

# Legal Update



## Michigan School Business Officials 2017 Annual Conference

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**Scott R. Eldridge, Esq.**

Miller, Canfield, Paddock and Stone, PLC  
One Michigan Avenue  
Suite 900  
Lansing Michigan 48933-1609  
(517) 483-4918

[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)

**James M. Crowley, Esq.**

Miller, Canfield, Paddock and Stone, PLC  
150 West Jefferson Avenue  
Suite 2500  
Detroit, Michigan 48226  
(313) 496-7606

[crowley@millercanfield.com](mailto:crowley@millercanfield.com)

## School Reform Officer (“SRO”)

- ❑ In 2010 the Michigan Legislature, in response to the Race to the Top grant incentive program, passed legislation that specified how the State would identify its lowest performing schools and created the School Reform Officer (“SRO”) position to supervise the identified lowest performing schools.
- ❑ Codified under Section 1280c of the Revised School Code (M.C.L. § 380.1280c).
- ❑ Requires the State Superintendent to publish annually a list identifying the lowest achieving 5% of all public schools which are designated as “Priority Schools” and to issue an order placing these schools under the supervision of the SRO.



## Recent Actions by the SRO...

- ❑ On January 20, 2017, the SRO published a list of 38 “**Schools Identified for the Next Level of Accountability**,” which includes potential closure.
- ❑ Notices were sent by the SRO to each of these 38 Priority Schools as well as to the parents of each of the students in these schools.
- ❑ Also on January 20, 2017, the SRO published an additional list of 35 “**Schools At-Risk for Next Level of Accountability**,” which includes potential closure.

## SRO: Legal Challenge and MDE Partnership

- ❑ Legal Challenge: In response to the threatened closure of Priority Schools by the SRO three school districts, the Detroit Public Schools Community District, the East Detroit Public Schools and the Kalamazoo Public Schools, have filed separate legal actions challenging the SRO's authority to close Priority Schools under State law.
  
- ❑ MDE Partnership: On March 1, 2017, the State Superintendent sent out a letter to each of the 38 schools on the SRO's list offering to implement a partnership model with each of these schools in order to avoid potential closure.
  - If a partnership agreement is entered into within a 60 day window, the school would not be subject to closure as long as it is in compliance with the terms of the partnership agreement.
  
  - State funding under School Aid Act?

## Every Student Succeeds Act (“ESSA”): New Accountability Standards

- ❑ On February 14, 2017, the Michigan Department of Education (“MDE”) released a draft of the proposed ESSA accountability standards entitled, “**Michigan’s Consolidated State Plan Under the Every Student Succeeds Act**” for public comment.
- ❑ MDE and the Governor approved the final Plan and it was submitted to the U.S. Department of Education on April 17, 2017.
- ❑ The final approved Plan can be found at [www.michigan.gov/mde/essa](http://www.michigan.gov/mde/essa).
- ❑ The new accountability standards under ESSA are required to be implemented beginning with the 2017-18 school year.

# Open Meetings Act (“OMA”) Update

## ***Bell v Buchanan Community Schools***

2016 WL 300194 (Mich. App. Jan. 21, 2016) (Unpublished)

- ❑ 2010 – School District’s Business Manager established “an early retirement scheme” (“retire-and-hire” as independent contractor)
- ❑ May 2010 – Business Manager retires and is rehired as independent contractor through Professional Educational Services Group, LLC
- ❑ Aug. 2010 – New Superintendent is hired
- ❑ Feb. 2013 – Superintendent informs Educational Services she wants to terminate former Business Manager’s contract
- ❑ Apr. 2013 – Former Business Manager sues for age discrimination and OMA violation by not providing him an opportunity for a hearing before termination.



# Open Meetings Act (“OMA”) Update

## *Bell v Buchanan Community Schools*

- ❑ June 2014 – Trial Court dismisses both claims finding no genuine issue of material fact
  
- ❑ January 21, 2016 – Court of Appeals
  - Held: Former Business Manager’s assignment was terminated by the Superintendent
  - The Board, as a “public body”, “made no decision”
  - OMA inapplicable in this circumstance
  - It was not improper for the Superintendent to speak with Board members individually to determine their opinions on her decision

# Open Meetings Act (“OMA”) Update

## *Citizens for a Better Algonac Community Schools v Algonac Community Schools*

2016 WL 4705141, (Mich. App. Sept. 8, 2016)

- ❑ Early 2014 – School District undertakes search for Superintendent
- ❑ April 1, 2014 – Board votes to offer position to neighboring Superintendent and “begin contract development [asap]”
- ★ President and members exchange a series of emails over the next few weeks regarding contract negotiations, drafts of proposed contracts, working out details and settling on a final contract.
- ❑ April 28, 2014 – Board approves contract “unanimously, swiftly, and without discussion”



# Open Meetings Act (“OMA”) Update

## *Citizens for a Better Algonac Community Schools v Algonac Community Schools*

- ❑ May 2014 – Plaintiff files suit alleging emails constitute deliberations of a public body in violation of OMA
- ❑ Plaintiff sought declaratory judgment finding a violation of OMA, an order compelling compliance and enjoining further non-compliance, and attorney fees and costs
- ❑ Trial Court: Board “violated the [OMA] by conducting deliberations...outside of a public meeting”
- ❑ Trial Court: No injunction as Plaintiff failed to show practice occurred in the past, continued at the present time, or would persist in the future

# Open Meetings Act (“OMA”) Update

## *Citizens for a Better Algonac Community Schools v Algonac Community Schools*

- ❑ No injunction = no attorney fees or costs
  
- ❑ Court of Appeals
  - A complaint seeking pure declaratory relief, as an independent remedy standing on its own, is unsustainable in regard to alleged OMA violations.
  - OMA provides 3-tiered enforcement scheme for private litigants
    - ❖ An action to invalidate a decision made in violation of the OMA. MCL 15.270
    - ❖ An action for injunctive relief enjoining ongoing OMA violation and compelling compliance. MCL 15.271
    - ❖ An action for damages for intentional OMA violation. MCL 15.273
  - Plaintiff is not entitled to injunction = no sustainable cause of action. Vacated the Trial Court’s granting of declaratory relief.

# Open Meetings Act (“OMA”) Update

## ***Markel v Mackley***

2016 WL 6495941 (Mich. App., Nov. 1, 2016)(Unpublished)

- 7 Member Elected Twp Parks & Rec. Commission
- 4 members exchanged numerous emails regarding matters of public policy which would soon come before the Board
- 3 of the members actively exchanged thoughts and plans on how to handle the matters
- 4<sup>th</sup> member received the emails but did not actively engage in the exchange
- At subsequent meetings, the Board handled matters just as planned in the email exchanges

# Open Meetings Act (“OMA”) Update

## *Markel v Mackley*

- ❑ Trial Court: No quorum present. Summary Disposition for the Commission.
- ❑ Court of Appeals: Group emails constituted “meetings” under the OMA when a quorum is present and deliberations on public policy take place
  - OMA requires that a “quorum is present”. The OMA does not require the full quorum to deliberate.
  - Receipt of an email by a public body quorum does not, by itself, constitute “deliberation.” There must be some level of discussion.

# Freedom of Information Act ("FOIA") Update



## *Cramer v Village of Oakley* **2016 Mich. App. LEXIS 1254 (June 23, 2016)**

### ❑ *Facts:*

- The plaintiff filed six separate FOIA requests on May 15, 2015, seeking information from the Village's police department.
- On May 20, 2015, within the statutory response time permitted under FOIA, the Village sent letters stating that the FOIA request was "granted," but the Village would conduct a search of the records and provide the copies that they were able to locate.

# Freedom of Information Act (“FOIA”) Update

## *Cramer v Village of Oakley*

### □ Trial Court:

- Ms. Cramer filed suit, arguing that the Village needed to produce the documents within the time required under the FOIA.
- The Trial Court agreed with Ms. Cramer. Because the documents were not produced within the statutory time frame, the Trial Court concluded the responses were effectively denials.
- Put another way, the Trial Court found that a public body can only grant a request by delivering the requested documents within the time period specified by the statute for a response.

# Freedom of Information Act (“FOIA”) Update

## *Cramer v Village of Oakley*

### □ On Appeal:

- The Court of Appeals concluded that the FOIA did not require the actual provision of documents within the statutory time frame. The Court found that there was a difference in meaning between “granting” a request and “fulfilling” a request under the FOIA.
- In a footnote, the Court acknowledged that the “best efforts estimate” language relied on by the Court of is contained in Section 4, involving fees, but concludes that the requirement applied more broadly to all responses by a public body and not just those that ask for deposits or fees.

# Freedom of Information Act (“FOIA”) Update

## *Cramer v Village of Oakley*

- ❑ The Michigan Supreme Court vacated Part III of the Court of Appeals Decision. Part III was the section that granted summary disposition in favor of the Township.
- ❑ The Section was vacated because it was moot. In a footnote in the Court of Appeals decision, the Court acknowledged that the documents have already been turned over at the time of the decision.



## Possession of Firearms in School Buildings

- ❑ In December 2016, the Michigan Court of Appeals, in two separate published opinions, held that State law does not preempt policies adopted by a public school relating to the possession of firearms in school buildings and at school-sponsored events.
- ❑ Current Law: Schools may regulate firearms on school premises: requires affirmative action of establishing a policy.
- ❑ Michigan Supreme Court: Leave to appeal granted.

# Cyber Security Update

## School Districts are Attractive Targets!

- ❑ Education sector ranked 6th for cyber incidents in 2016 per Verizon's Data Breach Investigations Report
- ❑ Cybersecurity Programs at school districts are frequently weak, making intrusion easier
- ❑ Budgets are already stretched thin
- ❑ Networks can be sprawling and have many entry points, i.e. staff at different schools, students, parents, vendors, etc.



# Cyber Security Update: Common Threats

## ❑ Ransomware

- Hacker introduces malware that encrypts data or compromises system function and only provides key to unlock upon payment of ransom

## ❑ Phishing and Spear Phishing

- In phishing emails, hacker drafts generic message and casts wide net, hoping someone will bite

E.g. Nigerian prince wants to deposit \$5 million in your bank account

- In spear phishing emails, recipient is specifically targeted

E.g. Hacker spoofs Superintendent and emails HR to send all district employee W-2s or business manager to make wire transfer.

# Cyber Security Update: Consequences of Cyber-Attack

- ❑ Loss of access to data and functionality of system
  - School districts throughout country have had to pay ransom to unlock systems
    - E.g. Ransomware prevented New Jersey school district from administering online statewide tests as scheduled
  
- ❑ Theft of Student or Employee Information
  - Hackers obtain personal information regarding students and employees
    - In 2014, 10,000 Maryland school district employees had data compromised in cyber-attack
    - In 2014, a New Jersey charter school obtained the personal information of New Jersey public school students to mail them registration forms
    - In 2013, students in a Long Island school district had their personal information accessed and posted online, including whether they received free or reduced lunches
  - Identity theft or other issues ensue

# Cyber Security Update: Prevention and Mitigation

- ❑ Districts must devote resources to developing and implementing Cybersecurity Plan
  
- ❑ Employee training is a must
  - Human error is a leading cause of initial intrusions
  
- ❑ Technology and policy-based safeguards:
  - Firewalls, network monitoring, encryption, and multi-factor authentication
  - Develop and maintain information security plans and data breach incident response plans
  - Consider security of and vulnerabilities in systems of vendors who have access to district systems and information

# Transgender Students



- ❑ On February 2, 2017, the Departments of Education and Justice withdrew statements of policy and guidance on transgender students and their use of school rest rooms and locker rooms.
- ❑ The previous guidance defined “sex” in Title IX (i.e. federal law prohibiting sex discrimination in education) to mean gender identify rather than biological sex.
- ❑ *G.G. v. Gloucester City School Board*: On March 6, 2017, the U.S. Supreme Court announced that it is remanding the case back to the Fourth Circuit Court of Appeals for reconsideration in light of the withdrawal of the statements of policy and guidance.

## Michigan Campaign Finance Act (“MCFA”) Update

- ❑ 60-Day Black-Out/Gag Order Gone!
- ❑ Recent activities by Secretary of State.
- ❑ You are being watched...
  - Educate administrative staff, including building level administrators



## Advocate? No! Inform? Yes!

- School districts are prohibited from spending public funds or using other resources for campaign activities, including the election or defeat of candidates or ballot proposals.
- School Districts cannot expressly advocate for a ballot proposal but may use its resources to inform (i.e. factual information).

Do not use language like:	However, you may say:
This will really help our kids.	The bond issue is intended to benefit every child in the district.
This will benefit everyone in the district.	Make an informed decision.
We really need your help.	There is a lot of information available.



## Michigan Campaign Finance Act: Public Officials

A **Board member or Superintendent may** express his or her views on a ballot proposal at any time without using school district resources. Statements should not imply that they are expressing the viewpoint of the entire school district or its school board.

A **Board member or Superintendent's occasional, incidental use** of public resources (such as telephones, computers, offices, stationary, or postage) to communicate his or her views on a ballot proposal to constituents or the media is permissible.

A **Board member or Superintendent may** discuss a ballot proposal at a school board meeting.

A school board may adopt a resolution supporting or opposing a ballot proposal.

## 3% Healthcare Contribution: Update

- ❑ **Act 75:** Mandatory 3% Healthcare Contributions (July 1, 2010 through September 4, 2012):
  - Tax Issue: Subject to income and/or payroll taxes (FICA).
  - Legal challenge ongoing.
  - Over \$550 million of contributions held in escrow by State.
  - Protective claims for refund filed with IRS.
  - Tax issues if contributions returned?



## 3% Healthcare Contribution: Update

- ❑ **Act 300:** Optional 3% Healthcare Contribution (September 4, 2012):
  - Tax issues.
  - IRS granting refund requests for prior years.
  - Ruling request submitted to IRS by Michigan school district.
  - Current tax withholding recommendation?

# Building and Sinking Fund: Permissible Uses Expanded

Pre-2017 Voter Authorization	Post-2016 Voter Authorization
<ul style="list-style-type: none"> <li>• Voter Approval</li> </ul>	<ul style="list-style-type: none"> <li>• Voter Approval.</li> </ul>
<ul style="list-style-type: none"> <li>• Up to 5 mills for up to 20 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Up to 3 mills for up to 10 years.</li> </ul>
<ul style="list-style-type: none"> <li>• Purchase of real estate for sites for, and the construction or repair* of, school buildings.</li> </ul>	<ul style="list-style-type: none"> <li>• Purchase of real estate for sites for, and the construction or repair* of, school buildings, for school security improvements, or for the acquisition or upgrading of technology.</li> </ul>
<ul style="list-style-type: none"> <li>• NO EQUIPMENT OR FURNISHINGS.</li> </ul>	<ul style="list-style-type: none"> <li>• NO EQUIPMENT OR FURNISHINGS OTHER THAN SCHOOL SECURITY IMPROVEMENTS AND ACQUISITION AND UPGRADING OF TECHNOLOGY.</li> </ul>
<ul style="list-style-type: none"> <li>• NO MAINTENANCE**</li> </ul>	<ul style="list-style-type: none"> <li>• NO MAINTENANCE**</li> </ul>
<ul style="list-style-type: none"> <li>• ANNUAL AUDIT</li> </ul>	<ul style="list-style-type: none"> <li>• ANNUAL AUDIT</li> </ul>

\* Repair – putting back in good condition – curative.

\*\* Maintenance – keeping in good condition – preventative.

★ Voter approval to replace existing Sinking Fund authorization?

# Operating Millage Renewal/Restoration

- Headlee Rollbacks on the rise!
- Operating Millage Renewal, Restoration or Headlee Override
- Increase v. renewal...
- Requesting a Headlee Rollback cushion?

## School Election Date Options



- ❑ A school district may submit a ballot question, such as a bond proposal, to the school electors on one of the following dates:
  - Regular election date (i.e., one of the four fixed dates)
  - A date when a city or township within the school district's jurisdiction is holding an election; or
  - A "floater" election date.
  
- ❑ Ballot question must be submitted to the school district's Election Coordinator no later than 4 p.m. on the twelfth Tuesday before the election date.

## Three Fixed Regular Election Dates

- ❑ The three fixed regular election dates are as follows:
  - First Tuesday after the first Monday in May;
  - First Tuesday after the first Monday in August;
  - First Tuesday after the first Monday in November.\*

\*The November regular election date, even-years only, is the school district's Regular School Election date.

Note: The March Presidential Primary election date is also an available election date (second Tuesday in March, e.g. March 10, 2020).

## Floater Election Dates

- ❑ Any Tuesday that falls more than 30 days before or 35 days after one of the four fixed regular election dates.
- ❑ Requires initiative petition.
- ❑ 3,000 signatures or 10% of voters who voted in the last gubernatorial election



## Fixed Regular Election Dates

2017	2018	2019
N/A	N/A	N/A
Tuesday, May 2, 2017	Tuesday, May 8, 2018	Tuesday, May 7, 2019
Tuesday, August 8, 2017	Tuesday, August 7, 2018	Tuesday, August 6, 2019
Tuesday, November 7, 2017	Tuesday, November 6, 2018*	Tuesday, November 5, 2019

\*Regular School Election Date

## Picking an Election Date - Considerations

- Cost.
- Turn-out/ballot fatigue/other ballot issues?
- “Stealth Election”
- Coordination with proposed project timetable.

# Operating Cash-Flow Borrowing Update

- ❑ State Aid Note (“SAN”), Revolving Line of Credit (“LOC”) and Tax Anticipation Notes (“TAN”)
  
- ❑ Michigan Finance Authority SAN Program
  - Program Deadlines:
    - April 28 -- Applications posted to MFA website
    - June 28 -- Application Due
    - July 24 -- Pricing
    - August 20 -- Closing
  
  - New Borrowing Option: March (No Set-Aside) Pool: mandatory repayment in full on March 20, 2018.
  
  - Borrowing parameters will be the same as last year except for new participants.



# Legislative Update



- 2017-18 School Aid Act
- MPSERS Reform?
- Repeal of Section 1280c (S.B. No. 27)
- Board closed session allowed to consider security planning to address existing or potential security threats (H.B. No. 4027)
- Eliminate requirement to begin school year after Labor Day (S.B. No. 271)
- Amend PERA to exclude the school year calendar and schedule from the topics subject to collective bargaining (H.B. No 4146)
- Elections – Absent Voters – AV Applications.
- Sinking Fund – Purchase of Buses (H.B. No. 4046 and No. 4376)

# Scott R. Eldridge

Scott R. Eldridge  
Principal



Scott Eldridge focuses his practice on management-side labor and employment law, governmental litigation, and commercial litigation.

He represents colleges and universities, municipalities, non-profits, public bodies, government contractors and commercial enterprises in state court, federal court, and administrative tribunals. Scott also routinely represents his clients in the Michigan Court of Appeals and the Michigan Supreme Court.

## Labor and Employment Law

- Employment litigation defense (discrimination, harassment, whistleblower claims)
- Title VII of the Civil Rights Act; Family and Medical Leave Act (FMLA); Americans With Disabilities Act (ADA); Age Discrimination in Employment Act (ADEA); Pregnancy Discrimination Act (PDA); Fair Labor Standards Act (FLSA); Uniformed Services Employment and Re-Employment Rights Act (USERRA); General Information Non-Discrimination Act (GINA); Employee Retirement Income Security Act (ERISA); Sarbanes-Oxley Act (SOX); and Michigan analogues, including Elliott-Larsen Civil Rights Act, Whistleblowers' Protection Act, and Persons with Disabilities Civil Rights Act.
- Defending Union Grievance and Unfair Labor Practice Charges
- Union Elections
- Collective Bargaining
- Union Avoidance

## Governmental Litigation

- Ballot Questions (including Board of State Canvassers proceedings)
- Election Law
- State and Federal Administrative Law
- Michigan Constitutional Law
- U.S. Constitutional Law
- Government Contracts/Procurement
- Municipal Law

## General Litigation

- Higher Education Litigation and Title IX Compliance
- Sports Law
- Fair Debt Collection Practices Act and Fair Credit Reporting Act Defense
- Commercial Contract Disputes

## Lansing

120 N. Washington Square Suite 900  
One Michigan Avenue Building  
Lansing, Michigan 48933  
T: +1.517.483.4918  
O: +1.517.487.2070  
F: +1.517.374.6304

[eldridge@millercanfield.com](mailto:eldridge@millercanfield.com)

## Services

Employment and Labor Employment Litigation  
Governmental and Public Entities  
Human Resources Counseling and Training  
Labor Relations

## Education

Wake Forest University School of Law, J.D., 2003  
Alma College, B.A. 2000

## Bar Admissions

District of Columbia  
Michigan

## Court Admissions

U.S. Court of Appeals  
Sixth Circuit U.S. District Courts  
Eastern District of Michigan  
Western District of Michigan

# James M. Crowley

James Crowley  
Principal



Jim Crowley is a member of the Public Finance Practice Group in Miller Canfield's Detroit office, where he concentrates his practice in the areas of school finance, election and general school business law.

Jim has extensive experience in school finance and regularly serves as bond counsel, note counsel, underwriter's counsel, and disclosure counsel for public schools and other issuers.

In these capacities he has served as counsel relating to tax-exempt and taxable financings, fixed and variable rate financings, general obligation and revenue financings, unlimited and limited tax financings, conduit financings, installment purchase agreements, finance leases and operating cash-flow borrowings including state aid notes, tax anticipation notes and lines of credit.

Jim is also well versed in all aspects of the Michigan School Bond Qualification and Loan Program available to public school districts, and has extensive experience with school elections for school bond proposals, operating tax proposals (i.e. renewals, increases and Headlee restorations) and school building and site sinking fund proposals.

Jim also has a wealth of experience in general business law as it relates to public schools including school finance matters under the School Code and the State School Aid Act, employee benefit matters (i.e. MPSERS, 403(b) and 457 plans, etc.), tax law matters and tax-exempt organizations (i.e. education and other foundations, boosters clubs and other affiliated organizations).

## Detroit

150 West Jefferson  
Suite 2500  
Detroit, Michigan 48226  
T: +1.313.496.7606  
O: +1.313.963.6420  
F: +1.313.496.8453

[crowley@millercanfield.com](mailto:crowley@millercanfield.com)

## Services

Public Finance

## Education

Michigan State University, B.A.  
Accounting, 1981

Wayne State University, J.D., 1984

## Bar Admissions

Michigan

## Professional Activities

National Association of Bond Lawyers  
American Bar Association  
The Incorporated Society of Irish American Lawyers

## Articles

Sinking Fund Legislation Approved by Senate

## Thank you! Any Questions?

- This document is not intended to give legal advice and does not establish any attorney-client relationship. It is comprised of general information. School Districts facing specific issues should seek the assistance of an attorney.

