School Law Matters

November 2012

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

New York's Iran Divestment Act: Know the Rules

Joseph G, Shields, Esq.

As a proactive measure in 2010, President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act into law blocking any companies that are linked to Iran's regime from winning contracts with the federal government. To conform with the federal government's efforts, New York's Governor Andrew Cuomo signed into law an expansion of the Iran Divestment Act, effective April 12, 2012 (hereinafter the "Act"). The purpose of the Act is to exclude companies that invest in Iran's energy sector from entering into contracts with State entities and its political subdivisions (i.e. school districts). Now, any person who engages in at least $20 million of investment activities with Iran is classified as a "non-responsive bidder" for services and commodities.

The Act amended the State Finance Law and the General Municipal Law by requiring a "checks and balances" certification component in procurement agreements. Under this legislation, the Commissioner of the Office of General Services (OGS) developed a list, which is updated every 180 days, of those entities classified as "non-responsive bidders." This list can be accessed at www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf. Each bidder or proposer on a school district contract must now certify that it is not on this OGS list. An entity classified as a "non-responsive bidder" cannot bid on a contract, renew a contract or accept the assignment of a contract.

In order to safeguard against contracting with any "non-responsive bidders," School Districts should create a certification form that is attached to all bid or proposer documents, and then incorporated into the final contract. A sample certification form is included with this newsletter (either attached to the email, if you receive it electronically or included with the hard copy). Be aware, however, that it is important that Districts check the entities list regularly and not rely solely on the certification documents received from a bidder or proposer.

If an entity cannot provide a certification form, the school is not automatically precluded from contracting with them. There are two limited circumstances where the District can still award the contract without certification, including:

- If the investment activities occurred prior to April 12, 2012, have not been expanded after that date and that entity has adopted, publicized and begun to implement a plan to divest itself of the investment, OR
- If the District determines that the procurement is necessary for the District to perform its functions and that absent this procurement, the District would be unable to obtain the goods/services the contract offers. Language regarding the absence of alternatives is required to be in writing and incorporated into a public document.

In short, the Act generally only requires school districts to take two affirmative steps: 1) develop a certification form used in all future procurement agreements and 2) regularly check the "non-responsive bidders" list on the OGS website. If you need assistance in responding to this new requirement or have additional questions about properly including a certification form in procurement agreements, please feel free to contact Joe Shields at 315-437-7600 or email him at jshields@ferrarafirm.com.

In This Issue …

- New York's Iran Divestment Act: Know the Rules
- Attorney Spotlight
- Constitutionality of Conducting Locker Searches Called Into Question by Recent Supreme Court Case
- Be on the Look-Out: Retail Drug Stores May Be Over-Valued in Your District
- Precise Compliance with Homeless Student Procedures Required
- Upcoming Events

Attorney Spotlight

Joseph G. Shields, a partner and member of the firm's Management Committee, has more than 20 years of experience in representing school districts and private sector clients in complex legal matters. Mr. Shields represents school districts in all aspects of Education Law, including all phases of capital construction projects from preparation of the bid documents, selection of responsible bidder to dispute resolution.

Mr. Shields also counsels clients on protecting school districts' real property tax base by defending complex commercial tax certiorari proceedings and negotiating payment-in-lieu-of-tax ("PILOT") agreements on behalf of school district clients. Mr. Shields successfully represented twenty-two school districts in Monroe County, New York in their challenge of that County's sales tax intercept option, which resulted in the school districts retaining $29.5 million from the sales tax sharing agreement.

Mr. Shields also lectures on successful and timely completion of capital projects, defense of school district real property tax base and other Education Law issues. In addition, he serves on the Board of Directors of the New York State Association of School Attorneys,

Search and Seizure

Constitutionality of Conducting Locker Searches Called Into Question by Recent Supreme Court Case

Our office has been made aware of a memorandum circulated by the New York State Police, Office of Division Counsel, regarding the impact of *United States v. Jones*, 132 S.Ct. 945 (2012) a recent United States Supreme Court decision. The memorandum states that the Court has expanded the definition of a search and that school districts can no longer conduct searches of lockers based solely on the understanding that students have no reasonable expectation of privacy in those lockers. The memorandum goes on to suggest that school districts revise their policies in conformance with the Court's decision.

As you may know, *Jones* did not involve a search in the school setting. Rather, the Court addressed the narrow issue of whether the installation and use of a GPS tracking device on a private vehicle constituted an unconstitutional search. While the Court was unanimous in holding that such action was a search, it was deeply divided as to why. Of the Court's nine justices, four based their decision exclusively on the police's physical invasion of the defendant's car, four argued that the police violated the defendant's reasonable expectations of privacy, and one expressed sympathy with aspects of both these approaches while arguing for a more sophisticated and modern approach to deciding search and seizure cases. Ultimately, the Court adopted the first line of reasoning and held that a physical intrusion into or onto someone's private property may constitute a search.

Our office is in the process of evaluating the full impact of both the Court's opinion in *Jones* and the Office of Division Counsel's memorandum. At this time, we are advising clients to refrain from revising their search policies. It is our opinion that lockers **are** school district property and, consequently, are not affected by the Court's ruling. Moreover, we understand that the State Police, Office of Division Counsel, is continuing to review the *Jones* decision and may revise the opinion it expressed in its memorandum.

We will be contacting the Office of Division Counsel as necessary to ensure that school districts and police have a clear understanding of when and how locker searches may be conducted, and will provide further updates as they become available. In the meantime, should you need to conduct a locker search, we recommend contacting our office so that we can review the situation and provide appropriate guidance.

Protecting Your Tax Base

Be on the Look-Out: Retail Drug Stores May Be Over-Valued in Your District

In recent years, numerous Article 7 Tax Certiorari challenges have been presented in Trial Courts around the State of New York challenging the methodology used to value retail drug stores. Historically, these stores have been valued like any other "big box" retail store – i.e., using the sales comparison and income capitalization approaches. In the "sales comparison" approach, the Appraiser derives his valuation of the subject property based upon a comparison with other like sales in the same geographic area and not too remote in time. In the "income capitalization" valuation approach the Appraiser's valuation is determined by considering the amount of net income a property generates in a year and dividing

Continued on the next page

Protecting Your Tax Base

Be on the Look-Out: Retail Drug Stores May Be Over-Valued in Your District (cont'd)

into that net income the rate of return an investor would naturally expect.

These traditional methodologies for valuation of national retail drug stores have been successfully challenged in a number of Third Department cases based upon a theory that national retail drug store properties (Rite Aid/Eckerds, CVS, etc.) are subject to above-market leases which do not reflect the property's actual market value. The leases on these properties encompass the costs of purchasing and assembling various pieces of real property (often at a premium), demolition of existing structures thereon, and construction costs for the new building – these are known as "build-to-suit" properties. Citing a large differential between the rents of national retail pharmacies and other retail establishments as evidence of the phenomena of national retail drug store chains purchasing and building at premium prices, proponents of the build-to-suit valuation methodology argue that the sale of other retail stores (purposely excluding national retail drug stores) are more reflective of true market value. Application of this valuation methodology generally has resulted in lower assessment values for national retail drug store properties.

Where successfully asserted, this "build-to-suit" valuation methodology has resulted in reductions of the valuation of national retail drug store properties 21% to 47% below the challenged assessments. The ramifications of this shift in valuation methodology are substantial for School Districts and other taxing municipalities. The ramifications could be even more consequential if other national retail chains can make the same or a similar argument.

The one area where this new "build-to-suit" methodology has been successfully overcome is where the defending municipalities can show a recent "arm's length sale" of the subject property, or the sale of a similar property in the same geographic area. When presented with such sales, the Courts have generally held that evidence of a recent arm's length sale of the subject property or a similar property is probably the best indicator of true market value (see *Matter of FMC Corp. [Peroxygen Chems. Div} v. Unmack*, 92 N.Y.2d at 189, 677 N.Y.S.2d 269, 699 N.E.2d 893; *Matter of Eckerd Corp. v. Gilchrist*, 44 A.D.3d at 1240, 843 N.Y.S.2d 871). Build-to-suit valuation proponents ignore recent sales data at their own peril.

Accordingly, School Districts (and other taxing municipalities) should be on the look-out for these proceedings, evaluate the potential impact on your tax base, and consider whether your interests might best be served by intervening to protect your tax base.

Homeless Students

Precise Compliance with Homeless Student Procedures Required

School administrators are sometimes faced with students who seek enrollment or transportation based upon the claim that they are homeless. The federal McKinney-Vento Homeless Assistance Act, Education Law section 3209 and certain regulations of the Commissioner of Education, list procedures for handling such claims and protections for students who are determined to be homeless. Recent decisions from the Commissioner have reinforced the need to follow these procedures with precision.

Where a student claims to be a homeless student as defined in federal and state law, the school must enroll or continue the enrollment of the student, and may conduct an investigation into the student's circumstances to determine whether the student meets the legal definition of a homeless student. If the district disputes the claim of homelessness, it must afford the student an opportunity to submit information in support of the claim before making a final determination on the issue.

If a final determination is reached that the student is not homeless, the district must advise the student of the right to appeal to the Commissioner and provide, through its homeless liaison, forms for and assistance with the filing of such an appeal. Because

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Homeless Students

Precise Compliance with Homeless Student Procedures Required (cont'd)

the homeless liaison's job is to assist the student and/or family through the process, it is best that the homeless liaison not be the administrator who conducts the investigation and renders the final determination.

In two recent decisions, Matter of G.S. and Matter of C.D. , the Commissioner reiterated the "importance of ensuring that the educational needs of this vulnerable population is met" by following the prescribed procedures set forth in the statute and regulations.

If you have questions about the procedures for handling a claim of student homelessness, please feel free to contact our office.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Craig Atlas	**11/7/12**	**Central New York Association of School Personnel Administrators meeting at O-C-M BOCES presenting on "*Retiree Health Insurance"***
Joseph Bufano	**11/13/12**	**Client In-Service Program on "Dignity for All Students Act"**
Benjamin Ferrara	**11/15/12**	**NYSCOSS - 2012 Legal Briefing — Surviving the Superintendency — Tips from Legal Experts at O-H-M BOCES presenting on "*Dealing with Routine Decisions" and the Legal Pitfalls That Can Accompany Them"***
Eric Wilson	**11/15/12**	**NYSCOSS - 2012 Legal Briefing — Surviving the Superintendency — Tips from Legal Experts at O-H-M BOCES presenting on *"Facing Potential Staff Reductions? Understand How the RIF Process Works for Professional and Non-Instructional Staff Under the Educational Law and Civil Service Law"***
Susan Johns	**11/15/12**	**NYSCOSS - 2012 Legal Briefing — Surviving the Superintendency — Tips from Legal Experts at O-H-M BOCES presenting on "*The ADA Amendments to Section 504 and the Expansion of Section 504 Protections"***
Joseph Bufano	**11/15/12**	**Client In-Service Program on "Dignity for All Students Act"**
Eric Wilson	**11/29/12**	**Sullivan County School Boards Association Dinner Meeting presenting on *"3020-a and APPR Reforms - First Year Implementation"***

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.