

School Law Matters

NOVEMBER 2011



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

Route to: Board Personnel Instruction PPS Business Other: _____

Firm Events

Ferrara, Fiorenza Law Firm School Law Briefing Series Presents — Life Under the Tax Cap: What Are Your District's Options?

Legal Aspects, Publicity and Layoffs

New York's "real property tax cap" became a law on June 26. It likely will be a part of school districts' (except the "Big 5") budget planning for many years. While there are some areas of uncertainty that will have to be filled in over time, the main points are clear. Our Firm's December School Law Briefing will focus on these points and what options school districts have to address the fiscal problems it will undoubtedly create. The program will be presented on December 6 in Utica and Albany, December 8 in Syracuse and Rochester and December 13 in Watertown (see details below).

The first portion of the program will address the "nuts and bolts" of the tax cap law, including administering the tax cap and exceptions to the levy limit. Specifically, the discussion will include:

- an overview of the tax cap law;
- how to properly calculate the levy limit;
- exceptions in which a school district may exceed the levy limit; and
- how growth or decline in the tax base will impact the levy.

The second part of the briefing will involve a discussion of short-term and long-term impact of the tax cap on:

- budget development;
- contingency budgets;
- staffing; and
- program offerings.

It will also address what the law permits when gathering public support for your

district's budget as well as practical suggestions for minimizing the negative impact of the tax cap's limitations.

Finally, in light of the budgetary constraints caused by the tax cap, many school districts will have to consider layoffs of various personnel. This portion of the program will focus on how to avoid costly mistakes in the planning and implementation of reductions in force. It will include a discussion of:

- Tenure areas and seniority rights of teachers;
- Tenure areas and seniority rights of administrators;
- Layoff and recall of classified Civil Service employees;
- Collective bargaining and arbitration considerations; and
- Open Meetings Law and FOIL considerations.

The Briefing will be held in the following locations at the noted dates/times:

December 6

Utica 8:00 AM — 10:00 AM

Holiday Inn
1777 Burrstone Road
New Hartford, NY

Albany 2:00 PM — 4:00 PM

The Desmond
660 Albany Shaker Road
Albany, NY

December 8

Syracuse 8:00 AM — 10:00 AM

Hilton Garden Inn
6004 Fair Lakes Road
East Syracuse, NY

Rochester 2:00 PM — 4:00 PM

DoubleTree Rochester
1111 Jefferson Road
Rochester, NY

December 13

Watertown 2:00 PM — 4:00 PM

Hilton Garden Inn
1290 Arsenal Street
Watertown, NY

There is **NO REGISTRATION FEE** for any of the programs. However, space is limited and registration is necessary. Please register at our website www.ferrarafirm.com. Simply click on "School Law Briefing (Syracuse) or "School Law Briefing (Albany)", for example, from the Events Calendar on the far right column of 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 and providing your name, the name of your school district or organization and the names of all participants who will be attending.

In This Issue ...

- Life Under the Real Property Tax Cap: What Are Your District's Options
- Winter Holidays and the First Amendment
- Attorney Spotlight
- Law Enforcement Agencies Discontinuing Sex Offender Notifications
- Webinar on Mandatory Reporting Requirements for Superintendents
- Disciplining Employee for Facebook Postings May be Improper
- Upcoming Events

VISIT OUR WEBSITE AT WWW.FERRARAFIRM.COM OR CALL US AT 315-437-7600.

Hot Topics**Winter Holidays and the First Amendment****Susan T. Johns and Brian Hartmann**

The early winter months are marked by numerous holiday concerts, displays, and celebrations, which enliven the school environment and provide exciting learning opportunities in a number of subjects. However, holiday-themed events can also be a source of contention between the District and members of the community who object to what they see as the inclusion, exclusion, or perversion of religious beliefs.

The religion clauses of the First Amendment serve two purposes: the Free Exercise Clause ensures that people can practice their faith freely, and the Establishment Clause prevents the government—including public schools—from establishing or endorsing a religion. As many administrators have come to find, the First Amendment often works at cross-purposes in a school setting; by permitting overt religious displays, a school district runs the risk of violating the Establishment Clause, and by preventing children from creating such displays, it may run afoul of the Free Exercise Clause.

Complicating what is already a difficult legal issue is the reality that holiday displays and concerts in schools necessarily involve things of great importance, as there is little that concerns people more than the instruction of their children or their religious beliefs. Moreover, schools are often a source of identity for cities, towns, and villages, and public displays and concerts have the potential to convey certain ideas about what the community believes and what it deems important.

Because it is something that people care so deeply about, the content of holiday concerts and displays in schools has, on a number of occasions, caught the attention of the U.S. Supreme Court. The Court has made it clear that schools may teach about re-

ligion and its cultural significance, and may use religious symbols and songs in teaching about religion. However, schools may not carry out religious instruction and may not favor or denigrate one faith or belief over another. As long as a school maintains a neutral position on religion and is tolerant of all views, it is unlikely to run afoul of the First Amendment.

In practice, this means that it is permissible to limit or eliminate the use of overtly religious displays and references in favor of secular symbols of the holidays. If symbols or signs from a particular religious tradition are used, they should be balanced by those of other faiths, as well as appropriate secular signs. For example, a crèche or a menorah erected in isolation would likely be found unconstitutional if challenged. However, holiday displays that include a menorah, a star and crescent in recognition of the holy month of Ramadan, a Christmas tree topped with a star, and various secular decorations have been found to comport with both the Free Exercise Clause and the Establishment Clause. Additionally, in evaluating the context in which religious symbols are situated, administrators should be attentive to the religious intensity of the representation, ensuring that a display does not serve the purpose of proselytizing or endorsing of a religion.

The same reasoning has been applied to holiday concerts. Secular songs and themes are generally acceptable during these events. A school does not have to include or permit religious music at seasonal concerts, but if it does, such songs should be balanced with those of other faith traditions and secular music.

If you have any questions or need assistance in this regard, please contact us.

Attorney Spotlight

Susan T. Johns is a graduate of the College of Holy Cross and the Villanova University School of Law. Ms. Johns was admitted to the New York State Bar in 1985 and is admitted to practice before the U.S. District Courts for the Northern and Western Districts of New York, and the U.S. Court of Appeals for the Second Circuit. Her practice concentrates in civil litigation, employment and education law. As a significant part of her practice, she counsels and represents numerous school district clients in matters involving the education of children with disabilities and the application of Section 504 of the Rehabilitation Act. She is an adjunct instructor of Education Law in the Educational Leadership department at the State University of New York at Cortland.

Client Alert**Some Law Enforcement Agencies Discontinuing Notifications Regarding Sex Offenders**

The NYS Division of Criminal Justice Services (“DCJS”) has a new alert system regarding Level 2 and 3 Registered Sex Offenders. Your school district can sign up to receive free alerts by way of e-mail, text message or facsimile whenever offenders listed on the site move into or out of your community. However, given this new means of notice, some law enforcement agencies within the State have decided to discontinue notifying school districts when sex offenders move into their communities. You may want to contact local law enforcement agencies regarding their intentions in this regard.

You can register for notifications through the DCJS system at <http://criminaljustice.state.ny.us/nsor/nyalert.htm>. The service is available, not just to school districts, but to individuals as well.

Firm Events**FREE WEBINAR FOR CLIENTS AND FRIENDS****Mandatory Reporting Requirements for Superintendents**

It is a tragic reality that sometimes children are mistreated while at school. School employees and officials must be prepared to respond to these situations quickly and in accordance with state law. Article 23-B of the Education Law requires certain school employees to report allegations of child abuse in an educational setting. The law establishes a reporting process that must be followed. As recent headlines remind us, there are serious civil and even criminal penalties for failing to follow these rules. Join us on **December 28, 2011 at 11:00AM** for an hour-long webinar ad-

ressing Mandatory Reporting Requirements for all Superintendents. Specifically, the program will focus on:

- Legal Definition of Child Abuse and Neglect
- Mandatory Reporting Obligations
- Child Abuse in the Educational Setting
- Tips For Handling Disclosures of Abuse
- How to Avoid Allegations of Misconduct

There is **NO REGISTRATION FEE** for the webinar. Please register at our website **www.ferrarafirm.com**. Simply click on the event from the Events Calendar on the far right column of 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 and providing your name, the name of your school district or organization and the names of all participants who will be attending.

Social Media Issues**Disciplining Employees for Facebook Postings May Be Improper Practice**

While school districts are not subject to the rulings of the National Labor Relations Board (NLRB), the Public Employment Relations Board (PERB) tends to apply NLRB decisions in cases similar to those heard by the NLRB. This is especially true when the topic is one that PERB has not dealt with in the past. With that in mind, school officials should be aware of a recent NLRB decision concerning employee social media activity.

Recently, the NLRB required an employer to rehire five workers it had terminated after the workers posted derogatory comments about a co-worker and their employment with the company on Facebook. The NLRB found that the Facebook communications were a "concerted activity" that were protected by the National Labor Relations Act (NLRA).

This case involved five employees who worked for Hispanics United of Buffalo, Inc. (HUB), a non-profit that provides social services to its economically disadvantaged clients in the Hispanic community of Buffalo. One of the five made a posting on Facebook on a Saturday (outside of her normal working hours), in response to criticisms from another HUB employee named Lydia Cruz. Specifically, the employee posted on Facebook that "Lydia Cruz, a co-worker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?" The other four employees responded with their own Facebook postings, saying such things as "What the Hell, we don't have a life as is, What else can we do???" and "What the f. .. Try doing my job."

Cruz saw the posts and complained to

HUB's Executive Director, attempting to prompt HUB to terminate or at least discipline the Facebook posters. As a result, the five posters were terminated by the Executive Director. The five filed charges against HUB with the NLRB. HUB argued at the hearing that it terminated the five individual posters because: 1) Cruz had suffered a heart attack as a result of the Facebook comments, requiring HUB to have to pay Cruz compensation; and 2) the posts constituted bullying and harassment in violation of HUB's policies.

The NLRB Administrative Law Judge (ALJ) rejected HUB's rationale for the terminations, ruling that the employees had engaged in "protected concerted activity" thereby making their

Continued on the next page

SCHOOL LAW MATTERS is published by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com. © Copyright 2011 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part for other than internal use is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

Social Media Issues

Disciplining Employees for Facebook Postings May Be Improper Practice (cont'd)

terminations unlawful. The ALJ found it irrelevant that the workers were not trying to change their working conditions, that they did not communicate their concerns to HUB, and that there was no express evidence that the employees intended to take further organizing action. Nevertheless, the Judge concluded that employees simply "have a protected right to discuss matters affecting their employment amongst themselves." Based on these findings, the Judge ruled that HUB must offer all five employees reinstatement as well as back-pay compensation with interest.

To date, there are no reported PERB decisions involving Facebook postings. However, PERB has determined that off-duty communications (such as messages sent to employees' personal e-mail addresses) may be protected by the Taylor Law. It is an improper practice for an employer to discriminate or retaliate against an employee for engag-

ing in protected activity. In this regard, in our view it is likely that PERB would treat this issue the same as the NLRB.

However, New York State courts and PERB have held that the definition of "protected activity" under the Taylor Law is narrower than what is protected under the NLRA. This is because, unlike the NLRA, the Taylor Law does not protect employees who engage in concerted activities for the purpose of "other mutual aid or protection". In order for conduct to be protected by the Taylor Law, it must have some relationship with forming, joining or participating in an employee organization.

For example, a recent case involved the discipline of six employees who wore pink ribbons in the workplace to express their dislike of a supervisor. The employees called themselves members of the "I hate Teena club". PERB found that their conduct was not protected by the Taylor Law,

so their discipline was not an improper practice.

Nevertheless, employers should carefully review their social media policies and analyze any employment decisions based on employee activity on social media websites. As this case suggests, any social media postings that are related to work can potentially be considered "protected activity." Moreover, as public employers, school districts have the added concern that comments on social media sites may be considered protected speech under the U.S. Constitution. But that's an article for another time.

If you have any questions on social media issues, please feel free to call us at 315-437-7600.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Joseph Bufano	11/10/11	Client In-Service Program on <i>Dignity for All Students Act</i>
Marc Reitz	11/17/11 11/18/11	Client In-Service Program on <i>Dignity for All Students Act</i> Client In-Service Program on <i>Dignity for All Students Act</i>

◆◆◆◆ SAVE THESE DATES ◆◆◆◆

Firm School Law Briefing — Life Under the Tax Cap: What Are Your District's Options?

Marc Reitz	[12/6/11 12/6/11 12/8/11 12/8/11 12/13/11	Utica (8AM—10AM)	Our School Law Briefing will focus on understanding and addressing the legal issues related to the New York State Real Property Tax Cap and what school districts/BOCES can do to prepare for and withstand the limits it will impose. (See details on page 1.)
Henry Sobota		Albany (2PM—4PM)	
Norman Gross		Syracuse (8AM—10AM)	
Katherine Gavett		Rochester (2PM—4PM)	
		Watertown (2PM—4PM)	
Colleen Heinrich	12/28/11	Client and Friends Webinar on Mandatory Reporting Requirements for Superintendents (details on page 3).	

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.