

# The Board Report

*A Board Member's Practical Guide to the Issues Facing School Boards Today*

## E-MAILS – THE NEW SMOKING GUN

Much has been reported of the lowering of inhibitions in the computer information age. In the context of litigation and public dialogue on issues, caution should be exercised in communications conducted via e-mail. Where expressions of opinion normally do not appear in more formal business correspondence or exchange of documentation, such may not be the case in communications exchanged by e-mail. However, on two fronts, e-mail communications among School District Officials or between School Board Members may be open to disclosure under the Federal Rules as well as Pennsylvania's new Right-to-Know Law (RTKL).

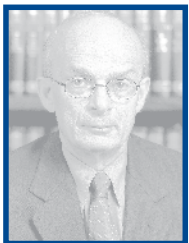
School Districts often find themselves faced with federal litigation involving civil rights and/or employment discrimination matters. Such cases are governed by the new and strict rules of federal discovery that went into effect on December 1, 2006 governing electronic discovery. For example, Federal Rule 34 provides that electronically stored documents are equally as discoverable as paper documents and normally must be produced. The Rules are not limited to "official" files or central files. Rather, all documents and data, regardless of where they are located and who is in possession of the documents, must initially be gathered and reviewed by the District's attorneys to determine whether they must be produced. This includes personal notes, "private files" and electronic material in a home computer or a hand-held device.

While the 2006 Federal Rule amendments have been in place for several years, Pennsylvania's RTKL, which took effect January 1, 2009, has expanded the disclosure of e-mail communications beyond the litigation context to requests for access by the public. The Pennsylvania Office of Open Records (POOR) addressed a public request for copies of e-mails in *Mollick v. Methacton School District* (AP 2009-0180). In that case, the requestor asked the School District for 36 different categories of e-mails between, from or to Board Members. The District denied the request on the basis that the e-mails were not public records or reflected pre-decisional deliberations. POOR disagreed and directed that the e-mail had to be provided. POOR determined that the District did not satisfactorily establish that the e-mails were part of pre-decisional deliberations. Also, POOR noted that the RTKL's exception did not protect records which were submitted to a quorum of the Board for deliberations at a public meeting.

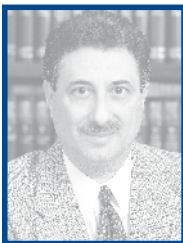
Exercise caution in e-mail exchanges among and between District Officials and Board Members as those e-mails may be the subject of discovery requests in litigation or a request for access under Pennsylvania's RTKL. Our attorneys have prepared a presentation which can be shared with your District's administrative team and School Board Members to provide you with greater guidance on e-mail and electronic data disclosure. Please contact us to schedule a presentation at your District.

## MAIELLO BRUNGO & MAIELLO, LLP EDUCATION LAW TEAM

As an ongoing service to School Districts in Western Pennsylvania, the Education Law Practice Group of Maiello Brungo & Maiello, LLP is available to respond to your questions, comments or concerns. You may contact any member of our Education Law Team at 412.242.4400 or at the below e-mail addresses.



Alfred C. Maiello  
Senior Managing Partner  
acm@mbm-law.net



Michael L. Brungo  
Partner  
mlb@mbm-law.net



David Raves  
Principal  
dr@mbm-law.net



Falco A. Muscante  
Associate  
fam@mbm-law.net



R. Russell Lucas, Jr.  
Associate  
rrl@mbm-law.net



Donald A. Walsh  
Associate  
daw@mbm-law.net



Jennifer L. Cerce  
Associate  
jlc@mbm-law.net



Beth Fischman  
Associate  
bf@mbm-law.net

## I'M AN ACT 32 DELEGATE – NOW WHAT?

As of September 15, 2009, Act 32 required that all taxing bodies, including School Districts and Municipalities, within each tax collection district (TCD) appoint a delegate and one or more alternates to serve on the tax collection committee (TCC). The first meeting of each TCC must occur no later than November 15, 2009. Delegates will receive notice of the date and location of the first meeting from their respective county offices. The Chair of the County Commissioners (or the County CEO in Home Rule counties) will serve as chair of the TCC's first meeting. In effect, the TCC's first meeting serves as the organization meeting which all School Districts and Municipalities undergo either every year (for School Districts) or every two years after the Municipal Election (for municipalities). The most daunting task for each TCC after its organization meeting will be the creation and adoption of by-laws governing its operations.

Act 32 is an "experiment" in regional intergovernmental cooperation on a large expansive scale. It has brought together delegates from numerous municipalities and School Districts, each with their own concerns of protecting and increasing their revenue from EIT collections. The creation and adoption of the by-laws for the TCC will be the first interaction which these delegates will have with each other. To assist the delegates, the Pennsylvania Association of School Business Officials (PASBO) has created and made available a draft proposed set of by-laws posted at their website at [www.pasbo.org](http://www.pasbo.org). The proposed by-laws are separated into nine (9) different Articles touching on numerous issues from the organization of the governing body to TCC finances. In each of the Articles, several different options are presented and will require debate, analysis and ultimately a final decision by the delegates. For example, as Act 32 provides, several different options are presented regarding the manner of voting, including weighted voting, "one person-one vote" voting, super majority voting on certain major decisions and majority voting for non-major decisions.

Our office has reviewed the PASBO draft by-laws and will be issuing a more detailed summary outlining the areas of concern which each delegate should be prepared to address as each TCC tackles the task of creating its by-laws. This summary is being prepared and will be provided to each TCC delegate prior to the first meeting of the TCCs. Our attorneys are prepared to respond to any question your School District or the newly created TCCs or delegates may have.

### SUPERINTENDENT'S CORNER

#### NO SUPERINTENDENT – NO SCHOOL BOARD

School boards have a legal duty to fill certain vacant positions in a timely manner. A recent, somewhat unusual case from the Schuylkill County Court of Common Pleas illustrates the consequences of not fulfilling that responsibility.

The Superintendent of the North Schuylkill School District resigned in June 2007, and the Board initially employed a Substitute Superintendent while advertising the vacancy. At the same time, the Board submitted a mandate waiver application to PDE seeking approval to name its Solicitor as Interim Superintendent despite the Solicitor having neither a teaching degree nor Superintendent's letter of eligibility. PDE denied the mandate waiver on those grounds in September 2007, but the Board appointed the Solicitor to the role two weeks later for the remainder of the school year. The Solicitor assumed the Superintendent's duties and the District submitted a revised mandate waiver application seeking relief from the School Code's requirements concerning Superintendent qualifications. PDE again refused in April 2008, but one month later, the Board hired the Solicitor to act as Interim Superintendent for the 2008-2009 school year. A third mandate waiver application was submitted to PDE.

A group of citizens filed a Petition to remove the Board Members under Section 318 of the School Code for failing to fulfill their mandated duties. The Judge granted the Petition and removed the Board Members after finding that the Board never intended to appoint a qualified Superintendent. The Judge also enjoined the outgoing Board from serving on the School Board for a period of five years.

The circumstances in this case, while odd, demonstrate the importance for Board Members to appoint a qualified Superintendent within mandated timelines.