

# School Law Matters

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

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## Hot Topics

## Attorney Spotlight

### Same-Sex Marriage Law Presents Challenges for Employers Complying with Federal and State Laws

Marc H. Reitz, Esq.

On June 24, 2011, the New York State Legislature passed -- and the Governor approved -- the Marriage Equality Act, authorizing same-sex marriage. The passage of this law extends certain rights to employees and places certain obligations on employers throughout the State. It also requires consideration of how certain federal laws may impact on those same rights and obligations.

The Marriage Equality Act provides that in all New York marriages each partner, regardless of sex, must be accorded the full rights and privileges of New York law. Specifically, the law provides:

No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. (Domestic Relations Law § 10-a.2.)

Prior to the passage of the Marriage Equality Act, New York had recognized same sex marriages for the application of certain benefits, provided that the marriage was legal in the location where it took place. In other words, if a same-sex couple married in Ontario, Canada, or in Massachusetts where same-sex marriages are legal, such marriage was considered a valid marriage for certain purposes in New York, e.g. health insurance. See *Martinez v.*

*County of Monroe*, 50 A.D.3d 180 (4<sup>th</sup> Dept. 2008). The Marriage Equality Act now makes clear that any right or privilege created by New York law that is dependent upon marital status is applicable to all marital partners regardless of the sex of the spouse.

While benefits such as health insurance and New York state pension rights are now clearly available to a spouse, regardless of whether the spouse is the same or different sex, there are still significant differences in treatment when federal statutes are reviewed. For example, while a New York employer must offer health insurance on the same basis to same sex marriage partners as is offered to different sex marriage partners, the federal tax treatment accorded will differ.

This is because of a federal statute entitled the Defense of Marriage Act (DOMA) which explicitly defines marriage as between partners of different sexes. Even though state law may authorize or recognize same sex marriage for state based benefits, DOMA prevents recognition of such benefits when based upon the interpretation of a federal statute. Thus, the health insurance contribution made for the spousal coverage for employer-provided health insurance is not subject to federal tax if made on behalf of a different sex spouse, but it is taxable if made on behalf of a same sex spouse. For New York state tax purposes, on the other hand, payment of such benefit by an employer is not subject to taxation under either scenario.

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**Marc H. Reitz**, one of our firm's founding partners, graduated from the Wharton School of Finance and Commerce, University of Pennsylvania, with a Bachelor of Science in

Economics in 1969. He pursued graduate work at Syracuse University's Maxwell School of Citizenship and Administration the following year. He then began work for the City of Syracuse, serving first as a Senior Budget Analyst, and for three years as Personnel Director for the City of Syracuse. In 1974, he continued his career with the Oswego County BOCES, where he served as Director of Employer/Employee Relations, negotiating labor contracts and working on grievance administration for the various component schools in Oswego County. While working at the Oswego BOCES, Mr. Reitz also attended Syracuse University College of Law. He received his J.D. degree, *cum laude*, in December 1977. Since June of 1978, he has practiced law, concentrating primarily on Public Sector Employment Law and Education Law. For the past 15 years, he has also been an adjunct Professor of Educational Administration at SUNY Cortland.

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**Hot Topics****Same-Sex Marriage Law Presents Challenges for Employers (cont'd)**

Under a strict statutory interpretation, the benefits afforded by the Family Medical Leave Act (FMLA) are federally-mandated benefits. Therefore, a spouse under FMLA, as defined by DOMA, does not include a same sex marriage partner. Accordingly, any FMLA benefit granted based upon a spousal relation is not available to same-sex spouses. It is important to remember, however, that while FMLA benefits are not mandated for same-sex spouses, there is nothing to precluding an employer from making such benefits available through policy or negotiations.

In implementing the benefits that must be accorded to participants in a same-sex marriage, employers must be careful to make sure that eligibility for such benefits is determined by the same criteria that are utilized when determining eligibility for benefits in a heterosexual marriage. If an employer has never required a participant in a heterosexual

marriage to produce a marriage certificate as proof of entitlement to enroll a spouse in a health insurance plan, it would be discriminatory to now ask a same sex spouse to provide proof of marriage. An employer can request proof of marriage, but if it does, such proof must be required for both same sex and different sex marriages.

A number of employers also have either collective bargaining agreements or policies that provide certain benefits for domestic partners. Such benefits were often extended in recognition that some relationships warranted the extension of some benefits to same sex partners, and that such benefits were not otherwise available since same sex partners could not marry. With the passage of the Marriage Equality Act, employers may want to consider whether such benefits should be continued since the legal impediment to extending such benefits to same sex partners no longer exists.

Finally, an employer may want to review its collective bargaining agreements to make sure that any contractual benefits accorded to spouses are made available to same sex marriage partners as well. For example if a labor contract has a provision allowing the use of sick leave for the illness or death of a spouse, that same benefit must be provided to the same sex spouse.

An employer must implement the benefits provided under the Marriage Equality Act. Failure to do so could result in a charge of discrimination based on marital status or sexual orientation. Policies should be reviewed and training implemented to make sure that the mandates of the statute are fulfilled.

If you have any questions or need assistance in reviewing or revising your policies, please feel free to contact us.

**School Finance****The Property Tax Cap — A Primer and Some Facts**

New York's "property tax cap" became a law on June 26. It likely will be a part of school districts' (except the Big 5) and local governments' (except New York City and its Counties) budget planning for many years. While there are some areas of uncertainty to be filled in over time, the main points are clear. This article discusses those points as an introduction and summary of the statute's operation.

Most of the provisions affecting school districts are set out in a new section of the Education Law – Section 2023-a (ominously similar to 3020-a). Some facts from the statute:

- The law is effective now and creates a formula for determining the maximum tax levy which will first impact the school levy for the 2012-2013 fiscal year.

- The cap applies to the total tax *levy* and has no direct impact on tax *rates*, which will vary as assessments change.
- The law establishes an "Allowable Levy Growth Factor" which limits the inflationary percent of increase of the levy from year to year. In general and subject to various adjustments and exclusions discussed below, the levy may not increase by more than the lower of 2% or the percent change in the cost of living over the last year (January to January). The prior year's levy, multiplied by this Allowable Levy Growth Factor and with adjustments discussed below is the "Tax Levy Limit" for the coming year. The growth factor will never require a decrease in the levy from year to year.
- Assessment growth from new construction, etc. (but not simply from

revaluation) as determined by the Commissioner of Taxation and Finance through ORPS, is factored into the formula and will allow a greater levy increase than would otherwise apply. Reductions in the assessment base do not reduce the Tax Levy Limit.

- PILOT payments are factored into the formula to neutralize the effect of fluctuating PILOT amounts.
- If a part of the Tax Levy Limit is not used in one year, up to 1.5% of the prior year's Tax Levy Limit can be carried over and added to the limit for the next year.
- The taxes in support of certain types of expenditures are excluded from the cap; these exclusions are not part of the Tax Levy Limit and are added to the tax levy for the

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## The Property Tax Cap — A Primer and Some Facts (cont'd)

year they are budgeted to be paid. The exclusions are:

- ◇ taxes necessary to pay court orders or judgments in “tort” lawsuits (those for damage or injury to person or property) for the amount of the order/judgment that exceeds 5% of the prior year total levy;
- ◇ taxes necessary to pay retirement contributions to ERS/TRS caused by rate increases of more than 2% from the prior year (the first 2% of a rate increase is not excluded from the cap);
- ◇ taxes necessary to pay the local share of capital projects and capital equipment purchases as well as transportation capital debt service; these include amounts budgeted to pay debt service or lease payments (apparently such as lease-purchase agreements for energy performance projects), subject to voter approval where required.
- The Tax Levy Limit must be disclosed in the Property Tax Report Card and the Budget Notice distributed before the budget vote.
- A budget which requires a tax levy greater than the Tax Levy Limit (not considering the capital and other exclusions) can be adopted if approved by at least 60% of the persons voting on the budget. If fewer than 60%, the budget is defeated.
- The same 60% rule applies to any Board- or Voter-presented propositions that require a tax which would result in a levy above the limit (excluding the capital and other items listed above).
- If the budget is defeated once, a revote may be scheduled or a final budget adopted by the Board. If a

revote is unsuccessful the Board must adopt a final budget. In the case of a final budget adopted by the Board and not voter-approved, the Board may not levy a tax that is greater than the prior year’s tax levy. The statute does not on its face allow adjustment of this levy for the exclusions (such as retirement payments and capital expenditures) nor for inflation or assessment growth.

- The Board-adopted final budget is also subject to the “contingency budget” limitation on the administrative component of the budget, but the other adjustments previously allowed in a contingency budget – such as 2% or CPI increase, capital expenditures, tax certiorari expenditures, etc. – have been repealed and replaced by the requirement that the levy may not be greater than the tax levied for the prior year.
- The calculations of a District’s tax cap must be made by March 31 and filed with the Comptroller, SED and the Commissioner of Taxation and Finance (ORPS); the calculation will be reviewed by SED and ORPS and corrections may be made.
- If the tax actually levied is erroneously greater than the tax levy limit, the excess amount must be reserved and applied to the next year’s levy.

These are the basic mechanics as stated in the legislation. We note several comments or questions that should be addressed before the law is fully implemented. Chief among them is whether a defeated budget truly must result in a levy no greater than the prior year’s levy, or can be adjusted by voter approved capital expenditures and the other “exclusions” listed above. If this is the true legislative intent, budgeting

will indeed become the newest high stakes test for school districts. Two “no” votes on the budget will limit the District to the amount of tax actually levied in the prior year and any capital expenditures coming on line after that will directly reduce the funds available for education.

As a further comment, it seems curious that court orders or judgments in tort cases may be excluded if over 5% of the prior year’s levy, but that tax certiorari judgments and contract disputes or civil rights cases of that magnitude may not. Tort lawsuits are typically covered by liability insurance, while contracts and tax certiorari claims are not, and damages paid because of civil rights lawsuits may also be outside of insurance coverage. The policy reason for limiting this “exclusion” to personal injury or property damage lawsuits while excluding tax certiorari matters is not readily apparent.

We note too that limiting the “inflation factor” to no more than 2% per year has the potential for catastrophic results in the future if inflationary pressures set in. A 5% or 10% rate of inflation for several years would potentially destroy a District’s ability to function unless the Legislature increases the inflation factor in the formula.

Like it or not, New York has joined many other states in acting to reduce the rate at which property taxes increase. The challenge for school administrators and school boards will be to maintain educational standards within the new financial limitations.

If you have any questions regarding the foregoing, please feel free to contact us at 315-437-7600.

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**Personnel News**

**Teacher and Principal Practice Rubrics Now Available**

The New York State Education Department (SED), as part of its implementation of the new requirements for annual professional performance reviews (APPR) of classroom teachers and building principals, recently posted its list of Approved Teacher Practice Rubrics and Approved Principal Practice Rubrics. As most of you are aware, the new law requires school districts and BOCES to use an approved rubric as an assessment tool for evaluating teachers and principals. School boards will have a choice among the approved rubrics, subject to negotiations with affected unions

In its announcement regarding the newly approved rubrics, SED reminds school boards that when selecting rubrics for use in the APPR, the District or BOCES is responsible for ensuring that evaluators have appropriate training—including training on the application and use of the rubrics—before conducting an APPR evaluation. The board is also responsible for certifying a lead evaluator as qualified before that lead evaluator conducts or completes a teacher’s or principal’s evaluation. (The requirements for evaluator training and certification are in §30-2.9 of the Commissioner’s regulations.)

School boards should note that most of the approved rubric providers charge a fee to license the rubric and associated support services. Further, all providers offer a range of optional services.

SED has posted its list of rubrics and associated costs on their website at <http://usny.nysed.gov/rttt/teachers-leaders/practicerubrics>. Districts and BOCES may wish to contact providers directly to discuss their specific needs for implementing their APPR plans.

If you have any questions, please feel free to contact us at 315-437-7600.

**Client Reminder**

**Be on the Lookout for Tax Cert Petitions**

Tax certioraris are proceedings in which taxpayers seek to lower or eliminate their real property assessments. These cases are usually brought against towns or counties and reference Article 7 of the Real Property Tax Law, so sometimes they are overlooked by school districts. However, their impact on school districts (where the property is located) can be

substantial. If an assessment is reduced, the district will receive less revenue from the property and may be forced to refund taxes already paid.

a timely fashion can lead to important deadlines being missed or perhaps even losing the chance to have a say in the financial resolution of the case.

To help avoid such revenue losses, it is a good idea to share any such petitions with your school attorney. Remember, failing to get involved in these cases in

If you receive a tax cert petition and have any questions or need assistance in responding, please do not hesitate to contact us.

**Upcoming Events**

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Susan Johns	8/22/11	Client In-Service Program on <i>Special Education - A District-Wide Perspective</i>
Henry Sobota	8/25/11	Client In-Service Program on <i>Annual Professional Performance Reviews (APPR)</i>
Marc Reitz Susan Johns	8/29/11	Client In-Service Program on <i>Recent Developments in School Law</i>
Benjamin Ferrara Dennis Barrett Henry Sobota Susan Johns Craig Atlas Joseph Shields Don Budmen Colleen Heinrich Eric Wilson Joseph Bufano	9/13/11	<b>The Study Council at SU &amp; NYSSBA Present the 35th Annual Education Law Conference - Preparing for Critical School Challenges and Implications: APPR, Parents' Rights, Business Operations, Impartial Hearings, Student/Staff Misconduct and More</b>

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.