

GIRVIN & FERLAZZO, P.C.

Kristine Amodeo Lanchantin, Esq.

20 Corporate Woods Blvd.
Albany, NY 12211
phone (518) 462-0300
fax (518) 462 -5037
e-mail address: kal@girvinlaw.com

Discussions of the Budget and Other Propositions

March 1, 2010

Education Law §§ 1716 and 1709(33) require and authorize boards of education to prepare and present to the voting public a proposed annual school district budget. The Commissioner of Education and the courts of New York have consistently construed this statutory grant of authority to include the power to present voters with “educational and informational materials to enlighten [them]” Phillips v. Maurer, 67 N.Y.2d 672 (1986) and that public resources may be used to do so. School districts are cautioned, however, that public resources may not be used to distribute any information which is designed to persuade the voting public to cast their votes in support of any position favored or advanced by the school board. Such action contravenes not only the Education Law as interpreted by the courts, but also the New York State Constitution’s restraints on the use of public funds. Schulz v. State of New York, 86 N.Y.2d 225 (1995). Thus, the district may use its resources to publish and distribute information which designed to educate, inform or promote voting in general, provided its purpose “is not to persuade, nor to convey favoritism, partisanship, partiality, approval or disapproval [by the school board] of any issue”. Stern v. Kramarski, 84 Misc.2d 447 (1976).

While a board of education may distribute factual information to educate and inform voters regarding a vote or election, the 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; Appeal of Hager and Scheuerman, 43 Ed Dept Rep 363, Decision No. 15,019; Appeal of Stolbach, 43 id. 218, Decision No. 14,977). It is improper for a board of education, as a corporate body, to be involved in partisan activity in the conduct of a school district election (Hager and Scheuerman; Appeal of Eckert, 40 id. 433, Decision No. 14,520). Even indirect support, such as a school board giving a PTA access to its established channels of communication to parents to espouse a partisan position that the board itself was prohibited from doing directly, has been deemed improper (Stern, et al. v. Kramarsky, et al., 84 Misc 2d 447; Hager and Scheuerman; Appeals of Tesser and Kavitsky, 42 id. 341, Decision No. 14,876).

Sometimes it is clear that the actions of school officials or the their production and dissemination of information violate these rules. For example, in the Phillips case, the school board spent public money on a newspaper advertisement which urged voters to “vote yes for the proposed budget...because it is in the best interest of the district” and stated that “by voting yes you will help protect our schools”. Such statements obviously go beyond objective information and advocate a certain outcome. However, it is not always clear what constitutes the “conveyance of favoritism or partisanship”, and what kinds of activities, other than the distribution of literature and information urging a “yes” or “no” vote, should be avoided. The Commissioner of Education has issued numerous opinions which address the kinds of budget vote-related activity and information from which school officials should distance themselves.

Since that landmark decision in Phillips, numerous challenges to the actions of school districts have been made. Some examples follow:

1. One decision was Greece Central School District, No. 14,256 (November 24, 1999). The appeal in Greece involved a challenge to the presence of signs that were hung in the windows of the school which read “vote YES on May 18th”. The record was clear that the signs were paid for exclusively by the teachers union, and that the district had no idea how the signs came to be posted. In spite of the fact that there was “nothing in the record which establishes that the [district] caused or acquiesced in the posting of the signs....or that district funds were involved in such posting” the Commissioner held that the district is accountable for how district facilities and resources are being used, and that it should take such measures as are necessary to ensure against the unauthorized posting of partisan election materials in the schools. Thus, the district will be held responsible not only for advocacy by its staff, but also for the advocacy of others which takes place on district property.

The Commissioner did attempt to distinguish between what constituted impermissible partisan advocacy and what is merely objective information or encouragement to participate. For example, it was alleged in Greece that the district’s election slogan, “Our Children, Our Schools, Our Future” was a partisan plug in favor of the district’s budget. The Commissioner held that such language merely encouraged participation in the process itself, and did not specifically encourage an affirmative vote. It was further alleged that the contents of literature distributed by the District, four weeks prior to the budget vote were improper. The literature was not directly related to the May 18, 1999 vote, but encouraging cooperation between the school and the community. The district listed “increasing the number of parents who vote ‘yes’ on the school budget” as a means of promoting such cooperation. The Commissioner found this not to be impermissible advocacy of the school budget, noting as significant that, while the statement makes reference to budget votes generally, it made no explicit reference to the May 18, 1999 vote.

2. Another decision, ¹*Wappingers Central School District, No. 14,250 (November 20, 1999) involved allegations that the Superintendent of Schools scheduled several “coffees”, where he and other district administrators could speak to specially invited guests. Such meetings were alleged to be “invitation only”, and were hosted and attended exclusively by persons with specific and direct connections to the district, such as PTA officers, parents of students, and teachers. The Commissioner found no evidence that the Superintendent or any other district official was responsible for scheduling the coffees. Rather, the Commissioner found that the meetings were organized and financed wholly by private organizations and persons. Such gatherings are commonplace around election time.

In this appeal, the Commissioner determined that it raised an “appearance of impropriety” for a superintendent of schools to attend private gatherings in an effort to convey factual information regarding the school district’s budget prior to the budget vote. In that case, the superintendent had met with the Rotary Club, a senior citizens group and small parent groups. The Commissioner ordered that the superintendent, in his official capacity as superintendent of schools, during the hours of his employment, must refrain from attending privately sponsored events, which are closed to the general public, for the purpose of providing information regarding school district elections and votes. The Commissioner also found that the characterization of certain projects as “needed” was opinion, not a fact, and thus constituted improper advocacy.

¹ The Wappingers school district appealed the Commissioner’s decision. On behalf of NYSCOSS, we argued that under the Commissioner’s own standards, an appeal will not stand if there is no evidence to support it. We argued that the Commissioner found no evidence of wrongdoing but sustained the appeal anyway. Furthermore, he offered no explanation for this departure from his own practice. Therefore, we argued, the decision is arbitrary and capricious. In addition, we argued that the Commissioner’s decision does not reflect the law. Under the law of New York, a superintendent may use school resources to objectively and truthfully inform the electorate about the district budget. He or she may not, however, encourage the voters to vote a certain way. That is, the content of the information must be neutral and objective. The Commissioner found that it was *the time and place* of the superintendent’s speech, rather than the content, that made his actions illegal. The law, we argued, does not support that conclusion.

Finally, we objected to the Commissioner’s determination that the characterization in budget literature of certain projects as “needed” by a school district, constitutes impermissible advocacy. At issue was a claim by Wappingers school district that it “needed” to raise academic standards, and that doing so would require additional spending. We argued that this “need” stems from new standards reflected in the rules of the State Education Department, and therefore reflect the truth, not just opinion.

The Court overturned the Commissioner’s decision based mainly on the grounds we argued above. However, in an appeal of that decision, the appellate court overturned the lower court’s decision, determining that the Wappingers Falls Central School District Board of Education did not formally act to initiate an appeal of a Commissioner of Education decision in a timely manner, thereby reinstating the Commissioner’s decision. Thus, superintendents of schools must again act with caution as they provide information to community groups regarding the upcoming budget vote and superintendents must tread carefully.

Surprisingly, in spite of the fact that there was nothing in the record which indicated that the Superintendent intended to advocate for a particular position at the meeting, and in spite of the fact that the record actually supported the conclusion that the Superintendent did not engage in any impermissible activity, he was admonished by the Commissioner to refrain from attending the meetings. The Commissioner found that “the attendance of [the Superintendent] and other district administrators, in their official capacities, and during their hours of employment, at privately sponsored coffees that are closed to the general public for the purpose of providing information on a district election, presents at least the appearance of partisan activity and should be avoided”. Thus, the Superintendents and other district officials need to be careful of not only what they say, but where they say it as well. Even where it is clear that only objective, factual information will be presented, it appears that its presentation in a nonpublic forum creates an appearance of impropriety. In the future, district officials should seek the advice of counsel before accepting any private invitations to speak on matters pending before the electorate.

3. The above decisions attempt to shed some light on what is appropriate in terms of the content of budget-related literature distributed by the district. In short, the literature must be completely neutral, and contain as few adjectives as possible. Anything that can be construed as an opinion rather than objective fact is impermissible. Specifically, the Commissioner found in Wappingers Falls that the characterization of a certain building project as “needed” is opinion rather than fact, and constitutes impermissible advocacy. Likewise, a statement that a budget increase would be required to “meet the need to continue our efforts to prepare ALL students to meet the Regents standards” was found impermissible. In Greece, the Commissioner adhered to his position in Wappingers Falls that anything in the budget vote-related literature which could be construed as opinion or speculation with respect to a specific election is impermissible. For example, statements that “new equipment is essential”, and that “the proposed budget addresses the needs of the community” were found impermissible. In addition, the suggestion that renovations, if not approved, will result in an overwhelming tax burden was found to be impermissible speculation.

In sum, these decisions demonstrate that the Commissioner will not look favorably on any communication by school district officials with respect to an election or budget issue, unless such communication is wholly factual and objective, not speculative, and made in an open forum. Superintendents and other district officials should avoid commenting on issues pending before the voters altogether unless such comment is made in a setting which is open to the general public. In situations where public comment is appropriate, care should be taken to ensure that statements relate solely to the proposed dollar amounts and the purposes for which the dollars are sought. Comments which indicate that the money is “needed” for certain projects or purposes, or that the budget, as proposed, addresses certain “needs” of the students or the public should be avoided, as should any speculation with respect to the results of the vote. Finally, all district administrators need to be vigilant, to ensure that no other person or organization uses district facilities to promote a partisan agenda or position.

4. It is improper for a board of education, as a corporate body, to be involved in partisan activity in the conduct of a school district election (Appeal of Hager and

Scheurman, 43 Ed Dept Rep 363, Decision No. 15,019; Appeal of Eckert, 40 id. 433, Decision No. 14,520). Even indirect support, such as a school board giving a PTA access to its established channels of communication to parents to espouse a partisan position that the board itself was prohibited from doing directly, has been deemed improper. This does not prevent individual Board members from expressing their personal opinions regarding issues concerning the District. However, a board of Education must avoid even the appearance of impermissible partisan activity with regard to the conduct of an election or vote.

In Matter of Canham, 19 Ed Dept Rep 254, it was found that board-directed telephone solicitation of a "selective list of voters who might be expected to support the adoption of the school budget gives the appearance of partisan activity" and the practice was condemned. Similar situations were discussed in Matter of Walker, 23 id. 280, Appeal of Blake, 27 id. 89, and Appeal of Tortorello and Bartnik, 29 id. 306. In Tortorello and Bartnik the Commissioner found that board-sponsored calls to high school students and recent graduates amounted to targeting a selected group of voters and determined that, because of the great potential for abuse, such practices were not permissible.

In Appeal of Tumilowicz (Decision No. 12,871, 1992), the Commissioner found that the Port Jefferson Union Free School District expended district funds in violation of the law when it permitted the Budget Advisory Committee to use school district facilities and personnel to distribute certain flyers. He found that the flyer clearly urged a "Yes" vote for the budget and that even though the flyer was prepared by a citizen's group, and not the district, the flyers were distributed to students who brought them home to their parents, with the approval of the Superintendent, and thus was improper. To the extent that the district permitted this citizen's group sufficient access to school premises so that the flyers could be given to students, such actions were unconstitutional. The district cannot allow others to use its school premises to distribute materials that respondent itself cannot distribute directly (Appeal of Allen, 32 Ed Dept Rep 69; Appeal of Weaver, supra).

In Appeal of Brower, (Decision No. 13,081, 1993), the Commissioner found that a board communication to parents that was sent home with students the day before the budget vote was improper. In the flyer, the board president stated that although he could not urge a "yes" vote and use school district funds for that purpose, but the tone of the letter was meant to solicit votes in favor of the budget. It urged parents to consider the results of austerity and vote on June 9th. While I do not find that the letter was technically partisan and in violation of Phillips v. Maurer, supra, it is dangerously close.

5. A school board president authored and published in the local newspaper 4 letters stating his personal opinions and encourage district residents to vote in favor of a proposed budget. Although an individual board member is **not** entitled to have his opinion published at district expense in board publications, this does not mean that he may not communicate his views at his own expense (Matter of Wolfe, 17 Ed Dept Rep 297). Individual board members are entitled to express their views about issues concerning the district and engage in partisan activity, provided school district funds are not used (Appeal of Carroll, 33 Ed Dept Rep 219; Appeal of Weaver, supra).

6. Statements in a letter from the Superintendent regarding the magnitude of the proposed budget increase and the academic successes of the district that were all based upon objective, verifiable information were okay. General statements (e.g., “In addition, our extra-curricular activities in music, art, and sports have, again, been superlative.”) were found to be “mere platitudes, and do not exhort the electorate to vote in any particular way or otherwise convey favoritism, partisanship, partiality, approval or disapproval for the budget proposal or for any particular candidates”. Likewise, a paragraph concerning disagreements in the community regarding the election does not advocate for or against any particular position or candidate. (Appeal of Carrol, et al, Decision No. 14,871, 2003).

7. The use of specialized mailings or distributions to parents of students or other selected groups may in some instances suggest the appearance of partisan activity (Appeal of Schattle, 38 Ed Dept Rep 599, Decision No. 14,102; Appeal of Sowinski, 34 Ed Dept Rep 184, Decision No. 13,276).

8. The district’s website contained a notice inviting the public to attend the hearing and advised that those wishing to speak could begin signing up at 6:30 p.m. Many people came, including a building principal, and spoke in support of the budget. Petitioner has failed to present any evidence that respondent used public resources to advocate for the budget by having the principal or any other citizen speak on its behalf. (Appeal of Hubbard, Decision No. 15,372, 2006)

9. Petitioner complained that respondent scheduled an evening parent orientation meeting at a school polling place on the same date as the district meeting. Holding a school function on the same date as a district meeting does not alone constitute improper electioneering (see, Appeal of Hoey and Koslowski, 45 Ed Dept Rep 501, Decision No. 15,394).

In sum, no District funds, property, equipment or personnel of any nature may be utilized to disseminate information to the public concerning an issue which is viewed as advocating or exhorting the public to vote a particular way on the matter. District funds, personnel and equipment may be used to disseminate factual information concerning a proposition for the information of the voters. Finally, so long as public funds are not used, Board members and employees may carefully express their personal opinions.