages of the procedures. According to the OCR guidance, procedures should specify the time frame within which:

- the district will conduct a full investigation;
- both parties receive a response regarding the outcome of the complaint; and
- the parties may file an appeal, if applicable.

Police investigations for possible criminal activity may be useful for districts in gathering information for their own sexual harassment investigations. However, because the standards of proof in criminal cases are more stringent than in Title IX cases, the results of a criminal investigation are not determinative of whether sexual harassment or sexual violence has occurred in violation of Title IX. Districts should not wait for the conclusion of a criminal investigation to begin their own Title IX investigation, and should take immediate steps, if necessary, to protect a student complainant in the educational setting. A district may, in some cases, need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence. However, once the district has been notified that law enforcement officials have completed their gathering of evidence, the district should promptly resume and complete its fact-finding for

its Title IX investigation In-Service Education and Training.

Persons involved in implementing a district's grievance procedures (such as Title IX coordinators) must have training or experience in handling Title IX complaints and familiarity with these procedures. The training should include confidentiality requirements, such as the Family Education Rights and Privacy Act ("FERPA"). Likewise, OCR recommends that districts take proactive measures to prevent sexual harassment and sexual violence by implementing preventative education programs for staff and students. The training should include discussion of what constitutes sexual harassment and sexual violence, the district's policies and disciplinary procedures, and the consequences of violating these policies. Our firm has provided, and will continue to provide, such training at the request of our school clients.

If you have specific questions about sexual harassment and sexual violence, or if you need in-service programs for staff or students, please feel free to contact us.

**Capital Projects News****New N.Y.S. Education Department Approval Process For Capital Projects**

The New York State Education Department's Office of Facilities Planning (OFP) recently announced a new approval process for every capital project submitted to OFP for a building permit whether or not the project is eligible for building aid. This new process is de-

signed to comply with the new State Smart Growth Public Infrastructure Policy Act, which became effective on January 22, 2011. The Act amends the Environmental Conservation law and its intent is to prevent sprawl development from public infrastructure projects

through the consideration of smart growth criteria.

The new process involves a written smart growth impact statement signed by the school district indicating that

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**Capital Projects News**

**New N.Y.S. Education Department Approval Process For Capital Projects (cont'd)**

the project, to the extent practicable, meets the relevant criteria set forth in the law, or alternatively that the project is not in compliance with the smart growth criteria because compliance is impractical. A written statement of justification of the district's position is required.

The following are the state smart growth public infrastructure criteria:

- To advance projects for the use, maintenance or improvement of existing infrastructure;
- To advance projects located in municipal centers;
- To advance projects in developed areas or areas designated for concentrated infill development in a municipally approved comprehensive land use plan, local waterfront revitalization plan and/or Brownfield opportunity area plan;
- To protect, preserve and enhance the state's resources, including agricultural land, forests, surface and groundwater, air quality, recreation and open space, scenic areas, and significant historic and archeological resources;
- To foster mixed land uses and compact development, downtown revitali-

zation, Brownfield redevelopment, the enhancement of beauty in public spaces, the diversity and affordability of housing in proximity to places of employment, recreation and commercial development and the integration of all income and age groups;

- To provide mobility through transportation choices including improved public transportation and reduced automobile dependency;
- To coordinate between state and local government and inter-municipal and regional planning;
- To participate in community based planning and collaboration;
- To ensure predictability in building and land use codes; and
- To promote sustainability by strengthening existing and creating new communities which reduce greenhouse gas emissions and do not compromise the needs of future generations, by encouraging broad based public involvement in developing and implementing a community plan and ensuring the governance structure is adequate to sustain its implementation.

OFP will review the information provided and evaluate the district's conclu-

sions. If OFP agrees with the district's conclusions, the project approval will be issued in the normal course of business. If they disagree with the conclusions in the smart growth impact statement, or determine that the project justification for non-compliance is insufficient, or question the process followed to arrive at the conclusions, they may ask for additional information, or if necessary, reject the application and return it to the district for a more thorough smart growth review process.

In this regard, the Smart Growth process can be considered very similar to the State Environmental Quality Review Act (SEQRA). OFP recommends that the district's best course of action is to follow a "very open and public process to address all smart growth concerns during the SEQR process and mitigate any concerns to the extent practicable by changing the project design accordingly."

The new State Smart Growth Public Infrastructure Impact Statement form FP-SGIS can be found on the State Education Department's website at the following location:

<http://www.p12.nysed.gov/facplan/documents/DRAFTSGImpactStatementForm.xls>

If you have any questions about these new requirements, please feel free to contact us at (315) 437-7600.

**Upcoming Events**

| <u>Attorney(s)</u> | <u>Date(s)</u> | <u>Location/Event/Program</u>  |
|--------------------|----------------|--|
| Marc Reitz         | 7/7/11         | Client In-Service Program for the <i>Role of the Board Member</i>  |
| Don Budmen         | 7/14/11        | Client In-Service Program on <i>Dignity for All Students Act</i>   |
| Eric Wilson        | 7/21/11        | Crowne Plaza Resort, Lake Placid, NY, New York State School Boards Association Workshop Series on <i>Collective Bargaining, presenting on Teacher and Principal Evaluations — Final Answers, New Questions</i> |
| Marc Reitz         | 8/4/11         | Client In-Service Program on <i>Recent Developments in School Law</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.