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Clients and Friends Legal Alert

Getting Out the [YES] Vote -- Navigating the Waters

Special Edition Newsletter

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In response to numerous questions we have received from clients on the "DOs and DON'Ts" of getting out the vote for District Elections and in an effort to further assist our clients and friends who may be experiencing additional issues related to these matters, we are reprinting the following article from one of our 2006 School Law Newsletters.

Getting Out the [YES] Vote - Navigating the Waters

In 1986, New York State's highest court, the Court of Appeals, ruled that school districts may not use district resources or personnel to exhort the voters to support a particular position with respect to any item that district residents will be asked to vote on in a school board election, budget vote, or any other ballot proposition. In other words, a school district does not have the right to use the public's money (or district resources that equate with money) to encourage them to vote in any particular way. *Phillips v. Maurer*, 67 N.Y.2d 672 (1986).

In numerous decisions since then, the Commissioner of Education has applied the prohibition of *Phillips v. Maurer*. In summary, the Commissioner's numerous subsequent decisions hold that district funds, facilities, and channels of communication may not be used to engage in direct or indirect advocacy on behalf or against any item on the ballot in a school district election or referendum.

It should be noted that these rulings do not apply to efforts of the District to garner support for District goals and objectives which are not subject to public vote (i.e., in newsletters). The Commissioner looks at "context." Do the statements otherwise seek to persuade or convey support for a particular position? If so, the Commissioner will rule against you. *Appeal of Gravink*, 37 Educ. Dept. Rep. 393 (1998).

While districts should comply with the law by refraining from improper partisan or

promotional activity, an election will not be overturned based upon improper advocacy unless it is proven to have affected the outcome (*Appeal of Leman*, 38 Educ. Dept. Rep. 683 (1999); *Appeals of Schadtler and Wilcox*, 38 Educ. Dept. Rep. 599 (1999)).

Basic Rules:

- Board can not use district funds, facilities or personnel to espouse a partisan position on a proposition.
- Board can not use district funds, facilities or personnel to target voters more likely to be sympathetic to a proposition (read "can't target parents"); PTA, Boosters, etc., cannot use district facilities for these purposes either.
- Board can use funds, personnel and facilities to disseminate information in a truthful way; can do lots of this and can do it in a professional way.
- Board can work to get out the vote - if Board doesn't target only "sympathetic voters."

Boards Must Avoid Even the "Appearance of Impropriety"

Districts also must avoid engaging in activities that "technically" do not violate the law, but that give rise to the appearance of impropriety. See, for example, *Appeals of Schadtler and Wilcox*, 38 Educ. Dept. Rep. 599; No. 14,102 (1999).

A. Private (Closed) Sponsored Activities (aka "Coffee Klatches")

The attendance of the superintendent and other district administrators, in their official capacities and during their hours of employment, at privately-sponsored coffees that are closed to the general public, for the purpose of providing information on a district election, presents at least the appearance of partisan activity and should be refrained from. Consequently, the Commissioner ordered the superintendent to refrain from attending such coffees in the future. *Appeal of Goldin*, 39 Educ. Dept. Rep. 323 (1999).

However, compare this ruling with *Appeal of Rampello*, 37 Educ. Dept. Rep. 153 (1997), wherein the Commissioner found "no indication that [a school superintendent] acted improperly" under circumstances where the superintendent hosted a free breakfast open to all 18-year old students to provide them with factual information about the budget and to encourage them to vote.

B. Phone Banks

Phoning voters to remind them to vote is ok - but using selective phone lists "creates the appearance of impropriety". *Appeal of Boni*, 40 Educ. Dept. Rep. 292 (2000). However, in the absence of partisan phone lists, the use of district phones to remind residents to vote is not improper. *Appeal of Gang*, 32 Educ. Dept. Rep. 337 (1992).

C. School Mailboxes and Buses

Likewise, using school mailboxes has been deemed to be too selective a means of providing information. The Commissioner cautioned, "in order to avoid the appearance of impropriety" boards should "refrain from distributing notice of such votes in a manner which reaches only certain portions of the populace." *Appeal of Bartosik*, 37 Educ. Dept. Rep. 541

(1998). The same is true for the use of school buses to transport only certain voters. *Appeal of Jordan*, 39 Educ. Dept. Rep. 551 (2000).

D. Specialized /Targeted Mailings

The use of specialized mailings or distributions to parents of students or other "selected" groups may in some instances, suggest the appearance of partisan activity. The Commissioner advised the district to "inform all district residents, not only parents of students, of upcoming elections and votes." *Appeal of Schadtler, et al.*, 38 Educ. Dept. Rep. 599 (1999).

Allowing Others to Do What District Officials/Personnel Cannot Do

"Indirect support of partisan promotional activities is prohibited." *Appeal of Miller*, 39 Educ. Dept. Rep. 348 (1999); see also, *Appeal of VanAllen*, 38 Educ. Dept. Rep. 801 (1999). The Commissioner has ruled that boards of education are "ultimately accountable for how district facilities and resources are used and must avoid even the appearance of impermissible partisan activity." *Appeal of Maliha*, 41 Educ. Dept. Rep. 367 (2002); see also, *Appeal of McBride, et al.*, 39 Educ. Dept. Rep. 702 (2000); and *Appeal of Karpoff, et al.*, 40 Educ. Dept. Rep. 459 (2000), 192 Misc.2d 487 (2001), aff'd 296 A.D.2d 691 (3rd Dept. 2000). For example:

A. Use of School Postage Meter

Districts should not allow third parties to use district postage meters for "reminders to vote" - even where costs are reimbursed. According to the Commissioner, "since the school district's costs were reimbursed, technically no school district funds were used." However, the Commissioner "encouraged" the district "in the future, to avoid even the appearance of impropriety" *Appeal of Moessinger*, 33 Educ. Dept. Rep. 487 (1994).

B. Use of School Premises

The president of the school board and another school board member, whose wife was the president of the local Home School Association (HSA), spoke at both a "tea" sponsored by the HSA, as well as at a "membership meeting" sponsored by the HSA. Both the tea and the membership meeting occurred in the schoolhouse. Both Board members also asserted that in doing so, they expressed their own personal opinions and did not purport to speak for the board. The Commissioner wrote: "[T]here is no evidence that the board itself engaged in partisan activities. Nor is there any evidence that district funds were used in preparing or distributing the flyers, or that [the board of education] was aware of, sanctioned or otherwise provided support to this activity at the time it occurred Provided that no district funds were used, the HSA, as an independent organization, may advocate its position on school district issues. The fact that the HSA held its meeting at the school and distributed flyers there is not per se evidence sufficient to demonstrate that [the board of education] engaged in partisan activities. Thus, there is no basis to conclude that the activities . . . were improper (citation omitted). However, Boards of Education must, therefore, exercise great care to avoid lending even indirect support to partisan activities through the use of such facilities and resources. Accordingly, ... the commissioner urged the Board of Education to prevent the distribution of partisan information at such events conducted on school premises to avoid any confusion or appearance of impropriety." *Appeal of Krantz*, 38 Educ. Dept. Rep. 485 (1999).

C. Use of District Mailing Labels

A board should not make sets of district mailing labels available to outside organizations in the absence of safeguards to ensure that such district resources will not be used to exhort the electorate to vote in a particular way. The complaint alleged that the superintendent allowed the PTSA to use district mailing labels to distribute PTSA newsletters to district residents, advocating support of the budget. The district acknowledged that it had routinely given such mailing labels to the PTSA. Observing that the PTSA newsletters in question were prepared by volunteers and paid for with PTSA dues, the Commissioner was satisfied that neither the school board nor the superintendent had engaged in any willful misconduct. However, "[t]he district must be accountable for how its resources (such as mailing address labels) are being used. It is simply not enough to provide resources to a third party without regard to how they will be used. [The district] should review its policies on elections and the use of district resources and determine whether further safeguards are necessary." *Appeal of Lawson*, 38 Educ. Dept. Rep. 713 (1999).

D. Use of School Mailboxes

Where the teachers' union used school mailboxes to distribute flyers to union members urging them to vote for certain preferred board candidates, (despite the fact that the superintendent told union leaders to desist and directed building principals to retrieve the flyers from the mailboxes upon learning of the distribution), the Commissioner admonished the district "to take steps to prevent other groups" from taking similar action in the future (*Appeal of Van Allen*, 38 Educ. Dept. Rep. 701 (1999)).

E. Enmeshing the Students - Do Not Espouse Partisan Positions to the Captive Audience

Districts also must take affirmative steps to ensure that its teachers (and staff) do not espouse partisan positions to students "on school time on matters pending before the voters." In one case, the vice-president of a school board directed her daughter to deliver envelopes containing letters from the Band Parents' Association (BPA), urging support of the budget, to the district's music teachers, who in turn had students address the envelopes to their parents during class time. Although the Commissioner found no evidence that district funds were used to produce the letters, he admonished the Board to "take affirmative steps to ensure that teachers and staff do not espouse to students on school time partisan positions on matters pending before the voters, and that the district does not lend indirect support to partisan activities through its channels of communication." (*Appeal of Lawson*, 36 Educ. Dept. Rep. 450 (1997); but, see also: *Appeal of Roxbury Taxpayers Alliance*, et al., 34 Educ. Dept. Rep. (1995)), in which the Commissioner ruled that there was nothing improper about a teacher explaining the meaning of a "contingency budget" to students in class, where the teacher only provided factual information to the students).

Students Have First Amendment Rights

The Commissioner has ruled in several different contexts, that students, unlike school officials, may have a greater First Amendment free speech rights to advance their personal views on school board candidates, budget votes and other ballot propositions, subject to time, place and manner restrictions by the district.

A. Promotional Sign By Students

Students posted a sign in the high school corridor which read: "OUR CHILDREN SCHOOLS FUTURE! Vote YES on May 18th." The high school principal asserted that it was the policy and practice at the high school to allow students to post message containing political speech in the corridors of the school. The Commissioner absolved the district, writing: "The record indicates that the posting of the sign by high school students was permitted under school policy, and there is nothing in the record to establish that the students acted "on behalf of" or "at the request or direction of" the district, or that district funds were used in the production or posting of the sign. *Appeal of Miller*, 39 Educ. Dept. Rep. 348 (1999).

B. Student Editorials on Board Candidates/Budget Vote in District Funded Newspaper

School Officials may permit student editors of a district funded newspaper to editorialize in support of particular school board candidates or the proposed school budget, provided that the district does not act to influence the content of such editorials. (*Appeal of Doro*, 40 Educ. Dept. Rep. 281 (2000).

C. Distribution of Partisan Literature by Students on School Grounds

Students may distribute literature on school grounds expressing their opinions about school budget and elections, subject to the imposition of reasonable restrictions by the district on the time, place and manner of distribution, provided, however, that the district does not use district personnel or funds to support such activities. *Appeal of Doro*, 40 Educ. Dept. Rep. 281 (2000). (Emphasis added).

Other Examples of Permitted Activities

The Commissioner of Education has ruled that the following are permitted activities:

- Allowing PTA to disseminate non-partisan materials to students on school grounds. *Appeal of McBride*, et al., 39 Educ. Dept. Rep. 702 (2000).
- District maintaining a link on its website to another website that contains partisan views. However, the District should include a statement disclaiming responsibility for the other site. *Appeal of Hager and Scheuerman*, 43 Educ. Dept. Rep. 363 (2004).
- Teachers may register students to vote - provided they do not try to influence how they vote. *Appeal of Hoefer*, 41 Educ. Dept. Rep. 203 (2001).
- Allowing (a few) school employees to wear campaign buttons in school on Election Day. *Appeal of Moessinger*, 33 Educ. Dept. Rep. 487 (1994).

Purely Factual Information May be Disseminated

A district included the following information in a report describing the district's long-term facilities plan:

"... we educate children in hallways and converted closets. The overburdened cafeterias force them to have lunch at 10:40 in the morning or, at the high school, to go off campus to eat. There is not enough gym space"

According to the Commissioner, this constituted factual information and did not amount to improperly exhorting the electorate. *Appeal of Meyer and Mittlestaedt, Jr.*, 40 Educ. Dept. Rep. 34 (2000); see also, *Appeal of Boni*, 41 Educ. Dept. Rep. 214 (2001).

Whether district correspondence and communication is merely factual in nature or advocates improperly for a particular position is often a fine line.

The Commissioner has ruled that the following are considered permissible "factual information":

- "Informational" newspaper advertisements. *Appeal of Prentice*, 38 Educ. Dept. Rep. 736 (1999); see also, *Appeal of Loriz*, 27 Educ. Dept. Rep. 376 (1988).
- Providing an estimate of change in the tax "rate". *Appeal of Russo*, 41 Educ. Dept. Rep. 182 (2001).
- Newsletters explaining proposed tax increase and encouraging voter turnout. *Appeal of Loriz*, 35 Educ. Dept. Rep. 231 (1995).
- Statements that programs will be cut. "[I]t is not impermissible per se to state that rejection of the budget may result in the elimination of programs. (see, *Appeal of Goldin*, 40 Ed. Dept. Rep. 628, No. 14,572)."
- "Mere platitudes" about the quality of the education program. *Appeal of Carroll, et al.*, 42 Educ. Dept. Rep. 326 (2003).
- Objective statements about the physical condition of the schools. *Appeal of Meyer and Middlestadt, Jr.*, 40 Educ. Dept. Rep. 34 (2000).
- Signs in school bus windows reminding public to vote. *Appeal of Schadtler, et al.*, 38, Educ. Dept. Rep. 599 (1999).
- Statements in district newsletters indicating board's support for school construction proposition considered factual by Commissioner. *Appeal of Brown*, 43 Educ. Dept. Rep. 231 (2003).

Personal Views of Public Officials

Individuals may also express personal views on their own time and at their own expense. *Appeal of Kelly*, 45 Educ. Dept. Rep. 38 (2005). There is no violation of the law because of a board president's letter to the editor urging budget support. *Application of Dinan*, 36 Educ. Dept. Rep. 270 (1997). Likewise, there is nothing wrong with a board member using a personal bulk mail permit for campaign purposes. *Appeal of Allen*, 39 Educ. Dept. Rep. 528 (2000). But individual board members must not purport to speak for the district or persons other than themselves. *Applications of Eisenkraft*, 38 Educ. Dept. Rep. 553 (1999).

If you have any questions about how to "navigate the waters" while getting out the vote for your District's next Election Day, please feel free to contact us at 315-437-7600.