

EXPLORING RECENT LEGAL TRENDS

UPDATE ON NEW YORK SCHOOL DISTRICT BOND FINANCING AND OTHER MISCELLANEOUS OBSERVATIONS

*

*

*

**Presented at the Fall Leadership Summit of the
New York State Council of School Superintendents
Rochester Riverside Convention Center**

October 4, 2009

Martin A. Geiger, Esq.

**Hawkins Delafield & Wood LLP
One Chase Manhattan Plaza
New York, New York 10005
mgeiger@hawkins.com
(212) 820-9406**

I. Miscellaneous Observations (Anecdotes and Suggestions)

(A) Bond Project scope of work

- (1) Meeting the legal requirements**
- (2) Retaining a measure of flexibility**
- (3) What to do with excess bond proceeds?**
- (4) Pitfalls:**

(a) failure to plan the project scope and/or estimate costs properly

(b) changing the project scope AFTER the referendum

(c) consequences of failure to comply with SEQRA

(B) Bond Referenda

- (1) Promotional activities - use of school district property and funds**
- (2) Procedural requirements**
- (3) Pitfalls:**

(a) misstatements about State aid in literature

(b) misstatements about tax impact in literature

(c) letters from school administrators

(d) absentee ballot procedure

(e) coercive voting

(f) private tea parties

(g) Appeal of Lanzilotta (see: Attachment A)

(C) Bond Offering Disclosure Materials

- (1) Official Statement - An offering statement prepared by or on behalf of the school district which provides a description of the debt obligations to be sold and the security therefore; financial, economic, and demographic information of the school district; as well as other information which may be helpful to potential purchasers of the schools district's bonds and notes.**

(2) Continuing Disclosure - A written agreement of the school district for the benefit of the holders and owners of school district obligations to periodically provide certain updated financial, economic and demographic information.

(a) Who are you relying on for substance and accuracy of information?

(b) Who should be reading the information?

(c) Don't be reluctant to question anything.

(d) New Rules

(D) Bond Debt Service - paying promptly when due

(1) Yes, this is a problem for some school districts!

(2) What is your fail-safe procedure?

(3) Pitfalls:

(a) waiting for a letter from someone

(b) relying on someone else in the business office

(c) failure to plan ahead

(E) IRS Compliance Checks (see: Attachment B)

(1) Are you on their list?

(2) What you will receive from the IRS (see: Attachment C)

(3) What to do if you hear from the IRS

II. Current Events - The American Recovery and Reinvestment Act of 2009 (ARRA)

(A) Purpose of the School Bond Provisions of ARRA

- (1) Expand marketability of school district bonds - the taxable bond market**
- (2) Allow school districts to access new markets and expand universe of investors**
- (3) Not intended to be a substitute for the tax exempt bond market**

(B) ARRA Provision Highlights Relating to School Districts

- (1) Creates two new types of bonds for school districts**
 - (a) Build America Bonds (“BABs”)**
 - (b) Qualified School Construction Bonds (“QSCBs”)**
- (2) Increases national bond volume allocation of Qualified Zone Academy Bonds (“QZABs”) from \$400 million to \$1.4 billion for 2009 and 2010**
- (3) Increases bank qualification eligibility from \$10 million to \$30 million for 2009 and 2010**

(C) Build America Bonds - BABs

- (1) Available only in 2009 and 2010.**
- (2) No bond volume limitation on amount of BABs**
- (3) Proceeds may be used to finance school district capital expenditures**
- (4) School districts may elect to issue BABs in lieu of tax exempt bonds**
- (5) BABs are taxable bonds**
 - (a) They may be sold with de minimus original issue premium**
 - (b) They are subject to most arbitrage and rebate regulations**
 - (c) They are still treated as tax exempt for State law tax purpose**

(6) TWO DISTINCT TYPES OF BABs

(a) First Type - Bondowners receive a tax credit

- (i) Owner of BABs receives a tax credit equal to 35% of the interest payable on the BABs**
- (ii) Tax credit accrues on each interest payment date**
- (iii) Unused tax credit may be carried forward**
- (iv) Interest on BABs is included in gross income of bondowner**
- (v) These BABs may be used for new money borrowings or refundings**

(b) Second Type - School district receives subsidy payment

- (i) In lieu of providing tax credits to bondowners, school district may elect to receive payments from Treasury Department equal to 35% of interest paid on BABs**
- (ii) Payments to be made to school district on each interest payment date**
- (iii) These BABs may be used ONLY for new money capital expenditures (and not for refundings)**

(D) Qualified School Construction Bond - QSCBs

- (1) Owners of QSCBs receive a tax credit, based on a tax credit rate set by U.S. Treasury that would permit issuance of QSCBs at par**
- (2) Available only in 2009 and 2010**
- (3) National bond volume limitation of \$11 billion each year**
 - (a) Amount available to all New York State school districts other than Buffalo, Rochester and New York City is \$192,049,000, for each of the years 2009 and 2010**
 - (b) What is happening with NYS's \$192,049,000???**

- (4) Proceeds may be used to finance new construction, reconstruction (rehabilitation and repair), and land acquisition**
- (5) Maximum maturity of QSCBs to be determined by U.S. Treasury**
- (6) BABs are taxable bonds**
 - (a) They are subject to most arbitrage and rebate regulations**
 - (b) They are still treated as tax exempt for State law purposes**

(E) Qualified Zone Academy Bonds - QZABs

- (1) Owners of QZABs receive a tax credit, based on a tax credit rate set by Treasury that would permit issuance of QZABs at par**
- (2) This is an ongoing program for school districts that have at least 35% of students qualifying for free or reduced lunch program**
- (3) Proceeds may be used to finance reconstruction (rehabilitation or repair), equipment, developing course materials, and related teacher and personnel training**
- (4) Requires private contribution equal to at least 10% of the amount of the QZAB bond issue**
- (5) New York State allocation increased from approximately \$28 million to approximately \$90 million for 2009 and 2010 - SED allocates based on an existing application process
(see: <http://www.emsc.nysed.gov/facplan/QZAB/QZAB.html>)**
- (6) Maximum maturity of QSCBs to be determined by Treasury**
- (7) QZABs are taxable bonds**
 - (a) They are subject to most arbitrage and rebate regulations**
 - (b) They are still treated as tax exempt for State law**



PHONE (212) 820-9300
FAX (212) 514-8425

ONE CHASE MANHATTAN PLAZA
NEW YORK, NY 10005
WWW.HAWKINS.COM

NEW YORK
WASHINGTON
NEWARK
HARTFORD
LOS ANGELES
SACRAMENTO
SAN FRANCISCO

MARTIN A. GEIGER

Martin Geiger is a Partner and Member of the Management Committee of Hawkins, Delafield & Wood LLP, a national law firm specializing in public finance law. He joined the firm in 1974 as an Associate, and has been a Partner since 1986. He is head of the firm's New York local government and school district practice, representing as Bond Counsel hundreds of municipalities and school districts in New York State.

He attended public schools in Harrison (NY), and was graduated from Phillips Academy, Andover (MA), University of Rochester (NY), and New York University School of Law where is received his J.D. in 1974.

He has considerable experience and expertise in the field of general obligation (property tax supported) financings. With principal responsibility for the firm's New York State school district and local government financing practice, during his career with the firm he has worked on numerous general obligation bond issues as Bond Counsel to school districts and municipalities in the State of New York, and has been the principal draftsman of certain legislation relating to public finance matters which have been enacted in New York.

Mr. Geiger currently devotes the principal portion of his time to representing school districts in New York State with respect to their various financings. He has served as Bond Counsel with respect to the issuance of billions of dollars and school bonds and notes, including several of the largest school bond issues approved by voters in New York State at public referendum.

He has frequently addressed conventions and meetings of various school district associations and organizations. He has been a guest lecturer at the Hofstra (Long Island) University School Business Affairs Institute, C.W. Post (Long Island), the State University at Albany program for aspiring school business officials, and at the annual Summer Business Management Workshop in Albany, co-sponsored by the New York State Education Department and the New York State Association of School Business Officials ("NYSASBO"). He presents a variety of programs, on a periodic and informal basis, to various local government and school district groups.

He has served as a member of the Legal Ethics Committee of NYSASBO and currently is a member of its Business Associate Committee. He is also a member of ASBO International and has been a lecturer and presenter at ASBO International Annual Conventions in Boston, Phoenix, Pittsburgh, San Diego and Vancouver, B.C.

Mr. Geiger represents the firm at functions sponsored by the American Association of School Administrators, the New York State Council of School Superintendents, NYSASBO, ASBO International, the National School Boards Association and the New York State School Boards Association. He is a member of the New York State Bar Association and the Government Finance Officers Association.

Contact Information: One Chase Manhattan Plaza, New York, New York 10005; (212) 820-9406; mgeiger@hawkins.com

ATTACHMENTS

- A** *Appeal of Lanzilotta* - decision dated March 26, 2009
- B** Articles from “The Bond Buyer” about IRS Compliance Inquiries
- C** Sample IRS Compliance Inquiry materials
- D** Highlights of Major Provisions of The American Recovery and Reinvestment Act of 2009 pertaining to tax-exempt bonds and certain other matters, prepared by Hawkins Delafield & Wood LLP
- E** Articles from “The Bond Buyer” about BABs
- F** Articles from “The Municipal Finance Journal” regarding municipal bond insurance companies and the impact of their downgrading

Appeal of ROCCO N. LANZILOTTA from action of the Board of Education of the Westbury Union Free School District, Laura Pierce, Adelaide Brinson and Stan J. Ercolano regarding an election.

Decision No. 15,905

(March 26, 2009)

Bondi & Iovino, attorneys for petitioner, Anthony F. Iovino, Esq., of counsel

Jaspan Schlesinger Hoffman LLP, attorneys for respondent Board of Education of the Westbury Union Free School District, Lawrence J. Tenenbaum, Esq., of counsel

MILLS, Commissioner.--Petitioner appeals certain actions of the Board of Education of the Westbury Union Free School District ("respondent board") in the conduct of the district's school board election held on May 20, 2008 ("the election").^[1] The appeal must be sustained.

The election was conducted at four polling places throughout the district. Petitioner and the three individually-named respondents ran for two open positions as board trustees. Respondents Laura Pierce and Adelaide Brinson ("Brinson") received the highest vote totals of 1,091 and 961, respectively, and were elected. Petitioner received 10 fewer votes than Brinson. This appeal ensued. Petitioner's request for interim relief was denied on June 23, 2008.

Petitioner seeks to set aside the results of the school board election. He alleges that there were several irregularities including, among other things that: there was an insufficient number of election inspectors at one polling site; the number of signatures in the registrant books is fewer than the number of votes cast; and certain absentee ballots were not counted in public.

Respondent board asserts that the petition fails to state a claim upon which relief can be granted, that the election was properly conducted and that petitioner fails to set forth sufficient facts to justify overturning the

election. Respondent board also objects to alleged additional assertions in petitioner's memorandum of law.

Initially, I must address a procedural issue. Respondent board submits that petitioner's memorandum of law contains new allegations which I should not consider. A memorandum of law should consist of arguments of law (8 NYCRR §276.4). It may not be used to add belated assertions or exhibits that are not part of the pleadings (Appeal of

A

Hall, 46 Ed Dept Rep 394, Decision No. 15,543; Appeal of E.P. and D.P., 46 id. 390, Decision No. 15,542). Specifically, respondent contends that petitioner's memorandum of law contains new allegations that the district maintained only one election inspector at the Park Avenue polling place. I disagree. The petition's supporting affidavits contained statements regarding the number of election inspectors at that polling place (see Affidavit of Masiello, paragraph 12 [Exhibit C to the Petition] and Affidavit of Kirton, paragraph 3 [Exhibit F to the Petition]). I therefore find no merit to respondent board's contention that this issue was impermissibly raised for the first time in petitioner's memorandum of law. Accordingly, I will consider the arguments set forth in the memorandum of law.

To the extent petitioner relies on authorities under the Election Law, such reliance is misplaced. The Election Law does not govern the conduct of school district elections (Election Law §1-102; Appeal of Thomas, 47 Ed Dept Rep 442, Decision No. 15,748; Appeal of Georges, 45 id. 453, Decision No. 15,380; Appeal of Donnelly, 33 id. 362, Decision No. 13,079).

To invalidate the results of a school district election, petitioner must establish not only that irregularities occurred, but also that any irregularities actually affected the outcome of the election (Matter of Boyes, et al. v. Allen, et al., 32 AD2d 990, affd 26 NY2d 709; Appeal of Georges, 45 Ed Dept Rep 453, Decision No. 15,380), were so pervasive that they vitiated the electoral process (Appeal of Georges, 45 Ed Dept Rep 453, Decision No. 15,380; Appeal of Brannon, 42 id. 220, Decision No. 14,830; Appeals of Laskas-Gillespie and Warshaw, 40 id. 568, Decision No. 14,559), or demonstrate a clear and convincing picture of informality to the point of laxity in adherence to the Education Law (Appeal of Christe, 40 Ed Dept Rep 412, Decision No. 14,514; Appeal of Levine, 24 id. 172, Decision No. 11,356, affd sub nom; Capobianco v. Ambach, et al., 112 AD2d 640). Implicit in these decisions is the recognition that it is a rare case where errors in the conduct of an election become so pervasive that they vitiate the fundamental fairness of the election (Appeal of Georges, 45 Ed Dept Rep 453, Decision No. 15,380; Appeal of Collins, 39 id. 226, Decision No. 14,223; Appeal of Roberts, 33 id. 601, Decision No. 13,162).

In addition, in an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Hoey and Kosowski, 45 Ed Dept Rep 501, Decision No. 15,394; Application of Bliss, 45 id. 308, Decision No. 15,331; Appeal of Rubinstein, 45 id. 299, Decision No. 15,329).

Petitioner raises numerous alleged irregularities in the conduct of the election. He first contends that respondent board failed to

appoint the requisite number of election inspectors to the Park Avenue polling place. Education Law §2025(3)(b) requires that two election inspectors be appointed for each voting machine. The Park Avenue polling place had two voting machines, requiring the appointment of four election inspectors. Petitioner submits, and respondent board does not refute, that after one election inspector was removed by the district while it investigated an allegation of wrongdoing, there was only one election inspector present at that polling place. Accordingly, I find that respondent board violated Education Law §2025(3)(b).

Petitioner also contends that the absentee ballots at the Drexel Avenue polling place were not opened in public. Respondent submits that the absentee ballots were "opened in the presence of two election inspectors, consistent with the provisions of Education Law §2018-a(10)" (Answer, paragraph 33). While Education Law §2018-a(10) requires the election inspectors to examine and count the absentee ballots after the polls close, Education Law §2018-a(11) provides that, while election inspectors are examining absentee ballots, "any qualified voter present in the polling place may object to the voting of the ballot contained in any envelope" upon certain specified grounds. This necessitates the opening of the ballots in public (Appeal of Pappas, 38 Ed Dept Rep 582, Decision No. 14,098). Accordingly, with respect to the Drexel Avenue polling place, I find that respondent board did not comply with Education Law §2018-a(11).

The record further indicates that there may have been paper ballots that were not included in the final results for the election. Petitioner submitted an affidavit indicating that at least one individual may have voted by paper ballot (Affidavit of DaRocha, paragraphs 3 and 11 [Exhibit I to the Petition]). In its answer, respondent board suggests that paper ballots were in fact used (Answer, paragraph 54). And finally, the statement of canvass for the Drexel Avenue polling place indicates that there were 25 paper ballots cast. However, results from paper ballots are inexplicitly not reflected in the district's election results page.

Petitioner also asserts that there is a discrepancy between the number of votes cast and the number of signatures in the registrant books. Respondent board concedes that there is a discrepancy, but disagrees with the extent of the discrepancy. Petitioner reviewed the registrant books and submits that there were 54 more votes cast than signatures contained in the registrant books. Respondent board admits that it performed two similar reviews that indicated a discrepancy of either 13 or 17, both which exceed the margin of votes by which petitioner lost the election.

Respondent board relies on prior decisions in which I noted that it is not unusual for discrepancies to exist between the machine count

