Miller, Tracy, Braun, Funk & Miller, Ltd. presents

School Law Advisor

News and Notes for School Administrators

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The New FOIA:

What are the Revisions, What Do They Mean for my District, and How Should this Affect our Response to FOIA Requests?

On August 17, 2009, Governor Quinn signed Senate Bill 189, codifying into law new requirements for governmental transparency. With the declared purpose of holding governmental agencies (such as school districts) "transparent and accountable," revisions to the Freedom of Information Act (FOIA) have been codified to ensure the open and expeditious operation of government, and provision of documentation thereof.

PA 96-542, which takes effect on January 1, 2010, severely limits exemptions and includes revisions to three major areas: training, timeline, and appeal. Training is a new component that an employee will have to undertake. The timelines for the process have been shortened significantly, and extensions will require the ability to demonstrate facts to support the need. A new appeal process (through the Attorney General) simplifies the review procedure.

EXEMPTIONS

While the new law limits and removes many exemptions, the biggest change affecting school districts is removal of the personnel file exemption. Under current law, files cannot be obtained from an employee personnel file, but the revisions now protect ONLY information that is a "clearly unwarranted invasion of personal privacy." The standard for proving such an invasion is as-yet unclear, but what is clear is that the legislature intends that a much wider swath of information about and from employees will now be subject to FOIA requests.

TRAINING and OFFICERS

The new FOIA revisions require every school district to designate an employee or employees as a "FOIA officer(s)" who will oversee FOIA requests. Nothing in FOIA requires or prevents a district from hiring a new person to handle the position, but the officer will be required to attend annual training. A district must post the name of its FOIA officer(s) and how to obtain FOIA information on its website and at its offices, and may not require a standard form be used for FOIA requests.

Officers appointed this year must complete electronic training by or before July 1, 2010. New hires must complete the training within 30 days of assuming the position. The electronic training course must be completed annually. Training information and scheduling can be obtained online at:

http://www.illinoisattorneygeneral.gov/government/pac_training.html.

TIMELINE

The timeline has been shortened by two (2) days on both responses and extensions: Responses are now due within five (5) business days, and an extension cannot exceed five (5) additional business days. Responses must be provided as soon as is practicable.

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Failure to abide by timeline restrictions prevents a district from charging any fees for production or reproduction, and failure to respond within the time period for production is considered a denial. Failure to respond at all will prevent a district from asserting the request is unduly burdensome.

PROCESS and APPEAL

Requests, though still required to be in writing, may be made by fax, email, or other electronic means currently in existence or later created. Moreover, although the Act does not require electronic responses in all instances, it does encourage them, and does require electronic response where the requested information can be transmitted that way. Oral requests may also be honored with written responses.

Part I: District Response

The FOIA officer is now required to do the following:

1. Note the date received on the written request; and
2. Compute the day on which the time to respond will expire and note the same on the written request; and
3. Review and properly respond to the request; and
4. Support any denial due to an exemption under the Act with specific reasoning and legal authority; and
5. Place the original written request and a copy of the response in an electronic or hard copy file maintained with all district FOIA requests.

Part II: Appeal

The new FOIA law has an exhaustive appeals procedure that involves several levels of administrative review *in addition to* filing in court. A summary of that procedure:

1. The Attorney General will now create a new position known as the "Public Access Counselor" (PAC), who will hear all appeals filed within 60 days of a denial of a FOIA request.
2. If the PAC finds the alleged violation unfounded, the PAC shall notify the district and the requester that no further action will be taken by the PAC.
3. If not, the PAC must send a copy of the request to the district within 7 working days. The district has 7 days after receipt of the request for review to provide copies of the records requested and otherwise cooperate with the PAC. The PAC may also submit an answer and affidavits to the allegations of the request. The PAC must forward a copy of any answer (or redacted answer) to the requester.
4. Unless the PAC extends the time by no more than 21 business days by sending written notice to the requester and public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion concluding whether the public body violated FOIA, (and whether records must be produced), within 60 days after initiating review. The opinion shall be binding upon both the requester and the public body, subject to administrative review (a lawsuit filed in Sangamon or Cook County Circuit Court for review of the Attorney General's decision).
5. In responding to any written request for administrative review, the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable.

Upon receipt of a binding opinion concluding that a violation of the Act has occurred, the public body shall either take necessary action as soon as practical to comply with the directive of the opinion or shall initiate administrative review. If the opinion concludes that no violation of the Act has occurred, the requester may initiate administrative.

OTHER CHANGES

- The PAC may subpoena records relating to a FOIA request, and may also subpoena those individuals with knowledge of alleged violations of FOIA to testify.
- The PAC has the same right to inspect closed session tapes as a circuit court.
- The requester retains the right to sue in court, as well – if he does so while a request for review is pending before the PAC or Attorney General, the PAC must notify the district and take no further action on the request.

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- Records turned over to the PAC are exempt from FOIA until the PAC issues a decision.
- The district may not charge for the first 50 pages of letter or legal size black-and-white pages, and not more than $0.15 for black-and-white letter or legal size pages thereafter.
- Privacy exemptions have been substantially limited—Although records exempted by the Student Records Act and Personnel Records Act remain exempted, the new law removes the exemption for evaluations and explicitly makes subject to the law outcomes of discipline and grievances.
- The "personal information" exemption has been limited significantly to exempt only an "Unwarranted invasion of personal privacy," ...disclosure of [which would be] highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.
- Whenever a district receives a request for information that the public body believes is exempt as "personal information," as described above, or "preliminary drafts, notes or recommendations," the district must notify both the requester and the PAC of its intent to deny. The PAC will then determine whether further inquiry is warranted.
- The law requires a court finding a district willfully or intentionally violated FOIA to fine the district a sum not less than $2,500 nor more than $5,000 per occurrence.

How should this change a district's outlook on FOIA requests?

Just as before, an exemption from disclosure is construed narrowly, and just as before, a requester may punish a failure to provide documents by appealing a decision to deny the request. The new law clarifies these presumptions, and gives requesters a new method of appeal – one which will likely be easier to utilize than the courts.

Significant changes limit a district's rights to time and fees. The law makes clear the legislature's intent that denials of FOIA requests should be narrow, should be limited, and should only be issued when absolutely necessary, particularly when asserted to protect a compelling interest unrelated to the school board or privacy (such as a student record).

School districts are advised that the presumption under the new FOIA is that documents should be available for public inspection unless specifically exempted from disclosure. The requirement to produce factual basis to support allegations of an exemption from disclosure requires that districts view exemptions as being narrow, limited, and supportable by sufficient facts to overcome the presumption of disclosure.

Further, the new FOIA law allows public bodies to seek advisory opinions upon receipt of a FOIA request – reliance on such an opinion prevents the district that fully disclosed all relevant facts from suffering a penalty under FOIA. Although the shortened timelines require expeditious response, a district would be advised to seek such an advisory opinion if any question exists as to the assertion of an exemption from disclosure.

The new FOIA law, Public Act 96-0542, may be viewed in its entirety at: http://www.ilga.gov.

Changes to Sick Leave Provisions of the School Code

On July 23, 2009 Governor Quinn signed into law Public Act 096-051. The bill, which makes changes to the sick leave requirements for schools, limits the use of sick leave by employees for purposes of adoption to thirty (30) days, unless a larger amount is negotiated and agreed to with the exclusive bargaining representative. The bill also allows a school board to require that "the teacher or other employee provide evidence that the formal adoption process is underway."

Additionally, the law allows school boards to require a certificate certifying the need for further use of sick leave from a medical professional or spiritual adviser of the employee's faith (if the treatment is by prayer or spiritual means) if sick leave is in excess of three (3) days for personal sick leave or thirty (30) days for birth.

Supreme Court Weighs In On Private Placement Reimbursement Remedy

As a result of the United States Supreme Court's decision in *Forest Grove School District v. T.A.*,--U.S.--, 129 S.Ct. 2484 (2009), schools districts may face requests for private tuition reimbursement--and potentially other requests from parents--despite provisions in the Individuals With Disabilities Education Improvement Act (IDEIA), 20 U.S.C. 1401 *et seq.*, to the contrary.

In *Forest Grove*, the school district conducted a special education evaluation of a student upon the request of a parent, and the district found the student ineligible for special education and related services. The parent then enrolled the student in a private school and requested a due process hearing to secure reimbursement from the school district for the private tuition.

Under the IDEIA, private tuition reimbursement is an available remedy to parents when a school district fails to provide a free, appropriate public education ("FAPE") to a special education student *and* the child has "previously received special education and related services under the authority of" the school district (and an additional notice requirement). In *Forest Grove*, the school district maintained that the tuition reimbursement was not an available remedy because the child had never received special education services from the district. While the federal district court overturned the hearing officer's award of tuition reimbursement, the 9th Circuit reversed, finding the award to be "appropriate relief."

On review, the Supreme Court upheld the 9th Circuit's decision, with Justice Stevens writing for the 6-3 majority. Most significantly, the Court held that its prior decisions in *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) made the reimbursement remedy appropriate. In *Burlington* and *Carter*, the Supreme Court authorized courts to reimburse parents for the cost of private school tuition when a district fails to provide FAPE and the private placement is appropriate.

The court held that the situation of *Forest Grove* was not distinguishable from the facts in either of the two prior cases, despite the fact that those cases involved the deficiency of a proposed IEP for children who had previously received special education services. The Court held that the "general remedial nature" of the IDEIA continued to control the outcome, unless Congress required a different result through the amendments to the IDEIA.

The Court then held that the amendments to the Act (specifically the 1997 amendments regarding the requirement that a child "previously received" special education services, which is also found in the 2004 amendments) do not impose a categorical bar to reimbursement. Rather, the Court held that not allowing reimbursement in *Forest Grove* would be at odds with the IDEIA's remedial purpose--as it would leave parents without a remedy when the school "unreasonably denies access to such services altogether."

The Court was also not persuaded that the outcome would place a heavy financial burden on public schools and encourage parents to enroll their children in private school without first trying to cooperate with public school authorities.

The Court's opinion concludes as follows:

> When a court or hearing officer concludes that a school district failed to provide FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education in warranted. As the Court of Appeals noted, the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand.

The case is now remanded to the trial court to examine the specific facts and to "re-examine the equities" to determine whether the parent will be awarded reimbursement. The factors to be weighed by the trial court include the failure of the parents to provide the school district notice before removing the child from public school. The trial court will ultimately decide how much of the cost the district will pay, in light of the Supreme Court's opinion.

Meet the Attorneys: J. Christian Miller

Miller, Tracy, Braun, Funk & Miller, Ltd., has specialized in representing school districts for 30 years, and has grown from one attorney and secretary to nine attorneys and a full support staff. The firm currently represents over 150 school districts throughout Illinois, with student populations ranging from less than 200 students to over 9,000, and provides a wide array of legal services relating to the many issues faced by Illinois school districts.

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Chris Miller graduated from the University of Illinois (1989) and California Western School of Law (1992). From 1995 to 2002 he was an associate at Miller, Tracy, Braun, Funk & Miller Ltd., and is now a principal of the firm. His areas of concentration are school law, labor law, labor relations, and public sector civil litigation. Chris is a member of the Executive Committee of the Illinois Council of School Attorneys. Chris often speaks at workshops throughout Illinois at such gatherings as the Illinois Association of School Boards Annual Conventions, Division Meetings and other Workshops, Illinois Association of School Administrators Workshops, Illinois Association of School Business Officials Annual Conferences, School District and Regional Office of Education Seminars and in–services, Western Illinois Annual School Law Conferences, Eastern Illinois University Roundtables and Southern Illinois University Roundtables.

New Law Requires Online Posting Of Administrative Salaries

While public employee compensation has long been "public information," a change to the School Code now specifically requires administrator salaries to be posted online. Section 10-20.46 of the School Code, 105 ILCS 5/10-20.46, requires school districts to post on their websites an itemized salary compensation report for every employee in the district holding an administrative certificate and working in that capacity, including the superintendent. The compensation report must be posted on or by October 1st, and must include, without limitation, the following information:

- base salary
- bonuses
- pension contributions
- retirement increases
- the cost of health insurance
- the cost of life insurance
- paid sick and vacation day payouts
- annuities
- any other form of compensation or income paid on behalf of the employee

In addition to the posting requirement, the report must be presented at a regular school board meeting, subject to applicable notice requirements, and submitted to the regional superintendent (who shall also make copies available upon request). Additionally, the statute specifies (per Section 10-20.40 of the School Code, 105 ILCS 5/10-20.40) that a district must also post online the terms of any contract that the district enters with an exclusive bargaining representative.

Would you like to receive the School Law Advisor by email? If so, please let us know by contacting Kay Lacy at klacy@millertracy.com.

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School Code Amended to Require "Reasonable" Access to Visit and Observe Classroom, Services for Special Education Students

Governor Quinn signed PA-96-657, which amends Section 14-8.02 of the School Code to require school districts to allow a parent "reasonable access of sufficient duration and scope for the purpose of observing his or her child in the child's current educational placement, services, or program or for the purpose of visiting an educational placement or program proposed for the child." The same also applies to an independent educational evaluator or qualified professional retained by a parent, including interviews with school personnel.

The statute provides a school district with some "limits" on the visitation requirements, including: 1) the parent or evaluator may be required by the school district to inform the principal in writing of the proposed visit, the purpose of the visit, and the approximate duration of the visit; 2) the visitor and the school district shall arrange the visit(s) at mutually agreeable times; 3) the visitor will be required to comply with school safety, security, and visitation policies; 4) the visitor must comply with confidentiality laws such as FERPA and the Illinois School Student Records Act; and 5) the visitor "shall not disrupt the educational process."

With the enactment of this statute, school districts should take the opportunity to carefully review their current visitation policies to make sure they accurately reflect both the requirement of the law and current practice.

The law became effective on August 25, 2009.

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