

*Thinking outside the cap***Six alternative sources of revenue**

By the New York State Association
of School Attorneys

Your school district is facing double-digit increases in insurance costs, energy costs and pension costs. Salaries probably are going up 3 to 4 percent due to step increments without any increases in base salary. And now the state has imposed a tax cap of 2 percent or CPL, whichever is less, for the 2012-2013 school year. You don't have to be an accountant to see the financial peril of maintaining the status quo.

In this brave new world where there is a cap on the tax levy, but not on operating costs, many districts are seeking alternative sources of revenues and revenue enhancers outside of the traditional tax base. What's possible within the law? Below are six options.

1. Lease or sell your school property. Education Law section 403-a provides that a school district may lease real property that is not currently needed for school district purposes. This can be done by board resolution. Voter approval is only required if the lease term exceeds 10 years. Common tenants are private schools and preschool programs, child care centers, BOCES, local government, the YMCA and other community and recreational centers. The rental price must reflect fair market value as determined by the board of education. The law also provides that cancellation clauses can be included in the lease for the following events: (a) a substantial increase or decrease in pupil enrollment, (b) a substantial change in the needs and requirements of the school district with respect to facilities, or (c) any other change which substantially effects the needs or requirements of the school district or the community in which it is located.

Another option is selling unneeded property. No voter approval is required in central and large city school districts, but voter approval is required in small city, union free and common school districts.

The school board has a fiduciary duty to obtain the best price possible. Thus, it is common practice to obtain a professional appraisal for the property prior to seeking voter approval or establishing a sales price. A sale, unlike a lease, is a one-time revenue generator. The sale of a school building is permanent in nature and its use cannot be reclaimed should circumstances change, such as a substantial increase in pupil enrollment. These factors, as well as the current market conditions, should be considered by the school board and its professionals when weighing options regarding unused school property.

2. Charge outside groups for use of school facilities. Pursuant to Education Law section 414, school buildings can be used by outside groups for certain enumer-

**Foundations can facilitate tax-free donations**

Many school districts are facilitating the formation of private educational foundations, which can receive tax-exempt donations routinely and more easily than the district itself.

The educational foundation must be a separate legal entity from the school district, although individual board members can serve on the foundation's board of directors as well. Most educational foundations are set up as a not-for-profit corporation by filing the Certificate of Incorporation with the New York State Department of State. Approval of the commissioner of education should be obtained as well. In order to qualify as a tax exempt organization, an application must be made to the Internal Revenue Service.

School districts which are considering establishing a private educational foundation should seek assistance from their school attorney. It is also helpful to have an accountant familiar with these matters.

Editor's Note: NYSSBA is offering pre-Convention workshop entitled "Leaving a Legacy: Secrets to a Successful Educational Foundation" from 1 to 4 p.m. Oct. 27 in Buffalo. See www.nyssba.org/convention for more information.

ated purposes, including the holding of social, civic and recreational meetings, civic forums and community centers, and recreation, physical training and athletics. It is well-established that a school district may charge entities using its buildings an amount sufficient to cover all expenses related to the use of the building such as utilities and custodial costs. In the past, many boards of education have been extremely generous in allowing outside groups to use its buildings with minimal fees. In these difficult fiscal times, one revenue enhancer that a district should consider is the adoption of a use of facility policy that requires that all expenses related to the use of facilities be recouped. Fees that a school district charges a non-resident organization for use of its facilities may exceed actual expenses, according to the commissioner of education's 1993 decision in *Appeal of Emilio*. Thus, charging higher fees for non-resident groups should also be considered in the "tax cap era."

3. Accept gifts of personal property. Pursuant to Education Law section 1709(12), a school board may accept for use by the schools "any gift, legacy or annuity," given or bequeathed of to the district by a donor or testator. Scholarships can be administered in accordance with the instructions of the donor provided that there are no restrictions or requirements

that are contrary to law or district policy. It should be noted that a gift cannot be accepted if it comes with a discriminatory restriction, based on race or religion, for example. However, a trust established to provide scholarships for students of a particular gender does not automatically violate the law [*Matter of Wilson*, 59 N.Y.2d 461 (1983)]. Thus, it is important when considering acceptance of a gift that has a restriction to consult with your school attorney to ensure that it does not run afoul of established law or policy.

4. Accept gifts of real property. Although a bequest of real property is rare, it is perfectly legal pursuant to Education Law section 1709(12-a). Real property may be acquired by any school district for school purposes by gift, grant or devise. Voter approval is not necessary.

5. Sell pouring rights. Since the groundbreaking 1998 Memorandum and Model Contract promulgated by the State Education Department, school districts have been able to enter into contracts giving a specific beverage manufacturer the exclusive right to sell its beverages within the district in exchange for a fee and other consideration. Many districts throughout the state have entered into contracts with Coke, Pepsi or similar beverage companies and have received scoreboards, lights

for the athletic fields and other compensation in exchange.

The commissioner of education has also considered the use of advertising in connection with pouring right contracts, trying to strike the right balance between commercial interests and legitimate school purposes. In *Appeal of American Quality Beverages LLC*, the commissioner concluded that the use of a lighted product panel on a vending machine containing only a photograph of an actual bottle of soda with the name Pepsi written on it was legally acceptable. The commissioner reasoned that the advertising effect of the panel was incidental to the services and product provided pursuant to the pouring rights contract and thus did not rise to the level of promoting private commercial activity.

Similarly, many districts have entered into licensing agreements with local cable networks for the videotaping and reporting of athletic and other school related events. While the consideration paid by the cable networks are currently in the form of scholarships and technical equipment for school use, it is likely that districts will identify this as a source of potential revenue enhancement and seek greater compensation from the cable networks.

6. Cross-contract services with neighboring districts. Another alternative source of revenue involves contracting with neighboring school districts for educational or transportation services. For instance, Education Law section 1709(25)(b) allows school districts that own their own bus fleet to lease buses to other school districts or share space on their buses with other school districts who are transporting students to private schools or special education programs. District-owned school buses may also be leased to not-for-profit organizations serving senior citizens or the physically and mentally disabled, as well as to any municipal corporation.

It is clear that in the "tax cap era" it will be necessary for school districts to think creatively and consider new sources of revenues to supplement the restrictions placed upon traditional tax revenues. Greater utilization of school facilities, and new partnerships with educational foundations and the business community should all be explored. However, the involvement of private businesses in schools must support the goals and objectives of the schools, and must be structured to meet an identified educational need and not a commercial motive. Consulting with your school attorney will be essential as your district explores new ways of coping with limited tax revenues.

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by Robert H. Cohen of Lamb & Barnosky, LLP.