

School Law Matters

FEBRUARY 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

Avoiding Improper Support of the Budget or Board Candidates – Use of School Facilities

Norman H. Gross, Esq.

Now that budget and election season is upon us, in anticipation of various questions from our clients on the DOs and DON'Ts of the use of school facilities directly or indirectly for support of the budget, propositions or board candidates, and as a reminder for all our clients, we provide the guidance below to assist you in handling some of the basic questions.

Avoiding the Appearance of Impropriety

A. Phone Banks

Phoning voters to remind them to vote is legally permissible - but using selective phone lists "creates the appearance of impropriety". *Appeal of Boni*, 40 Ed. 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 Ed. Dept. Rep. 337 (1992).

B. School Mailboxes and Buses

Likewise, using school mailboxes, which only provides information to school staff, 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 Ed. Dept. Rep. 541 (1998). The same is true for the use of school buses to transport only certain voters. *Appeal of Jordan*, 39 Ed. Dept. Rep. 551 (2000).

C. 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 Ed. 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 Ed. Dept. Rep. 348 (1999); see also, *Appeal of VanAllen*, 38 Ed. 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 Ed. Dept. Rep. 367 (2002); see also, *Appeal of McBride*, et al., 39 Ed. Dept. Rep. 702 (2000); and *Appeal of Karpoff*, et al., 40 Ed. 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 targeted reminders to vote. For example, in *Appeal of Moessinger*, 33 Ed. Dept. Rep. 487 (1994), a parent organization in the Iroquois Central School District



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Before entering private practice, Mr. Gross served as an attorney for the New York State School Boards Association for twelve years, the last four of which he served as Counsel. Prior to joining NYSSBA, he served as an attorney with the New York Education Department's Office of Counsel.

He is a frequent speaker and panelist on regional, statewide and national programs relating to topics of interest in the fields of education law and employment law.

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Hot Topics**Avoiding Improper Support of the Budget or Board Candidates –
Use of School Facilities (cont'd)**

prepared a flyer to remind high school parents of the date, time and location of the vote. The association used the district's postage machine to mail the flyers. The cost of postage, however, was reimbursed to the district. According to the Commissioner, since the school district's costs were reimbursed, technically no district funds were used. However, the Commissioner "encouraged" the district "in the future to avoid even the appearance of impropriety".

B. Use of School Premises

In an appeal to the Commissioner (*Appeal of Krantz*, 38 Ed. Dept. Rep. 485 (1999)), 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 Ed. 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. In *Appeal of Lawson*, 38 Ed. Dept. Rep. 713 (1999), the complaint to the Commissioner of Education alleged that a school district 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. How-

ever, "[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 Ed. Dept. Rep. 713 (1999).

D. Holding Special Events at the Schoolhouse on Election Day

In *Appeal of Sowinski*, 34 Ed. Dept. Rep. 184 (1994), the Commissioner ruled that holding an "all-curriculum night", including a school concert on the night of the budget vote did not amount to electioneering, since the petitioner gave no proof that the district engaged in electioneering by targeting parents and students attending the concert to be held at the school for the vote. However, the Commissioner cautioned the board that if it chose to continue the practice of conducting a concert on the same evening as the date of the election, notice of the concert must be given to all district residents in the same manner (that is, not just to those district residents whom the board believes will be supportive of the propositions on the ballot).

If you have any further questions about these issues or about how to "navigate the waters" while getting out the vote, please feel free to contact us at (315) 437-7600 or (716) 875-1406.

State Funding for Education**Governor's Budget Proposal Available for Review Online**

The 2011-12 Executive Budget proposal has been posted at: <http://publications.budget.state.ny.us/eBudget1112/fy1112littlebook/index.html>.

Governor Cuomo's Executive Budget recommends \$19.4 billion in School Aid for the 2011-12 school year, which will be a year-to-year reduction in School Aid of \$1.5 billion, or 7.3 percent. Because education in New York is fi-

nanced primarily through a combination of State and local funding, the proposed reduction in State aid represents only 2.9 percent of the total op-

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State Funding for Education**Governor's Budget Proposal Available for Review Online (cont'd)**

erating expenditures projected to be made by school districts statewide during the 2010-11 school year.

The decrease in School Aid would be achieved through several actions:

- The Executive Budget recommends maintaining operating formula aid categories at current levels. The largest formula aid category is Foundation Aid, which is recommended to remain at \$14.9 billion. Foundation Aid represents the largest component of School Aid. Consistent with the recommenda-

tion advanced by the New York State Board of Regents to extend the phase-in of Foundation Aid, the Executive Budget recommends extending the full phase-in of Foundation Aid to the 2016-17 school year.

- The Executive Budget also recommends a \$2.8 billion Gap Elimination Adjustment (GEA) for the 2011-12 school year. This approach reduces school aid progressively, accounting for each school district's wealth, student need, administrative efficiency and residential property tax burden. Low-wealth districts would receive proportionately smaller reductions than high-wealth

districts. The Governor argues that through the progressive nature of the GEA, this approach, combined with future phase-in of Foundation Aid, will target State resources to those school districts with the greatest needs.

- The GEA is partially offset by \$305 million of growth in existing expense-based aids such as Building Aid, Transportation Aid and BOCES Aid.

For more information on the Governor's budget proposal and its possible impact on your District or BOCES, please feel free to contact us.

Special Education Update

Change at the Top: Paul Kelly resigned as the New York State Review Officer and was recently replaced by the new State Review Officer, Justyn P. Bates, Esq. It is too early to tell whether Mr. Bates' rulings will be significantly different from that of his predecessor. Many decisions seem to be consistent. Others, however, may be the beginning of a new trend. In particular, the new SRO seems to be placing particular emphasis on evidence that the CSE considered any and all of the evaluations obtained by the parents. Some recent decisions are reported below.

SRO Decision No. 10-101: The parent's challenge to an IEP was successful where the CSE failed to address the student's diagnosed central auditory processing deficit in the area of "figure-ground listening." The SRO held that the CSE did not adequately consider its impact upon the student's ability to perform in his 12:1 classroom. The CSE did not provide any additional supports

State Review Officer News

or assistive technology to filter out the background noise.

SRO Decision No. 10-095: The SRO overturned the Impartial Hearing Officer's finding that the student's IEP offered a free appropriate public education on the basis that the IEP did not accurately portray the student's "unique profile", especially in light of the information from the independent evaluations made available to the CSE. There was no evidence that the CSE discussed the independent evaluations. This is the second time that the SRO found an IEP inappropriate because it did not adequately identify the student's needs in light of private evaluations available to the CSE. In another recent case, the SRO found that the IEP did not sufficiently identify the student's needs, particularly in light of the private evaluations available to the CSE. Here, the IEP did not address the health, vitality and physical skills or limitations caused by the student's Post Traumatic Stress Disorder and diagno-

sis of colossal agenesis.

This case also involved a parent's claim to recover reimbursement from the school district for the tuition and other related costs associated with the parent's unilateral placement of the student in a private school. Federal and State law and regulations provide that any recovery of tuition can be denied or reduced if a parent does not provide the requisite 10 day notice to the district that the student will be unilaterally placed. The purpose of the notice requirement is to provide the school with an opportunity to reconsider whether the IEP is appropriate for the student and, if not, to modify the IEP before the student begins at the private school. Here, the Due Process Complaint notice initiating the impartial hearing to obtain tuition reimbursement was filed with the school district 10 days prior to the time that the student began at the private school. The SRO held that the

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Student Discipline

**State Review Officer
News (cont'd)**

Due Process Complaint notice served as the requisite 10 day notice to the school district.

SRO Decision No. 10-112: The SRO allowed the parent to select those pendency services desired for the child and to reject others. This matter involved a student transitioning from preschool to school-age services. As a preschool student, the student attended a 9:1:4 special education program with additional SEIT time and related services. The parent challenged the IEP developed for the student's kindergarten year and invoked the right to maintain the student's then current educational placement. However, the parent wanted only the SEIT and related services. The school argued unsuccessfully that the SEIT and related services were to complement the special education program and should not be available separately.

Finance Issues

**PILOTs, TIF's and PIF's: What Are They?
Why Should We Care?**

What is a PILOT? A PILOT Agreement is a "Payment in lieu of Tax" Agreement which commercial taxpayers can obtain through the local Industrial Developmental Agency (IDA). A School District should pay close attention to these arrangements because the property owner can have its real property either exempt from taxes or get a significant reduction on its real property taxes through a PILOT Agreement.

How would we (as a School District) know about a proposed PILOT Agreement? The IDA must send the School District Superintendent a notice if the IDA intends to deviate from its Policy. If your School District Superintendent receives a Notice, please be certain to contact our office as your School District has certain rights under the General Municipal Law. However, the School District must take action to protect its rights.

What are a TIF and a PIF? A TIF is "Tax Incentive Financing Agreement" and a PIF is "PILOT Incentive Financing Agreement". These are processes which permit a developer to divert either tax payments with a TIF or PILOT payments with a PIF from the local taxing jurisdictions to utilize the diverted money to help pay the development costs for the developer's proposed project. School districts have legal rights and options in these situations, as well. Districts should be notified about these proposed transactions either by the developer directly or by the local IDA.

If your school district is contacted about one of these projects, please contact Joseph Shields in our office to assist you in protecting your District's rights. Thousands and sometimes even millions of dollars in tax revenue can be at stake.

Upcoming Events

February 2011

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Joseph Shields	2/7/11	Client In-Service Program on <i>Ways to Successfully Complete a Capital Construction Project</i>
Susan Johns	2/17/11	Client In-service Program on <i>Special Education Issues Q & A</i>
Donald Budmen Eric Wilson	2/27/11	NYSCOSS Winter Institute (The Desmond Hotel, Albany, NY) Featured Presenters at 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 present a program for you, please contact us so we can schedule one to suit your needs.