

School Law Matters

JANUARY 2011



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Route to: Board Personnel Instruction PPS Business Other: _____

Hot Topics

Attorney Spotlight

Real Property Tax Cap Looms on the Horizon

Colleen W. Heinrich, Esq.

One of Governor-Elect Andrew Cuomo's first initiatives when he takes office in January is expected to be a call for a real property tax cap. Governor Cuomo proposes to hold the annual rate of property tax growth for local governments, including schools, at two percent (2%), or one hundred twenty percent (120%) the rate of inflation, whichever is lower. This initiative appears to have significant public support, with three-quarters of New Yorkers in favor of the plan. The tax cap plan will, however, have a significant impact upon school district and municipalities which rely on property taxes for budget operations. School districts, on an average, rely upon property taxes for approximately forty five percent (45%) of their total revenue. Local government associations are lining up and voicing strong objections to the Governor's plan, maintaining it will leave school districts and municipalities unable to meet rising personnel contract costs and costs associated with health insurance. The New York State School Boards Association ("NYSSBA"), the Council of Mayors and the Association of Counties are calling on the Legislature to take action to alleviate the burden of a variety of State mandates which will control tax payer costs more effectively than a property tax cap.

NYSSBA recently released a survey assessing the impact the proposed property tax cap could have on local districts. The report indicates work force costs in the schools, outside of the major cities, are expected to grow an average of \$1.044 billion annually over the next four years, while revenue under the proposed tax cap is expected

to grow \$229 million per year, resulting in a short fall of approximately \$815 million per year. In order to address this issue, NYSSBA is calling on the Legislature to dismantle many of the advantages unions have enjoyed.

NYSSBA is advocating for the State to adopt cost-cutting steps to reduce personnel costs which comprise nearly seventy percent (70%) of a typical school district budget. Proposals sought by NYSSBA include relief for school districts from mandatory contri-

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Join us on January 20, 2011, for a

FREE CLIENTS/FRIENDS WEBINAR ON SCHOOL PERSONNEL LAYOFFS AND OTHER REDUCTIONS IN FORCE

Thursday, January 20, 2011
12:00 noon -1:30 pm

Are layoffs or other reductions in force a possibility in your school district for 2011-12? Now is the time to review the rules and most recent Commissioner's and court rulings governing this difficult area of personnel administration. Join us on Thursday, January 20, 2011, for this important and timely webinar which will address the different rules governing layoffs and other reductions in both instructional and non-instructional positions. Contract compliance and collective bargaining considerations will also be discussed.

You can register at our Firm's website www.ferrarafirm.com. Simply click on "Layoffs and Other Reductions in Force", from the Events Calendar on the far right column on our Firm's home page, then click on "Register Now" and complete the online form. Click "Submit" and you're registered. You may also register by telephone by calling 315.437.7600 or 716.875.1406.



Colleen W. Heinrich graduated *magna cum laude* from Siena College in 1990 and received her law degree from Albany Law School in 1993. She is a member of the American

Association of Trial Lawyers, the New York State Bar Association, the Women's Bar Association of the State of New York, and the Central New York Woman's Bar Association (President 2001-2002). Ms. Heinrich has performed pro bono work for the Central New York Women's Bar Association Domestic Violence Divorce Project and the Vera House. She has lectured on School Law for the National Business Institute (1998, 2003, 2005) and on Civil Litigation for the New York State Bar Association (1999). Ms. Heinrich was formerly on the Board of Directors of Legal Services of Central New York and has served as an Impartial Hearing Officer for State of New York Office of Special Education Services since 1996. Her other areas of practice include: municipal and education law and related civil litigation.

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Hot Topics**Real Property Tax Cap Looms on the Horizon (Cont'd)**

butions to the State pension system. School district contributions to the Teachers' Retirement System have increased from 0.36 percent of total teacher payroll in 2002-2003, to 16.3 percent for the 2011-2012 school year. The NYSSBA survey also advocates for the implementation of a new Tier VI, offering a new deferred contribution plan, or a hybrid model, for employees which is intended to stabilize district pension costs.

Health care benefit costs are a rapidly expanding expense for school districts and municipalities. The NYSSBA survey advocates for a mandatory minimum health insurance contribution for district employees at 10% for individual coverage and 25% for dependent coverage. The NYSSBA survey points out that the proposed employee contribution level is below the national average of 19% for individuals and 30% for dependents. The creation of low cost regional health insurance plans for all school employees is also suggested which will increase a school district's health insurance purchasing power and drive down costs.

The common mantra among local governments in reference to the Gover-

nor's proposal is, "you can't cap what you can't control". State mandates and restrictions prohibit municipalities from enacting reasonable cost containment measures in the area of employee compensation. Municipalities are seeking Legislative assistance to obtain relief from the terms of various collective bargaining agreements. NYSSBA has proposed enabling BOCES to negotiate regional collective bargaining agreements, with voluntary participation by school districts, in order to put districts on a more level playing field with teachers during negotiations. NYSSBA is also advocating a state-wide salary structure for teachers which would reduce disparities in salaries and determine pay partly on performance based increases. The elimination of some of the provisions of the Triborough Amendment to the Taylor Law which keeps public employee union contracts largely in force even after the term of the given contract expires is another area of cost saving opportunities. NYSSBA is advocating amending Triborough to require school districts to maintain salaries at the rate set in the expired collective bargaining agreement, without step increment enhancements.

As a short term measure, the Conference of Mayors and NYSSBA have

called on the Legislature to declare a "fiscal emergency" which they contend will allow local governments and schools to suspend any contractual salary increases. NYSSBA advocates that a one or two year salary freeze could enable schools to rein in spending while the State recovers from its current financial emergency. Union officials have responded, promising legal challenges if such action is taken. The New York State United Teachers ("NYSUT") opposes the Governor's proposed property tax cap plan, but rejects any proposal to alter collectively bargained benefits.

While it is unclear whether any of the measures advocated by NYSSBA, the Association of Counties or Association of Mayors will be implemented, all of the suggested cost-cutting measures will be up for serious discussion during the next Legislative session. The expiration of federal stimulus dollars and the expected cuts in school aid will make it difficult for school districts to meet student needs under a real property tax cap absent substantial structural changes at the State level. While a real property tax cap may be on the horizon, it appears to be untenable without additional mandate reforms for school districts.

Collective Bargaining**Collective Bargaining in 2011: The New Year Presents Many New (and Old) Challenges**

This year promises to be one of the most challenging years for collective bargaining in the last two decades. The major issue for school districts in preparing proposals for negotiations and developing budgets is the uncertainty associated with recurring revenue streams. With a new Governor, a new State Senate and a new Congress, projecting both State and Federal revenue for school districts is almost impossible.

There seems to be universal agreement, however, that the education funding bubble will burst sometime over the next two years. Federal stimulus

aid to states is scheduled to expire. Education Jobs Fund revenue will be depleted in the 2011-2012 school year and there is no reason to believe that New York State's deficits will diminish. Real property tax caps may be imposed. School district reserve funds may be used as short-term solutions and alternatives to layoffs, but such solutions are not sustainable.

Now more than ever, districts and unions need to explore creative proposals designed to promote cost containment and savings. Such proposals could include re-opener clauses whereby the district and the union agree to reopen

provisions of the collective bargaining agreement if certain contingencies occur. One such contingency could involve an increase in either TRS or ERS contributions or an increase in health insurance premiums beyond an agreed upon percentage. State legislation imposing a real property tax cap could be another. Re-openers do not guarantee concessions, but they do bring parties to the bargaining table and obligate them to bargain in good faith.

There are a number of other innovative approaches in the areas of health

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Collective Bargaining**Collective Bargaining in 2011: The New Year Presents Many New (and Old) Challenges (cont'd)**

insurance and local retirement benefits. As budgeting season approaches and school administrators get a clearer picture from the Governor and the Legislature regarding next year's funding, both districts and unions will be faced with difficult decisions.

In the midst of the bleak economic picture, most districts will also be attempting to comply with the new Annual Professional Performance Review mandates of Education Law Section 3012-c

and the yet to be published Regulations of the Commissioner of Education. While every district has a unique set of circumstances which must be considered in developing bargaining strategies, our general advice is to handle the majority of APPR bargaining through a committee approach thereby keeping it separate and apart from the economic issues which will be the focus of traditional bargaining. However, districts must be vigilant to certain problematic issues in the APPR requirements, including the evaluations appeal mandate.

It is clear that collective bargaining is taking on greater significance and it is safe to say that the taxpayers will be taking greater interest in how districts handle collective bargaining this year. It is incumbent upon both districts and unions to explore innovative cost containment and savings approaches to compensation and benefits keeping in mind that the mission of a school district is not to employ adults, but rather to educate children.

Student Discipline**Recent U.S. Dept. of Education Guidance and Newly-Enacted State Law on Bullying Create Uncertainty for Schools****U.S. Dept. of Education Guidance**

On December 7, 2010, the National School Boards Association (NSBA) issued a response letter to the United States Department of Education's Office of Civil Rights (OCR) seeking clarification of their recently issued "Dear Colleague" Letter (DCL) dated October 26, 2010 on bullying and harassment.

In the DCL, OCR advised that not only must a school district consider responding to a bullying incident itself by punishing the bully, but school districts must also consider whether the bullying incident also involves discriminatory harassment. The NSBA letter seeks clarification of several issues: first, the DCL deviates substantially with regard to the standard of liability for when school districts may be sued for damages related to student harassment.

In 1999, the U.S. Supreme Court set forth the standard in *Davis v. Monroe*

County Board of Education, 526 U.S. 629 (1999) indicating that a school district is liable for harassment about which they had "**actual knowledge**" of the misconduct and did not respond to it; however, the DCL states that a school district is "responsible for addressing harassment incidents about which **it knows or reasonably should have known.**" Secondly, the DCL suggests that if harassment is out in the open, the school district has actual knowledge of it; a conclusion not supported by the *Davis* decision. Rather, *Davis* only addresses the issue of harassment that has been brought to the attention of school district teachers or other officials.

Another issue NSBA seeks to clarify is that under *Davis*, "harassment that is so severe, pervasive, **and** objectively offensive that it **effectively bars** the victim's access to an educational opportunity or benefit" may result in liability. However, the DCL's position is

much broader. Specifically, it states: "Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, **or** persistent so as **to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by the school.**"

Under the DCL, the presence of any one of the factors above can constitute a hostile environment whereas under the *Davis* decision all three factors must be present. Additionally, the DCL differs from *Davis* in that a hostile environment is deemed to exist when it interferes or limits the student; however, under *Davis* the harassment had to "effectively bar" the student from access to an educational opportunity or benefit.

Finally, NSBA seeks clarification with regards to what steps school districts

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Student Discipline

Recent U.S. Dept. of Education Guidance and Newly-Enacted State Law on Bullying Create Uncertainty for Schools (cont'd)

must take to eliminate harassment. *Davis* does not support the DCL's position that school districts must take multiple steps to remedy and prevent harassment. Instead, *Davis* provides that school districts must only respond to known peer harassment and in a manner that is not clearly unreasonable.

The DCL also fails to address students First Amendment free speech rights. School districts may discipline students for on and off campus, non-school sponsored speech only if: 1) the speech is likely to cause a substantial disruption of or a material interference with school activities; 2) the speech interferes with the rights of other students to be secure and to be let alone; 3) the speech is sexually explicit, indecent or lewd; or 4) if it can be reasonably regarded as encouraging illegal drug use. Despite that these issues were omitted in the DCL,

they should also be considered when dealing with bullying and harassment.

N.Y.S. Dignity for All Students Act

Finally, in September 2010, the Governor of New York State signed into law the Dignity for All Students Act. Among the Act's requirements, by July 2012, school districts must:

- include an age appropriate version of the Act's anti-harassment/discrimination policy in the students code of conduct; and

Each Board of Education must also create policies and guidelines to:

- Create a school environment free from discrimination or harassment;
- Be used in training programs to raise staff awareness and sensitiv-

ity to potential harassment and discrimination;

- Enable staff to prevent and respond to harassment and discrimination; and
- Develop nondiscriminatory instructional and counseling methods, requiring at least one staff member at every school be thoroughly trained to handle human relations in the protected categories.

All of these issues should be considered when addressing bullying and harassment. Please do not hesitate to contact our offices if you have any questions or if we can provide assistance in your efforts to address harassment or the Dignity for All Students Act.

Upcoming Events

January — February 2011

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Donald Budmen	1/4/11	Client In-Service Program on <i>Student Discipline Done Right</i>
Susan Johns	1/4/11	Client In-Service Program on <i>Discipline of Students with a Disability</i>
Donald Budmen	1/6/11	Client In-Service Program on <i>Cyber-technology Issues in the Schools</i>
Donald Budmen	1/10/11	Client In-Service Program on <i>Sexual Harassment</i>
Donald Budmen	1/14/11	Client In-Service Program on <i>Cyber-technology Issues in the Schools</i>
Henry Sobota Joseph Shields	1/20/11	<u>FREE</u> Firm Webinar on <i>Layoffs and Other Reductions in Force</i> (details on page 1)
Michael Dodd	1/26-27/11	Client In-service Program on <i>Preventing Harassment and Workplace Violence</i>
Susan Johns	2/17/11	Client In-service Program on <i>Special Education Issues Q & A</i>
Donald Budmen	2/27/11	NYSCOSS Winter Institute (The Desmond Hotel, Albany, NY)
Eric Wilson		Featured Presenters a Legal Briefing — <i>The 2011 Budget: When the Wolf is Really At the Door – Essential Communication Issues with the Community during Grim Economic Times</i>
Joseph Shields	2/28/11	NYSCOSS Winter Institute (The Desmond Hotel, Albany, NY) Presenter at "Skills Building Workshop" — <i>"Skills, Strategies and Practical Tips on How to Successfully Manage and Complete the Capital Construction Project"</i>
Henry Sobota	2/28/11	NYSCOSS Winter Institute (The Desmond Hotel, Albany, NY) Presenter at "Sunrise Café Roundtable" session on <i>"Hot Topics in Personnel for the Spring of 2011"</i>

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us do a program for you, please contact us so we can schedule one to suit your needs.