CAPE ELIZABETH SCHOOL DEPARTMENT
Cape Elizabeth, Maine

Friday, December 9, 2011
SCHOOL BOARD
12:00 p.m. **-** *Workshop*
WM H. JORDAN CONFERENCE ROOM

☐ John Christie	☐ David Hillman	☐ Kim Monaghan-Derrig	☐ Michael Moore	☐ Kathy Ray	☒ Mary Townsend	☒ M. Kate Williams-Hewitt	

☒ Joanna Morrissey (member-elect) ☒ Elizabeth Scifres (member-elect)

MINUTES

1. 2012 School Board orientation workshop

NOT A QUORUM Workshop began at 12:03 p.m. Harry Pringle of Drummond Woodsum provided an overview of the roles and responsibilities of a school board including information regarding employment, the Maine Freedom of Information Access Act, developing working relationships between school boards and superintendents, and recent legislative changes.

Adjourned at 12:59 p.m.

School Law Advisory

DrummondWoodsum

Our mission is to help our clients improve education for all children – through sound advice and advocacy when possible, through skillful litigation when necessary.

Summer 2011, Volume 23, No. 3

In This Issue

SchoolLaw.com

84 Marginal Way, Suite 600
Portland, Maine 04101-2480
(207) 772-1941; (FAX) 772-3627

100 International Drive, Suite 340
Portsmouth, NH 03801
603-433-3317; (FAX) 603-433-5384
800-727-1941

Maine Legislature serves up healthy dose of new legislation

Peter C. Felmly

Peter Felmly's practice focuses in the areas of school law, employment law and collective bargaining.

Drummond Woodsum has been representing public school districts in Maine for well over 30 years. During that time, there have been some years that have brought some pretty significant changes to the legal landscape, such as the passage of the school consolidation legislation in 2008. The most recent legislative session stands out, however, as one during which the Legislature acted upon an extraordinary number of bills affecting K-12 education. The bills considered by the Legislature included proposed changes to the school funding formula, a proposal to create charter schools, various proposals designed to assist schools provide health insurance to their employees, a number of proposals that would have altered the school year, and several proposals to amend Maine's Freedom of Access Act.

In all, more than 200 bills affecting K-12 education were just approved and signed into law. This article will not attempt to discuss all of these changes to the education laws. What follows below are my own personal choices for legislative developments that are significant enough to warrant some discussion because I believe they tell us something about what we can expect will continue to happen and change in our school systems.

Legislation that passed

There were a number of very important pieces of legislation that were enacted during the last legislative session. Except as noted in this article, these new laws will take effect on September 28, 2011.

— Continued from first page

DrummondWoodsum

School Law Practice Group

S. Campbell Badger*
Peter C. Felmly*
Sara S. Hellstedt*
Eric R. Herlan*†
Melissa A. Hewey*†
David M. Kallin*
Jeanne M. Kincaid*†
Elek A. Miller*
Robert P. Nadeau*
William L. Plouffe*
Harry R. Pringle*
Daniel J. Rose*†
Bruce W. Smith*
Richard A. Spencer*†
E. William Stockmeyer*†
Amy K. Tchao*†
Joanna B. Tourangeau*
M. Thomas Trenholm*
Matthew H. Upton†
Gerald M. Zelin†

Consultants

Roger P. Kelley
Labor Relations and Conflict Management

Ann S. Chapman
Policy and Labor Relations

Michael J. Opuda, Ph.D.
Special Education

Of Counsel

Hugh E. G. MacMahon*
Donald A. Kopp*

* Admitted in Maine
† Admitted in New Hampshire

Health insurance

The Legislature passed several pieces of legislation that were designed to increase competition in the school health insurance market in the state of Maine. One will require the MEA Benefits Trust to release claims data by school district.[1] The Trust has previously refused to release this information, which is considered necessary by insurance companies in evaluating risk. Without this information, insurance companies have been unwilling to submit proposals for health insurance and, as a result, school districts have been unable to shop for insurance. In addition to requiring the Trust to release its claims data, the new law authorizes schools to offer group self-insurance to provide health or dental insurance for employees and their families, and to enter into interlocal agreements with other school administrative units or municipalities to provide such insurance.

Another law will require the MEA Benefits Trust to review its current benefit offerings and consider a new option at a lower premium rate for the 2012 plan year. The law also requires the MEA Benefits Trust to include on its board of trustees a representative appointed by the Maine School Boards Association.[2]

A third law will allow employees of school administrative units to participate in the group health plan that is available to state employees.[3]

We expect that these changes will have an impact at the bargaining table and on the health insurance premiums paid by school districts across the state. Just how great an effect these laws will have remains to be seen, and will depend in part upon how hard school units wish to press for lower insurance premiums.

Here come the charter schools

Maine is about to become the 41st state to allow public charter schools. Governor LePage signed into law a measure that would authorize the creation of charter schools commencing on July 1, 2012 and allow such schools to open their doors to students at the start of the 2012-13 school year.[4]

Charter schools are publicly funded schools governed and operated independently of the traditional public school system. Proponents of charter schools believe that they have more flexibility than traditional public schools over decisions concerning curriculum and instruction, scheduling, staffing and finance; and that they offer innovative solutions to meet the needs of Maine students. Opponents of the measure testified that charter schools are bad for Maine's education system because they will siphon much-needed funds from existing schools; they could accelerate the closing of some of Maine's smaller, more rural schools; and that school units will be forced to compete with charter schools for talented teachers.

The new law allows the Charter School Commission to authorize a maximum of 10 charter schools during a 10-year transition period (local school boards can authorize additional charter schools). Under the new law, charter schools may be formed to provide educational services at the preschool, prekindergarten and any grade or grades from kindergarten to grade 12. They may focus on the delivery of education to students with special needs, at-risk pupils, English language learners or students involved with the juvenile justice system; they may also be centered around a specific academic approach or theme (such as vocational training, foreign language, science, math, technology, etc.). Charter schools may not enroll more than 5% of a school administrative unit's noncharter public school students per grade level.

— New legislation, *continued*

However, that limit is increased to 10% if the school administrative unit's student enrollment is greater than 500.

Very briefly, there are a number of other key components governing the creation and operation of charter schools, including:

- To start the process of forming a charter school, a charter school "authorizer" —either a local school board, the seven-member State Charter School Commission, or a group of school boards—must submit a request for proposals. Any non-profit, non-religious organization is eligible to respond to the RFP with an application that outlines the student population and communities targeted by its proposed school; organizational, governance and financial plans; student and staff policies; how it plans to meet the transportation needs of its students; and the proposed school's academic program/strategic vision.
- Once an application is approved, the operations of a charter school will be controlled by a contract that must be executed between the governing board of the charter school and the "authorizer."
- The "authorizer" must monitor the performance and legal compliance of the charter school it oversees. This includes collecting, analyzing, and reporting all data from state assessments.
- Charter schools may be approved for an initial 5-year term, which term may be extended for successive terms of 5 years.
- Charter schools will be subject to all federal laws and may therefore not discriminate against any person on the basis of a protected characteristic.
- Charter schools may not engage in any religious practices in its educational program or operations.
- Charter schools are subject to the same student assessment and accountability requirements applicable to other public schools in the state.
- Charters schools may not charge tuition to Maine students.
- Teachers in a charter school must hold an appropriate teaching certificate within 3 years of their hire date, except for those individuals with an advanced degree, professional certification, or unique expertise in the curricular area in which they teach.
- Teachers in charter schools may choose to bargain collectively. Bargaining units in charter schools will be separate from the school administrative unit's bargaining unit(s).
- In the case of a charter school authorized by a local school board, the school administrative unit in which the charter school is located remains the "local educational agency" and the charter school is treated as a school within the LEA (except it may apply separately for competitive federal grants). If the Charter Commission authorizes the charter school, the charter school itself will be considered the LEA and will itself be responsible for meeting the requirements of LEA's under federal and state law, including those relating to special education (including identification and provision of service).
- All state and local operating funds follow each student to the charter school attended by the student, except that the school unit where the student resides may retain up to 1% of the per-pupil allocation to cover associated administrative costs.

The Maine Department of Education is in the process of developing rules concerning the implementation of the charter school law. We will be monitoring any new developments in this area, and will report any such developments in a subsequent edition of the *School Law Advisory*.

Teacher probationary period extended by a year

The Legislature changed the teacher probationary period from 2 to 3 years.[5] This is a welcome change, and one that will allow school administrators additional time to evaluate the effectiveness of teachers. A more detailed discussion of this important legislation can be found in Harry Pringle's article on page 20.

Changes to the Freedom of Access Act

The Legislature enacted a number of recommendations of the Right to Know Advisory Committee. Included among them were the following:

- An amendment to Section 401 of the Freedom of Access Act to make clear that communications between public officials that occur outside of public proceedings are not unlawful unless done to subvert the purpose of the Act.
- An amendment to Section 403 of the Act that requires public bodies, except for advisory bodies that make

— New legislation, *continued*

recommendations but have no decision-making authority, to keep records of all meetings for which public notice is required. The record must include: the time, date, and location of the meeting; the members of the body holding the public meeting recorded as either present or absent; and all motions and votes taken, by individual member, if there is a roll call. An audio, video, or other electronic recording of a public proceeding will satisfy this record requirement.

- An amendment to the definition of "public records" to make clear that social security numbers are confidential.[6]

A separate bill was also passed, which amends the definition of "public record" to exclude certain personal information contained within communications between constituents and elected officials. Information of a personal nature includes the following: (a) an individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders; (b) credit or financial information; (c) information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family; (d) complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or (e) an individual's social security number.[7]

School boards regain the right to establish evaluation systems using student achievement data

Many will recall a bill passed in 2010 that required school units wanting to include student assessment data as part of teacher evaluations to select a model approved by the Department of Education and a stakeholder group. This year, the Legislature passed LD 397, which *permits* school boards to select one of the models proposed by the Department and approved by the stakeholder group, and expressly authorizes boards to develop and adopt their own models for teacher and principal evaluations.[8]

State sets general purpose aid for K-12 operations for 2011-12 and 2012-13

Governor LePage signed a 2-year, $6.1 billion state budget that sets GPA at $894 million in 2011-12 and $914 million for 2012-13. The GPA in 2010-11 was $932 million.

Retirement system restructured

The budget signed by the Governor includes a provision stating that any person who retires on or after July 1, 2011 must be paid at 75% of the compensation for the position, and is not entitled to health, dental or life insurance.[9] A more detailed discussion of this new law can be found in Bruce Smith's article on page 21.

The state budget contains several other changes to the state retirement plan affecting teachers, superintendents, and other administrators. In particular, the new legislation raises the retirement age from 62 to 65 for new hires or those with less than 5 years of service. Second, cost of living increases to retirement benefits will be frozen for 3 years. After that, there will be a cap of 3% (previously 4%) on cost of living increases, which would apply only to the first $20,000 of a retireee's annual pension payment. Third, teachers who retire after July 1, 2012 will pay 100% of health insurance premiums until the member reaches normal retirement age. This provision does not apply to individuals receiving a disability retirement benefit.

Consolidation: penalties and withdrawal

Two bills were passed that amend the school reorganization statutes. One measure, which takes effect on July 1, 2012, will eliminate the penalties for non-conforming units.[10] The other, which also takes effect on July 1, 2012, will shorten from 3 years to 30 months the time period a municipality must remain in a RSU before it can petition to withdraw from the school unit.[11]

A new graduation hurdle

The Legislature passed a law that adds civics to the social studies and history graduation requirement.[12] The law does not specifically require a separate course in civics, however.

I pledge allegiance to the flag . . .

A new law requires every school in Maine to give students an opportunity to recite the Pledge of Allegiance during the school day.[13] However, due to First Amendment concerns, schools cannot require students to recite the Pledge. This law appears to be modeled after a similar statute in New Hampshire that recently withstood First and Fourteenth Amendment scrutiny in the First Circuit Court of Appeals. School officials

— New legislation, *continued*

should bear in mind that it is unlawful to discipline or penalize students who choose not to participate in reciting the Pledge. We also recommend that school officials not require students to stand or leave the classroom if they choose not to recite the Pledge, as this could be viewed by a court as a subtle form of coercion.

Changes in the special education laws

A number of bills affecting special education were signed into law, most of which were designed to bring Maine into line with federal requirements. A summary of the new laws affecting special education can be found in Amy Tchao's article on page 13.

Added protections for those providing an employment reference

The Legislature revised Title 20-A to provide protection to employees of a school unit who discloses information about a former employee's job performance or work record to a prospective employer.[14] The new law provides that such employees will be immune from civil liability for such disclosure unless the employee's lack of good faith can be demonstrated by clear and convincing evidence. "Clear and convincing evidence of lack of good faith" means evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information. With this standard, school administrators called upon to comment on a former employee's job performance can breathe a little easier.

School funding formula tweaked to increase allocations to rural school units and to units with a higher than average percentage of economically disadvantaged students

At the very end of the legislative session, the Legislature passed a bill that would change portions of the EPS funding formula beginning in fiscal year 2012-13.[15] First, the new law alters the calculation used to determine teaching staff costs by eliminating benefit costs from the regional adjustment in the total operating allocation (the adjustment based on regional differences in teacher salary costs for the labor market areas in which school administrative units are located). The effect of this change is to benefit those school administrative units with lower teacher salary costs relative to statewide averages due to local economic circumstances. Second, per-pupil staff ratios will be reduced by 10% for those school units with fewer than 1,200 students. These ratios play into the base per pupil rate calculation, which is a key component in determining the funding allocation a school unit receives. Third, the new law adds an adjustment for a school unit that is a minimum subsidy receiver if the percentage of economically disadvantaged students in the school administrative unit is greater than the state average percentage of economically disadvantaged students. In other words, school units that have a higher than average percentage of students receiving free and reduced lunch will receive an "economically disadvantaged" allocation.

What is most striking is the amount of legislation that tinkers with or reforms existing law and the manner in which schools operate.

Legislation that failed

A large number of bills failed to garner legislative support or avoid the Governor's veto pen. Included on this long list of failed measures were the following:

- A bill that would have extended the probationary period for teachers from 2 years to 3 years for teachers hired in 2012 and 4 years for teachers hired in 2013 or thereafter
- A bill that would have extended the school year to 185 days
- A bill that would have permitted schools to use an alternative school calendar of 4 days of student instruction per week
- A bill that would have prohibited employers from discriminating against employees on the basis of a prior criminal conviction
- A bill that would have required high school students to register to vote in order to graduate
- A bill that would have reduced from 90 days to 30 days the period in which a school board may terminate a teacher's contract due to changes in local conditions

— New legislation, *continued*

- A bill that would have placed the burden on a school unit to prove that a student's IEP is appropriate
- A bill that would have required school units to grant school choice to up to 20 students and thus permit them to attend school anywhere in Maine
- A bill that would have permitted non-attorney advocates to represent families at special education due process hearings

What's in store for next session

The Legislature carried over a number of LD's for consideration in its next session, which commences in January. Among the more important pieces of legislation that will be considered are the following:

- A bill that would drastically change Maine's Freedom of Access Act by requiring school systems to provide public records in the requested "medium" and "immediately upon request" (L.D. 1465)
- A bill that would repeal the existing hazing law and require school boards to adopt policies prohibiting "offensive behavior," including hazing, harassment, bullying and cyberbullying. It would require school boards to include in the policy a procedure for reporting the offensive behavior to the authorities. The bill also amends the state's criminal code to make harassment by cyberbullying a civil violation punishable by a fine of up to $500 (L.D. 980)
- A bill that would direct the MDOE to have an independent agency review the EPS model for school funding (L.D. 958)

We will watch these bills closely and alert you to any important developments. Additionally, it is expected that the Joint Standing Committee on Education and Cultural Affairs will submit a bill addressing standards-based graduation requirements after it receives an implementation plan from the MDOE in late 2011 (L.D. 949).

Summary

Now that the dust has settled a bit, it is worth a moment to step back and think about the myriad education-related bills introduced during the past legislative session. The activity in Augusta was remarkable, not only because of the dizzying number of education-related bills, but also because of the nature of the legislative measures that were enacted. The legislation enacted in the past session reveals that there remains a strong desire to press for efficiencies in our public school systems. Our elected representatives determined that the solution was to permit charter schools and to pass sweeping changes to the public pension system and the manner in which health insurance is delivered in our public schools. The changes in the funding allocation formula will very likely shift some state funds away from larger, more urban communities and into more rural towns in Maine. Some schools will therefore have to do more, with less. But most striking is the amount of legislation that tinkers with or reforms existing law and the manner in which schools operate. We are seeing a push for more involvement in or control over the delivery of public education from Augusta—a phenomenon that is consistent with what we are experiencing from the federal government with recent legislation such as NCLB and school reform programs, like Race to the Top. For nearly two centuries, the debate in Maine has centered on whether our education system should be controlled at the state or local level. The sheer number of bills introduced this past session, and the testimony offered for and against such legislation, demonstrates that this debate continues in full force. ■

Endnotes

1. P.L. 2011, ch. 395 (L.D. 1326).
2. P.L. 2011, ch. 249 (L.D. 404).
3. P.L. 2011, ch. 438 (L.D. 619).
4. P.L. 2011, ch. 414 (L.D. 1553).
5. P.L. 2011, ch. 172 (L.D. 976).
6. P.L. 2011, ch. 320 (L.D. 1154).
7. P.L. 2011, ch. 264 (L.D. 1082).
8. P.L. 2011, ch. 36 (L.D. 391).
9. P.L. 2011, ch. 380 (L.D. 1043).
10. P.L. 2011, ch. 251 (L.D. 385).
11. P.L. 2011, ch. 328 (L.D. 139).
12. P.L. 2011, ch. 294 (L.D. 1211).
13. P.L. 2011, ch. 162 (L.D. 1136).
14. P.L. 2011, ch. 397 (L.D. 1402).
15. P.L. 2011, ch. 419 (L.D. 1274).

Spring 2011

SchoolLaw.com
Advisory

DrummondWoodsum

Our mission is to help our clients improve education for all children – through sound advice and advocacy when possible, through skillful litigation when necessary.

Ten ways that superintendents and school boards can undermine each other

By Harry R. Pringle, Esq.

Earlier this year, I was asked to give a presentation to a school board on the roles and responsibilities of school board members. It is a presentation I always enjoy giving because of my interest in what produces a high performing organization. When school boards and superintendents work together in a respectful fashion, great things can happen. When they do not, however, it is hard for a school district to move forward at all.

At this particular workshop, what was unique was that the superintendent had taken the time to put down, in writing, some ways in which board members could, by their conduct, unknowingly undermine a superintendent. Struck by the universality of that list, I asked for and received permission to reprint it here, without attribution.

Thinking that the superintendent's list might be nicely complimented by a similar list prepared by a school board member, I then contacted a highly respected former school committee chair. The chair agreed to prepare a list from the perspective of school board members, and it is reprinted below as well.

Here are those lists.

Ten ways a board member might *unknowingly* undermine a superintendent

1. By soliciting parent complaints – because it bypasses the chain of command and ignores the critical role teachers and administrators play in resolving school issues;
2. By emailing an entire board about an upcoming issue, thereby encouraging decision making outside of a board meeting and undercutting the board's responsibility to do its business in public;
3. By raising unscheduled agenda items at board meetings without prior notice to the superintendent or chair, thereby depriving the board of the opportunity to be appropriately prepared for a healthy discussion on a particular issue;
4. By meeting with school staff about an issue without first consulting the superintendent, because this undermines the supervisory authority of the superintendent;
5. By allowing board members to criticize the superintendent in public, thereby creating the impression that the superintendent lacks the confidence of the board;
6. By allowing individuals to demand that the superintendent research issues of particular interest to that board member, thereby reducing the time the superintendent has to focus on issues of concern to the entire board;

7. By not respecting the role of the board chair in working closely with the superintendent, which is necessary for effective board governance;
8. By using his or her position on the board to promote issues which directly affect that board member's children, since it undermines the need for the board to work for the best interests of all students;
9. By being absent from a critical board or committee meeting and not respecting the decisions made by the board or the committee at that meeting; and
10. By working towards individual goals rather than those agreed upon by the entire board and the superintendent, thereby limiting the board's ability to improve education for all students.

Ten ways a superintendent might *unknowingly* undermine a Board

1. By openly criticizing the board, or individual members of the board, either in public or in discussions with school staff or local officials;
2. By not providing prior notice to board members of sensitive issues that will appear in the media, or that will be raised at board meetings by parents, staff or other community members;
3. By communicating new initiatives through the media before informing the board members;
4. By not providing timely, clear and complete documentation supporting agenda items brought before the board;
5. By not making honest and complete responses to questions which involve controversial or difficult issues facing the board;
6. By not taking responsibility for the actions of other district administrators and staff;
7. By assuming that the board chair is prepared to speak for the board on issues that have not been the subject of prior discussion and deliberation;
8. By spending time and resources on addressing the requests of individual board members, without obtaining approval by a majority of the board;
9. By not clearly communicating constraints, tradeoffs and alternatives to critical issues which come before the board; and
10. By emailing staff, local officials or community members on issues raised by board members and others, and including the text of all prior communications.

What is striking about these two lists is that, while they are by no means mirror images of each other, they contain the same themes: taking responsibility for one's actions; acting for the good of the school rather than individual interests; demonstrating leadership; and maintaining good communications. As Don Kopp pointed out in his excellent article about why Maine school boards are so unique,[1] what school boards must remember is that they are part of a *governing team* – and that they have duties towards and responsibilities for that *entire* team. Conversely, what superintendents must remember is that they are the chief executive officers supporting their respective governing teams, with a responsibility to work with and lead those teams forward. When these important and complementary roles are both understood and adhered to, school districts can become exciting and high performing organizations indeed. ■

Endnote

1. "Maine School Boards are Unique: Understanding that Uniqueness is Important," School Law Advisory, Fall 2005.

THE MAINE FREEDOM OF ACCESS ACT

Updated Version of Chapter 6 from Maine School Law for Board Members, Second Edition, 2007

Revised: December 1, 2011

Maine law embraces the concept that the actions of public entities should be a matter of public record. With the enactment of Maine's Freedom of Access Act in 1959, the Legislature put into place numerous provisions governing public meetings, executive sessions and access to public records. These provisions apply to school units as well as to any formal authority established by a school unit such as a subcommittee of the school board.[1]

In any situation involving Freedom of Access issues, it is important to keep in mind the statement of public policy adopted by the Legislature in connection with the Act. That statement is as follows:

> The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.
>
> This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.[2]

Maine courts take very seriously the Legislature's direction to construe the Freedom of Access Act liberally.[3]

Public Meetings

Meetings open to the public. Perhaps the most fundamental tenet of the Freedom of Access Act is that "all public proceedings shall be open to the public."[4] Along with this principle goes the requirement that any person must be allowed to attend any public proceeding.[5]

Questions often arise as to whether all meetings of school board members are "public proceedings." Under a decision of Maine's highest court, informal discussions about school matters among less than a quorum of school board members are not unlawful.[6] Nevertheless, public business may not be transacted in private or secret meetings. Care also should be taken that e-mail communications not amount to private deliberations of a majority of the board.[1]

Record of meetings. In 2011, the Legislature amended the Freedom of Access Act to require that a record of every proceeding must be made within "a reasonable period of time" after the proceeding, and must be open to public inspection.[7] The record must at a minimum include the date, time and place of the proceeding; the names of the members of the body holding the proceeding recorded as either present or absent; and all motions and votes taken, by individual member, if a roll call vote was taken. Audio or video recordings of proceedings satisfy these requirements, which do not apply to advisory bodies, such as subcommittees, that "make recommendations but have no decision-making authority."[8] Significantly, the statute also provides that the validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required by the statute.[9]

Notice. In order to ensure that people know when public proceedings will be held, the Freedom of Access Act requires that notice be given "in ample time to allow public attendance," and that such notice must be "disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned."[10] In the event of an emergency meeting, local representatives of the media must be notified of the time and place of the meeting "whenever practical," with notification by the same or faster means than is used to notify members of the board or agency that is meeting.[11]

Most school units satisfy the notice requirement by holding regular meetings on a certain day or days of the month and by publicizing those meetings in local newspapers. Sometimes the school board's regular meeting date is published (along with the meeting dates of other local boards) in the annual report of the municipality. Many school units also post an agenda in a prominent location several days in advance of regular school board meetings or on their websites.

Recording and broadcasting of meetings. Some school boards tape record or videotape their public session meetings to provide a permanent record and to facilitate the preparation of meeting minutes. The Freedom of Access Act also specifically allows any member of the public "to make written, taped, or filmed records of the proceedings, or to live broadcast the same, provided the writing, taping, filming or broadcasting does not interfere with the orderly conduct of proceedings."[12] Many school boards also have a policy in place establishing reasonable rules governing recording and broadcasting of meetings in order to treat all members of the public (including the media) in a fair and consistent manner.

Written decisions. The Freedom of Access Act requires that public entities make a written record of certain types of decisions. Of particular relevance to school units, the Act requires that a written record be made "of every decision involving the dismissal or the refusal to renew the contract of any public official, employee or appointee."[13] Except in the case of probationary employees (to whom the requirement does not apply), the Act requires a public entity to

> set forth in the record the reason or reasons for its decision and make findings of fact, in writing, sufficient to appraise [sic] the individual concerned and any interested member of the public of the basis for the decision. A written record or a copy thereof shall be kept by the agency and made available to any interested member of the public who may wish to review it.[14]

This requirement can be troublesome in some of its applications, because the personnel records of any school unit employee, with certain limited exceptions, are confidential pursuant to state law.[15]

Executive Sessions

Despite the fundamental commitment of the Freedom of Access Act to openness of public meetings, the Act recognizes several important subjects that may properly be addressed in "executive" or private session of the public agency.[16] A discussion of those subjects follows.

Employment-related matters.[17] Employment-related matters may be discussed in executive session, but only if public discussion "could be reasonably expected to cause damage to the reputation or the individual's right of privacy would be violated."[18] "Employment" matters include "appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal," or "the investigation or hearing of charges or complaints."[19]

Any person "charged or investigated" has a right to be present during the executive session, as does any person bringing allegations of misconduct. If requested in writing by the person charged or being investigated, the investigation or hearing must be held in open session.[20]

Student suspension or expulsion.[21] Discussion about whether to suspend or expel a student may also be held in executive session. The student, the student's parents (if the student is a minor) and/or legal counsel for the student must be permitted to be present during the executive session if they so desire.

Condition, acquisition or use of property.[22] A school board may go into executive session to discuss or consider certain matters related to property. Specifically, this section applies to real property, personal property permanently attached to real property, disposition of public property, or economic development, but only if premature disclosure of the information "would prejudice the competitive or bargaining position" of the public body.

Labor contracts.[23] A school board and its negotiators may discuss labor contracts and proposals in executive session. In such cases, the parties to such contracts must be named before the school board goes into executive session. Negotiations between representatives of a public employer and public employees may be open to the public only if both parties agree to conduct negotiations in open session.

Consultation with legal counsel.[24] A school board may consult with its attorney in executive session regarding the board's legal rights and duties, pending or contemplated litigation, settlement offers, or other matters protected by the attorney/client privilege, or where premature public disclosure of the matter being discussed would place the public body at a substantial disadvantage.

Confidential matters.[25] A school board may go into executive session to discuss information restricted by statute from disclosure to the general public. Such information might include, for example, the personnel record of a school unit employee[26] or student records.[27]

Safeguards. The Freedom of Access Act contains a number of safeguards to ensure that executive sessions are not abused. First, the Act states that executive sessions may not be used to defeat the purposes of the Act.[28] Second, the motion must be approved by three-fifths (3/5) of the members who are present and voting.[29] Third, the Act requires that a motion to go into executive session specify the "precise nature of the business" to be discussed, and include "a citation of one or more sources of statutory or other authority" permitting the executive session.[30] Fourth, the Act makes clear that no final approval for any official action may be taken during executive session.[31]

Finally, as the Maine Supreme Court has held, a public body charged with violating the Freedom of Access Act during an executive session has the burden of proving that its actions during the executive session complied with an exception to the Act's open meeting requirement.[32] Following a clear procedure, such as that employed by the school committee in *Blethen Maine Newspapers v. Portland School Committee*,[33] will help ensure compliance with the statute. In the *Portland School Committee* case, there was a clear agenda for the executive session; the committee's attorney advised committee members of the purposes and limitations of the executive session; and any discussion about issues inconsistent with the stated purpose of the executive session was immediately halted.

Public Records

The Freedom of Access Act defines the term "public records" and the specific procedures allowing public inspection of those records. It is important for school officials to understand both the definition and the relevant procedures.

Definition of "public records." The term "public records" is defined very broadly under the Freedom of Access Act. The term includes information in virtually any form (including written, printed, graphic and electronic data), in the possession or control of an entity subject to the Act, that has been "received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business."[34]

As might be expected, certain types of records are specifically excluded from the reach of the Freedom of Access Act. The exceptions applicable to school units include records designated confidential by statute;[35] records within the scope of a privilege against discovery as recognized by Maine courts;[36] collective bargaining materials;[37] records related to a juvenile fire setter;[38] security plans aimed at preparing for or preventing acts of terrorism;[39] information describing technology infrastructure;[40] personal contact information for public employees (but not elected officials);[41] certain information contained in communications between constituents and elected officials;[42] notes prepared during lawful executive sessions;[43] and documents prepared exclusively for lawful executive sessions.[44]

Public inspection of records. The Freedom of Access Act confers on every person the right to inspect and copy any public record during regular business hours of the location of the records. A reasonable fee may be charged for any copies requested, and in addition limited fees for searching for and compiling records may also be

charged.[45] In some circumstances, the school unit must provide fee estimates and may require payment of fees in advance.[46]

If a records request is made, the school unit may request clarification concerning which records are being requested,[47] but the receipt of all requests must be acknowledged within a "reasonable period of time."[48] The acknowledgement should be in writing so that the school unit has a record of it. However, a *denial* of a request to inspect public records must be made within five working days after the request is received.[49]

A request may be granted by informing the person seeking access that the records will be available for inspection and copying at a specified date, time and location. Note that the law does *not* require that the records be made available for inspection within five working days. Rather, the law makes it clear that the right to inspect and copy records must be granted within a "reasonable" period of time, and may be scheduled for a time that will not "delay or inconvenience" the regular activities of the school unit.[50]

If a request is to be denied, the school unit (generally the superintendent) must provide a written statement of the reasons for the denial.[51] There is a difference between providing access to records and meetings, which is required, and researching and compiling requested information, which generally is not required (but may, in some cases, be advisable).

If a request to inspect public documents is denied, the person may challenge that decision by filing an appropriate action in superior court. Such an appeal must be filed within five working days of the denial. The court then conducts a trial to determine whether the denial was for just and proper cause. If it was not for good cause, the school unit will be required to disclose the records as requested.[52]

Employee Records

Schools are required to maintain a record of directory information on each employee consisting of: name; dates of employment; regular and extracurricular duties; postsecondary educational institutions attended; major and minor fields of study; and degrees received and dates awarded.[53] The record of directory information must be available for inspection and copying by any person.

Confidentiality requirements for school employee records are very broad. Information "in any form" relating to an employee or applicant for employment, or to the employee's immediate family, must be kept confidential[54] if it relates to:

- Applications for employment;
- Medical information;
- Performance evaluations;[55]
- Credit;
- Personal history, character, or conduct of the employee or any member of the employee's immediate family;
- Complaints, replies and materials relating to disciplinary action;

- Social security number; and
- Teacher action plan and support system documents.

Any written record of a decision by the school board involving disciplinary action of an employee is excepted from the above category of confidential records.

The Freedom of Access Act permits executive session deliberations to consider records made confidential by statute. The employee records statute requires that much information about employees be kept confidential. Disclosure of information required to be kept confidential also may violate an individual's privacy rights. Protection against violating an individual's right to privacy and protecting an employee's reputation is thus a function of executive sessions.

There are employee records that are neither directory information nor confidential. Such records include individual contracts, collective bargaining agreements and salary schedules. These are public records to which access must be provided.

Violations

The Freedom of Access Act imposes a civil penalty of not more than $500.00 for every willful violation of the Act. The penalty is assessed against the governmental entity (i.e., against the school unit) rather than against the individual officer or employee.[56]

In addition, in 2009 the Legislature amended the Freedom of Access Act to allow a court to award reasonable attorneys' fees in successful Freedom of Access appeals.[57] The amended language allows fee awards to a "substantially" prevailing plaintiff who appeals a public records denial or illegal action, but only if the court determines that the refusal or action was committed "in bad faith." While the statute does not define bad faith, the summary of an earlier bill to allow attorneys' fees introduced in the 122nd Legislature in 2006 explained the term "bad faith" as follows: "[b]eing unsure whether a requested record is a public record is not sufficient to rise to the level of bad faith nor would a legitimate, but mistaken, belief that the record requested is confidential."[58]

Training

In 2008, the Freedom of Access Act was amended to require all elected public officials, including school board members, to complete a course of training on the requirements of the statute "relating to public records and proceedings."[59] The training must be completed not later than the 120th day after the date that an elected school board member takes the oath of office to assume their duties, each time the board member is elected. The statute sets out minimum requirements for the training, which must be designed to be completed in less than two hours, but must include instruction on the following items:

- The general legal requirements of the Freedom of Access statute regarding public records and public proceedings;
- Procedures and requirements regarding compliance with requests for a public record under the Freedom of Access statute; and

- Penalties and other consequences for failure to comply with the Freedom of Access statute.

The statute also provides that these training requirements are met by conducting a thorough review of all of the information made available by the State of Maine on the Frequently Asked Questions portion of the State's Freedom of Access website.[60] Once the training is completed, the statute further requires that an elected official must make a written or electronic record attesting to the fact that the training has been completed and identifying the training and the date of completion. It is strongly recommended that each school board member keep a copy of their completed Certificate of Completion of their training, in addition to filing it with the office of the superintendent in their school unit.

Summary

Although the Freedom of Access Act provides broad protection to the public to be informed about the business of school units, the Act also sets forth numerous exceptions which allow schools units to conduct certain confidential matters in executive session and to withhold certain confidential records. A basic understanding of the statute should allow school units to protect both the public's right of access and its need to maintain the confidentiality of certain matters.

Recap

- All meetings of school boards and their committees should be open to the public.
- Executive session discussions are permitted to protect the reputation and privacy of individuals, for student discipline, collective bargaining negotiations, consultations with legal counsel, confidential records, and certain property matters.
- Final board action must be taken in public.
- Executive sessions should be used by school boards only when strictly necessary.
- The public has the right to inspect public records within a reasonable time after the request.
- All records requests must be acknowledged within a reasonable period of time.
- Schools are generally not required to search records to compile information in response to requests unless they choose to do so.
- All elected school board members must receive training on the Freedom of Access statute within 120 days of taking the oath of office each time they are elected.

ENDNOTES

[1] *Marxsen v. Board of Directors, M.S.A.D. No. 5*, 591 A.2d 867 (Me. 1991); *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335 (Me. 1988). *See also* 1 M.R.S.A. § 402(2)(C) (defining "public proceedings" to include transactions of any function taken by a school board which affects any or all citizens of the State).

[2] 1 M.R.S.A. § 401.

[3] *E.g., Guy Gannett Publishing Co. v. University of Maine*, 555 A.2d 470 (Me. 1989).

[4] 1 M.R.S.A. § 403.

[5] 1 M.R.S.A. § 403.

[6] *Marxsen*, 591 A.2d at 870. In 2011, the Legislature recognized this concept in an amendment to 1 M.R.S.A. § 401 which provides that the Freedom of Access Act does not prohibit communications between board members outside of public proceedings "unless those communications are used to defeat the purposes...of the Act."

[7] 1 M.R.S.A. § 403(2).

[8] 1 M.R.S.A. § 403(6).

[9] 1 M.R.S.A. § 403(5).

[10] 1 M.R.S.A. § 406.

[11] 1 M.R.S.A. § 406.

[12] 1 M.R.S.A. § 404.

[13] 1 M.R.S.A. § 407(2). Section 407(1) requires a written record of "every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit." This subsection will not usually be relevant to school units.

[14] 1 M.R.S.A. § 407(2).

[15] 20-A M.R.S.A. § 6101(2). The only exception to this confidentiality requirement is "directory information" which includes an employee's name; dates of employment; regular and extracurricular duties; postsecondary educational institutions attended; major and minor fields of study recognized by any postsecondary institutions attended; and degrees received and dates awarded. 20-A M.R.S.A. § 6101(1).

[16] 1 M.R.S.A. § 405.

[17] 1 M.R.S.A. § 405(6)(A). This section specifically does not apply to discussion of a budget or a budget proposal.

[18] 1 M.R.S.A. § 405(6)(A). *See Blethen Maine Newspapers v. Portland School Committee*, 2008 ME 69 (holding that the time for the reasonable expectation of damage to reputation to be assessed is before the executive session is conducted, not after it is over).

[19] 1 M.R.S.A. § 405(6)(A).

[20] 1 M.R.S.A. § 405(6)(A)(3).

[21] 1 M.R.S.A. § 405(6)(B). This subsection applies both to public school students and to students at a private school if the cost of that education is paid from public funds.

[22] 1 M.R.S.A. § 405(6)(C).

[23] 1 M.R.S.A. § 405(6)(D).

[24] 1 M.R.S.A. § 405(6)(E).

[25] 1 M.R.S.A. § 405(6)(F).

[26] *See* 20-A M.R.S.A. § 6101(2).

[27] *See* 20-A M.R.S.A. § 4008. The protection of confidentiality afforded by this section does not apply to the extent necessary for a person to comply with Department of Health and Human Services reporting requirements or in certain other emergency situations. 20-A M.R.S.A. § 4008(3).

[28] 1 M.R.S.A. § 405(1).

[29] 1 M.R.S.A. §§ 405(3), (4).

[30] 1 M.R.S.A. § 405(4). The statute goes on to provide that neither a failure to cite all possible authorities, if one or more is accurately cited, nor an inadvertent inaccurate citation of applicable authority, violates the Act.

[31] 1 M.R.S.A. § 405(2). Any person who subsequently learns of final action taken during an executive session may challenge that action in superior court. If the court, after a trial, determines that the action was taken illegally during executive session, the action will be declared null and void. 1 M.R.S.A. § 409(2).

[32] *Underwood v. City of Presque Isle*, 1998 ME 166, ¶ 19, 715 A.2d 148, 154.

[33] 2008 ME 69.

[34] 1 M.R.S.A. § 402(3).

[35] 1 M.R.S.A. § 402(3)(A).

[36] *See Springfield Terminal Railway Company v. Department of Transportation*, 2000 ME 126, 754 A.2d 353 (discussing "work product doctrine" privilege under this section of the Freedom of Access Act).

[37] 1 M.R.S.A. § 402(3)(D).

[38] 1 M.R.S.A. § 402(3)(I).

[39] 1 M.R.S.A. § 402(3)(L).

[40] 1 M.R.S.A. § 402(3)(M).
[41] 1 M.R.S.A. § 402(3)(O).
[42] 1 M.R.S.A. § 402(3)(C-1).
[43] *Blethen Maine Newspapers v. Portland School Committee*, 2008 ME 69.
[44] *Blethen Maine Newspapers v. Portland School Committee*, 2008 ME 69.
[45] 1 M.R.S.A. § 408(3).
[46] 1 M.R.S.A. §§ 408(4), (5).
[47] 1 M.R.S.A. § 408(1).
[48] 1 M.R.S.A. § 408(1).
[49] 1 M.R.S.A. § 409(1).
[50] 1 M.R.S.A. §§ 408(1), (2).
[51] 1 M.R.S.A. § 409(1).
[52] *See Cook v. Lisbon School Committee*, 682 A.2d 672 (Me. 1996) (failure to respond to request to inspect public records within five working days deemed denial of request).
[53] 20-A M.R.S.A. § 6101(1).
[54] 20-A M.R.S.A. § 6101(2).
[55] *See Cyr v. Madawaska School Dept.*, 2007 ME 28, 916 A.2d 967 (portions of independent report on school controversy confidential under § 6101 and thus must be redacted before any disclosure under Freedom of Access Act).
[56] 1 M.R.S.A. § 410.
[57] 1 M.R.S.A. § 409(4).
[58] LD 466 (122nd Legis. 2006).
[59] 1 M.R.S.A. § 412.
[60] *See* www.maine.gov/foaa/faq.