WPSBA
ED LAW 2022

PART 2 – MARCH 31ST

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PRESENTER CONTACT INFO

Candace J. Gomez, Esq.
Partner
Bond, Schoeneck & King, PLLC
1010 Franklin Avenue, Suite 200
Garden City, NY 11530
(516) 267-6336
CGomez@bsk.com

Melissa N. Knapp, Esq.
Partner
Thomas, Drohan, Waxman, Petgrow & Mayle, LLP
2517 Route 52
Hopewell Juncton, NY 12533
(845) 592-7000
mknapp@tdwpm.com

Emily J. Lucas, Esq.
Partner
Ingerman Smith, LLP
550 Mamaroneck Avenue, Suite 209
Harrison, NY 10528
914-777-1134
elucas@ingermansmith.com

Stephanie M. Roebuck, Esq.
Partner
Keane & Beane, P.C.
445 Hamilton Avenue
White Plains, NY 10601
(914) 946-4777
sroebuck@kblaw.com

David S. Shaw, Esq.
Partner
Shaw, Perelson May Lambert, LLP
115 Stevens Ave.
Valhalla, NY 10595
(914) 741-9870
dshaw@shawperelson.com

BOARD ELECTIONS – PRESENTING VS. PROMOTING THE BUDGET

Presented by:

Stephanie Roebuck
& Emily J. Lucas

THE BUDGET PROCESS

- Board required to adopt budget
- Budget must be made available to voters for review 14 days prior to budget vote
  - Budget must be in plain language and consistent with the Commissioner's Regulations
  - Budget must be presented in three components:
    - a program component;
    - a capital component; and
    - an administrative component

THE BUDGET PROCESS CONTINUED

- Budget must include appendices:
  - statement on administrative salaries
  - New York State report card
  - property tax report card
  - tax exemption report
- Board conducts public hearing on budget
  - Hearing held at least 7 days prior to but no more than 14 days before vote
- Board submits "Budget Notice" to all qualified voters no later than 6 days prior to meeting where school budget vote will occur

PERMISSIBLE COMMUNICATIONS CONCERNING THE BUDGET

"….To educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval …. Of any issue, worthy as it may be…."

Stern v. Kramarsky, 84 Misc. 2d 447 (1975)

- Boards must be vigilant in ensuring that district resources are not used, directly or indirectly to disseminate partisan information.

Appeal of Richard R. Cass, Jr., 46 Educ. Dept. Rep. 321, Decision No. 15,521 (2007)

PERMISSIBLE COMMUNICATIONS CONCERNING THE BUDGET

- The Board is permitted to present informational material to the voters in addition to the budget notice required by law
- The informational material must contain only objective, factual information
- Holding fundraiser at time of election does not constitute electioneering. These activities are permissible as long as the district gives notice to all residents in the same manner, not just those residents the Board believes will support the budget.

  Appeal of Diane Eckel, 46 Educ. Dept. Rep. 279, Decision No. 15,507 (2006).

- Individual Board members are permitted to comment on the budget/election in their individual capacities

  CAUTION: The Board member must CLEARLY distinguish personal views from those of the Board.

  - *See, Appeal of Glen W. Johnson*, 45 Educ. Dept. Rep. 469, Decision No. 15,384 (2006).

IMPERMISSIBLE COMMUNICATIONS CONCERNING THE ELECTION

While a board of education may disseminate information "reasonably necessary" to educate and inform voters, its use of district resources to distribute materials designed "to exhort the electorate to cast their ballots in support of a particular position advocated by the board" violates the constitutional prohibition against using public funds to promote a partisan position.

Phillips v. Maurer, 67 N.Y.2d 672 (1986)

EXAMPLES OF IMPERMISSIBLE COMMUNICATIONS

- Publishing information stating
  - "Vote Yes" on the budget
  - ***Opinions*** concerning the budget
- Targeting specific groups or individuals with information about the budget (e.g. use of automated telephone system to provide information to only parents of students)
  - The determination of whether school district officials have engaged in improper targeting of information to selective district voters for the purpose of affecting the result of a district election is a question of fact dependent upon the circumstances of each case.
- Attendance of district administrators, in their official capacities and during hours of employment with the district, at privately sponsored coffees that are closed to the general public for the purpose of providing information on a district presents the "appearance of partisan activity."

  Appeal of Goldin, 39 Educ. Dept. Rep. 323, Decision No. 14,250 (1999)
- Permitting the use of school property or resources for the purpose of advocating for the budget
  - Permitting the distribution of materials advocating for the budget in the back packs of students
  - Providing mailing labels to PTA for use in distributing materials

  Appeal of Hoey and Kosowski, 45 Educ. Dept. Rep. 501, Decision No. 15,394 (2006))

EXAMPLES OF STATEMENTS FOUND TO BE IMPERMISSIBLE
APPEAL OF DAVIS

- District newsletter that stated: "….A 'no' vote would impact the whole community, because solid property values are linked to good schools. Potential homebuyers would be discouraged by overcrowded classrooms and a lack of educational and extracurricular opportunities." The Commissioner found this statement clearly intended to persuade the public to vote "yes" by raising fears about the negative consequences of a "no" vote and not setting forth objective facts designed to educate or inform the public.

Appeal of Davis, 40 Educ. Dept Rep. 459, Decision No. 14,527 (2000).

EXAMPLES OF STATEMENTS FOUND TO BE IMPERMISSIBLE

APPEAL OF ECKERT

- "The proposed project is absolutely critical in order to halt further decay in our facilities. But more than that, it represents a cost-effective opportunity to invest in the future of West Irondequoit. It makes financial sense and practical sense. It will enhance the value and quality of our community. Most of all, it will support our students and teachers in their pursuit of academic excellence. Our children deserve no less."

- "The closer one looks, the more compelling and necessary this project becomes…"

- Superintendent speech where he utilizes the phrase "rally the team" in support of the passage of the proposition on which a vote will be held.

Appeal of Eckert, 40 Educ. Dept. Rep. 433, Decision No. 14,520 (2000)

EXAMPLES OF STATEMENTS FOUND TO BE IMPERMISSIBLE
APPEAL OF HUBBARD

- Superintendent statement in videotape thanking the community for supporting the prior year's budget and stating: "For the long term future of Greece, for the benefit of business stability and economic development, and for the renewal of our young families moving into our town, I believe that we must continue to pass school budgets and continue the positive momentum we now are experiencing"
- "The major improvements we are asking you to support include…."
- "We are also seeking your support for two propositions."
- "Through your input and with your support we will make even more improvements in our instructional program, education services and buildings."
- "In the new budget, we're asking for the community to support upgrading all of our middle school technology labs."
- "If we pass this budget, which We do hope we do, we will have window replacement on the western side of the building, and we would be looking forward to that."
- "The budget will result in a tax increase of ***only*** 1.9 percent."

Commissioner found these statements were not reasonably necessary to inform and educate the public about the proposed budget and propositions but instead improperly exhorted district residents to vote in favor of the budget and propositions.

Appeal of Hubbard, 39 Educ. Dept. Rep. 363, Decision No. 14,259 (1999)

CHALLENGES ALLEGING IMPROPER ADVOCACY

- Challenges concerning improper advocacy of the budget/election are made to the Commissioner of Education
- Person challenging the improper advocacy has the burden of proof in an Appeal to the Commissioner
- The person making the challenge is required to show that the "…. irregularities affected the outcome of the election, were so pervasive as to vitiate the electoral process, or demonstrate a clear and convincing picture or informality to the point of laxity in adherence to Education Law."
- In most instances, the issues which determine the outcome of the appeal are factual issues resulting in decisions on a case by case basis

ELECTIONEERING THE DAY OF THE VOTE

- Education Law Section 2031-a(2) – "no person shall do any electioneering within the polling place, or within one hundred feet therefrom…"
- Even if a petitioner can establish that improper electioneering occurred, there must also be a showing that the impropriety affected the outcome

  - *Appeal of Toure* – Commissioner found that a candidate did improperly address voters within the 100 feet of the polling place, but that the petitioner did not demonstrate that the statements influenced them to vote for her.

Appeal of Toure, 54 Educ. Dept. Rep. ____, Decision No. 16,660 (2014)

ELECTIONEERING ON THE DAY OF THE VOTE

- Candidates can speak to voters within the 100 feet zone around the polling place as long as they are not attempting to influence the vote

- A candidate admitted to speaking to voters within the 100-foot zone, but averred that he was not discussing the election or the budget vote. The Commissioner determined that there was no evidence of electioneering presented.

Appeal of Bentley, 51 Educ. Dept. Rep. __, Decision No. 16,356 (2012)

SCHOOL EVENTS THE DAY OF THE ELECTION

- Scheduling a district event at the same time as the election is not improper if the District gives notice to all district residents and not just those residents who will likely vote in favor of the budget (i.e., parents)
- Concerts, sporting events, and fundraisers open to the general public are likely proper as long as they are advertised to all residents of the district
- Events where only parents can attend are likely to be deemed improper, as the event would likely be seen as targeting specific voters

Appeal of Sowinski, 34 Educ. Dept. Rep. ___, Decision No. 13,276

QUESTIONS ?

FOIL OVERVIEW

Presented by:

Candace Gomez

WHAT IS FOIL?

- FOIL requires governmental agencies, including school districts, to enact rules and regulations governing the availability of records; to maintain certain records; and to make all records available for public inspection and copying except those specifically defined in statutory exceptions.
- FOIL can be found in the New York Public Officers Law Sections 84-90.

POLICY AND RULES

- Each school district must have written rules and regulations pertaining to the availability of records, including but not limited to:
  - The times and places records are available;
  - The persons from whom records may be obtained (e.g., the Records Access Officer); and
  - Fees for copies of records

INSPECTION AND COPYING

- Records must be available for inspection and copying at all reasonable times, *i.e.*, during all hours that the school district is regularly open for business. Any member of the public may inspect or obtain copies of school district records, whether or not he or she resides in the school district. Any person has the right to inspect accessible records at no charge. However, there may be situations in which some aspects of a record – but not the entire record – may be properly withheld. In that case, the school district may prepare a redacted copy and charge the established fee for the copy (i.e., $.25 per page).

WHAT ARE RECORDS?

- Under FOIL, a "record" is defined as "any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever."
- This can include, but is not limited to:
  - Letters/Emails
  - Text Messages
  - Personnel records
  - Vendor data, invoices, etc.
  - Voter Rolls
  - Audio Recordings of Board of Education Meetings

WHAT ARE RECORDS? CONT'D

- Are emails from a Board of Education member's personal emails discoverable under FOIL?
  - Yes.
- Are text messages sent between Board of Education members' personal cell phones discoverable under FOIL?
  - Yes.

The NYS Committee on Open Government has stated "electronic communications, such as e-mails or text messages that involve [school] business, whether stored on a government or a personal device, constitute 'records' that fall within the coverage of FOIL."

RECORDS THAT MUST BE MAINTAINED BY STATUTE

- A record of the final vote of each school board member or trustee in every proceeding in which the member votes;
- A record setting forth the name, public office address, title and salary of every officer or employee of the school district; and
- A reasonably detailed current list, by subject matter, of all records in the possession of the school district, whether or not available under FOIL. The subject matter list must be updated annually.

RECORDS TO BE MADE AVAILABLE

- Each school district must make available for public inspection and copying all records **except** those allowed to be withheld under law, specifically NYS Public Officers Law §87(2).

RECORDS THAT MAY BE WITHHELD

- Records that are specifically exempt from disclosure by state or federal statute (for example, student records covered by the Family Educational Rights and Privacy Act (FERPA) and attorney-client communications);
- Records that, if disclosed would constitute an unwarranted invasion of personal privacy pursuant to Public Officers Law Section 89(2);
- Records that, if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- Records that are trade secrets or are submitted to a school district by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise;

RECORDS THAT MAY BE WITHHELD CONT'D

- Records that are compiled for law enforcement purposes and which, if disclosed, would:
  - Interfere with law enforcement investigations or judicial proceedings;
  - Deprive a person of a right to a fair trial or impartial adjudication;
  - Identify a confidential source or disclose confidential information relating to a criminal investigation; or
  - Reveal criminal investigative techniques or procedures, except routine techniques and procedures
- Records that, if disclosed would endanger the life or safety of any person;

RECORDS THAT MAY BE WITHHELD CONT'D

- Inter-agency or intra-agency materials which are not:
  - Statistical or factual tabulations or data;
  - Instructions to staff that affect the public;
  - Final school district policy or determinations;
  - External audits, including but not limited to audits performed by the comptroller and the federal government
- Examination questions or answers which are requested prior to the final administration of such questions;
- Computer access codes;

RECORDS THAT MAY BE WITHHELD CONT'D

- Photocopies, microphotographs, videotapes or other recorded images prepared pursuant to the authority of Vehicle and Traffic Law Section 1111-a.

EXAMPLES OF RECORDS THAT MAY BE EXEMPT FROM DISCLOSURE

- ADA/FMLA leave related records
- Non-final disciplinary records, such as counseling memos, investigation notes, warnings, etc.
- APPR observations, data or final scores
- Medical treatment records
- Home addresses/phone numbers/personal email addresses
- Workers Compensation records
- Parts of resumes/CVs that are unrelated to the position for which the public employee was hired such as college GPA, marital status, hobbies, etc.

EXAMPLES OF RECORDS THAT MAY BE EXEMPT FROM DISCLOSURE CONT'D

- Application materials for unsuccessful job candidates
- Individualized Education Programs

WHAT IS AN UNWARRANTED INVASION OF PERSONAL PRIVACY?

- Under New York Public Officers Law §89(2), an unwarranted invasion of personal privacy includes, but shall not be limited to:
  - Disclosure of employment, medical or credit histories or personal references of applicants for employment;
  - Disclosure of items involving the medical or personal records of a client or patient in a medical facility;
  - Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
  - Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it

WHAT IS AN UNWARRANTED INVASION OF PERSONAL PRIVACY? CONT'D

- Information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;
- Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
- disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

PROCEDURES: RESPONDING TO A REQUEST

- The school district must respond to a written request for a record reasonable described within five (5) business days of receipt of the request by:
  - Making the record available to the person requesting it;
  - Denying the request in writing; or
  - Furnishing a written acknowledgement of the receipt of the request and a statement of the approximate date, which is reasonable under the circumstances of the request, when the request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with Public Officers Law Section 89(5).

PROCEDURES: RESPONDING TO A REQUEST

- If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, or if a school district delays responding for an unreasonable time after it acknowledges that a request has been received, a request may be considered to have been constructively denied. In such circumstances, the denial may be appealed.

PROCEDURES: EXTENSIONS

- If the school district determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person, within twenty (20) business days from the date of the acknowledgement of the receipt of the request, the school district mut state, in writing, the reason for the inability to grant the request within twenty (20) business days and a date certain within a reasonable period, when the request will be granted in whole or in part.

PROCEDURES: VOLUMINOUS REQUESTS

- Unfortunately, a school district cannot deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome. If the school district lacks sufficient staffing, it may engage an outside professional service to provide copying, programming, or other services required to provide the copy.

PROCEDURES: PRODUCING THE DOCUMENTS

- Upon payment of or an offer to pay the fee for copies, the school must produce a copy of the record and certify to the correctness of the copy, if requested, or certify that it does not have possession of the record or that the record cannot be found after a diligent search.

PROCEDURES: CREATING RECORDS

- The school district does not have to prepare a record that it does not possess or maintain. Although the school district does not have to create a record in response to a request, if portions of records (i.e., databases) can be extracted or generated from existing records with reasonable effort, the school district is required to do so. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer the record to the medium requested by a person is not deemed to be the preparation or creation of a new record.

PROCEDURES: FEES

- A fee of $.25 per page may be charged for copying.
- A school district may require payment of the requisite fees in advance of the preparation of copies of requested records.
- Districts cannot charge for employee copying/searching time.
- The Committee on Open Government has stated: "Based on the language of the statute, it is clear that the only fee that may be charged when a request involves photocopies of paper records up to nine by fourteen inches is a maximum of twenty-five cents per photocopy; no additional fee may be charged for employee time, for search, redactions, etc."

PROCEDURES: FEES CONT'D

- Employee time may be charged only when the request involves "other" records, those that are larger than nine by fourteen inches or which are maintained electronically, and even then, only in circumstances in which at least two hours of employee time are needed to prepare the records.
- The provisions concerning the actual cost of preparing copies of records specify that "preparing a copy shall not include search time or administrative costs" (*see* 87[1][c][iv]).
- A fee can be charged for the medium (e.g., a flash drive)

PROCEDURES: FEES CONT'D

- Employee time for electronic records can be charged if there is programming involved to cull a large database but only when at least two hours of an employee's time is necessary to prepare electronic copies.
- "If the document exists in electronic format and the agency has the authority and the ability to redact electronically, we believe it would be reasonable for the agency to provide the requested redacted copy at no charge, in light of the statutory fee provisions." – FOIL-AO-19103

PROCEDURES: ELECTRONIC DOCUMENTS

- "With respect to scanning paper records in order to transmit them via email, it is our view that if the agency has the ability to do so and when doing so will not involve effort additional to an alternative method of responding, it would be required to scan the records." – FOIL-AO-18620
- "When materials can be emailed there would be no fee because the records are not photocopied and a storage medium is not involved." – FOIL-AO-18620

ADMINISTRATIVE APPEAL

- Any person denied access to a record may appeal the denial within 30 days in writing to the school district's head or chief executive or governing body or individual designated by the school board to receive and decide such appeals.
- A response to the appeal must be made within ten (10) business days of receipt of the appeal and must fully explain in writing to the person requesting the record the reasons for further denial or access to the record sought must be provided.

ADMINISTRATIVE APPEAL CONT'D

- The school district must provide a "particularized and specific justification for denying access" or a "factual basis" for claiming an exemption.
- This appeal and the determination must be filed with the Committee on Open Government.

JUDICIAL APPEAL

- If a person is denied access in the appeal determination, or an appeal is made but a determination is not rendered within ten (10) business days of the appeal, s/he may bring a proceeding for review of the denial in State Supreme Court pursuant to CPLR Article 78.
- The court may award reasonable attorney's fees and other litigation costs against the school district if the person requesting the record substantially prevails.
- The Commissioner of Education has no jurisdiction over alleged violations of FOIL.

QUESTIONS ?

STUDENT SPEECH – MAHANOY DECISION & IMPLICATIONS

Presented by:

Candace Gomez,
Stephanie Roebuck,
Melissa Knapp,
David Shaw, &
Emily Lucas

MAHANOY AREA SCHOOL DISTRICT V. B.L. 141 S. CT. 2038 (2021)

- Status: Decided June 23, 2021
- Cert granted to resolve circuit split as to the applicability of the *Tinker* decision to off-campus speech. *Compare Bell v. Itawamba County School Board*, 782 F.3d 712 (5th Cir. 2015) (upholding student discipline for off-campus speech) *with B.L. Mahanoy Area School District*, 964 F.3d 170 (3d Cir. 2020) (striking down student discipline for off-campus speech).

QUESTION

Whether *Tinker v. Des Moines Independent Community School District*, which holds that public school officials may regulate student speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off-campus?

FACTS

- B.L. was a student at Mahanoy Area High School. She tried out for the cheerleading team during her freshman year of high school and made the junior varsity (JV) squad. She tried out again as a sophomore and was again assigned to the JV squad.
- B.L. was especially frustrated when she saw that a freshman had been promoted to the varsity team.
- Saturday, at a local store with friends, B.L. posts twice on Snapchat
  - In the First post, B.L. was with a friend and B.L. was holding out her middle fingers with the caption:
    - "F… School F… softball F… cheer F… everything"
  - In the Second post, the image was blank but it contained the caption:
    - "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji.

SCHOOL RESPONSE

- School officials learned of the post and SUSPENDED B.L. from the JV cheerleading team for the upcoming year.
  - School's rationale was that the post and caption violated team/school rules – respect for school, coaches, others; avoid foul language and inappropriate gestures; refrain from negative information regarding cheerleading on the internet AND
  - Requirement that students: "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner."

LAWSUIT

- B.L. argued:
  - 1. Her suspension from the team violated the First Amendment;
  - 2. The school and team rules she allegedly violated are overbroad and viewpoint discriminatory; and
  - 3. The school and team rules she allegedly violated are unconstitutionally vague.

THIRD CIRCUIT COURT OF APPEALS

- First Amendment provides: "Congress shall make no law … abridging the freedom of speech." U.S. Const. Amend. I
- Court addressed 2 questions:
  - 1. Was B.L.'s Snapchat message protected speech? If not, the analysis ends there.
  - 2. If yes, did B.L. validly waive that protection?
- 3d Circuit Court's answers:
  - 1. Snapchat message was protected speech.
  - 2. B.L. did not waive the First Amendment protection.

THIRD CIRCUIT RELIANCE ON *TINKER*

- The Third Circuit Court relied on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)
  - Tinker held:
    - Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
    - A narrow exception "in light of the special characteristics of the school environment" some forms of speech can "interfere … with the rights of other students to be secure and to be let alone."
    - School officials may regulate speech that "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of school.'"
- Third Circuit Court held that *Tinker* **does not apply to off-campus speech** – that is, speech that is outside school-owned, -operated, or –supervised channels and that is not reasonably interpreted as bearing the school's imprimatur. Because B.L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B.L. for engaging in a form of pure speech.

SUPREME COURT OF THE UNITED STATES

- The Supreme Court affirmed the decision of the Third Circuit Court of Appeals.
- The Supreme Court noted that: "Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. **The school's regulatory interests remain significant in some off-campus circumstances**."
- "Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, **we nonetheless agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed**."

MAHANOY PRINCIPLES ABOUT OFF-CAMPUS SPEECH

THE SUPREME COURT OPINED:

- **A school, in relation to off-campus speech, will rarely stand in loco parentis.** The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them.

- **Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.**

- **When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.**

- The school itself has an interest in protecting a student's **unpopular expression**, especially when the expression takes place off campus. **America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas**."

MAHANOY PRINCIPLES ABOUT OFF-CAMPUS SPEECH (CONT'D)

THE SUPREME COURT OPINED:

- **[Teaching Good Manners and Vulgarity].** The strength of the school district's anti-vulgarity interest is weakened considerably by the fact that the student spoke outside the school on her own time.
- **Disruption in the Classroom Standard]** The school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity.
- The Court found no evidence of "the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action.
- **The Court noted that the record showed that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats**
- **One of the coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No."**

MAHANOY PRINCIPLES ABOUT OFF-CAMPUS SPEECH (CONT'D)

THE SUPREME COURT OPINED:

- **[Team Morale** was asserted in defense of the school's action in suspending the student from the activity not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school."
- **The Court noted that there was little that suggests any serious decline in team morale**—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion.
- "**undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression**." Tinker, 393 U. S., at 508.
- The Court's decision calls for school administrators to take a hard look at the foreseeability of disruption to the educative process when making suspension decisions

MAHANOY PRINCIPLES ABOUT OFF-CAMPUS SPEECH (CONT'D)

THE SUPREME COURT OPINED:

- What off-campus conduct might be regulated by school authorities?
  - Incidents of significant bullying/harassment
  - Threats against teachers or students
  - Failure to follow school rule on cheating and hacking
- **Interplay between *Mahanoy* and DASA including Cyberbullying Ed Law §11(8) and 8 NYCRR§100.2(jj)**

QUESTIONS ?

THE EMPLOYMENT OF THE SUPERINTENDENT: THE HIRING PROCESS AND CONTRACTUAL PROVISIONS

Presented by:

Melissa Knapp &
David Shaw

BOARD POLICY & CBA CONSIDERATIONS

- The Board should review its employment related policies to assure that the solicitation of candidates comport with the protocols as stated.

  Equal opportunity policy

  Nondiscrimination policy

  Recruiting and Hiring policy

- Provisions in collective bargaining agreements ("CBAs") may require postings of administrative openings, including the position of Superintendent of Schools.

MEANS OF CONDUCTING THE SUPERINTENDENT'S SEARCH

- Superintendent's Searches are usually conducted through a professional search firm or through the BOCES.
- School Boards may choose to conduct a search through their own means using school district staff .
- When intending to engage a search firm or BOCES an RFP method should be used.
- An important element of the search process will be whether or not the search is considered to be "private" such that candidate identities will not be known until the final candidate is chosen.

MEANS OF CONDUCTING THE SUPERINTENDENT'S SEARCH

- The search consultants and BOCES search team may be interviewed in executive session prior to engagement.
- A contract that includes the time table for the search, the deliverables and payment schedule should be entered into if a search firm or BOCES is engaged.
- The manner in which the constituencies of the school community will be engaged is an important aspect of conducting the search.
- The development of the profile of the superintendent should be determined ahead of seeking applicants.

FORMAL BACKGROUND CHECKS

- If the Board is doing formal background check with a company the Board must comply with the requirements set forth in the federal Fair Credit Reporting Act..
- The applicant must be informed, in writing (in a stand alone format) that the information obtained may be used as part of decision making process.
- Informed of of his or her right to a description of the nature and scope of the investigation
- There must be written permission to do the background check.
- Certify to the company from which you are getting the report that you: (a) notified the applicant and got their permission to get a background report; (b) complied with all of the FCRA requirements; and (c) won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

CONSIDERATIONS DURING THE HIRING PROCESS

- New York law prohibits all employers - both public and private - from asking prospective or current employees about their salary history and compensation. It also prohibits businesses from seeking similar information from other sources.

- The law also prohibits an employer from relying on an applicant's salary history information as a factor in determining whether to interview or offer employment

- An applicant may voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer. If an applicant voluntarily discloses salary history information, the prospective employer may factor in that information in determining the salary for that person.

DURATION OF SUPERINTENDENT CONTRACTS

- In Westchester and Putnam Counties there are four categories of employing entities whose superintendents may be employed for the following terms:
- Union Free and Central School Districts: 3-5 years (Ed. Law 1711[3])
- Central School Districts: 3-5 years (Ed. Law 1711[3])
- Small City School Districts: 1-5 years (Ed. Law 2507[1])
- BOCES: Up to 3 years (Ed. Law 1950[4][a][1])

[Note: the executory period of the contract or contract extension may not exceed the maximum number of years described above. See *Lewiston-Porter CSD v. Sobol*, 154 A.D.2d777(1989). A Shorter contract terms would be void. See *Appeal of Greenstein,* 20 Ed. Dept. Rept. 304(1980)]

CONTRACT DURATION AND "EVERGREEN CLAUSES"

- Since contract extension agreements are lawful, contract language may include an ***Evergreen Clause*** that would automatically renew the agreement for an additional year or years, so long as the executory period of the extension would not exceed the permissible contract term.
- Where such clauses are agreed to there should be a notification requirement imposed upon the Superintendent to forewarn the Board of the approaching deadline that would trigger the extension.

[Sample Language:"For automatic extension of this agreement to occur, the Superintendent must notify the Board in writing of the date by which its decision to extend the agreement must be acted upon or else this automatic renewal provision shall be null and void ."]

CONTRACT RENEWAL & TERMINATION CLAUSES

- A common provision in the employment agreement is a **notification of intent to renew** for an additional year(s).
- A one year prior notice requirement is most common, but a longer period of notice is permissible.
- Additional language indicating that a failure to give notice of intent to renew the agreement shall not result in an automatic extension is important in order to avoid giving public notice that the agreement is not being extended. Otherwise, typically, an addendum agreement or new agreement would be voted upon at or about the time of the renewal notice deadline date.
- Superintendent's notice to voluntarily terminate the agreement is typically 4-6 months.

FAILURE TO EVALUATE AND CONTRACT RENEWAL

- In *Appeal of Wilson*, 47 Ed. Dept. Rep. 448(2008) a school superintendent appealed to the Commissioner to have her contract extended based upon a failure to implement the evaluation process in the Superintendent's Contract.
- The Commissioner denied the appeal noting that the automatic renewal provision in the contract was not dependent upon the outcome of the annual evaluation of the Superintendent required by the Commissioner's APPR Regulations at 8 NYCRR §100.2(o)(1)(iii)(a)(2)

SALARY AND DEFERRED COMPENSATION PROVISIONS

- Salary Determination based upon *comparables*, experience and with an eye towards retention.
- Future year increases may be based upon: [1] fixed percentage increases (e.g. tax cap percentage);[2] evaluation based increases and/or [3] goals acquisition based increases (to base or non-recurring bonus payment).
- Longevity based retention pay or deferred compensation
- Annual non-elective district contributions into the superintendent's IRC§403(b) tax sheltered annuity account. (Subject to the limitation of IRC §415(c) for all employee elective contributions into IRC §403(b) and §457 accounts, as well as the employer non-elective contribution into the §403[b] account)

EVALUATION & CRITICISM

- The Superintendent of Schools is subject to annual evaluation on a form typically subject to mutual agreement.
- If agreement cannot be reached the Board should have the contractual right to determine the evaluation instrument.
- The evaluation should be developed at the beginning of the school year and conducted to conclusion by no later than June.
- Most agreements have a contract clause that requires the Board to bring to the Superintendent's attention significant criticisms.

LEAVE BENEFITS IN SUPERINTENDENTS' AGREEMENTS

- Vacation Days*
- Sick Leave (meeting at least the statutory minimum of 10 annual and 150 accumulated of Ed. Law §3005-b)*
- Holidays
- Personal Leave
- Bereavement Leave

[Note 1: There are often provisions for payouts for vacation days, annually or upon separation/retirement. Sick leave payout provisions are also common features upon separation/retirement. Payments may be made into the Superintendent's IRC §403(b) account.

Note 2: According to the NYS Comptroller's audits, payouts should be prorated for days vesting in the final school year of employment for pre-June 30 separations See Report of NYS Comptroller 2007M-213.]

HEALTH INSURANCE BENEFITS

- **Health Insurance** - contract language references to health insurance plan participation and premium cost sharing during the period of active employment should be worded flexibly to assure participation in a plan that can be made available to the Superintendent (i.e., *"The Superintendent shall be entitled to participate in a District provided health insurance plan."*)
- **Retiree Health Insurance -** the agreement should clearly state the minimum period for vesting and participation in a District provided health insurance plan, as well as the premium share, conditioned upon retirement to receive benefits from the NYSTRS.
- **Medicare Reimbursement -** rights should be explicitly stated to be conditioned upon the Superintendent retiring from the District to receive benefits from the NYSTRS. (e.g., floor or standard Medicare Part B reimbursement)
- **Dental and Optical Insurance -** are often through union welfare benefits funds or a District provided plans.

HEALTH INSURANCE BENEFITS

- **Disability Insurance** - usually based upon a dollar limitation regarding the District's annual payment.

- **Life Insurance –** usually an individual or group term policy based upon a face value amount or a contractual provision with a specific dollar limitation regarding the District's annual payment.

[Note: The NYS Comptroller recommends several quotes where face value of insurance is contractually referenced]

STATUTORY RESTRICTION REGARDING "ME-TOO" PROVISIONS

- The Superintendent's Agreement may not have clauses that tie-into salary or benefits provisions from other employee contracts or collective bargaining agreements:
- Education Law Section 1711(3)
- Education Law 2507(1)

The contract terms "relating to an increase in salary, compensation or other benefits, shall not be based on or tied to the terms of any contract or collective bargaining agreement that the board of education has or will enter with the teachers or other employees of the school district."

TERMINATION PROVISIONS

- **"For Cause" Termination** – based upon conducting a due process proceeding that may be held in private, preceded by a probable cause finding by the Board of Education.
- Typically a Board appointed hearing office presides and makes a report with recommendations for Board action on the charges and whether or not the contract may be terminated.
- Pay rights are typically continued during the pendency of the proceedings.

- **"No-Fault Termination" –** Usually a feature in longer term contracts, allowing for placement on a paid leave of absence with a duty of due diligence to seek comparable employment elsewhere before the final contract year.

RESIDENCY REQUIREMENTS & MOVING EXPENSES

- **Residency** - may be required either within the boundaries of the school district or within a radial milage distance from the District Offices. (e.g. 30-40 miles)
- Failure to meet a residency deadline could result in the automatic discontinuation of the contract, without invoking the *for cause* due process hearing provision (e.g., where residency outside of the district is undisputed after inquiry)*. See *Appeal of D.* C. 48 Ed. Dept Rep 113, Decision No.15,809(2008)

* Minimal Due Process as described in *Cleveland Bd. of Educ. v, Loudermill,* 470 532(1985)

RESIDENCY REQUIREMENTS & MOVING EXPENSES

- **Moving Expenses** – A fixed upper limit cost should be established and a requirement for there to be at least three price quotes from reputable moving companies.
- These expenses may include the cost of temporary housing while exploring rental or purchase opportunities.
- A time limit on when such costs may be reimbursable is a common provision.

NYSED REQUIREMENTS

- **Certification –** The Superintendent of Schools must maintain certification as required by NYSED (School District Administrator ["SDA"]or School District Leader ["SDL"])
- **Distinguished Educator Clause -** Pursuant to Ed. Law §211-b(5)(a) all contracts with superintendents must specify that the superintendent shall be required to cooperate fully with any distinguished educator appointed by the commissioner to work with the District for its improvement as per Ed. Law §211-c.

MEDICAL EXAMINATIONS

- A post offer of employment and pre-employment medical examination for fitness to serve as Superintendent is a common provision in Superintendent's Contracts.
- Some agreements provide for the annual examination of the Superintendent at school district expense (i.e., reimbursement for uninsured expenses.
- For purposes of compliance with the Americans with Disabilities Act, post employment medical examinations may not be compelled unless there's a reasonable basis to direct the examination (informed by a medical professional) in accordance with Ed. Law §913.

INDEMNIFICATION

- The contract usually contains a provision that the Superintendent will be afforded the indemnification provisions in the following statutory provisions:

Education Law 3023 – Negligent Acts

Education Law 3028 – Corporal Punishment

Education Law 3811v - Intentional Acts

Pub. Officers Law §18 – Civil Actions and Proceedings

[Note: Language may not be added to indemnify against punitive damages due to public policy restrictions under NY Law]

EQUIPMENT AND TRANSPORTATION

- The Superintendent is usually provided with a District owned computer for business use and a District paid for cell phone for business use and incidental personal use.
- Some contracts provide for the business use of a personal cellphone via monthly payment.
- The business use of personal vehicle for out of district travel is usually paid for at the current IRS mileage rate.
- Car allowances are common and usually range between $400 and $700 per month.

QUESTIONS ?

LABOR NEGOTIATIONS AND PERSONNEL MATTERS: LESSONS LEARNED FROM THE COVID-19 PANDEMIC

Presented by:

David Shaw &
Emily Lucas

INTRODUCTION

The COVID-19 Pandemic ushered in lengthy periods of disruption to the educational processes in New York's Schools not seen before in our lifetimes. There were major shifts in operational decision making from the local school district level to the Governor's Office and the State Education Department.

The effects of the Pandemic tested school district employers and their unions, as well at the supervisory relationship between school management and employees.

INTRODUCTION

How students were expected to learn and how teachers were called upon to teach, stretched the resources of parents in having to supervise remote instruction and teachers having to plan for in-person and remote learners at the same time, while classroom closures could materialize in an instant.

REMOTE INSTRUCTION ISSUES

In July 2020, the New York State Education Department ("NYSED") issued school reopening guidance that called for local school districts and BOCES to plan for instruction in several modes:

[1] synchronous live streaming;

[2] hybrid (some students in the classroom and other remote at home); and

[3] push-out instructional materials.

The Taylor Law Question: Did the school districts and BOCES have the right to unilaterally determine which option to employ for the delivery of instruction?

METHOD OF INSTRUCTION UNDER THE TAYLOR LAW

In the past, distance learning was typically the exporting of video instruction from one classroom to another in a different school district and the matter was considered to be a mandatory subject of bargaining, except when the multiple classrooms were in more than one school district pursuant to a BOCES CoSer Agreement.

Webster Central School District v. Webster Teachers Association, 75 N.Y.2d 619 (1990).

Exporting instruction to classmates while at home from their classroom has been accepted as a school district right to implement unilaterally.

Long standing PERB precedent informs that the method of instruction is a non-mandatory subject of bargaining. *Somers C.S.D.*, 9 PERB ¶ 3005 (1976)

THE CONTOURS OF THE INSTRUCTIONAL DAY

During the time of remote instruction in 2019-20 and the transitional period of returning to the classroom during the 2020-21 School Year, school districts and BOCES implemented shortened periods, alternate class/remote days and deep cleaning days. Issues were raised regarding the change to reduced length of periods and the number of classes instructed each day.

The Taylor Law Question: Did the number of classes taught and the length of periods have to be negotiated?

THE CONTOURS OF THE INSTRUCTIONAL DAY (CONT'D)

In the absence of contract language prescribing the length and number of periods during the workday the District has the right to determine the length and number of periods to be taught during the workday. Contractually defined duty-free time (lunch and perhaps prep time depending upon the language) couldn't be unilaterally changed. *Cohoes CSD*, 12 PERB¶3113 (1079), *Wyandanch CSD*, 16 PERB¶3012 (1983), *Greece CSD*, 22 PERB¶3005 (2002)

Teachers' unions did not challenge shorter periods where contract language specified longer periods!

WHERE IS TEACHING TO ORIGINATE FROM

When student instruction was wholly remote, but teachers were deemed to be essential employees, the location of the teacher for instructional purposes became an issue.

The Taylor Law Questions: Could teachers be required to come to work to teach? Could they be required to teach from their homes?

If the buildings were open there was no question about the right of the employer to have the teachers report to work and instruct from their classrooms or other school facilities.

Instructing from home when buildings were closed, as a job requirement, was a question unanswered by Taylor Law precedent and remains as such. School Districts relied on cases that might support the requirement for instructing from home in order to carry out the mission of education.

County of Orange, 9 PERB ¶3068 (1976) and *New York CSD*, 21 PERB ¶3068 (1988)

LIVESTREAMING FROM THE CLASSROOM

The issues that emerged based upon the teacher having to export synchronous live stream instruction included:

- The FERPA rights of students appearing on the video – directory information provisions in policy are key.
- Teacher responsibility for the maintenance of the video device
- Teacher camera presence during instruction – negotiable
- Teacher Evaluation when all students or some are remote (APPR, etc.)*

*NYSED Opined such observation could count towards APPR

CONTEMPORARY ISSUES REGARDING LIVE STREAMING INSTRUCTION

Great opposition has been presented by teachers' unions to avoid hybrid instruction requirements for students who are medically fragile or isolated due to COVID-19 infection. There has been less opposition to hybrid instruction for students in precautionary quarantine.

The parties have universally agreed that hybrid instruction should not be extended to vacationer whose stay exceeds the return to school date.

CONTEMPORARY ISSUES REGARDING LIVE STREAMING INSTRUCTION

Video Recording of Livestreamed Lessons and job security concerns:

- Could whole courses be recorded for reuse?
- Who owns the intellectual property rights to lesson plans?
- Work product produced for the school district is the intellectual property of the school district. *Shaul v. Cherry Valley-Springfield CSD*, 266 F.3d 71 (2004)

EMPLOYEE ACCOMMODATIONS: MEDICAL AND RELIGIOUS

- The Equal Employment Opportunity Commission (EEOC) recognized an employee's right to seek a medical or religious exemption to a mandated COVID-19 vaccination. "Reasonable Accommodation"
- Employees continue to be eligible for "reasonable accommodations" in the workplace due to the pandemic.
- School districts must engage in an "interactive dialogue" with employees requesting any type of reasonable accommodation in the workplace.
- "Interactive dialogue" must occur prior to any denial.

EMPLOYEE ACCOMMODATIONS: MEDICAL AND RELIGIOUS

- School districts may deny requested accommodations based upon a showing of "undue hardship" to the employer.
  - Fundamentally alters the nature or operation of the business.
  - Is extensive, substantial or disruptive
  - Would cause significant difficulties to implement
  - Is unduly costly *29 C.F.R. §1630.2(p)*
    - Includes requests for medical and/or religious exemptions
    - "In-person" instruction (lack of remote options) & denial of remote option
    - Need to be "in close proximity" to vulnerable students & denial of remote option

EMPLOYEE ACCOMMODATIONS: MEDICAL AND RELIGIOUS

- School districts may also review request for an accommodation and offer an alternative as long as it is a "reasonable accommodation" under the circumstances.
  - KN95 mask
  - Shields
  - Cleaning supplies
  - Remaining in one classroom
  - Leave of absence

EMPLOYEE ACCOMMODATIONS: MEDICAL AND RELIGIOUS

- What is deemed to be unreasonable?
  - **Removing an essential function of the job** (e.g. teaching!, working with special needs students, delivering related services, etc.)
  - **Lowering performance expectations** *29 C.F.R. §1630.2(n); See also, EEOC Guidance, The Americans with Disability Act: Applying Performance and Conduct Standards to Employees with Disabilities*
  - **Excusing misconduct, performance deficiencies or rescinding legitimate disciplinary action**. *29 C.F.R. 1630.2(n); See also, EEOC Guidance, The Americans with Disability Act: Applying Performance and Conduct Standards to Employees with Disabilities*
  - Changing an employee's supervisor if retaining current job.
  - A request to work from home due to a vulnerable family member at home is not a "reasonable accommodation". *Corwin v. City of New York*, 2020 WL 5745617 (2020)

TENURE CONFERRAL AFFECTED BY THE COVID-19 PANDEMIC

- Changes have been made to Education Law §3012 for awarding tenure to classroom teachers and building principals in the absence of Annual APPR Ratings in 2019-20 & 2020-21:
  - Suspension of the three-year requirement for effective or highly effective ratings in favor of one year or two years depending on their date of hire.
  - The rating in the tenure year may not be ineffective.
  - Juul Agreement is an option if the tenure year is rated ineffective.

THE NON-SALARY COST FACTORS

Change in the TRS Rate:

2021-22: 9.80%

2022-23: 10.29%

Change in the NYSLRS (ERS) Rate:

2021-22 16.2%

2022-23 11.6%

THE NON-SALARY COSTS

Health Insurance Plan Increases:

NYSHIP	1.1.22	12%
PNW PLAN	7.1.22	9.0%
SWSCHP	7.1.22	1.5%

MEDICARE PART B
2022 RATES

	Individual Income	Joint Income	Premium Rate
"Standard or Floor"	$91,000 or less	$182,000 or less	$170/mo
First IRMAA Tier	Above $91,000 up to $114,000	Above $182,000 up to $228,000	$238.10/mo
Second IRMAA Tier	Above $114,000 up to $142,000	Above $228,000 up to $284,000	$340.20/mo
Third IRMAA Tier	Above $142,000 up to $170,000	Above $284,000 up to $340,000	$442.30/mo
Fourth IRMAA Tier	Above $170,000 up to $500,000	Above $240,000 up to $750,000	$544.30/mo
Fifth IRMAA Tier	$500,000 or above	Above $750,000	$578.30/mo

QUESTIONS ?