Update on New Decisions from our Courts and Administrative Agencies and New Laws and Regulations

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Student Residence

1. *Appeal of Evans*, 57 Ed Dept Rep, Dec. No. 17,374 (2018).

The petitioner resided on a parcel of land which was located partially within respondent's school district and partially within the state of Connecticut. The property had 2 mailing addresses, one for the New York portion and one for the Connecticut portion. The physical dwelling where petitioner resided was located entirely on the Connecticut portion and the New York portion was vacant and contained no dwellings.

Petitioner attempted to register her child in the New York school district with a cable bill bearing an in-district address, a driver's license reflecting Connecticut address and a notarized letter from her landlord (a family member) that petitioner was renting property located at the in-district address. In a letter dated 2/12/16, the district's director of business services indicated that the student was not eligible to attend respondent's schools since petitioner and the student resided in Connecticut. In August, petitioner submitted documents indicating her purchase of the New York portion of the property. The district concluded that petitioner and the student were residents of Connecticut and indicated that mere ownership of property does not, *ipso facto*, demonstrate residency.

The Commissioner noted that the record indicated that the New York portion of the property was vacant, contained no dwellings, and that petitioner does not claim a school tax relief credit on the property. "Although petitioner owns property within respondent's district, the mere fact that one rents or owns a house or property in the district, or even pays taxes in the district, does not necessarily confer residence status." In addition, there was no evidence that the petitioner's dwelling intersected the state boundary. The Commissioner also noted that Education Law section 3203(1) was inapplicable to the case, since the property in question was not located within two school districts. Therefore, petitioner was not entitled to enroll her child in respondent's district based on the designation provision of that section of the Education Law.

2. *Appeal of Moore*, 57 Ed Dept Rep, Dec. No. 17,353 (2018).

The petitioner appealed the determination of the board of education that her children are not district residents. Petitioner asserted that she and the students have resided within the district for over three years and that her parents, who reside outside of the district, assist with the needs of the children.

The district's residency investigation included surveillance on four weekday mornings at the in-district address and on seven weekday mornings at the out-of-district residence. Neither the student nor the petitioner was observed at the in-district address on any of the dates of surveillance. However, the students were observed leaving the out-of-district residence with their uncle and/or their uncle's vehicle on each date of surveillance.

A residence hearing was commenced during which petitioner stated that construction at the in-district residence was complete. She testified that she and the students leave the house at 5:00am so she can drop them off at her parents' house, which is located outside the district boundaries. She stated that her brother drives to the out-of-district residence every morning and picks up the children and drives them to school.

Surveillance of the in-district address was conducted on an additional day and additional surveillance of the out-of-district residence was conducted on the day of the

hearing. The hearing officer concluded that the students were not residents and ordered their exclusion as of February 1, 2016.

The petitioner argued that the students live with her, and that she is a single parent with "chronic health conditions" and early morning work hours. Due to these hardships, she claimed that her family assists her with childcare, which includes the children eating breakfast at the parents' out-of-district residence before school. Also, the children were spending significantly more time at the parents' house due to construction at the in-district residence.

The commissioner concluded that the petitioner met her burden of proving that she resides at the in-district address based on the documents showing the in-district address: 1) registration for a vehicle in petitioner's name, 2) an interim driver's license, 3) a car insurance card, 4) a bank statement, 5) a lease agreement, and 6) a property tax statement issued to petitioner's brother who is the owner of the in-district residence. Petitioner explained the district's in-district surveillance indicating, in part, that she would have left early to drop off the students at their grandparents. She also provided further evidence on appeal to refute the surveillance, including affidavits from her mother and father, the testimony of her brother at the hearing, and a patient discharge regarding her father's admission to a hospital.

The commissioner sustained the appeal and concluded that the petitioner met her burden of proving that she and her children are district residents.

3. *Appeal of a Student with a Disability*, 57 Ed Dept Rep, Dec. No. 17,354 (2018)

The petitioner appealed the actions of the board of education that her children were not residents of the district. At the time that the students were enrolled, they lived at an address within the district. After discussions with individuals providing the student's services, the district became aware of information that indicated that petitioner may not live in-district.

The petitioner claimed that renovations began at the in-district address, and that intermittently thereafter she and the children slept at the out-of-district address, but only when the construction rendered the in-district address an unsuitable environment for her son. She provided the district with numerous documents including a tax return, driver's license, vehicle registration, automobile insurance identification cards, her son's IEP, and medical records, all bearing the in-district address. She also provided a doctor's letter recommending that the student not stay at the in-district address for the duration of the renovations. The district provided affidavits from 3 special education providers describing information they provided in response to the assistant superintendent's request for any information they had that might raise questions that the students might not live at the in-district residence. The district provided no other direct evidence to that effect. No surveillance was conducted.

The commissioner concluded that the petitioner provided sufficient documentation to establish residency with the district and sustained the appeal.

4. *Appeal of Henderson*, 57 Ed Dept Rep, Dec. No. 17,377 (2018).

The petitioner appealed the determination of the board that her 3 children were not district residents. A bus driver reported to the superintendent that it appeared that no one was home at the in-district address, that petitioner would drop the students off at the

bus pick-up point each morning just before the bus came. Petitioner emailed the superintendent additional documentation and indicated that the in-district address was "in various states of remodeling" and claimed that she and the students do not always sleep at that address. She also claimed that she frequently traveled for work. As a result, the children "have been picked up at our house after school by my mom and sleeping at her house."

The superintendent informed the petitioner of her determination that she and the students did not reside within the district. The superintendent acknowledged receipt of an internet bill and a copy of a utility bill, but concluded that this did not demonstrate petitioner's physical presence at the in-district address.

Petitioner argued that she was in the process of renovating and buying the house at the in-district residence at the time she enrolled the students and submitted various documents in support of her claim.

The commissioner sustained the appeal. "Although the evidence submitted by the parties is not overwhelming, upon review of the record, I conclude that petitioner has met her burden of proving that the students physically reside within respondent's district. Petitioner asserts … that … she was in the process of buying the in-district residence from her paternal grandmother and renovating the house … submitted a letter from her paternal grandmother who stated that she was the owner of the property and that petitioner is 'in the process of buying the property and [that petitioner] is the current resident.'" She also submitted a receipt for storage services in connection with the move to the in-district address, electric and cable/internet bills with the in-district address. In response, the district relied solely on observations by the bus driver and transportation assistant for the district. The commissioner noted that the district did not provide surveillance evidence of the in-district residence or any other residence at which the petitioner allegedly resided.

5. *Appeal of McGuffie*, 58 Ed Dept Rep, Dec. No. 17,487 (2018)

Petitioner challenged the determination of the board that his child is not a district resident. The district's surveillance of the in-district and out-of-district addresses was conducted on 7 weekdays in October and one weekday in November. On three occasions, the students and his mother were seen departing from the out-of-district address in the morning. On two mornings, the in-district address was surveilled between 6:00 am and 8:45 am. Although the investigator did not observe anyone coming to or going from the in-district address on these mornings, the student was present in school. In addition, on two afternoons, the student was picked up from school and driven to the in-district address where, shortly thereafter, he and his mother re-entered the car and left the in-district address. On one of these occasions, the student arrived at the out-of-district address.

The stipulation of settlement provided the petitioner with "residential custody" of the student. However, the commissioner noted that the petitioner still "bears the burden of proof in this appeal to show that the student physically resides within the district and intends to remain therein." The commissioner found that the petitioner failed to meet this burden and dismissed the appeal. The commissioner concluded that the surveillance supported the district's contention that the student resides at the out-of-district address, and "petitioner has produced no explanation or evidence to the contrary."

6. *Appeal of Students with Disabilities*, 58 Ed Dept Rep, Dec. No. 17,467 (2018)

Petitioner appealed the determination of the board that her children were not district residents. The students had been attending school in the school district since September 2015. In August 2017, the petitioner sent an email to the district indicating that she and the students had relocated to another residence within the district. Petitioner, one week later, completed a change of address form and submitted a copy of a lease agreement regarding the residence, a bank statement and a completed post office change of address form, each showing the new in-district address. In September, the superintendent was informed that the petitioner and the students did not reside within the district and that petitioner had been driving the students to and from New Jersey.

Surveillance was conducted on four non-consecutive school days. On October 3 and 12, the new in-district address was surveilled and neither the petitioner nor the students were observed. In the early morning hours of October 6, 10 and 12, surveillance was conducted in New Jersey. On two of the three dates, the petitioner and students were observed exiting the New Jersey residence and observed driving to school. On October 6, the investigator observed petitioner and the students depart from the high school and arrive at the New Jersey residence.

Petitioner contended that she and the students frequently travel to New Jersey to care for her elderly mother, who is ill. She also maintained that the father of the students, who resides in New Jersey, has shared custody, and that she also travels to New Jersey to accommodate his visitation schedule.

The commissioner sustained the appeal stating; "although the evidence from both parties is far from overwhelming, I find that petitioner has met her burden of proving that she resides within respondent's district." For instance, the petitioner submitted a lease for the new in-district residence and the respondent admitted that it received a signed copy. Also, according to the commissioner, the petitioner set forth a reasonable explanation for her and the students' presence in New Jersey on the dates of the surveillance; "namely, that she and her family regularly traveled there to care for petitioner's ill mother who resides in New Jersey, and to accommodate the students' father's court-ordered visitation schedule."

7. *Appeal of Jordan*, 58 Ed Dept Rep, Dec. No. 17,486 (2018)

Petitioner appealed a determination of the board that her sons are not district residents. The district received information that petitioner and the students were not residents; that they resided at the student's residence in another school district. The district surveilled the out-of-district address on four days in January 2017 which depicted the students departing from, or returning to, the out-of-district address. Based upon this, the district determined that the students were not residents of the district.

The commissioner noted that the evidence submitted by both parties is "not overwhelming," and concluded that the petitioner has met her burden of proving that the students reside within the district. The commissioner noted that the respondent's surveillance "is limited and, as a result, does not rebut the evidence submitted by petitioner." The Commissioner noted that the surveillance is consistent with the explanation that the students visit their father at the out-of-district address approximately twice per week.

The Commissioner sustained the appeal.

Immunizations

1. *Appeal of A.S.*, 57 Ed Dept Rep, Dec. No. 17,319 (2018).

Petitioner appealed the determination of the board that his child was not entitled to a religious exemption from immunization. Petitioner submitted a request indicating in part:

> … After thorough research and great soul searching I assert the following in accordance with faith: My faith in the principles handed down from GOD teaches me that in order to have an abundant, healthy physical and spiritual life, we must not blemish our bodies or souls with things that are not in accordance with the many scriptures that do guide us in that direction.
>
> I have always been opposed to the injection of all immunizations most particularly those that include cell-lines derived from aborted fetal tissue, believing that murder is sinful, as well as those with added foreign proteins not fit to be consumed by man according to my faith.

The attorney for the school district notified the petitioner that his exemption was denied, stating in part; "Based on my review, I am denying your request for exemption from immunization..."

The Commissioner remanded the case to the school district based upon deficiencies with the district's review process. The commissioner noted that it is the building principal that is responsible to review each request form and for communicating in writing with the parent regarding the request's approval or denial and the principal "cannot assign these duties to the designee." The commissioner noted that the exemption request was considered by the district's attorney in a "letter that provided no rationale for such denial."

> …the record in this case indicates that respondent's attorney both considered and issued the final determination to deny petitioner's religious exemption request, which contained no reasoning or explanation. … The principal avers that, when he 'received' petitioner's request …, he 'forwarded the request to the Law Department for review' and thereafter 'received a copy of the letter that was sent from the Department of Law' denying petitioner's request.

The commissioner remanded the matter to the district "so that the building principal may render a determination as to petitioner's requires and explain his reasoning in accordance with 10 NYCRR 66-1.3(d) and consistent with SED's guidance."

2. *Appeal of T.R.*, 57 Ed Dept Rep, Dec. No. 17,329 (2018).

The petitioner challenged the determination of the district that the student was not entitled to a religious exemption pursuant to the Public Health Law. In the request, the petitioner asserted that he "has always been a person of faith by virtue of his upbringing as a member of the evangelical 'Church of Christ.'" He assertions include, but are not limited to: "[f]aith in the Lord ha[s] always been extremely important part of my life" and that he was blessed with miracles throughout his life that "have strengthen[ed] my personal relationship with Jesus, the Holy Spirit and my interpretation of the Holy Bible which shaped my view on vaccinations." Petitioner acknowledged that he had previously vaccinated his children, but described a turning point when he realized "that being vaccinated was adverse to the teachings of the Bible and the Holy Spirit." He explained the two main reasons for is opposition to vaccinations: first that blood is sacred and he was "appalled" to learn that vaccines put "many types of biological material into blood and body"; second he asserted that vaccinating would be a betrayal "of my professed faith … I cannot support the idea that mankind's achievements in science take precedent [sic] over my faith in God's plan for this world and my children."

The district rejected the exemption indicating in part that "You have not specified the precise nature and origin of your beliefs which are contrary to immunizations."

The commissioner found that the petitioner sufficiently demonstrated a genuine and sincere religious belief within the meaning of the law. The petitioner "uses Biblical verses and passages to explain the precise nature and origin of his beliefs …" The commissioner further noted that "to further support his religious exemption request, petitioner states that he objects to specific ingredients contained in vaccines … based on a chart from the Centers for Disease Control Prevention … which … contain 'some form of animal by product or human cells.'" The commissioner concluded that the affidavit submitted on behalf of the district failed to rebut the linkage between the vaccines and the biological materials contained therein as posted on the CDC website. "While the Rosen affidavit appears to explain that, at most, only 'minute' or 'undetectable' amounts of the materials to which petitioner objects may be present … she does not aver that no nexus exists."

3. *Appeal of D.G.*, 57 Ed Dept Rep, Dec. No. 17,345 (2018).

The petitioners appealed the determination of Yeshiva of Spring Valley that their children were not entitled to an exemption from the immunization requirements of the Public Health Law. Petitioner requested a religious exemption based on their "sincere and genuine religious belief that immunizations are prohibited." The district denied the request. Petitioner had provided the district with a written explanation including:

> The Torah requires us to adhere to many laws, in all aspects of our lives. … By allowing one to immunize themselves with bacterias, beneficial or not, they could profane the Holy Image of G-d. … Having been created in the image of G-d, we are required to guard and protect this being, in all of its Holiness. Part of this protection also includes, not allowing ourselves to be injected with foreign bodies, bacterias etc. into us, as not to profane our holiness.

The district denied the request without rationale or explanation but, on appeal, asserted that the objections were based on "medical, moral, philosophical, political, scientific and/or sociological objections to immunization."

The commissioner sustained the appeal and ordered the district to grant the exemption from immunizations. The commissioner stated:

> …I find the weight of the evidence supports petitioners' contention that their opposition to immunization stems from religious beliefs. Respondent's argument that petitioners' objection to immunization is not based on Jewish law or tradition is of no merit. As stated above, it is not necessary for a person to be a member of an organized religion which opposes immunization to claim the exemption. Contrary to respondent's assertion, there is nothing in the record which establishes that petitioners' objection to immunization is based solely on philosophical, scientific, medical or personal preferences.

Charter Schools

1. *Matter of New York State Board of Regents v. State University of New York, et al*., (Index No. 957-18) (Sup. Ct. Cnty of Albany 2018).

The New York State Board of Regents, the New York State Education Department and the Commissioner of Education commenced an Article 78 proceeding/declaratory judgment seeking an order to invalidate regulations adopted by the SUNY Charter Schools Committee establishing an alternative teacher certification pathway to Charter schools.

Education Law section 355 (2-a) allows the state university trustees charter school committee to promulgate regulations with respect to "governance, structure and operation of charter schools …" Based on that law, SUNY Charter Schools Committee adopted regulations which established an independent licensure process as a substitute for the teacher certification system as established by the Regents and SED. They argued that the licensing of teachers falls under "governance, structure and operation of charter schools."

The court granted the petition and declared the regulations vacated, annulled and enjoined from use. The court noted that the Education Law provides the commissioner with the exclusive authority regarding teacher certification. The court concluded that licensure or certification of teachers does not constitute the "governance, structure and operation" of charter schools. The court noted that while regulation may be promulgated by the subcommittee with respect to teacher certification, those regulations must be at a minimum equivalent with what petitioner/plaintiffs have already set as the certification requirements. "In other words, respondents/defendants are free to require <u>more</u> of the teachers they hire but they must meet the <u>minimum</u> standards set, not <u>less</u> than those required by Elia and the Board of Regents. The minimum standards certification standards promulgated by Elia and the Board of Regents set the floor not the ceiling."

The court also noted that the regulations were not adopted pursuant with New York state Administrative Procedures Act (SAPA).

Student Discipline

1. *Appeal of F.A.*, 57 Ed Dept Rep, Dec. No. 17,383 (2018).

Petitioner challenged the decision of the board to impose discipline upon the student. The student attended 10th grade and during class the teacher repeatedly asked the student to complete his work. In response, the student told the teacher to "shush" and to "quiet down." When told by the teacher that his language and conduct was inappropriate, he told her to "shut the f*** up," called her a "punta," and threw papers and a pen into the air. Thereafter, the student stood up, grabbed his pants, glanced downward and told the teacher she could "suck [his] d***." The student then grabbed his desk and flipped it over onto the floor. Upon leaving the classroom the student called the teacher a "f***ing b****."

The long-term suspension hearing occurred on 2/12/16 and the superintendent found the student guilty of charged conduct and imposed suspension through and including 1/27/17. The petitioner claimed that the student should have been treated as a student presumed to have a disability and asserted that the classroom teacher "did not try additional strategies, conduct a functional behavioral assessment ("FBA"), or develop a behavioral intervention plan ("BIP"), or other behavior plans to address [the student's] behavioral issues or make a referral to the CSE."

The commissioner rejected the argument that the student should have been presumed to have a disability for disciplinary purposes and referred to sections 201.5(a) and 201.5(b) of the regulations. The commissioner noted that while the record reflected that the student had behavioral needs and that the district employed response to intervention strategies, "there is no evidence that, for example, a teacher or other school employee expressed specific concerns about a pattern of such directly to the director of special education or to other supervisory personnel of the school district. Petitioner's argument that the classroom teacher 'should' have referred the student for special education does not suffice; 8 NYCRR 201.5 requires actual referral." The commissioner noted that the district had, in fact, referred the student to the CSE prior to the hearing, but that the CSE did not find the student eligible for special education. As a result, the commissioner stated that the district's CSE "was not required to consider special factors for the student including concluding an FBA or developing a BIP."

2. *Appeal of M.B.*, 57 Ed Dept Rep, Dec. No. 17,378 (2018).

The petitioners appealed the decision of the BOE to suspend the student. A middle school student sent a group text message/chat in which he stated that: "Id [sic] much rather kill" three named students and briefly gave reasons. The student admitted that he sent the text message. The petitioners challenged the short term suspension because the district did not notify petitioners of the right to question complaining witnesses. They also claimed that the long term suspension was not based on competent and substantial evidence and that it was excessive. They also claimed that the district failed to produce an intelligible record.

Regarding the short term suspension, the commissioner concluded that the principal's letter did not comply with the written notice requirements of the regulations because it failed to inform the family that they could request an opportunity to question complaining witnesses. "…the fact that petitioners were offered an informal conference

and in fact met with the principal to review the evidence does not excuse respondent's failure to provide proper written notice." The commissioner, therefore, annulled and expunged the five-day suspension.

Regarding the long terms suspension, the commissioner noted that a parent of one of the students named in the text message testified that her son told her that the student had talked "about killing people for a few months now" and that he had been told by one of the recipients of the text message that he was on the "kill list." A police officer testified that the student admitted that he had a "kill list."

The commissioner found that the record belied the student's explanation that the group text message was not a threat to kill, but rather a joking attempt to cheer up a suicidal friend. Regarding whether there was evidence indicating that staff, students or property was endangered, the commissioner noted that while the message did not reference the school, or identify the three named individuals as students, "the record indicates that those individuals were fellow students and that the text message became accessible to other students not on the original group text message. The record indicates that the text message was forwarded by one of the students in the original group text message to one of the three named students. Thus, it was reasonably foreseeable that the message … would be shared with other students at the school, which would create a risk of substantial disruption of the operation of the school." The commissioner denied the family's challenge to the long term suspension.

3. *Appeal of D.B.*, 57 Ed Dept Rep, Dec. No. 17,395 (2018).

The parents appealed the decision of the district to permanently suspend their son, a sophomore in the school district. On or about November 18, 2016, the student obtained login information for another student's email address. On Monday, November 21, 2016 the student sent an email using the other student's email account to the high school assistant principal which stated:

> I am going to bomb the school on Tuesday the 22nd. I am giving warning to you as a caution to my fellow student [sic] but I just want to destroy the place that makes me the most unhappy and suicidal. Do not attempt to disarm the bomb, as it is remotely controlled and if someone touches it it will go off. I assure you that you will not be able to fine [sic] the device or the bomb as it is already in the school. The quad area is your only clue.

The police were contacted. Later that evening the assistant principal, other administrators and police swept the building and found nothing. A police officer visited the other student's home and questioned her regarding the email. The officer concluded that she had not written the email.

As a result of the bomb threat, the school arranged to have 2 members of law enforcement guard the school during the school day on November 22, 2016. On November 29, 2016 another email was received from another email account which stated:

> Me and my team have secured plenty of firearms to massacure [sic] the students at GHS. We know you will not take this email

> seriously but we figured it would add quite a bit of emotional damage to you, the administrators to find out you could have prevented a tragedy that makes comparable disasters look like a fight on the schoolyard. Honestly, the lack of security and initiative at this school is incredible and I am confident that two police officers will not be sufficient to prevent the smuggling in of weapons and explosives. They claim to do these so called 'k-9 sweeps' but honestly a long term timed detonation device paired with some vaccum sealed mylar will be perfectly concealed within the school. The cowards will run and die, the few who try to stop us will go down as heros [sic] but still, die. We will make our bloody mark in history today, and I am completely confident in your idiocy that you will not prevent our wrath.
> Eric and Dylan will have nothing on us, and I hope they look down upon us in favor as we commit this act of cleansing.

As a result of this email, police officers arrived as well as employees of the FBI and ATF. Buses had already picked up students and students seeking to enter had to undergo a full search of their jackets and belongings. In addition, a sweep of the building was conducted. On November 29, 2016 the police interviewed the student in question at his home. The student admitted that he wrote both of the emails and indicated that he "wanted to see a bigger response" when asked why he wrote the emails.

A long-term suspension hearing was held on May 25, 2017 and the hearing officer recommended that the student be permanently suspended from the district. The superintendent adopted the findings and recommendations with respect to guilt and penalty.

The petitioners contended that the penalty of permanent suspension was excessive given that he admitted guilt and given his age and limited disciplinary record. They also argued that two mental health professionals, a forensic psychologist and a licensed clinical social worker, who interviewed the student as part of a court-ordered 30-day assessment, testified that he has accepted responsibility and that he is "a very low risk to the school environment and has a low recidivist risk."

The commissioner acknowledged that a permanent suspension is an extreme penalty that is "generally educationally unsound except under extraordinary circumstances, such as where the student exhibits 'an alarming disregard for the safety of others' and where it is necessary to safeguard the well-being of other students."

The commissioner reviewed two incidents in the student's anecdotal record which were considered by the hearing officer. In May of 2015, the student and others generated a fake Twitter account that contained harassing pictures of an 8th grade student. According to the summary of the incident; "The pictures have the Nazi symbol over the face of the student, 'mocks' the Jewish religion and had the KKK hood over the faces of some people. … The [accused] students attempted to blame another 8th grade student for this behavior." Regarding this prior incident, the student admitted to creating the account and "conspired to place the blame on another student." He received a two-day suspension.

He also received a 5 day suspension for receiving a teacher's password, sharing the password with another student and logging into the teacher's account without authorization.

The commissioner noted that the student's conduct on November 21, 2016 was in and of itself enough to warrant a substantial penalty and noted that the student's impersonation of the classmate could be considered a crime. Then, seven days later, the commissioner stated, the student sent the terrorist threat by using a generic email address and proxy server to disguise his identity.

A police officer testified that it was the most serious threat he had encountered in his 16 years of law enforcement and the threat was deemed "sufficiently credible to warrant contacting the FBI and the ATF." The student faced criminal charges and pled guilty to the attempted making of a terrorist threat – a class E felony.

The commissioner stated:

> Tragically, school shootings are far from theoretical events; our nation is beset by an epidemic of such shootings. Armed assailants continue to commit mass murders in public schools. Simply put, the district had no choice but to treat this situation seriously, and it is imperative that school officials retain the ability to protect their students and staff.
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> …
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> I find that the student's conduct evinced an alarming disregard for the safety of others, and that respondent justifiably deemed permanent suspension necessary under such circumstances to safeguard the well-being of its students.
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> …
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> This is not a case involving a single isolated incident but, rather, a pattern of misconduct by the student that escalated to a very serious incident involving a terrorist threat.
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> …
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> I cannot conclude with any degree of confidence that this student's pattern of misbehavior, which at the very least would warrant a penalty measured in years, would not continue and cause harm to other students should he return to the district. … I agree with respondent that the need to protect the well-being of other students of the district is of paramount and overriding importance.

4. *Appeal of M.B.*, 57 Ed Dept Rep, Dec. No. 17,304 (2018).

The petitioners appealed the decision of the board regarding the imposition of discipline of their son. The student was a member of football team and was involved in an incident whereby several members of the team allegedly vandalized a team room and damaged equipment. The petitioners raised a number of issues including a request for an investigation and for disclosure of various records pertaining to the incident that led to the in-school suspension. They requested an order directing that all school district records relating to the incident, including verbal/written statements made by other

football players, notes by district staff and photos/videos of the damaged locker room be made available for review.

The commissioner denied the appeal and, regarding the disclosure issue, noted that in the context of a student disciplinary hearing under the Education Law, "the Commissioner has previously ruled that there is no statutory authority for discovery related to a disciplinary incident. … Petitioners' recourse, if they wish to seek review of the school district's records, is to request disclosure of the records under the Freedom of Information Law … of the Pubic Officers Law, though the student disciplinary records are confidential and may only be disclosed to the extent permitted under the federal Family Educational Rights and Privacy Act, …"

5. *Appeal of a Student with a Disability,* 57 Ed Dept Rep, Dec. No. 17,297 (17,297).

The petitioner appealed the decision of the board of education to impose discipline on a number of grounds including that the district violated the student's right to question witnesses because the associate principal had introduced six student witnesses' written statements at the hearing. The commissioner noted that the Education Law provides, in part, that no pupil may be suspended in excess of five days unless the student and parent are given the opportunity for a fair hearing with the right to question witnesses against the pupil. As such, the introduction of written statements in lieu of live witness testimony would deprive a student of the opportunity to cross-examine the witnesses. The commissioner, however, noted a "school district's interest in protecting the identity of student witnesses against possible retaliation from a potentially violent student may overcome a student's right to question witnesses against him or her."

The commissioner noted that at the hearing, the associate principal stated that the "students did not want their names shared for fear of retaliation" and, in an affidavit stated that the six witnesses as well as the classmate "did not want to participate in [the student's] hearing for fear of physical retaliation by [the student]." The commissioner further noted that following the student's physical altercation with the classmate, the classmate's injuries were "sufficiently severe to warrant admission to the emergency room."

The commissioner found, based on the evidence, "that the district's interest in protecting the identities of the students in order to protect them from potential retaliation outweighed the student's right to cross-examine them."

6. *Appeal of a Student with a Disability,* 57 Ed Dept Rep, Dec. No. 17,408 (2018).

The student was a senior in high school. On October 16, 2017, the assistant principal observed a student walk by a parked car, put his mouth on a vaping device which a student in the driver's seat of the car (the student who is the subject of the appeal) extended out of the car window, and attempt to walk away. The assistant principal observed the student take the device from his hands and place it in the center console of the car. Another assistant principal proceeded to search the vehicle. A vaping device was found along with "copious amounts of drugs and drug paraphernalia." A search of the rear of the vehicle revealed a paint gun, a bow, which was disassembled, and several arrows. The student was suspended for five days and counsel for the district indicated that a long term suspension hearing would be scheduled based on various charges. Following the hearing, the hearing officer found the student guilty of all nine

charges and a manifestation determination found no manifestation to the student's disability. The superintendent suspended the student through June 21, 2018.

The petitioner contended, in part, that the student did not "possess" the items because he did not physically possess or exercise control over the items discovered in the vehicle. The petitioner also argued that the search of the vehicle was unreasonable in violation of the federal and state constitutions. The petitioner also claimed that the penalty was excessive.

The commissioner dismissed the claim that the search was unconstitutional for failure to exhaust administrative remedies. The record contained a written appeal to the board of education which did not allege that the search of the vehicle was unreasonable. "Therefore, petitioner cannot now raise this objection for the first time in an appeal pursuant to Education Law §310."

The commissioner rejected the petitioner's "possession" argument, and noted: "I rejected a similar argument which is materially indistinguishable from petitioner's argument in the instant appeal. … Constructive possession of items can be established where there is evidence of an individual's dominion and control over an automobile in which the items were found." The commissioner noted that the student had dominion and control over the car in which the items were found. "He had driven the car to school, parked it in the student parking lot on school grounds and answered questions about the items as the assistant principal discovered them."

Regarding the excess penalty argument, the commissioner indicated that the petitioner argued that the suspension was "tantamount to and otherwise represents a *de facto* permanent suspension …" The commissioner concluded that a suspension through the end of a student's senior year is not *per se* "tantamount" to a permanent suspension, "since, depending on the student's age, he or she may have two or more years of eligibility to obtain a high school diploma following such suspension." The commissioner noted that the student "would be provided alternative education during the suspension and would have the opportunity to graduate with his class."

7. *Appeal of a Student with a Disability*, 57 Ed Dept Rep, Dec. No. 17,311 (2018).

The petitioner appealed the decision of the board of education to suspend the student for one year. On March 24, 2017, two assistant principals saw the student with a long silver device which appeared to be a "vaping pen" (a device used to inhale vaporized substances such as oils, waxes, and dry herbs). When the student was caught he claimed that he did not have anything, then subsequently admitted that he had dropped a device in the locker room after "attempting to escape." The head of security and the police tested the substance: both tests confirmed that the substance contained THC oil (chemical compound in cannabis "responsible for a euphoric high."). The student was ultimately suspended through March 30, 2018.

Petitioner claimed that the penalty was excessive. The commissioner dismissed the appeal, noting that the student attempted to conceal it from the assistant principal and that the "possession of a controlled substance on school property on school grounds is a serious offense and I have previously upheld a one-year suspension in a case involving a similar offense related to a controlled substance." While the commissioner acknowledged that the student participated in weekly counseling sessions following the suspension, "I do not find that this mitigates the serious conduct described in this appeal

or warrants the substitution of my judgment in this case as to penalty." In addition, the commissioner noted that the fact that the district's code of conduct does not require a specific or minimum penalty for such an offense, but rather recommends progressive discipline, "does not preclude respondent from imposing a one-year penalty for the serious conduct involved in this case." The commissioner noted that the code of conduct used qualifying language including "as a general rule, discipline will be progressive."

8. *Appeal of J.M.*, 57 Ed Dept Rep, Dec. No. 17,335 (2018).

The petitioner appealed the decision of the board of education to impose discipline on his son. The student approached another student (A.C.) in the cafeteria and asked why A.C. had been cyberbullying his sister. The student attempted to return to his table and was then confronted by A.C.'s brother (D.G.). The student claimed that D.G. raised his voice and said "that is my little brother; watch who you are talking to." The student then told D.G. "get out of my face little boy." The sequence of events is disputed; one witness testified that he saw the student swing at D.G., while other witnesses testified that they did not observe the student push or punch D.G.

The student was restrained by D.G., who held his arms behind him, while another student (C.M.) repeatedly punched him. According to the record, the student was placed in a "choke-hold" during the altercation.

The principal suspended the student for five days. A long term suspension hearing was conducted and the superintendent found that the district had proven the student's guilt by competent and substantial evidence. The superintendent concluded that the student; "put the events that occurred on May 8th in motion" by confronting A.C. and that the student "exacerbated" the situation by saying "get out of my face little boy." The superintendent also found that the student "admitted taking a swing" at D.G. and that the student was "punched repeatedly by either D.G. or C.M." The superintendent noted a prior incident where the student left class to confront a student about cyberbullying his sister and an "altercation ensued." Ultimately the superintendent imposed a four-week suspension as a penalty.

While acknowledging that the record demonstrated that the student engaged in inappropriate conduct, the commissioner found that the district failed to produce competent and substantial evidence of the charges ("Assault with Physical Injury or Threat of Injury on School Property."), and also that any "assault" by the student was justified on the grounds of self-defense." The commissioner noted:

> The record demonstrates that, after the student confronted A.C., D.G. approached, 'raise[d] his voice' and said 'that is my little brother; watch who you are talking to.' In response to this comment, the student 'felt offended,' 'raised [his] voice' and told D.G. 'get out of my face little boy.' Although the student admitted at the hearing that he made this comment, I cannot find that his comment constituted a violent physical or verbal attack with threat of injury. … The student's comment was inappropriate, and the district could presumably have sought to impose discipline upon him a charge of violating an appropriate provision of respondent's code of conduct. Instead, … the district charged the student only

> with "Assault With Physical Injury or Threat of Injury," and there is no evidence in the record suggesting that the student's comment constituted "assault" with a "threat of injury" to D.G. or the intentional placing of another in fear of imminent harmful or offensive contact.

After the initial interaction, the commissioner noted that what transpired is "inconsistent at best" and that "the weight of the evidence in the record as a whole supports a finding that … the student did not swing at D.G. prior to being physically restrained." Regarding the period where the student was physically restrained, the commissioner noted that the student admitted that he swung at another student, "albeit while physically restrained and trying to escape," and established his guilt as to the specific charge of assault with physical injury or threat of injury. "However, in numerous decisions the Commissioner has recognized that, in a proper case, a student may raise self-defense as a justification for the student's conduct." Self-defense, according to the commissioner, is a limited defense insofar as it "only provides justification for acts which are necessary to protect the individual from attack, and only permits sufficient force to reasonably provide such protection." The commissioner found that petitioner established that the student justifiably acted in self-defense and "swung only in an attempt to extricate himself from physical restraint which had been imposed by another student."

> The student testified that he was in pain, bloody and confused; had received an estimated dozen punches to his face when he took a swing at C.M.; and that he only swung in an effort to escape. … There was no evidence … that C.M. suffered any physical injury as a result of any such swing; that the student threw any other punches after swinging at C.M., … that the student persisted in fighting after attempting to escape from the physical restraint; or that the swing involved excessive force in response to the attack by C.M.

The commissioner sustained the appeal and ordered the suspensions (both short term and long term) be expunged from the student's record.

9. *Appeal of R.E.*, 58 Ed Dept Rep, Dec. No. 17,438 (2018).

Petitioners appealed the decision of the board to impose discipline on their daughter. On December 15, 2015, pepper spray was released into a school hallway which resulted in EMS arriving and the evacuation of staff and students. 18 people were treated on site and 33 people were transported at local hospitals.

Petitioner J.E. and petitioner/student met with the principal. The principal deemed the student's presence in the high school "a danger to herself and the students and staff," and that her "presence in school would create a disruption with the school." The student was suspended immediately. A long-term suspension hearing was held on December 22, 2015 and the hearing officer found the student guilty of the charged conduct. The student was suspended through December 16, 2016.

Petitioners raised a number of issues on appeal. For instance, petitioners objected to the introduction of a written statement by a witness who did not testify at the suspension hearing. The commissioner noted that Education Law § 3214(3)(c)(1) sets forth various due process rights for students who are subject to a long term suspension, including the right to question witnesses against the pupil. The commissioner concluded that the district improperly introduced the written statement without making the student available for cross-examination. The district, in its answer to the appeal, claimed that it had "an interest in protecting the identity of [the student witness] and that outweighs any interest a charged student has in cross-examination." The commissioner noted the general principle that a "school district's interest in protecting the identity of student witnesses against possible retaliation from a potentially violent student may overcome a student's right to question witnesses against him or her." However, the commissioner noted that the district did not make this argument at the hearing. In addition, at the hearing one of the assistant principals revealed the name of the student witness on the record during direct examination. The commissioner stated: "Thus, even assuming that respondent initially had an interest in safe-guarding the identity of this student witness, the revelation of the student witness's name at the hearing, in the presence of the student, extinguished any such interest." The commissioner also noted that the written statement was the "only evidence presented at the hearing which identified and implicated the student." "Therefore, I cannot conclude that the introduction of the written statement was harmless under the circumstances, and find that the written statement was improperly admitted into evidence and I have not considered it [in] this appeal."

The commissioner further concluded that based on the remaining evidence adduced at the hearing, the district failed to provide competent and substantial evidence that the student committed the alleged misconduct. "Taken together, the testimony of these three witnesses did not establish, by competent and substantial evidence, that the student was one of the students who engaged in the charged conduct. Respondent's position would require me to make inferences and assumptions which are not supported by the evidence in the record."

The commissioner ordered the district to annul and expunge the suspension from December 16, 2015 through December 16, 2016 from the student's record.

Discrimination

1. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

The plaintiff brought a sex discrimination claim under Title VII alleging he was fired from his job because he failed to conform to male sex stereotypes by referring to his sexual orientation. Issue: does sexual orientation discrimination constitute a form of discrimination "because of ... sex" in violation of Title VII? Holding: Yes, sexual orientation discrimination is a form of discrimination "because of ... sex" in violation of Title VII.

Zarda, a gay man, worked as a sky-diving instructor and, as part of his job, he participated in tandem skydives. His coworkers routinely referenced sexual orientation or made sexual jokes around clients. Zarda told a female client for whom he was preparing a tandem skydive that he was gay. The client alleged that Zarda

inappropriately touched her and disclosed his sexual orientation to excuse his behavior. Zarda' boss was notified and he was fired.

The Second Circuit overturned prior precedents to the contrary. The court found that sexual orientation discrimination is a subset of sex discrimination because "sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account." The court also found that sexual orientation discrimination is based on "assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted." Lastly, the court concluded that sexual orientation discrimination is "associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex."

*NOTE: *Petition for Cert. docketed in Supreme Court – June 1, 2018*

Open Meeting Law

1. **New York State Committee on Open Government** (OML-AO-05535 (1/17/17)).

Issue: the propriety of a member of the Suffolk County Planning Commission to participate fully by means of videoconferencing while at Kennedy Airport. The Assistant County Attorney indicated that the "Jet Blue Terminal may not be a proper location … as it is not a 'true' public space." The Committee on Open Government concluded that a member of the public body could video conference at Kennedy Airport:

> …in my view, participation by a member in the manner described would not be prohibited by or inconsistent with the Open Meeting Law." …
>
> …
>
> From my perspective, there is as distinction between the situation in which all or a majority of the members of a public body seek to meet in a restaurant, and the case in which one member seeks to participate while in Florida, Arizona, Europe, his or her home, or perhaps at an airport. When the entirety of a public body meets in a restaurant, if a member of the public wants to attend, that person has no choice but to do so at that location. Again, in that circumstance, there is an expectation or an obligation to pay for food or service of some sort. That creates a barrier that is, in my view, inconsistent with the intent of the OML. The great majority of meetings are held in a government facility … and the reality is that most people interested in attending will do so at the public body's usual meeting location. That one or perhaps two members might be participating from remote locations is generally of little significance when members of the public can attend at the usual, primary location.

2. **New York State Committee on Open Government** (OML-AO-5575 (3/6/18)).

1. Voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. A member of a public body may not attend a meeting by telephone, be counted for quorum purposes, or cast a vote by telephone.

2. Assuming the governing board has the technical capability to conduct a meeting via videoconferencing, a blanket prohibition on the use of attendance and participation via that method would be inconsistent with the OML.

3. If the governing board has the ability to videoconference with more than one member at a time, it should permit members to do so and not restrict the number of members who can videoconference.

4. A governing board may require that the members disclose the number of attendees that attend from the location at which a member participates via videoconferencing and could require an acknowledgment and affidavit from the member that no one was present with the member during an executive session.

5. A governing body may place reasonable limitations on the number of times a member can videoconference in any given time period. For instance, if a board member spends the winter in a warmer location, in the view of the Committee on Open Government, that board member should be permitted to participate via videoconferencing. If, on the other hand, a board member has moved out of the area and plans to participate in every meeting for the remainder of his/her term via videoconferencing, a limitation may be determined to be reasonable.

Receivership

1. *Appeal of Williams*, 57 Ed Dept Rep, Dec. No. 17,298 (2017).

Education Law section 211-f designates a school superintendent as a receiver in charge of developing and implementing an intervention plan for a school identified as struggling or persistently struggling under the law. A receiver is vested with broad authority including, but not limited to, the power "to supersede any decision policy or regulation …of the board of education…that in the sole judgment of the receiver conflicts with the school intervention plan."

In the case at bar, a school superintendent, who is also the superintendent-receiver for a struggling middle school, challenged a board resolution that imposed a moratorium on involuntary teacher transfers, as well as other board directives aimed at teacher transfers. As superintendent, the petitioner is the receiver for the district's middle school. Subsequent to the board's adoption of the moratorium resolution, the superintendent issued directives transferring six teachers. On that same date, she informed the board of the transfers, explained her reasons for the transfers and that she was exercising her authority as receiver to supersede the board's moratorium on transfers. Two of the teachers ignored the directive of the superintendent reassigning them to the receivership school relying upon letters issued by the board advising them to disregard the transfers.

The superintendent first argued that the board moratorium violated Education Law §2508 which provides superintendents of small city school districts the authority to transfer teachers from one school to another or from one grade or course of study to another, and to report immediately such transfers to the board for its consideration and action. The commissioner agreed and stated that this authority has been held by the courts to be absolute in absence of contractual provisions otherwise or of malice, bad faith, gross error or prejudice. Although a board retains authority to consider and take action after notice of teacher transfers is received, it cannot circumvent a superintendent's authority in the first instance. Accordingly, the commissioner annulled the board's resolution establishing the moratorium on involuntary transfers.

The commissioner also found that the board's September letters advising teachers to disregard the transfers unlawfully interfered with the superintendent's powers as receiver to supersede a board's decision. As explained by the commissioner, a receiver may invoke the power to supersede, provided the receiver notifies the board of education in writing at least 10 business days prior to the effective date of the supersession of the specific decision, policy or regulation the receiver intends to supersede. In the written notice a receiver must explain the reasons for the supersession, the specific decision, policy or regulation that will replace the one that shall be superseded and the time period during which the supersession will remain in effect.

The commissioner determined that the superintendent properly followed the required procedures. As to the reasons for the transfers, the superintendent explained that the teachers' skill sets and certification matched the instructional needs of the receivership school. The commissioner determined the transfers were directly linked to the school intervention plan which had identified excessive teacher absences and turnover as a concern. Accordingly, the board's actions barring involuntary transfers directly conflicted with the school intervention plan by prohibiting the superintendent from addressing shortages and staffing at the receivership school.

The commissioner rejected the board's arguments that the transfers were not in the best interest of the district and did not serve any educational purpose. The superintendent explained she transferred two low preforming teachers out of the receivership school and the two teachers reassigned to that school had skills that would aid the school. In addition, while there was conflicting evidence as to the benefits and appropriateness of the transfers, none of the evidence demonstrated that petitioner acted with the malice, bad faith, gross error or prejudice necessary to justify setting the transfers aside.

The board's argument that the challenged transfers would "eviscerate" resources from every other district school was deemed unpersuasive. According to the commissioner, the statute sets forth only two limitations on a receiver's supersession powers. A supersession must be directly linked to the school intervention plan and cannot relate to a superintendent's employment status. The commissioner declined to read further exceptions into the unambiguous language of the statute.

While upholding the superintendent's authority to supersede board resolutions, the commissioner nevertheless declined to void the district's policy on teacher transfers. The superintendent claimed the language of the policy permitted a board to unilaterally effectuate teacher transfers. However, the language of the policy specifically provided

transfers were to be carried out within the provisions state law and negotiated contracts. Any transfers under the policy are thus subject to applicable laws.

Administration Tenure Areas

1. *Appeal of Dr. Caputo*, 57 Ed Dept Rep, Dec. No. 17,404 (2018).

The petitioner appealed the decision of the district and the superintendent to assign her duties outside her tenure area. Petitioner was an assistant principal who received tenure in the area of secondary assistant principal. She had been charged with acts of misconduct and was ultimately suspended for a four-month unpaid suspension. She asserted that since her return to work after the suspension, she was assigned duties outside her administrative tenure area. For example, she claimed that she was directed to write non-specific grant applications; write a course about organic gardening; and make copies for the superintendent's secretary. She requested a determination from the commissioner that the district violated 8 NYCRR 30-1.9(c), by assigning her duties outside her tenure area and requested duties that are reasonably related to and consistent with her tenure area of assistant principal.

The commissioner noted that administrators may be transferred within their tenure areas but may not be transferred outside their tenure areas involuntarily. The commissioner also noted that "an administrator will be considered to be in a new tenure area if the administrator will devote more than 50 percent of his or her time to new or different duties within that new tenure area."

The commissioner indicated that a board of education has broad discretion in assigning duties to members of its professional staff, as long as the employee's tenure rights are not infringed upon. The commissioner concluded that "it is clear from the record … that petitioner will continue to accrue tenure and seniority credit in the secondary assistant principal tenure area."

The commissioner stated: "While petitioner generally claims that the assigned duties were all outside of her administrative tenure area of secondary assistant principal, petitioner has provided no evidence to refute respondent's contention that the duties she performed were within her tenure area and reasonably related to her competence and training."

DASA

1. *Appeal of R.T.*, 57 Ed Dept Rep, Dec. No. 17,340 (2018).

The parents challenged the validity of their son's AP biology course grades and class rank primarily on the basis that his teacher violated DASA by her alleged repeated berating of the student for his tardiness to her first period class and for his submission of late assignments. The parents also claimed a DASA violation relating to the teacher's grading of the student's assignments.

After the parents filed a DASA complaint, an investigation was conducted by the district's assistant superintendent. The school board upheld the administrator's finding that the family's DASA claims were unfounded, and the family appealed to the commissioner of education.

The appeal requested, among other things, that the student's AP biology grades and his permanent high school record be changed and that his class rank be recalculated based on those changes. The commissioner dismissed the class rank adjustment request because the recalculation could adversely affect the class rank of the student's classmates, who were not joined in the appeal.

The commissioner rejected the appeal on the merits and concluded that the parents failed to show that the school board acted in an arbitrary and capricious manner when it determined that the DASA claim was unfounded.

According to the commissioner, the student was late to class 52 times, and the teacher followed school district policy by referring the student to the attendance office. In the commissioner's view, the parents failed to prove that the teacher's actions constituted "threats, intimidation or abuse" within the meaning of "harassment" and "bullying" in DASA. The parents also failed to show that the teacher's response to the student's lateness is the type of conduct contemplated by the statute, the commissioner said. Also missing was any allegation or proof that teacher's actions were based on the student's membership in a protected class specified in DASA.

Regarding the parents' grade claim, the commissioner once again said that decisions regarding grading rest initially with the classroom teacher, and then ultimately with the board of education. The commissioner said DASA is not a vehicle for challenging the validity of a grade, generally. An exception would apply, however, if the grade was the product of discrimination, intimidation, taunting, harassment, and bullying.

First Amendment (Agency Fees)

1. *Janus v. AFSCME, Council 31*, 2018 WL 3129785 (June 27, 2018)

The petitioner, a state employee, refused to join the union because he opposed many of the union's positions, including those taken during collective bargaining. Under the relevant collective bargaining agreement, he was required to pay an agency fee of $44.58 per month, or $535 per year.

Under Illinois law, employees in the bargaining unit are not obligated to join the union selected by their co-workers. If an employee does not wish to join, the employee must, nevertheless subsidize the union by paying an "agency fee" (a percentage of the full union dues that a member would pay). This fee covers chargeable expenditures – those costs attributable to those activities "germane" to the union's collective bargaining activities, but would not cover the union's political and ideological projects (non-chargeable expenditures). Under Illinois law, if a public-sector collective bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of that fee, that amount is automatically deducted from the non-members wages.

Issue: May states and public-sector unions extract agency fees from nonconsenting employees? No, the Supreme Court concluded that this procedure violates the First Amendment. The court overruled *Abood v. Detroit Bd. of Education.*

The Court explained that employees who decline to join the union are not charged full union dues but must pay an agency fee. Under the *Abood* case, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to the union's duties as collective bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. For instance, excluded

from agency shop fees are union expenditures related to the election or support of any candidate for political office.

The Court noted that the First Amendment is applicable to facts at bar.

> We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns … We have therefore recognized that a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'

The Court rejected the main defenses of the agency-fee arrangement in *Abood*. With respect to the interest of "labor peace" the court noted that *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, "and it is now clear that *Abood's* fears were unfounded." The Court referred to federal employment as an illustration. That is, under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, "but federal law does not permit agency fees. … Nevertheless, nearly a million federal employees – about 27% of the federal work force – are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee."

The Court also rejected the "risk of free riders" argument as justification for agency fees. That is, respondents claim that agency fees are needed to prevent nonmembers from "enjoying the benefits of union representation without shouldering the costs." The Court concluded that avoiding free riders is not a compelling interest and insufficient to overcome First Amendment objections.

> In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

The Court also noted that agency fees cannot be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation since, according to the Court, "That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit."

The Court concluded that:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees … Neither an agency fee nor any other payment to the union may be deducted from a nonmember's

> wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. … Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

First Amendment (Free Exercise Clause)

1. *Masterpiece Cakeshop, L.T.D. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018)

Same-sex couple visited Masterpiece Cakeshop to inquire about ordering a cake for their wedding reception. The couple was told by the owner that he would not create a cake for their wedding because of his religious opposition to same-sex marriages; but he would sell them other baked goods. Colorado did not recognize same-sex marriages at the time.

The Colorado Civil Rights Commission determined that the shop's actions violated Colorado's Anti-Discrimination Act and ruled in the couple's favor.

The U.S. Supreme Court held that the Commission's actions violated the Free Exercise Clause of the First Amendment. The court concluded that the baker's claim that using his artistic skills to make an expressive statement, "a wedding endorsement in his own voice and of his own creation," is a "significant First Amendment speech component and implicates his deep and sincere religious beliefs." The Court noted the baker's dilemma was understandable given that his decision to refuse service occurred in the year of 2012 and at that point, Colorado did not recognize gay marriages. "Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs…"

The court further noted that the Civil Rights Commission's treatment of his case "has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." The Court noted that the commissioner went so far as to "compare [the baker's] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." This, according to the Court, "cast doubt on the fairness and impartiality of the Commission's adjudication of [the baker's] case.

The court concluded that the Commission's treatment of the baker's case "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."

The Court noted that factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Based on these factors, the Court held that the Commission's consideration of the case was "neither tolerant nor respectful of [the baker's] religious beliefs."

Conclusion: By failing to act in a manner that was neutral to religion, the Colorado Civil Rights Commission violated the First Amendment of the Constitution and the judgment of the Colorado Court of Appeal's was reversed.

Elections

1. *Appeal of Sidmore*, 57 Ed Dept Rep, Dec. No. 17,225 (2017).

Petitioner challenged the practice of the district of holding events on the same day as the annual meeting/election. The National Honor Society 33rd Annual Academic Achievement Dinner and National Junior Honor Society Induction (the "event") was held the same day as the election. Also, the petitioner alleged that at a vote on a capital project, the district improperly sent a flyer to parents inviting them to attend a "Cabin Fever Reliever" during the vote. The petitioner claimed that by holding the annual budget and election on the same day as the event, the district sought to increase participation of a targeted group of voters. Petitioner submitted a list of voters and a program from the event and "it appears that petitioner compared the list of voters to the students listed in the program and alleges that '76 of those voters are related to or are students themselves being honored at the dinner/induction.'" Petitioner alleged that the group was likely to vote in favor or the proposition because "their child[ren] benefit directly by the capital project improvements."

The commissioner dismissed the appeal on procedural grounds but addressed the merits. The commissioner noted that the mere scheduling of events simultaneously with a vote is not sufficient to establish that impermissible "targeting" has occurred. The scheduling of these types of events is permissible, "provided that a district gives notice to all district residents, and not just to those district residents that the board believes will be supportive of the budget, especially parent of students." The commissioner concluded that neither party provided a sufficient description of the event, "though the program indicates that the induction ceremony was held in the school auditorium, which presumably could accommodate additional attendees. Therefore, given the limited record in the appeal … the appeal would be dismissed on the merits as petitioner has failed to carry her burden of proof."

2. *Appeal of Flippen*, 57 Ed Dept Rep, Dec. No. 17,296 (2017).

The petitioner challenged the outcome of a special election held for a capital improvement bond. The election was the second time the board was presenting the proposition to the voters. The petitioner claimed that the school district provided confusing notice of the vote, improperly used district resources to advocate for favorable votes, that district employees and officials openly supported the vote, that the board failed to appoint an impartial chairperson, and that certain absentee ballots were improperly rejected.

The majority of petitioner's claims centered around allegations of improper advocacy engaged in by various district officials and employees. While school boards are authorized to disseminate informational materials to the voters, they are prohibited from using district resources to exhort the electorate to cast their votes in support of a particular position. Such action violates the constitutional prohibition against using public funds to promote partisan positions. The board, as a corporate body, is also

prohibited from providing indirect support, such as giving access to the districts channels of communication for outside entities, like a parent teacher organization (PTO), to espouse a partisan position.

The petitioner challenged a district produced post card and color brochure mailed to district residents. The commissioner reviewed both and found them to be factual in nature. The brochure depicted current conditions in school buildings through color photographs. According to the commissioner, nothing prohibits neutral informational brochures from including color photographs of places allegedly in need of repair. The post card notified residents of two informational meetings held prior to the vote as well as the vote itself. However, it additionally stated "please support our children" and "help support our children." While the commissioner determined the post card did not specifically advocate for a yes vote, she cautioned that in the future the district should ensure that such mailings are strictly objective and factual so as to be less likely to cause confusion or invite criticism.

Challenges were also raised regarding the alleged distribution of a PTO flyer to elementary students advocating a yes vote and an automated phone message sent by the district. The petitioner failed to produce any evidence to substantiate these claims. The district denied that flyers were sent home with elementary children. Additionally, the superintendent submitted an affidavit asserting that the telephone system was only used to remind residents to vote and did not advocate any particular position. As such, the commissioner dismissed these claims.

Actions of board members collectively and individually were also challenged. The petitioner claimed that a board member improperly interjected himself into a conversation about the bond vote that occurred between two residents at a basketball game and advocated for the proposition. The commissioner found there was no evidence of improper advocacy because a school board member may individually express his or her views and engage in partisan activity, provided school district funds are not used.

Next, petitioner asserted that employees and the board acted improperly at a series of events and meetings held prior to the vote. After the first failed bond vote, the high school principal provided a tour of the school to parents interested in observing their child's learning experience. Parents on the tour raised questions regarding the state of the facilities and were told if they had concerns they could support a capital improvement plan. The commissioner highlighted that the board had not yet decided at the time of the tour to place the second capital improvement bond before the voters; such resolution was not passed until the following month. Responding to parental question by alerting parents of the option to support a capital improvement plan was not improper advocacy. As such, the commissioner found the petitioner failed to establish that any improper advocacy occurred on the tour.

The petitioner also failed to meet her burden of proof with respect to her allegations of improper conduct at a PTO meeting and at a public hearing held to provide information about the bond vote. The board president submitted an affidavit countering claims that a PTO meeting to discuss an academic program was instead monopolized by board members advocating for the capital improvements. The president averred that a discussion of building conditions occurred at the end of the meeting but that none of the four board members present advocated for a yes vote. The petitioner challenged the public hearing because a presenter from the architectural firm hired by the district

described the improvements that were included within the bond and financing options available to the district by means of the bond. The petitioner failed to provide any affidavits from voters who agreed with her allegation that the board's use of the presenter "exerted undue influence" to sway voters into supporting the proposition.

In addition to her claims of improper advocacy, the petitioner alleged other irregularities occurred in the conduct of the election. The first allegation centered on the notice of the bond vote.

Similar to the annual meeting and election, notice of a special meeting must be published at least four times within the seven weeks preceding the vote with the first publication occurring no later than 45 days prior to the vote. According to the record, the first notice did not contain the deadline for personal registration for voters to be able to register to vote on the proposition. The district subsequently corrected the notice in time for the three remaining publications and also posted corrected notice in 20 locations throughout the district. Petitioner did not challenge the initial notice error, but claimed that the notice was confusing and led voters to believe they had to re-register in order to vote. It is well established that election proceedings will not be overturned for lack of due notice unless such omission was willful or fraudulent. Here, the commissioner found no fraud or willfulness given the district immediately sought to correct the error. Furthermore, she determined the language of the corrected notice was not confusing and that petitioner failed to present any further evidence that voters found the text confusing.

Petitioner additionally claimed the chairperson of the election was improperly appointed because she was a member of a church wherein one of district's board members was a pastor. The education law requires that a chair person be a qualified voter of the district. There is no prohibition against an attendee of the same church in which a board member is a pastor serving as chairperson. Therefore, the commissioner found the board properly appointed a qualified voter as chairperson.

The petitioner also made an allegation that absentee ballots were not accepted up until the closing of the polls, based upon the district brochure which listed 5 pm as the deadline for receipt of absentee ballots. The commissioner rejected this claim as the education law provides that absentee ballots must be received in the office of the district clerk by 5 pm on the day of the election in order to be canvassed. Therefore, the district's brochure properly notified voters of the deadline for receipt of absentee ballots.

Speculation as to the effect of alleged irregularities is an insufficient basis upon which to overturn a school election. Based upon the foregoing, the commissioner found that the petitioner did not prove that any irregularities occurred which affected the outcome of the election and there was no basis to overturn the election results. The commissioner reminded the district to ensure all district meetings and elections in the future are clearly conducted in compliance with the law to avoid unnecessary controversy.

3. *Appeal of Campbell*, 57 Ed Dept Rep, Dec. No. 17,373 (2018).

The petitioner, an incumbent up for re-election challenged the outcome of the election based, in part, upon the absentee balloting process. She argued that the district's process disenfranchised over 100 voters and also claimed district resources were used for an improper robo-call.

In order to be issued an absentee ballot, a voter must submit an application. As part of the application, a voter will explain his or her inability to vote in person due to illness, physical disability, hospitalization, incarceration (unless incarcerated for a felony), or travel outside the voter's county or city of residence for business, studies, or vacation on the day of election. The education law requires the application to be received by the district clerk at least seven days prior to the election, if the ballot is to be mailed to the voter, or the day before the election if the ballot is to be issued to the voter in person. In 2017, the election was on May 16th, so any applications for ballots to be mailed to voters had to be received by May 9th.

The petitioner brought in over 100 absentee ballot applications on May 12th. The original absentee ballot application issued by the district contained a box wherein the voter could designate a proxy to whom the ballot could be issued. All of the applications the petitioner turned in listed her as proxy. The district clerk informed the petitioner that she could submit the applications but the voters would be required to pick up their own absentee ballots.

According to the school district, six ballots were given to persons other than the voter prior to May 11, 2017. On that date, the district after consulting with its attorney, realized that it should not have issued ballots to persons other than the voter. At the time of this discovery, 65 applications were pending. In order to compensate for its mistake and not disenfranchise those 65 voters, the district, on May 12th, sent them ballots by overnight mail. In her appeal, the petitioner challenged the late mailing of the ballots to those voters and the district's subsequent refusal to also issue by express mail ballots to those applications she returned on May 12th.

On appeal, the commissioner of education stated that there is no authority in education law for proxy voting. The education law only permits an absentee ballot to be issued to the applicant, either in person or by mail. Therefore, the district did not act improperly in refusing to issue ballots to the petitioner. In addressing, petitioner's challenge to the outcome of the vote, the commissioner found she failed to meet her burden of proof to overturn the election. In order to overturn an election, it must be proven not only that irregularities occurred, but that the irregularities actually affected the outcome of the election, were so pervasive that they vitiated the electoral process or demonstrate a clear and convincing picture of laxity in adherence to the education law. In this case, petitioner lost by a margin of at least 326 votes. She failed to establish that the six absentee ballots improperly delivered to proxies or the 65 ballots delivered by overnight mail after the deadline, affected the outcome of the election. Moreover, petitioner failed to submit any affidavits from any of the 100 plus voters she alleges were disenfranchised by the district's refusal to issue the ballots to her.

The commissioner, similarly found that the petitioner did not establish that robo-calls received by district residents were a result of improper use of the district's resources. School districts may distribute neutral information about items on the ballot but cannot exhort the voters to support a particular position. The petitioner alleged that the robo-calls urged residents to "Join the ABC team- vote for anyone but Campbell" and were the result of improper use of district resources. Although the district's website contained a link where residents could sign up for automatic notifications from the district, the petitioner presented no evidence that any candidates were provided with access to the information gained from the website.

While the commissioner declined to overturn the election results, she cautioned the district that it needs to review its election procedures in order to avoid making procedural changes at the last minute. She also reminded the district that it needs to treat all applicants for absentee ballots in the same manner and may not accept untimely applications for some applicants.

4. *Appeal of Herloski*, 57 Ed Dept Rep, Dec. No. 17,361 (2018).

The petitioner challenged the election results based upon claims of improper advocacy. At issue was the placement of signs from a local community coalition in support of public education on school property and statements in the district newsletter. In her decision, the commissioner of education warned the school district of the need to avoid even an appearance of partisan impropriety.

The signs at issue were produced by the coalition "A Community Together for Education" (ACT) which counts school districts, area businesses and community residents among its members. The formation of ACT was spearheaded by the Monroe County Superintendents' Public Education Advocacy Committee. The signs included slogans such as "Supporting our Public Schools" and "ACT for Education" and included the coalition's website at the bottom. In the weeks leading up to the 2017 budget vote, principals purchased and placed the signs from ACT in front of multiple school buildings, including the high school which served as the district's single polling location.

In her examination of the signs, the commissioner found that they conveyed facially neutral information. The commissioner noted that although she did not have a copy of the ACT for Education website as it existed at the time of the 2017 budget vote, there was nothing on the current webpage concerning school budget votes. All information on the signs and webpage referenced therein simply encouraged support of public schools. She further found that even though the signs were placed in close physical and temporal proximity to the May 2017 budget vote, that such actions did not constitute improper partisan activity under the circumstances. The commissioner cited to prior decisions where it was determined that signs with facially neutral information designed to encourage voter turnout were permissible.

However, the commissioner went on to comment that the manner in which the signs were acquired and displayed showed that the district did not take sufficient steps to avoid the appearance of partisan impropriety. According to the superintendent's affidavit, the building principals ordered and erected the signs at various points in April, at most one and one-half months prior to the budget vote. Photographic evidence submitted by the petitioner showed that in at least two instances the ACT signs were placed in close physical proximity to signs reminding voters of the date and time of the vote. The petitioner also submitted photographs showing the signs had been removed from three of the schools the day after the vote.

Furthermore, while the district argued that the signs were exclusively available for purchase from the Monroe County Superintendents' Public Education Advocacy Committee, a message sent by a social media account associated with the district offered the signs for sale and provided contact information for the district's public relations coordinator. According to the commissioner, the social media posting suggests that the district was directly responsible for ordering and disseminating the ACT signs.

Additionally, the commissioner rejected arguments by the board and superintendent that they were not responsible for the purchase and placement of the signs. Given that the superintendent and board have the combined responsibility for the management and control of the district, they could not evade responsibility for compliance with the constitutional mandate by attributing the actions to their subordinates.

Based upon the foregoing, the commissioner determined the combined actions contributed to an appearance of partisanship. She admonished the district to ensure that if in the future ACT signs are displayed on school property that their display is made in a time and manner which do not suggest improper advocacy.

The petitioner also challenged statements contained within the district newsletter as comprising improper advocacy. Among the challenged statements were the following phrases:

- "fiscally prudent spending plan,"
- "outstanding educational programs," and
- "a budget that is fiscally responsible."

These phrases were included in an open letter to the voters from the superintendent and board president. The letter also urged voters to exercise their right to vote but did not specifically exhort voters to vote yes on the budget. The commissioner noted that the statements characterizing the budget as fiscally prudent and responsible represent close questions but ultimately determined they did not constitute impermissible advocacy. She did however, urge the district to ensure budget related newsletters contain strictly objective and factual information in the future so as to avoid confusion or invite criticism.

Lastly, the commissioner declined to overturn the election results on this record. The petitioner failed to prove that the outcome of the vote was affected by improper partisan advocacy or that the vote involved an irregularity that could and did vitiate the electoral process.

Doctrine of Spoliation

1. *Tanner v. Bethpage UFSD*, 161 A.D.3d 1210 (2d Dep't 2018).

A civil action to recover damages due to an incident when a student allegedly tripped and fell over a metal chain while running outside the school during gym class. The plaintiff requested that the district/defendant provide video footage of the incident. The defendant responded indicating that no video footage existed since the system in place at the time of the incident only retained images for 30 days, at which point the video was overwritten. The plaintiff moved to strike the defendant's answer on the ground of spoliation of evidence. The motion was denied by both the lower court and the Second Department.

The court noted that under the doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, "the responsible party may be sanctioned under CPLR 3126." However, the party seeking the sanction must show that the party having control over the evidence, "possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant …" Importantly, in the absence of pending litigation or

notice of a specific claim, "a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices … Here, the plaintiff failed to establish that the defendant intentionally or negligently failed to preserve the video after being placed on notice that the evidence might be needed for future litigation."

2. *Francis v. Mount Vernon Bd. of Educ.*, 2018 WL 4101043 (2d Dep't 2018).

Plaintiff alleged that the student sustained injuries when he was picked up and dropped on his head by a fellow student. The complaint alleged that the district did not provide adequate supervision.

The lower court denied the plaintiff's cross motion seeking to strike the district's answer based on spoliation. The court noted the general rule regarding spoliation; "When a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." The court must consider the "prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness."

In the case, a video recording that captured the incident could not be located after it had been viewed by the plaintiff, the police, and school administrators. The principal did not know when the video disappeared but claimed the disappearance was accidental and that a search had been conducted to locate the video. The court concluded that under the circumstances, "where the defendant lost the video recording after having provided it for viewing to the plaintiff and others, the plaintiff would still be able to establish her case at trial despite the absence of the video." So the drastic sanction of striking the district's answer was unwarranted.

The court also agreed with the lower court's determination to grant the district's motion for summary judgment since the district submitted evidence that the plaintiff/student and the other student had no previous interaction and that the other student's prior disciplinary record did not include any violent act, "thereby establishing that the district had no specific knowledge or notice of any prior conduct such that L.F.'s alleged assault could reasonably have been anticipated."

Health and Welfare Service

1. *Appeal of the Bd. of Educ. of the New Hyde Park-Garden City Park UFSD*, 57 Ed Dept Rep, Dec. No. 17,397 (2018).

The district of location sought reimbursement from the district of residence for health services costs incurred over a period of five school years, the earliest being the 2009-2010 school year. Because an appeal to the commissioner must be started within 30 days from the decision or the act complained of, the commissioner addressed whether the school district's appeal was timely commenced.

The commissioner overruled prior opinions that declined to apply the 30-day time limitation in the context of health services reimbursement cases. The commissioner noted that while a school district's refusal to provide health services would constitute a continuing wrong, "the instant action is simply a claim for monetary reimbursement."

The commissioner adopted the reasoning of cases involving claims for reimbursement of foster care tuition payments. In those foster care cases, claims of reimbursement for a particular school year "become due at the completion of that school

year." The commissioner, therefore, concluded that an appeal to the commissioner by the district of location which seeks monetary reimbursement for health services must be commenced within 30 days after the conclusion of the school year in which the costs were incurred. This new rule applies to "those cases involving reimbursement for the 2018-2019 school year and beyond."

Shared Decision-Making

1. *Appeal of Barr*, 57 Ed Dept Rep, Dec. No. 17,364 (2018).

The petitioner appealed from an action of the board of education concerning shared decision-making. Petitioner is a school district employee and president of the Lyons Teachers Association and member of the District Leadership Team ("DLT"). Pursuant to regulations, a shared decision-making plan ("plan") was adopted. On 1/29/13 the board revised and approved the plan. In the fall of 2014, the DLT began discussing the plan and meetings were held in September, October and November 2014 and the plan was ultimately approved by the board on 1/29/15.

The petitioner claims that the superintendent failed to obtain "consensus" of all members of the DLT prior to sending the plan to the board for approval and that the board, by approving the plan "lacked consensus." Petitioner also asserted that the board improperly appointed one of its own members to serve on the DLT in violation of the regulations.

The commissioner concluded that to the extent petitioner claimed that the board violated Article XII of the plan by failing to obtain a "consensus" of all members of the DLT, "petitioner has failed to meet his burden of proof." Article XII of the plan requires that revisions must be adopted by "consensus of the DLT". The record indicated, according to the commissioner, that the DLT met on 3 occasions to discuss updates and revisions. With respect to the November meeting, respondents claimed that a poll was taken among the members in attendance to cast final votes on the revised plan by a showing of a "thumbs up" or a "thumbs down." Respondents submitted affidavits indicating that all DLT members present, including the petitioner, gave a "thumbs up" to indicate their consent. The superintendent indicated that, following the November meeting, she obtained either verbal or written consent to the written memorialization of the updates agreed upon and circulated. Also, the fact that two members who were not in attendance subsequently sought to make additional changes did not establish that a consensus was not reached at the November 2014 meeting. "'Consensus' has been interpreted by at least one New York court to mean 'judgment arrived at by <u>most</u> of those concerned.'"

The commissioner, however, did find that the appointment of the board member to the DLT violated the regulations since the regulation lists the mandatory participants to the shared decision-making plan. The intent is for board members to work in collaboration with the district planning committee "and not to serve on the committee itself." The commissioner, however, noted that there was no evidence that this appointment required the annulment of the plan.

Removal of Board Member Issues

1. *Appeal of Forcucci*, 57 Ed Dept Rep, Dec. No. 17,204 (2017).

The board of education held a special meeting where it voted to pursue removal charges against a board member. The board approved three motions by a 4-2 vote which charged petitioner with misconduct. Petitioner claimed that the board president should have been disqualified from voting on the motion because of an alleged bias and that without the board president's vote, the board did not have the proper number for votes to initiate removal charges.

The commissioner noted the distinction between a board member's vote to authorize removal proceedings and his or her vote to sustain charges of official misconduct following a full and fair opportunity to refute the charges. "Although a board member harboring an 'adverse animus' should not be allowed to participate in the 'decision-rendering' aspect of a removal proceeding, petitioner cites no authority indicating that this standard is applicable to a board member's vote to initiate removal proceedings." The commissioner stated that even assuming, arguendo, that the bias standard applicable to the final determination level must also be applicable at the initiation level, "petitioner has not met her burden of proof to show that Board President … was, in fact, biased against petitioner."

2. *Appeal of McCray*, 57 Ed Dept Rep, Dec. No. 17,307 (2018).

The petitioners sought removal of board members and the superintendent. Issues stemmed from litigation between the board and SED regarding state aid for certain building renovations. The construction was substantially completed by May 2004 and the board was required by state regulations to file final cost reports by June 30 of the school year in which the certificates of substantial completion were issued or six months after the certificates were issued, whichever occurred later. The final cost reports were due by the end of 2004. The board did not file the reports until June 2008. SED excused the late filing for one project, but discontinued the apportioned payments and sought to recoup state aid apportionment which had already been paid. Litigation ensued and the lower court granted the board's request for a temporary restraining order, which resulted in a payment from SED to the board in the amount of approximately $7.5 million.

In March 2014, the NYS Comptroller issued a report which concluded that district officials "underestimated revenues and overestimated expenditures … for fiscal years 2008-09 through 2012-13…" The Comptroller noted that after the district learned of the potential $13.6 million liability to SED, "the entire amount needed was accumulated in unexpended surplus funds by the end of the 2010-11 fiscal year, due to the operating surplus incurred that year." Despite this, the Comptroller noted that "officials continued to accumulate additional unexpended surplus funds in subsequent years." The Comptroller also noted that district officials had "hoped that funds for this contingent liability could be placed in a reserve and excluded when calculating the statutory limit." However, according to the Comptroller, "there is no statutory authority to establish a reserve for this liability."

The petitioners claim, in part, that respondents willfully violated the Real Property Tax Law section 1318 by retaining funds greater than 4 percent of the next fiscal year's budget for the 10-11, 11-12 and 12-13 school years. The commissioner

dismissed the application. A board member or school officer may be removed from office under Education Law 206 if, proven to the satisfaction of the commissioner, that the board member or officer has engaged in a "willful violation or neglect of duty under the Education Law or has willfully disobeyed a decision, order, rule or regulation or the Board of Regents or Commissioner of Education… To be considered willful, the board member or officer's actions must have been intentional and with a wrongful purpose." The commissioner noted that while the petitioners have proved violations of the Real Property Tax Law,

> the actions of which petitioners complain do not rise to the level of a willful violation or neglect of duty under the Education Law. … petitioners have produced no evidence that any respondent acted with a wrongful purpose. Additionally, each board member has asserted … that they took the actions which resulted in the accumulation of unexpended surplus funds during the disputed timeframe after receiving the advice of counsel. It is well-settled that a board member who acts on the advice of counsel will not be found to have engaged in a willful violation or neglect of duty that would justify removal under Education Law §306.

While the application for removal was dismissed, the commissioner reminded the district to comply fully with RPTL 1318 and implement the recommendations of the Comptroller's report and the district's corrective action plan. The commissioner also cautioned the respondents that "future noncompliance with the recommendations of the Comptroller or the corrective action plan could give rise to a finding of willfulness."

Employee Discipline

1. *Grassel v. Dep't of Educ. of the City of N.Y.*, 158 A.D.3d 501 (1st Dep't 2018).

Tenured teacher sought to vacate an arbitrator's determination terminating his employment. The First Department concluded that the determination was rational and not arbitrary and capricious. "Testimony by five students who witnessed the incidents supported the conclusion that petitioner took a knife from the desk in the classroom and waved it around in order to get control of his class. Moreover, there was testimony by a student and a paraprofessional that supported the finding that petitioner also pulled a stool out from under a student in a separate incident on the same day."

2. *Matter of Bolt*, 30 N.Y.3d 1065 (2018).

Three 3020-a cases from New York City involving tenured teachers. The respective hearing officer in each case found guilt, and the teachers were terminated. *Matter of Bolt* involved a teacher whom the hearing officer found improperly assisted students during the administration of the statewide ELA examination in violation of applicable protocols. This allegedly caused an inaccurate measurement of student performance. According to the arbitrator, termination was warranted based on gross misconduct, neglect of duty and her failure to serve as a positive role model.

Matter of Beatty involved a special education teacher with 17 years of service, who worked in the district's Home Instruction Program providing instruction to students unable to receive instruction in a regular classroom because of medical or psychiatric reasons. An investigation found that she had not met with a particular student on 24 occasions despite her certifications to the contrary. There was also an issue of submitting false logs and time sheets. The hearing officer found termination was an appropriate penalty.

Matter of Williams involved a middle school physical education teacher who allegedly initiated conversations with several of his eighth grade female students, asking if they had eligible older sisters and, if so, a physical description and their telephone numbers. The hearing officer determined that termination was warranted.

On appeal the lower court reversed each hearing officer regarding the penalty of termination and the school district appealed. The New York Court of Appeals determined that the lower court exceeded its authority by reweighing the evidence and substituting its judgment for that of the hearing officer. The concurring opinion set forth principles regarding a court's review of an administrative disciplinary proceeding. The test is whether the punishment is so disproportionate to the offense, in light of all circumstances, as to be shocking to one's sense of fairness. Such a determination involves consideration of "whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general."

Other factors include the prospect of deterrence of the individual or of others in like situations, and whether the penalty reflects societal standards with respect to the offense involved. The harshness of a penalty and its severe consequences does not shock the conscience "unless it is obviously disproportionate to the misconduct and in contravention of the public interest and policy reflected in the agency's mission."

Negligence

3. *Tzimopoulos v. Plainview-Old Bethpage CSD*, 155 A.D.3d 987 (2d Dep't 2017).

A student (third grader) was injured during school recess when another student accidentally collided with him as they ran to retrieve a ball during game called "wall ball." The plaintiff/student, who has cerebral palsy, was under supervision of a special education aide who was assigned to provide one-on-one assistance. The aide was standing approximately 10 feet away at the time of the incident. The students were also under the supervision of the physical education teacher. The plaintiff claimed that the school district was negligent in failing to provide adequate supervision, and in allowing the plaintiff to participate in the wall ball game.

The court dismissed case. The district established their entitlement to judgment "as a matter of law by demonstrating that they provided adequate supervision to the infant plaintiff during recess … and, in any event, that the accident was caused by a sudden and spontaneous collision which could not have been prevented by more intense supervision."

4. *Juerss v. Millbrook CSD,* 161 A.D.3d 967 (2d Dep't 2018).

The student was suspended from school after the principal concluded that the student had engaged in an act of misconduct. That evening, the student committed suicide. The administrators of the estate commenced an action against the district and principal alleging that the suicide was caused by the defendants' negligent investigation into the allegations and their negligent training of school staff in investigation procedures. The lower court dismissed the complaint for failure to state a cause of action. The Second Department agreed. "New York does not recognize a cause of action sounding in negligent investigation … Moreover, 'a claim for negligent training in investigative procedures is akin to a claim for negligent investigation or prosecution, which is not actionable in New York.'"

5. *Brennan v. Wappingers CSD,* 2018 WL 3863359 (2d Dep't 2018).

Plaintiff commenced an action against the school district to recover damages for personal injuries allegedly sustained while performing subcontract work at a school. He was allegedly injured when a chair on which he was sitting collapsed during his lunch break. The court set forth the general rule; "A landowner has a duty to maintain its premises in a reasonably safe manner and, thus, may be found liable if it created or had actual or constructive notice of the alleged defective condition."

The court noted that the district established its prima facie entitlement to judgment as a matter of law showing that it did not have actual or constructive notice of any defect in the chair. "Since the plaintiff presented only unsubstantiated hearsay in opposition to the School District's motion, he failed to raise a triable issue of fact."

In addition, the doctrine of res ipsa loquitur was found to be inapplicable because the school district did not have exclusive control over the chair. The chair was located in the custodian break room and accessible to third-party contractors "giving numerous people access to it."

6. *Pickles v. Hyde Park CSD,* 2018 WL 3862951 (2d Dep't 2018).

Plaintiff allegedly slipped and fell on ice located on a roadway owned by the school district. The lower court denied the summary judgment motion of the district. The Second Department affirmed since the district did not establish its prima facie entitlement to judgment as a matter of law dismissing the complaint on the ground that the plaintiff was unable to identify the cause of her fall.

The district also failed to demonstrate that it did not create or have actual or constructive notice of the alleged hazardous condition. The certified weather reports showed an approximate 4 day snowstorm culminating in a snow/ice cover totaling 19 inches on the date of the accident. In addition, the affidavits of the district's director of facilities and operations and middle school principal failed to provide any information about the district's snow and ice removal practices, "or what was done to remove snow and ice from the premises prior to the accident, except to state generally that a facilities and operations staff member finished 'all maintenance efforts' at the middle school by 2:59 p.m. on the date of the accident."

7. *Hurley v. Brewster CSD*, 163 A.D.3d 787 (2d Dep't 2018).

The infant/plaintiff and his parents commenced the action against the school district for negligent supervision. At the 50-h hearing, the infant/plaintiff testified that he "became nauseous during his high school health class while watching a graphic documentary about the dangers of drunk driving." The infant plaintiff told the teacher that he "did not feel well" and received permission to use the bathroom. He did not inform the teacher that he felt nauseous or dizzy. He left the classroom, walked about 30 feet and fainted in the hallway. The case was dismissed by the lower court and the plaintiffs appealed.

Second Department reiterated the general rule that schools are "under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." The court noted, however, the premise that schools are not the insurer of its students' safety, and "will be held liable only for foreseeable injuries proximately related to the absence of adequate supervision."

> Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury.

The court concluded that the district met its burden by establishing that the accident occurred in so short of a span of time that "even the most intense supervision would not have prevented it." Thus, the case was dismissed.

Notice of Claim

1. *In the Matter of C.B. v. Carmel Central School District*, 2018 WL 3863264 (2d Dep't 2018).

Petitioner moved for leave to serve a late notice of claim. The infant petitioner stopped attending the school district in November 2013, when she was in 8th grade. Thereafter, she was diagnosed with depression and general anxiety disorder. She allegedly complained to her guidance counselors on a regular basis that she was bullied by other students (both verbally and physically). Petitioner sought to serve a late notice of claim alleging damages arising from the district's alleged negligence in failing to prevent or stop the bullying.

In determining whether to grant a the motion to serve a late notice of claim courts must consider all relevant facts and circumstances, including but not limited to, "whether (1) the school district acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the delay substantially prejudices the school district in its ability to maintain its defense on the merits, and (3) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim." In addition, the court will consider whether the claimant was an infant and the court "may consider whether there is a causative nexus between infancy and the delay."

Here, the court noted that the petitioner demonstrated that the district had "actual notice of more than just the discrete incidents to which it responded; it had notice of the

alleged pattern of abuse." The court concluded that the petitioner demonstrated that the district had actual notice of the essential facts constituting the claim within 90 days of the accrual and that the district was not substantially prejudiced by the delay in serving the notice of claim.

"Given the petitioner's infancy, the school district's actual notice, and the absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim."

Private Nuisance

1. *Ranney v. Tonawanda City School District*, 160 A.D.3d 1461 (4th Dep't 2018).

The school district constructed a multimillion dollar sports stadium on a parcel of land adjacent to plaintiffs' residential properties. The plaintiffs commenced an action claiming that defendant's use of its land constituted a private nuisance and sought damages. The court noted the following elements regarding an action for a private nuisance: (i) an interference substantial in nature, (ii) intentional in origin, (iii) unreasonable in character, (iv) with a person's property right to use and enjoy land, (iv) caused by another's conduct.

The question of whether the use of land constitutes a private nuisance generally turns on facts that include "the degree of interference and the reasonableness of the use under the circumstances." The court denied the district's motion to dismiss the case. The court concluded that evidence established that the stadium has lights and a loudspeaker that plaintiffs find disturbing. When events occur at the stadium, the lights and loudspeaker are used late into the evening, sometimes until 11:00 p.m.; the lights shine directly into the home of one of the plaintiffs; spectators at event make a disturbing amount of noise, and also stand near plaintiffs' property lines drinking alcohol and throwing trash onto plaintiffs' properties.

Section 913

1. *McVetty v. Valley Stream UFSD*, 154 A.D.3d 764 (2d Dep't 2017).

The petitioner was employed by the district as a custodian and his ex-wife was also employed by the district in another school building. The ex-wife apparently advised the district that the petitioner had been admitted to a psychiatric facility after making threats of violence against her to his psychiatrist. The school district referred the petitioner for a section 913 medical examination. The district directed the employee to provide the doctor with "any and all medical records relating to [his] current state of health." The employee attended the examination, but did not bring any medical records, contending that this was an invasion of his privacy. As a result, the school district commenced a disciplinary proceeding pursuant to Civil Service Law section 75, charging the petitioner with insubordination and incompetence. The hearing officer recommended that the charges be sustained and the custodian's employment terminated. The board adopted the findings and terminated the employee.

The court concluded that there was substantial evidence to support the charge of incompetence because the examining doctor opined that the employee presented a potential danger to the students and fellow staff members. The court, however, dismissed

the insubordination charge that had been based on the employee's failure to provide the requested medical records. The court noted that Education law section 913 does not mandate that medical records be produced as a requirement of submitting to a medical examination.

The court noted that the district's "request for 'any and all medical records relating to [the petitioner's] current state of health' was overly broad and not reasonably tailored in scope in that it sought medical records beyond those that were relevant to the employee's mental capacity to perform his duties. … Since the request for medical records lacked any time or subject matter limitation, the board erred to the extent that it found that the petitioner was insubordinate for his failure to comply with this unreasonable directive." The insubordination charge was therefore dismissed.

The case was sent back to the board for consideration of an appropriate penalty in connection with the incompetence charge, but not the insubordination charge which was dismissed by the court.

Probationary Period (non-instructional)

1. *Mogilski v. Westbury UFSD*, 158 A.D.3d 692 (2d Dep't 2018).

The petitioner was hired by the school district as Supervisor of School Facilities and Operations which came with a 26-week probationary period. The district informed petitioner that his probationary period was being extended for 12 days due to school closings for holidays. The Nassau County Civil Service Commission approved the district's request for the extension. The board voted to terminate his employment effective the last day of his probationary period. The Civil Service Commission informed the district that it had incorrectly authorized the extension for 12 days when the extension should have been 6 days. The petitioner commenced the action seeking reinstatement asserting that the local civil service rule, which requires a probationer's term to be extended for authorized or unauthorized absences on "workdays" does not authorize an extension for school closings on holidays. The petitioner also alleged that the district failed to give him at least one week notice of his termination as required by the local civil service rule.

The court concluded that the district's interpretation of the local civil service rule was irrational and the extension of the probationary period was improper. The court noted that the term "workdays" in the rules includes all days when the employee's presence would normally have been required. "A school closing due to holiday is not a day when the petitioner's presence would normally have been required."

The court also concluded that the district did not "substantially comply" with the one-week written notice of termination requirement of the local rule.

Right to Sound Basic Education

1. *Davids v. State of New York*, 159 A.D.3d 987 (2d Dep't 2018).

The plaintiffs alleged that the laws in New York and the seniority-based layoff system make it nearly impossible for school administrators to dismiss ineffective teachers. As a result, it was claimed that administrators are compelled to either leave the ineffective teacher in place or transfer the teacher from school to school. This, according

to the plaintiffs, conflicts with the right to a sound basic education, because these ineffective teachers are unable to prepare students to compete in the economic marketplace and substantially reduces the overall quality of the teacher workforce in the state.

The defendants in the case, which included the Board of Regents and the NYSED sought to have the cases dismissed, essentially alleging that the complaints failed to state a cause of action. The Second Department concluded that the allegations were in fact sufficient and the motion seeking dismissal was denied. The court stated that "the … allegations are sufficient to state a cause of action for a judgment declaring that the Dismissal Statutes [3020-a] and the LIFO [last in first out] Statute separately and together violate the right to a sound basic education protected by the Education Article of the NY Constitution."

Unemployment

1. *Matter of Papapietro,* 156 A.D.3d 1048 (3d Dep't 2017).

Claimant, a per diem substitute teacher, worked at least three days in the week immediately prior to a holiday recess at the end of December 2015. The claimant applied for unemployment insurance benefits due to a "lack of work" related to the recess. The Unemployment Insurance Appeal Board ruled that the claimant was ineligible to receive unemployment insurance benefits because he had a reasonable assurance of continued employment. The Board explained that it has "long held" that an employer need not give any notice to an employee regarding employment following a recess or a vacation.

The court reversed the decision, indicating that the Board's interpretation of Labor Law section 590(10) "is inconsistent with the plain language of that provision requiring a reasonable assurance from an employer, and therefore we reverse." The court noted that, pursuant to the Labor Law, a person who is employed in an instructional capacity does not get unemployment insurance benefits during "any week commencing during an established and customary vacation period or holiday recess, not between such academic terms or year, provided the person performed services for the district immediately before the vacation period or holiday recess and there is a reasonable assurance that the person will perform any services … in the period immediately following the vacation period or holiday recess" (quoting *Matter of Scott,* 25 A.D.3d 939 (2006)).

The court noted that it was uncontested that the employer "never sent any letter to claimant or provided him with any other form of notice that made a representation regarding claimant's employment after the recess." The court remitted the matter to the Appeal Board for further proceedings.

Executive Session

1. *Matter of Lucas v. Bd. of Educ. of the East Ramapo CSD,* 57 Misc.3d 1207(A) (Supreme Ct. Rockland Cnty. 2017)

Petitioners commenced a court proceeding seeking an order declaring the decision by the board of education, abolishing a number of bus driver positions, to be illegal. The board, during two consecutive meetings, moved into executive session by motion

allowing the board to "convene into executive session to discuss litigation, personnel, real estate, and contracts …"

The court concluded that the board violated the Open Meetings law by inadequately describing the purpose for entering into executive session. The court stated that by merely reciting to "litigation, personnel, real estate, and contracts" as the basis for going into executive session, without describing with some detail the nature of the proposed discussions, "the board of education has done exactly what the Open Meetings Law was designed to prevent." The court further stated:

> Nowhere does the Board of Education identify, for example, the name of the case that will be the subject of the discussion regarding "litigation," or the name of the property that will be the subject of the discussion regarding "real estate". Similarly, the board … fails to identify which "contract" they will be discussing … or what particular "personnel" issues they will be discussing. As a result, the public lacks the ability to determine whether the subjects may properly be considered in private.

The court determined that the board's action approving the termination of the bus drivers to be void.

Individuals with Disabilities Education Act/Section 504

1. *Harden v. Buffalo Pub. Sch. Dist*., 2018 WL 3537070 (W.D.N.Y. 2018).

The father filed a complaint which contained two claims under the Individuals with Disabilities Education Act (IDEA). The district moved to dismiss the complaint.

The court noted that under the provisions of the IDEA, any child "seeking relief that is also available" under the IDEA must exhaust IDEA's administrative procedures even if the child seeks relief under a statute separate from the IDEA. Citing to the Supreme Court case of *Fry v. Napoleon Cmty, Sch*., 137 S.Ct. 743 (2017), the court noted that to determine whether a plaintiff must exhaust the IDEA's administrative procedures before pursuing judicial review of their claim, "a court must determine whether 'the gravamen of [the plaintiff's] compliant charges, and seeks relief for, the denial of a FAPE.' To do so, a court must look to the substance of the allegations, and not whether they do or do not contain the acronyms FAPE or IEP, or the phrases contained in them."

The court concluded that the plaintiffs' two IDEA claims must be dismissed because the gravamen of those claims charged and sought relief for the denial of a FAPE and that the plaintiffs failed to exhaust their administrative remedies. "It is the substance of those claims that leads the court to its conclusion" not simply because the claims contain the phrase "free adequate public education" and the acronym "IEP". The court indicated that both claims alleged that the district's actions led to an inadequate education for the student guaranteed by the IDEA. Because the court concluded that the plaintiffs did not exhaust the IDEA's administrative remedies as required, the complaints were dismissed.

2. *Board of Education of the North Rockland CSD v. C.M., on behalf of her child, P.G.*, 2018 WL 3650185 (2d Cir. 2018).

The parent filed a due process complaint against the school district alleging that the district failed to provide the student with a Free Appropriate Public Education (FAPE) in violation of the Individuals with Disabilities Act (IDEA). The impartial hearing officer dismissed the IDEA claims as untimely but held that the district violated Section 504 by failing to provide the student with a residential placement from January 2012 through June 2012. The state review officer (SRO) agreed that the IDEA claim was untimely, but did not consider the Section 504 claim because it lacked jurisdiction to do so. The district filed an appeal seeking reversal of the IHO's decision regarding the Section 504 claim, and the parent appealed seeking reversal of the SRO's decision regarding the IDEA claim.

Regarding the accrual date of the claims, the court agreed with the school district and concluded that the parent's claims accrued in May or June of 2011 when the district denied the parent's request for a residential placement for the 2011-2012 school year at a Committee on Special Education (CSE) meeting held in May 2011, and confirmed its decision by mailing a copy of the Individualized Education Program (IEP) to the parent in June 2011. The court noted that that the timing of the accrual should be focused on the time of the discriminatory act, "not the point at which the consequences of the act become painful."

> The District's decision to deny a residential placement for the 2011-2012 school year was the alleged discriminatory act for purposes of the Section 504 claim, while the events unfolding during the second half of the 2011-2012 school year were alleged manifestations of the consequences of that decision.

The court noted that even though the district convened another CSE on 2/9/12 and once again denied the student a residential placement for the 12-13 school year, the parent never asserted any claims against the district for the 12-13 school year.

Based on the accrual date of either May or June 2011, the IDEA and Section 504 claims were untimely. The court noted this to be true even "if we apply the longer three-year statute of limitations that Parent asks us to apply to Section 504 claims, because Parent did not file her due process complaint until January 2015."

Family Education Rights and Privacy Act

1. *Magnoni v. Plainedge UFSD*, 2018 WL 4017585 (E.D.N.Y. 2018)

Plaintiffs, parents of a disabled student brought a federal lawsuit for violations of various statutes including the Individual with Disabilities Act (IDEA) and the Family Education Rights and Privacy Act (FERPA). While the plaintiff/student was a student at the elementary school, an "anonymous donor" began donating holiday gifts to the special education students in plaintiff's class on Halloween and Christmas. The parents of the children in the class were required to sign a consent form regarding the gifts, but were not advised of the anonymous donor's identity. The consent apparently did not cover the

release of information to the anonymous donor. Importantly, the district told the anonymous donor the plaintiff's name, preference in candy and toys, and classroom number and also gave the anonymous donor a photograph (it's unclear whether the photograph was of just the plaintiff or his entire class).

The parents of the student started becoming suspicious and they found out from the school that the anonymous donor was the student's aunt. The family, however, had "consciously and vehemently excluded" the aunt from their child's life due to concerns about her mental state. The family filed a petition, and the Family Court issued a temporary restraining order.

The plaintiffs sued the school district under various federal statutes and their claims included an alleged violation of Section 1983 pursuant to the IDEA, for depriving "Plaintiffs of their federally protected right to keep the Plaintiffs' [personally identifiable information] PII confidential and further by failing to keep the confidential PII confidential potentially endangered Plaintiffs." They also sought declaratory judgement under FERPA in that the district violated the statute's confidentiality requirements.

The district argued that even if Section 1983 applied to this case, the plaintiffs have failed to state a claim because the district "did not disclose education records in violation of the IDEA." Instead, the district claimed that it only disclosed "directory information," rather than PII, which may be disclosed absent parental permission unless the parents affirmatively opt-out of disclosure.

The IDEA provides in part that the "Secretary shall take appropriate action … to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State educational agencies and local educational agencies." Thus, under the IDEA a school district may not disclose PII without consent, but they may disclose directory information.

The IDEA defines PII as information that contains "(a) the name of the child, the child's parent, or other family member; (b) The address of the child; (c) A personal identifier, such as the child's social security number or student number; or (d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty."

The court concluded that the student's name and photograph are both listed as directory information under the regulations implementing FERPA, and may be disclosed without prior consent. The remaining issue was the disclosure of the student's classroom and preferred types of candy and snacks. The court concluded that a student's classroom and favorite candy is directory information rather than PII. The court noted that the type of information that qualifies as PII is "highly sensitive information that could be used to identify or steal the identity of the child such as a social security number or a personal characteristic." The court concluded that "Neither a student's classroom nor his favorite type of candy is the type of information that could be used in this way; there are usually many children in a given classroom, and a child's favorite candy could be the favorite candy of any number of other children."

Procurement

1. *Appeal of Ansel*, 58 Ed Dept Rep, Dec. No. (17,455)

Petitioner appealed, on behalf of himself and the taxpayers of the district from an action of the board in procuring the architectural services from an architectural firm regarding a school construction project(s) to be funded from a capital construction bond. Specifically, petitioner alleged that the district violated its own purchasing policies by failing to issue an RFP prior to selecting the architectural firm, and that by selecting one sole source, the district violated district policy 6700, which requires the district "to engage competitively and without prejudice in procurement actions which will seek to obtain optimal value for the expenditure of school district funds." Petitioner alleged that the district violated district policy 6700-E-1 which requires that contracts for professional services be awarded through RFP.

The commissioner dismissed the appeal on procedural grounds. The commissioner, however, addressed the merits "for the benefit of the parties" and noted the general rule that "professional services that require special skill or training are not subject to competitive bidding under General Municipal Law §103. However, a school district must procure services not subject to competitive bidding in accordance with internal policies and procedures that comply with General Municipal Law §104-b which requires that such services 'be secured by use of written requests for proposals, written quotations, verbal quotations and any other method of procurement which furthers the purpose of this section.'" The District had a policy that required procurement of professional services through an RFP process. The commissioner noted that the district identified an April 2003 RFP for which architectural services for a specific capital project was awarded to the architect, but there was no indication in the RFP that the firm awarded the contract would be appointed district architect for all capital projects of the district. The commissioner noted:

> Given the lack of clarity in this record concerning the RFP for a district architect, and the passage of time since [the architect's] appointment, it would have been fiscally prudent for respondent to issue a new RFP for a district architect, given that the intent of General Municipal Law §104- b is 'to assure the prudent and economical use of public moneys in the best interest of the taxpayers …, to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption.'

While the appeal was dismissed, the commissioner urged the district to issue a new RFP for a district architect in order to "avoid unnecessary appeals in the future and to assure the taxpayers … that these professional services are being procured in a manner consistent with the purposes of General Municipal Law §104-b."

Reclassification of Position

1. *In the Matter of Razzano v. Remsenburg-Speonk UFSD*, 162 A.D.3d 1043 (2d Dep't 2018)

The petitioner commenced an Article 78 proceeding to review a determination of the board which reclassified petitioner's full-time position as a school psychologist as a part-time position. The petitioner claimed, in part, that the reclassification was undertaken in retaliation for various complaints she made regarding allegedly hazardous health conditions in the school building.

The lower court conducted a nonjury trial, and concluded that the determination "was made in good faith and was motivated be valid budget concerns."

The Second Department noted that in demonstrating that administrative actions were taken arbitrarily or in bad faith, "the plaintiff bears a heavy burden of proof, for which conclusory allegations and speculative assertions will not suffice." The court concluded that the board's determination to reclassify the position was based on valid budget concerns and was not made in bad faith or to retaliate for the complaints about the dangers the school building posed.

> The evidence reflected that the petitioner's complaints about the school building were unfounded, but that the respondents still made consistent good-faith efforts to address her complaints and to provide reasonable accommodations for the petitioner's alleged health issues.

The court also credited the testimony of a district witness who established that in preparing the budget, the board was faced with significant pressure to reduce expenditures for school personnel. "… the Board determined that, given the number of students he would be counseling and the amount of time she needed to perform her other responsibilities, there was no longer a need for her to continue on a full-time basis." The court noted; "School districts have wide discretion within the law to manage their affairs efficiently and effectively and this includes the right to reduce and abolish even tenured positions for economic reasons."

Labor (certification of union)

1. S*ervice Employees International Union*, 51 PERB ¶ 3017 (2018)

The Director of Public Employment Practices and Representation declined to set aside an election in which the Services Employees International Union, Local 200United (SEIU) received a majority of valid votes cast in a representation election concerning a bargaining unit of employees of the joint employer in which SEIU was the only employee organization seeking certification.

The joint employer argued that PERB should change the standard it applies in determining majority support in representation elections where only one union seeks to represent a unit of unrepresented employees from PERB's current standard of "a majority of valid votes cast" to a standard that would require "a majority of employees in the bargaining unit."

SEIU filed a petition seeking to represent a unit of unrepresented part-time adjunct faculty employed by the joint employer. A secret mail-ballot was held and there were 19 votes cast in favor of representation by SEIU and 9 "No" votes. Thus, a majority of the valid votes that were cast showed support for representation by SEIU.

PERB noted its longstanding standard that a "majority of the valid votes cast" regardless of the number of eligible voters who actually participate in the election. The joint employer noted that Section 201.8(c)(1) of the rules provides that, where only one union seeks to represent employees, that union can be certified without an election if a majority of unit employees have executed a showing of interest. As such the joint employer argued that that same standard should apply in all elections involving one union.

PERB rejected the joint employer's argument and noted that, in the context of union certification *without an election*, there is sound reason for requiring that a union present a showing of interest from a majority of employees within the unit; "namely, employees who do not sign a showing of interest may not have had the opportunity to make their views on representation known. In elections, such as a mail-ballot election, by contrast, all employees have the opportunity to participate in the election. Thus, … where there has been a reasonable opportunity to vote, it may be assumed that employees who refrain from voting are 'content to be bound by the result obtained without their participation.'"

PERB certified SEIU as the exclusive bargaining agent for the unit.

I. New Laws of 2018

All chapter law referenced in this outline were adopted in 2018.

BOCES

Chapter 56 Part D §1 amends the education law to authorize boards of cooperative educational services (BOCES) to enter into a memorandum of understanding with boards of education of non-component school districts, including city school districts with 125,000 inhabitants or more, to participate in a recovery high school program offered by the BOCES for a period not to exceed five years. Non-component school districts may only be charged for administration expenses, including capital costs, related to the recovery high school program (Educ. Law § 1950(4)(oo)).

Charitable Funds

Chapter 59 Part LL § 5 amends the education law to provide authority for school districts to establish charitable funds.

A charitable fund is a fund established by a board resolution for the receipt of unrestricted charitable donations. Such funds may be used for any public educational purpose (Educ. Law §§ 1604(44), 1709(12-b), 1804(1), 1903(1), 2503(1), 2554(1)). In New York City, the chancellor is granted the authority to establish such fund (Educ. Law § 2590-h(54)). Charitable funds may not be established by boards of cooperative educational services.

Monies donated to a charitable fund must be deposited and may be invested pursuant to the terms of the general municipal law, with any interest or capital gains accruing to the charitable fund (Educ. Law §§ 1604(44), 1709(12-b), 2590-h(54); see also Gen. Mun. Law §§ 10, 11). Monies in the fund may be transferred to the school district's general fund for expenditures as allowed by law. The district must maintain an accounting of all such deposits, interest or capital gains, transfers, and expenditures (Educ. Law §§ 1604(44), 1709(12-b), 2590-h(54)).

The amount of taxes to be levied each year must be determined without regard to any transfers from the charitable fund (*Id.*).

Property owners in the district who make donations to the charitable fund will be entitled to a credit on their school taxes for such donation if the school board has adopted a resolution authorizing such credits. The administrator of the charitable fund will be responsible for issuing in duplicate acknowledgements of donations (RPTL § 980-a).

For further information regarding charitable funds see NYS Department of State and Department of Taxation and Finance, *Charitable Contributions to Local Governments and School Districts Guidance* (May 16, 2018), at: https://www.tax.ny.gov/pdf/ORPTS/charitable-contributions-guidance.pdf).

The Internal Revenue Service has published a notice of proposed rulemaking which would establish rules limiting the availability of charitable contribution deductions when a taxpayer receives or expects to receive a corresponding state or local tax credit. The proposed regulations can be accessed at: https://www.gpo.gov/fdsys/pkg/FR-2018-08-27/pdf/2018-18377.pdf.

Child Care Availability Task Force

Chapter 33 amends Social Service Law § 390-k to expand the membership of Child Care Availability Task Force, to include a representative from the State Education Department. The law refines and adds to the factors affecting child care availability the Task Force must examine. Based upon these changes the report the Task Force must produce on its interim findings will be released no later than November 1, 2018 and the final report and recommendations will be issued by December 31, 2020.

Child Care Providers and After School Programs

Chapter 34 amends the social services law and the education law to clarify what information is to be provided to the Council on Children and Families for the creation of an internet mapping resource for child care and after school programs. The Council should receive a listing from the Office of Children and Family Services and the State Education Department of all recipients of competitive grants awarded for the purpose of providing after school programs or extended learning time, including the program's contact information (Soc. Serv. §§ 17(i), 483-h; Educ. Law § 305(56)).

Civil Service

Chapter 271 amends the civil service law to extend the protection of a due process hearing pursuant to Civil Service Law § 75, prior to disciplinary action, to members of the labor class who have completed five years of continuous service.

Computer Science Education Standards

Chapter 56 Part R charges the commissioner of education with setting up a working group including teacher, school administrators, industry experts, higher education institutions and employers to develop a draft model New York State Computer Science Learning standards for kindergarten through grade 12. The working group must report to the commissioner by December 1, 2019.

County-Wide Shared Services Panel

Chapter 55 Part EE § 1 amends the general municipal law to establish County-Wide Shared Services Panels. While school districts and boards of cooperative educational services (BOCES) are not required members of such panels, the chief executive of a county may on an annual basis invite any school district or BOCES to join a county-wide shared services panel (Gen. Mun. Law § 239-bb(2)(b)). A school district or BOCES may accept the invitation by selecting a representative, by majority vote, to serve on the panel (*Id*.). The panels help develop and ultimately approve a county-wide shared services property tax savings plan (Gen. Mun. Law § 239-bb(3), (5), (7)).

The plan must be designed to generate property tax savings resulting from actions including but not limited to the elimination of duplicative services, shared services arrangements such as joint purchasing, shared storage facilities, shared plowing services and energy and insurance purchasing cooperatives, reducing back office and administrative overhead and better coordinating services (Gen. Mun. Law § 239-bb(3)(a)).

Any panel member may, prior to the panel-wide approval vote, provide written notice to remove from a plan any proposed action affecting the unit of government represented by that member (Gen. Mun. Law § 239-bb(7)(a)). School districts and BOCES that participate in such panels should consult with legal counsel with respect to their ability to participate in elements of the proposed plan and remove themselves from such activities for which they lack authority to participate.

School districts and BOCES that participate in the panels may create and execute cooperative agreements, when such agreements are part of the activity of the panels, without opinion or approval of the state education department (Gen. Mun. Law § 119-o(4)).

Under specified circumstances, savings that are actually and demonstrably realized by the participating local governments are eligible for one-time matching funding from the state (Gen. Mun. Law § 239-bb(8)).

Financial Reporting

Chapter 59 Part CCC § 4 establishes requirements for school districts to publicly report funding.

Beginning in 2018-19, certain specified school districts will be required to annually submit to the commissioner of education and the director of the division of the budget by July 1 a detailed statement of total funding allocation for each school in the district. The statute delineates a set of criteria identifying which districts must file the reports that eventually expands to all school districts by the 2020-2021 school year (Educ. Law § 3614(1)). Such reports must be made publicly available and also be posted on the school district website (*Id.*).

The statement must be in a form prescribed by the division of budget after consultation with the commissioner. The reports must include an explanation of the approach used to allocate funds to each school and include demographic data, per pupil funding level, source of funds and the uniform decision rules regarding allocation of centralized spending to individual schools from all funding sources (Educ. Law § 3614(1)(a)).

Within 30 days of receipt of the statement it will be reviewed and determined whether it is complete and in the required format. If the statement is complete and in the required format a written acknowledgment will be sent to the district. If no determination is made within 30 days it shall be deemed approved. If the commissioner or director of the budget requests additional information in order to determine completeness the 30 day window is extended for another 30 days from the date of submission of the additional information (Educ. Law § 3614(1)(b)).

If a school district fails to submit a complete statement or if a statement is deemed noncompliant, a written explanation will be provided and the district will have 30 days to cure. If a district fails to cure within 30 days the comptroller or chief financial officer of the municipality in which the majority of the district is situated is authorized to obtain the appropriate information from the district and complete the form and submit such statement (Educ. Law § 3614(1)(c)). If the municipality's comptroller or chief financial officer chooses to exercise this authority, he or she must file the report within 60 days of the notice of noncompliance. In any event, a district may submit a completed statement at any time.

The state will withhold any state aid increases due to the district until a notice of compliance is issued (Educ. Law § 3601).

Guidance has been issued by the State Division of the Budget and may be accessed at: https://www.budget.ny.gov/schoolFunding/NYSchoolTransparencyGuidanceDocument.pdf. An FAQ is also available: https://www.budget.ny.gov/schoolFunding/NYSchoolTransparencyFAQ.pdf.

Graduation Exercises

Chapter 32 amends the Education Law to expand the ability of students to participate in graduation exercises. The law repealed § 4402(9) which provided that students with disabilities who earned a skills and achievement commencement credential or a career development and occupational studies commencement credential to participate in graduation exercises under specified conditions. Chapter 32 adds a new section to § 3204, applicable to all students who earn either a skills and achievement commencement credential or a career development and occupational studies commencement credential to participate in graduation exercises with the 12^{th} grade class in which the student entered 9^{th} grade. School districts must adopt policies and procedures addressing graduation participation and provide notice to all parents (Educ. Law § 3204(4-b)).

Notice of Charges of Sex Offense

Chapter 233 amends the education law to add new section (§ 3021-a) that requires a district attorney to notify school superintendents and nonpublic school administrators whenever an accusatory instrument alleging the commission of a sex offense for which registration as a sex offender would be required, has been filed against a person known to be an employee of a school district, charter school, BOCES, nonpublic school or special education school. Such notification

shall not be deemed to diminish the rights of an employee to due process under Education Law § 3020-a, Civil Service Law § 75 or any collective bargaining agreement.

Person in Parental Relation

Chapter 80 amends General Obligations Law provisions (§§ 5-1551-1552) with respect to the power of a parent to designate a person in parental relation to his or her child to extend the period of time such designation is effective from 6 months to 12 months. An individual designated as a person in parental relation may be required to carry out duties listed within Education Law § 3212 (see also Education Law § 2).

Property Taxes

Chapter 59 Part E § 3 amends the education law effective April 15, 2020 to add a new section (§ 2023-b) requiring the superintendent of schools to certify to the state comptroller, commissioner of taxation and finance and commissioner of education that the budget adopted does not exceed the tax levy limit for that year. If it is determined the tax levy exceeded the limit, despite the certification, the excess shall be placed in a reserve and used to reduce the tax levy in accordance with § 2023-a. Additionally, every school district subject to § 2023-a, shall report both its proposed and adopted budget to the comptroller and the commissioner of education.

Chapter 59 Part E § 6 amends Real Property Tax Law § 928-a(1) to specify that when a county official collects the taxes only the county may establish a partial payment program. If a county prepares the tax bills or its software is used by a school district then written county approval is necessary prior to establishing a partial payment program (Real Prop. Tax Law § 928-a(1)(d), (e)).

School Bus Drivers

Chapter 207 amends the vehicle and traffic law effective December 22, 2018 with respect to drug and alcohol testing for school bus drivers. The law would require all school districts, municipalities or transportation contractors hired by a school district or municipality to transport children to and from school to conduct pre- employment drug and alcohol testing (Veh. & Traf. Law § 509-g(6)(a)). Such testing will be performed in accordance with provisions in the federal regulations (Veh. & Traf. Law § 509-g(6)(b); see also 49 CFR Part 382). *Note: Pre-employment alcohol testing is not required by the federal regulations.*

Every school bus driver must be included in the pool from which drivers are selected for random drug and alcohol testing (Veh. & Traf. Law § 509-g(6)). This represents an expansion of the pool of drivers required to be tested as under the federal regulations a bus driver is only subject to drug and alcohol testing if he or she drives a vehicle that is designed to transport 16 or more passengers, including the driver (see 49 CFR §§ 382.103, 382.107)

The law amends Vehicle and Traffic Law § 509-l to provide that no school district or motor carrier (contractor of a district) may require or permit a driver to operate a bus if by the person's general appearance, conduct or other substantiating evidence such person appears to

have consumed a drug, alcohol or controlled substance within 8 hours before reporting to work. Previously, the law contained a 6 hour time limitation.

The law also amends Education Law § 3623 to make pre-employment and random drug and alcohol testing eligible for state aid.

School Crossing Guards

Chapter 214 amends General Municipal Law § 208-a to provide that a board of education may enter into an agreement with any city, town, village or county police department or police district to pay for all or a portion of the salaries of the school crossing guards providing services to the students of the district. A board of education does not have authority to enter into such agreement unless it results in an increase in the number of school crossing guards employed by the municipality. School crossing guards remain employees of the municipality and are not considered school district employees.

School Nutrition

Meal Shaming Prohibited

Chapter 56 Part B § 1 amends the education law to add a new section which prohibits meal shaming. Except in limited circumstances, all school districts that participate in the national school lunch program or school breakfast program, must develop a plan that ensures that a student, whose parent or guardian has unpaid school meal fees, is not shamed or treated differently than a student whose parent or guardian does not have unpaid school meal fees (Educ. Law § 908). Under the plan children with unpaid meal charges will be provided a reimbursable meal from available daily offerings, unless a parent has provided written permission to a school to withhold a meal (Educ. Law § 908(a)).

The plan must include elements such as procedures for handling unpaid meal charges, outreach to families regarding unpaid meal charges and training staff to ensure procedures are carried out correctly (Educ. Law § 908). The plan is not intended to allow for unlimited accrual of debt but a school district is not permitted to use a debt collector (Educ. Law § 908(e)(iv), (f)).

Plans had to be submitted to the commissioner of education by July 1, 2018 and must also be posted on the district's website (Educ. Law § 908).

For more information on meal shaming, see the following: NYS Education Department, Office of P-20 Education Policy, *Revised New York State Legislation – Prohibition Against Meal Shaming* (June 8, 2018), at: http://www.cn.nysed.gov/content/revised-prohibition-against-meal-shaming and *Meal Charge and Prohibition Against Meal Shaming Policy Template*, at: http://www.cn.nysed.gov/content/meal-charge-and-prohibition-against-meal-shaming-policy-template.

Breakfast After the Bell

Chapter 56 Part B § 2 amends the law to provide that all public elementary or secondary schools, with at least 70 percent or more of its students eligible for free or reduced priced meals under the federal National School Lunch Program as determined by the state education department, must offer all students a school breakfast after the instructional day begins (L. 2018 c. 56 Part B § 2 amending L. 1976 c. 537). If required, each school will determine the breakfast service delivery model that best suits its students after consulting with teachers, parents, students

and community members. Delivery models may include, but are not limited to, breakfast in the classroom, "grab and go" breakfast, and breakfast served in the cafeteria (*Id*.).

Time spent by students eating breakfast may be counted as instructional time when students eat breakfast in the students' classrooms and instruction is provided while students are eating breakfast. Additionally, schools subject to this requirement must provide notice to parents and guardians that the school will be offering breakfast to all students after the instructional day has begun (*Id*.).

Any school that is required to offer a breakfast after the instructional day has begun may apply to the commissioner of education for a waiver from the requirement. The commissioner may grant the waiver if the school demonstrates a lack of need for a school breakfast program after the instructional day has begun due to a successful existing breakfast program, or that such a program would cause economic hardship for the school (*Id*.).

School Lunch Subsidy

Commencing July 1, 2019, and thereafter, a school district is eligible for a lunch meal state subsidy of 25 cents for any school lunch meal served by the school district. To receive this subsidy, the school district must certify to the state education department that it has purchased at least 30 percent of its total cost of food products for its school lunch service program from New York state farmers, growers, producers or processors in the preceding school year (L. 2018 c. 56 Part B § 2 amending L. 1976 c. 537).

Sexual Harassment

Chapter 57 Part KK of the Laws of 2018 adopted changes to several provisions of state law with respect to preventing sexual harassment.

Harassment of Non-Employees

The law was amended to provide it is unlawful discrimination for a school district to permit sexual harassment of non-employees in the school district's workplace. Therefore, a district may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other persons providing services pursuant to a contract in the school district's workplace, with respect to sexual harassment. A school district will be liable if it, its agents or supervisors knew or should have known that the non-employee was subjected to sexual harassment in the school district's workplace, and the district failed to take immediate and appropriate corrective action (Exec. Law § 296-d).

Policies and Prevention Programs

Effective October 9, 2018 the Labor Law requires every school district to either adopt the model sexual harassment prevention policy developed by the Department of Labor in consultation with the Division of Human Rights, or adopt a sexual harassment prevention policy that equals or exceeds the minimum standards established by the state's model policy (Labor Law § 201-g(1)(b)). The sexual harassment prevention policy must be provided to all district employees in writing (Labor Law § 201-g(1)(b)).

Pursuant to the law, the model sexual harassment prevention policy must:

- Prohibit sexual harassment consistent with guidance issued by the Department of Labor, in consultation with the Division of Human Rights, and provide examples of prohibited conduct;
- Include, but not be limited to, information concerning the federal and state statutory provisions concerning sexual harassment, remedies and a statement that there may be applicable local laws;
- Include a standard complaint form;
- Include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment, including supervisory and managerial personnel who knowingly allow such behavior to continue; and
- Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful (Labor Law § 201-g(1)(a)).

All employers in the state must develop an interactive training program to prevent sexual harassment in the workplace which meets or exceeds the standards outlined in the Department of Labor's model training program. The model sexual harassment prevention training program developed in consultation with the Division of Human Rights, and must include:

- An explanation of sexual harassment consistent with guidance issued by the Department of Labor, in consultation with the Division of Human Rights, and provide examples of prohibited conduct;
- Information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims;
- Information concerning employee's rights of redress and all available forums for adjudicating complaints.
- Information addressing conduct by supervisors and any additional responsibilities for supervisors (Labor Law § 201-g(2)(a), (b)).

The sexual harassment prevention training program must be provided to all employees on an annual basis (Labor Law § 201-g(2)(c)).

Reimbursement by Employees Responsible for Harassment

An employee who has been subject to a final judgment of personal liability for intentional sexual harassment must reimburse the school district for the employee's proportionate share of the judgment when the school district makes a payment to a plaintiff for an adjudicated award (Pub. Off. Law § 18-a(2)).

If the employee fails to reimburse the school district within 90 days of the district making payment, the chief fiscal officer must, upon obtaining a money judgment, withhold from the employee's compensation the amounts allowable by law (Pub. Off. Law § 18-a(3); see also C.P.L.R. § 5231).. If the employee no longer works for the school district, the school district has the right to receive the reimbursement from the individual through the enforcement of a money judgment pursuant to law (Pub. Off. Law § 18-a(3)).

Non-Disclosure Clauses

Unless expressly requested by an complainant, no settlement, agreement, stipulation, decree or resolution, which involves sexual harassment, shall contain a provision that prevents the disclosure of the underlying facts and circumstances to the claim or action. If such a provision is requested by the complainant, all parties will be provided with such term and condition and the employee will have 21 days to consider the provision. If the non-disclosure provision is the complainant's preference it will be memorialized in an agreement and signed by all parties. For a period of at least seven days following the execution of the agreement, the complainant may revoke the agreement (C.P.L.R. § 5003-b; Gen. Oblig. Law § 5-336).

School Tax Relief Program (STAR)

Chapter 59 Part B enacts amendments to the STAR program.

Income Verification

Beginning in 2019 applicants for the enhanced exemption must annually verify the income of all owners of the property and their spouses by participating in the STAR income verification program. The law includes procedures for property owners to respond when notified that they do not meet income qualifications for the exemption. If the property owners do not supply satisfactory information such that the property is eligible for the enhanced exemption the commissioner of taxation and finance will direct the assessor to adjust the assessment roll by removing the exemption altogether or replacing it with the basic exemption. The law also establishes appeal provisions for a property owner. (Real Prop. Tax Law § 425(4)(b)(iv)).

Beginning in tax years commencing after January 1, 2019, if a person whose income is to be factored into the determination of eligibility has not filed a tax return the law establishes procedures by which he or she may submit a statement showing sources of income (Real Prop. Tax Law § 425(4)(b)(ii)).

Similar provisions apply with respect to determination of whether a tax payer is entitled to the basic or enhanced STAR credit (Tax Law § 606(eee)(1)(B)).

STAR Credit – Multiple Residences

A married couple may not receive a STAR credit on more than one residence during a taxable year unless living apart due to legal separation. A married couple is also not eligible to receive a STAR credit when already receiving a STAR exemption unless living apart due to legal separation (Tax Law § 606(eee)(6)(A)).

State Aid

Community Schools Set Aside

Chapter 59 Part CCC § 9-b amends the education law with respect to the community schools set aside within foundation aid. It establishes how increases in the aid will be calculated and how such increases may be utilized (Educ. Law § 3602(4)).

Full Day Kindergarten Conversion Aid

Chapter 59 Part CCC § 12 establishes a 3 year aid cycle for full day kindergarten conversion aid for programs first qualifying in the 2018-19 or 2019-20 school years (Educ. Law § 3602(9)).

Universal Prekindergarten (UPK) Expansion Grants

Chapter 59 Part CCC § 18-a establishes the terms under which UPK expansion grants will be awarded to establish new full-day and half-day prekindergarten placements (§ 3602-e(18)). Such grants are only available to programs that offer instruction consistent with the state prekindergarten early learning standards.

Students in Foster Care

Chapter 56 Part CC added a new section (§ 3244) to the Education Law outlining provisions for the education of students in foster care.

Definition of Child in Foster Care

A child or youth in foster care means a child who is in the care and custody or custody and guardianship of a local commissioner of social services or the commissioner of the office of children and family services (Educ. § 3244(1)(a)).

School District and School of Attendance

A child in foster care may attend school in either the school district of origin or the school district of residence (Educ. Law § 3244(2)(a)). A school district of origin is the district within New York where a child in foster care was attending public school or preschool on a tuition-free basis or was entitled to attend at the time of placement into foster care (Educ. Law § 3244(1)(b)). A school district of residence is the public school district within New York where the foster care placement is located (Educ. Law § 3244(1)(c)).

The child may attend the school of origin or any school that the children who live in the attendance area where the foster care placement is located are entitled to attend (Educ. Law § 3244(2)(a)). The school of origin is the public school the child attended at the time of placement into foster care and includes a preschool or a charter school. The school of origin also includes the designated receiving school at the next grade level after a child has completed the final grade level served by the school of origin (Educ. Law § 3244(1)(f), (g)).

For a child who was eligible to apply, register or enroll in a public preschool or kindergarten after the time of placement in foster care or a child living with a school age sibling attending school in the district of origin, the school of origin is the public school or preschool such child would have been entitled or eligible to attend based on the child's last residence before the circumstances arose which caused such child to be placed in foster care (Educ. law § 3244(1)(g)).

A preschool includes a publicly funded prekindergarten or Head Start program administered by a school district and/or services under the Individuals with Disabilities Education Act administered by a school district (Educ. Law § 3244(1)(e)).

Designation of School of Attendance and Procedures for Admission

The applicable social services district, in consultation with the appropriate local educational agency or agencies, shall designate the school district and school where a child in foster care shall attend (§ 3244(2)(a)). Such designation is required to be made in the context of a whether the designated placement is in the child's best interest (Educ. Law § 3244(2)).

Upon notification of a designation, the designated school district must immediately enroll the child even if the child cannot produce records normally required for enrollment such as academic records, immunization and other health records, and must treat the child as a resident for all purposes (Educ. Law § 3244(2)(d)).

If necessary, the designated district must make a written request to the school district where the child's records are located for a copy of such records (§ 3244(2)(d)(3)). A school district receiving a request for a copy of such records must forward them within five days of receipt of the request (Educ. Law § 3244(2)(e)).

Children in foster care must be provided comparable services relative to other students in the school with respect to school nutrition, transportation, educational services such as special education services, programs for English language learners, career and technical education and programs for gifted and talented students (Educ. Law § 3244(5)).

A child in foster care is entitled to attend the designated school for the duration of the child's placement in foster care, until the end of the school year in which such child is no longer in foster care, and for one additional year if such year would be a child's terminal year in such school building (Educ. Law § 3244(2)).

Point of Contact

Each school district is required to designate a point of contact within the district for children and youth in foster care. The point of contact cannot be the person who is designated as the McKinney-Vento Homeless Student liaison unless the McKinney-Vento liaison has sufficient ability to carry out both sets of responsibilities (Educ. Law § 3244(2)(g)).

Tuition Costs

Generally, the cost of instruction for a child in foster care shall be borne by the school district of origin, where the child was attending public school or preschool on a tuition free basis or was entitled to attend prior to placement in foster care (Educ. law §§ 3202(4)(b); 3244(3)). The identity of the school district of origin is established through procedures set out in law. A district initially identified as the school district of origin may dispute such identification to the local social services district and ultimately the commissioner of education (Educ. Law § 3202(4)(f)).

If a child's school of origin is a charter school, the designated district of attendance is deemed the district of residence for purposes of fiscal and programmatic responsibility, including transportation. If the designated school district of attendance is not the school district of origin, the designated school district may seek reimbursement from the school district of origin in accordance with Education Law § 3202 (Educ. Law § 3244(2)(f)).

However, when children cared for in free family homes or family homes at board are not supported and maintained at the expense of a social services district or of a state agency, and such homes are the actual and only residence of such children, the children shall be deemed residents of the school district where in such homes are located and no tuition may be charged (Educ. Law § 3202(4)(c)).

Transportation

The designated school district of attendance will bear the cost of transporting the child from the foster care placement to the school of origin. Any costs incurred up to 50 miles each way are subject to reimbursement through state aid (Educ. law § 3244(4)(a)).

When a child in foster care attends school in the district of residence (i.e. the district of the foster care placement) transportation shall be provided to such child on the same basis as resident students (Educ. Law § 3244(4)(b)).

Transportation costs which exceed the allowable limits outlined in statute will be shared equally by the local social services district responsible for the foster care costs of the child and the designated school district of attendance, unless the school district and social services district have a written agreement relating to excess transportation costs which complies with federal law and is on file with the State Education Department and the Office of Children and Family Services (Educ. Law § 3244(4)(c); 20 USC § 6312(c)(5); see also 20 USC §§ 6311(g)(1)(E); U.S. Department of Education and U.S. Department of Health & Human Services, *Non Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care* (June 2016), at: http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf).

Student Health

Chapter 56 Part Q requires that feminine hygiene products must be provided in the restrooms of public elementary and secondary schools serving students in grades 6 through 12. Such products must be provided free of charge (Pub. Health Law § 267).

Teacher Diversity Report

Chapter 56 Part CCC § 2 adds a new subdivision to Education Law § 305 to require the commissioner of education to submit a report no later than June 1, 2019 to the governor and the Legislature detailing teacher diversity throughout the state. The report must examine potential barriers to achieving diversity within teacher preparation programs, initial certification as a teacher, teaching assistant or teacher aide; include available data on race, ethnicity, gender and age including the efforts higher education is making to recruit a diverse student population and efforts schools are making to attract and hire diverse teaching candidates.

Union Membership and Dues

Chapter 59 Part RRR § 1 amends the civil service law with respect to employee deductions for union dues. Provided the employee has submitted a dues deduction authorization card, the public employer must commence making the deductions as soon as practicable, but in no event later than 30 days after receiving proof of a signed dues deduction authorization card. The dues must be transmitted to the union within 30 days of the deduction. The right to the membership dues deduction remains in effect until either the employee revokes membership in the union in writing pursuant to the terms of the signed authorization, or the employee is no longer employed by the public employer (Civil Serv. Law § 208(1)(b)).

In addition, an employee organization has the right to meet with individuals in its bargaining unit within 30 days of the employee's initial employment or reemployment, or within 30 days of the employee being promoted or transferred to a new bargaining unit. The public employer must

notify the employee organization that represents the employee's bargaining unit of the employee's name, address, job title, employing agency, department or other operating unit, and work location. Furthermore, an official representative of the employee organization must be permitted to meet with the employee for a reasonable amount of time during the employee's work hours without charge to leave credits, except as otherwise stated in the governing collective bargaining agreement. This meeting must be scheduled in consultation with a designated representative of the school district (Civil Serv. Law § 208(4)(a), (b)).

Union Representation of Non Members

Chapter 59 Part RRR § 4 amends Civil Service Law § 209-a(2) to provide that a union cannot be found to have interfered with, restrained or coerced public employees when it limits its services and representation of non-members in defined ways.

The duty of fair representation for nonmembers is limited to the negotiation or enforcement of terms of a collective bargaining agreement.

An employee organization need not provide a non-member with representation during questioning by the employer, statutory or regulatory proceedings or to enforce statutory or regulatory rights, or in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the union and be represented by his or her own counsel.

Additionally, a union may provide legal, economic or job-related services or benefits beyond that required in the CBA exclusively to union members.

Extensions of Current Law

BOCES

Chapter 56 Part J extends the ability of BOCES to contract with the Office for Children and Family Services for the provision of special education services until June 30, 2020 (Educ. Law § 1950(4)(h)(8)).

Chapter 59 Part CCC § 40 extends the ability of the city school district of the city of Rochester to may make purchases from the BOCES with jurisdiction in its geographic region, upon consent of the BOCES board.

BOCES and School District Contracts with Office of Mental Health

Chapter 89 extends the period of time a BOCES or school district may contract with the commissioner of mental health for the provision of special education and related services and educational services respectively, to patients between the ages of 5 and 21 who do not have a high school diploma and who are hospitalized in hospital operated by the office of mental health until June 30, 2021 (Educ. Law §§ 1950(4)(h), 3202(6-b)).

Building Safety Aid

Chapter 59 Part CCC § 11 extends the availability of aid for the installation of metal detectors, security cameras and other security devices to enhance the safety of students and staff. Aid will be available for expenses made prior to July 1, 2023 (Educ. Law § 3602(6-c)(b)).

Conditional and Emergency Conditional Appointments

***Chapter* 59 Part CCC § 31** extends until July 1, 2019 the ability of school districts, BOCES and charter schools to make conditional and emergency conditional appointments while awaiting the outcome of criminal history record checks.

Contracts for Excellence

Chapter 59 Part CCC § 1 extends provisions of law related to contracts for excellence. School districts which had to submit such contract for the 2017-18 school year must submit a contract for the 2018-19 year unless all schools in the district are identified as in good standing.

Gun Free Schools

Chapter 59 Part CCC § 33 extends through June 30, 2019 the state law provisions implementing the federal Gun Free Schools Act and provisions of the education law relative to the provision of supplemental educational services, and attendance at a safe public school.

High Tax Aid

Chapter 59 Part CCC § 14 extends the availability of high tax aid through the 2018-19 school year (§ 3602(16)).

Municipal Finance

Chapter 113 extends various provisions of the local finance law related to different types of bonds through July 15, 2021. It extends provisions related to maturity of serial bonds (Local Fin. Law § 21.00(b)); extends the ability to redeem installment bonds prior to maturity (Local Fin. Law § 53.00(b)); extends the ability to issue variable rate bonds (Local Fin. Law § 54.90); and also extends the suspension of the requirement for a 5% down payment in certain conditions (Local Fin. Law § 107.00(9)).

Chapter 87 amends the local finance law to extend the ability of municipalities, including school districts, to finance judgments for certain tax proceedings, including certiorari and small claims assessment review for five years until June 15, 2023 (Local Fin. Law § 11.00(33-a)).

Chapter 70 extends until June 1, 2023 the ability of municipalities, including school districts, to utilize an electronic format for the public sale of bonds (Local Fin. Law § 58.00).

Purchasing

Chapter 70 extends until June 1, 2023 the ability of municipalities, including school districts, to utilize an electronic format for accepting bids and offers for purchase contracts (Gen. Mun. Law § 103(1)).

Chapter 211 extends until July 31, 2021 the ability of school districts and other municipalities to "piggyback" onto contracts of other municipalities that were let in accordance with the provisions of the general municipal law for the purchase of materials, equipment or supplies and contracts for the installation, maintenance or repair of such materials, equipment or supplies (Gen. Mun. Law §103(16)).

Special Education

Chapter 68 extends to June 30, 2020 the ability of a multidisciplinary evaluation program licensed under Education Law § 4410 to employ a certified school psychologist to conduct an evaluation of a preschool child or an infant or toddler suspected of having a disability (§ 4410(6)(d)).

Chapter 90 amends various provisions of law adopted to comply with the federal Individuals with Disabilities Education Act to extend their effectiveness until June 30, 2021.

Standardized Test Scores

Chapter 59 Part CCC § 35 extends the prohibition that standardized test scores may not be included in a student's permanent record through December 31, 2019.

Teacher Certification

Chapter 59 Part CCC § 18-b extends for one year the exemption from certification requirement for teachers in pre-school programs if such teachers has a written plan to obtain certification. Certification must be achieved by June 30, 2019.

II. Bills that have Passed both Houses Awaiting Action by the Governor

Administrative Tenure

S.6090-A/A.8108-A amends the education law to provide that an individual who has been previously tenured as an administrator in New York State and who was not dismissed from such position as a result of charges brought pursuant to Education Law sections 3020-a or 3020-b shall be appointed for a shortened probationary period of three years when serving in a new administrative position (Educ. Law § 3012(1)(b)(ii)).

BOCES Superintendent Salary Cap

A.2112-A/S.3203-A amends the education law with respect to the cap on the salary of BOCES district superintendents for the 2018-19 school year and thereafter. The cap would be the lesser of 98% of the salary earned by the commissioner of education in the 2018-19 school year or 6% over the salary cap applicable in the preceding school year (Educ. Law § 1950(4)(a)(2)).

Career Education Data

A.381/S.8749 amends the education law (§ 3602(10)(e)) to require the commissioner of education to collect data from schools receiving aid under §3602 regarding the number of students in grade nine who are enrolled in career education courses in trade/industrial education, technical education, agricultural education, health occupations education, business and marketing education family and consumer science education, and technology education programs. Such data collection would commence with data from the 2017-18 school year.

Charter School Supplemental Basic Tuition

A.7966-C/S.6551-C amends the education law to require beginning with the 2018-19 school year the supplemental basic tuition for charter schools will be payable to school districts outside New York City during the current school year rather than in the following school year (§ 2856(1)).

Child Abuse in an Educational Setting

A.8485-B/S.7372-B amends the education law to expand the applicability of provisions requiring reports of child abuse in an educational setting and requiring greater training for covered reporters.

The definition of child is expanded to include any person under the age of 21 enrolled in a school, previously the law excluded non-public schools and the city of New York (Educ. Law § 1125(2)).

The definition of employee (Educ. Law § 1125(3)) is broadened to include any person receiving compensation from a school and a person whose duties involve direct student contact pursuant to a contract to provide transportation services (i.e. school bus drivers, monitors and attendants who work for private contractors).

The term volunteer is amended to include any person, other than an employee, who has direct student contact and provides services to a school or provides services to any person or entity that contracts with a school to provide transportation services to children (Educ. law §1125(4)).

The term educational setting is amended to include vehicles provided directly or by contract for the transportation of students (Educ. Law § 1125(5)).

The term administrator is expanded to include titles equivalent to principal that may be used in a school (Educ. law § 1125(6)). Corresponding amendments are also made to include school administrators in sections of law assigning duties to school superintendents such as forwarding reports to law enforcement and receipt of information from a district attorney (Educ. Law §§ 1128-a(1), 1130, 1131, 1133).

School is defined to include a school district, public school, charter school, nonpublic school, board of cooperative educational services, special act school districts as defined by Education Law § 4001, approved preschool special education program pursuant to Educational Law § 4410, approved private residential or non-residential school for the education of students with disabilities, including private schools established under Chapter 853 of the law of 1976, the state school for the blind and the state school for the deaf (Educ. Law § 1125(10)).

Under the amendments licensed and registered physical or occupational therapists, speech-language pathologists, teacher aides and school resource officers will also be required to promptly file a report with the school administrator whenever he or she receives a written or oral allegation of child abuse in an educational setting (Educ. Law § 1126(1)).

When an allegation of child abuse in an educational setting is made to a school bus driver employed by a contractor of the school, the bus driver must promptly report such allegation to his or her supervisor at the contracting entity. The supervisor will be required to complete a written report in compliance with § 1132 and shall personally deliver such report to the school district superintendent or school administrator employed by the nonpublic school where applicable (Educ. Law § 1126(1-a)). The bill also amends Education Law § 1126(3) to provide said supervisors with immunity for making good faith reports.

The bill provides that in any case where it is alleged that a child was abused by an employee or volunteer of a school other than the school the child attends where such case involves a nonpublic school, the appropriate school administrator or administrators, in additional to any appropriate superintendent of schools shall be notified and thereafter the administrators shall comply with the investigation and reporting requirements (Educ. Law § 1126(2)).

The bill directs that when the employee against whom the allegation is made is the superintendent or the administrator of a nonpublic school, the report of the allegation shall be made to another administrator designated by the school (Educ. Law § 1126(4)).

The bill requires the commissioner of education to promulgate regulations mandating training for all employees described in Education Law § 1126. The training expands upon that previously required and must now include information regarding the physical and behavioral indicators of child abuse and maltreatment and the statutory reporting requirements set out in specified provisions of the social services law, including but not limited to when and how a report must be made, what other actions the reporter is mandated or authorized to take, the legal protections afforded reporters and the consequences for failing to report (Educ. Law § 1132(2)).

The bill requires employees of nonpublic schools in titles equivalent to teacher or administrator as well as any school bus driver employed by a contractor of the school to complete two hours of coursework or training regarding the identification and reporting of child abuse and maltreatment. The training must be obtained from a provider approved by the state education department. As with employees of public schools the training must include information regarding the physical and behavioral indicators of child abuse and maltreatment and the statutory reporting requirements set out in specified provisions of the social services law, including but not limited to when and how a report must be made, what other actions the reporter is mandated or authorized to take, the legal protections afforded reporters and the consequences for failing to report. The employees of a nonpublic school must furnish proof of the training to the school administrator and each school bus driver must provide proof to his or her employer. The SED is authorized to request such records on a periodic basis and may publish a list of any persons or schools not in compliance (Educ. Law § 1132(3)).

The coursework or training required by the law does not apply to persons already required to undergo such training as part of the certification process as a superintendent or teacher (Educ. Law § 1132(4), see also Educ. Law §§ 3003, 3004).

Lastly, the bill provides that if a person is required to report an incident of child abuse in an educational setting to the vulnerable persons' central register pursuant to article 11 of the social services law such report will be deemed as complying with the reporting requirements under the education law (Educ. Law § 1134).

Family Court Act- PINS and Educational Neglect Proceedings

A.7557/S.5714 amends the Family Court Act in various respects as relates to truancy allegations in Persons in Need of Supervision (PINS) and child protective proceedings in family court.

The bill provides that the designated lead PINS diversion agency shall review and document the steps a school district took to improve attendance or conduct at school whenever a PINS proceeding contains an allegation of truancy or misconduct at school. Additionally, the lead PINS diversion agency would be required to notify the school district of conferences so that educators could provide assistance in resolving issues (Fam. Ct. Act § 735(d)(iii)).

Court pleadings regarding allegations of truancy and/or school misbehavior would be required to include notice from the designated lead agency regarding the diversion efforts undertaken or services provided by the lead agency or school district to the youth and the grounds for concluding the education-related allegations could not be resolved absent the filing of the petition (Fam. Ct. Act § 735(g)(ii)).

The court will have the authority to notify and give the school district an opportunity to be heard at any stage of a proceeding when the court determines the assistance of the school district may aid in the resolution of education allegations (Fam. Ct. Act § 736(4)). Additionally, the court would have the authority to refer PINS proceedings to a diversion agency at any stage in the proceeding (not just upon a juvenile's initial court visit) (Fam. Ct. Act § 742(b)).

The definition of neglected child would be amended to require proof of parental failure to provide educational services to a child notwithstanding the efforts of a school district and child protective agency to ameliorate such failure (Fam. Ct. Act § 1012(f)(i)(A)). This would thus make failure to resolve educational problems through diversion a prerequisite to filing a neglect petition.

Neglect petitions would be required to include the efforts undertaken by the petitioner and the school district to remediate the alleged failure to provide education prior to the filing of the petition and the grounds for concluding the education related allegations could be resolved absent filing of a petition (Fam. Ct. Act § 1031(g)). Lastly, the court will have the authority notify and give the school district an opportunity to be heard at any stage of a proceeding when the court determines the assistance of the school district may aid in the resolution of education allegations (Fam. Ct. Act § 1035(g)).

Paid Family Leave

S.8380-A/A.10639-A amends provisions of the state's paid family leave law to include bereavement leave upon the death of a family member and establishes the notice and documentation requirements associated with such bereavement leave (Workers' Comp. Law §§ 201(15); 205(2)(b), (5); 217(1), (3), (4)). *Note: School districts are not required to participate in the paid family leave program but may opt in to such participation pursuant to provisions outlined in law.*

Property Tax Cap

S.7730/A.9825 amends the education law with respect to excluding a component school district's share of BOCES capital expenditures from the calculation of a school district's property tax levy limit when a project is approved by the voters (§§ 1950(13)(b); 2023-a(2)(c)). A district's own capital expenditures have always been excluded from the calculation of the tax levy limit.

Property Tax Exemptions

A.1647/S.2273 amends the real property tax law to provide that a municipal corporation, including school districts, may after a public hearing adopt a resolution permitting non-profit organizations within its jurisdiction who purchase property after taxes have been levied to apply for a pro-rata exemption RPTL §§ 420-a(16), 420-b(8)). A school district which receives notice of a pro-rata exemption from the assessor must include an appropriation in its budget for the next fiscal year equal to the aggregate amount of such credits (RPTL §§ 420-a(16)(a)(iv), 420-b(8)(a)(iv)). A non-profit organization that purchases property after the taxable status date and prior to the levy of taxes may also be permitted to apply for an exemption within 30 days after the property transfer (RPTL §§420-a(16)(b), 420-b(8)(b)).

Report on Childhood Trauma

S.8000-B/A.10063-B requires the commissioner of education to conduct a study of the effects of trauma on childhood development and learning and deliver a report on the findings to the Legislature, and the governor. The study must include the following topics:

- The types of trauma experienced by students
- The impacts of trauma on child development and learning
- Screening and assessments of trauma available in schools
- Programs, interventions and services related to trauma that are available in schools
- Best practices for school personnel in the area of trauma as it relates to child development and learning (Educ. Law § 305(59)).

Retiree Health Insurance

S.8118/A.10337 amends the general municipal law to require municipalities, including school districts to provide retirees 30 days' notice prior to approval of a change in health insurance premium or a substantive change in coverage for retired officers, employees or their families who are covered by such contract or plan. Where such health insurance coverage is provided to retirees under a collective bargaining agreement written notice must be provided at the time such health insurance contract is binding on the covered retirees. Such notice shall include either the full text of the proposed contract, plan or amendment and any relevant financial information such as the cost of the proposed contract for the municipality and the retirees or the general terms of such plan or amendment and a web address to a secure website where the retires can obtain full financial information (Gen. Mun. Law § 92-a(2-a)).

Retirement Membership

S.8844-A/A.10935-A amends the education law to provide beginning July 1, 2019 for the automatic enrollment of eligible employees in the New York City Board of Education Retirement System upon entry into the system, unless such employee files an application to opt out. All current employees who are eligible for membership as of July 1, 2019 who are not members of the NYC Board of Education Retirement System or any other retirement system shall be enrolled in the retirement system unless such employee files an application to opt out prior to October 1, 2019 (Educ. Law § 2575(18)(b), (f)).

School-based Health Centers Fund

A.2660-B/S.4487-B amends the tax law and the state finance law to establish a school-based health centers fund (State Fin Law § 99-bb) and provide a contribution check-off on state income tax forms for donations to such funds (Tax Law § 630-f). The school-based health centers fund would disburse funds for the expansion of medical services at existing school-based health centers and provide funding for establishing new centers and amounts expended from the fund shall not affect the amount that would otherwise be appropriated for school-based health centers under any other provision of law (State Fin. Law § 99-bb(4), (6)). The services provided at the school based health centers must be furnished by a multi-disciplinary team consisting of a mid-

level practitioner, a mental health counselor and a medical assistant in consultation with a physician. The centers must provide access to health care 24 hours per day, seven days a week (State Fin. Law § 99-bb(7)). Services provided may include but are not limited to comprehensive physical and mental health assessments, diagnosis and treatment of acute illnesses, vision, hearing, dental, nutritional and tuberculosis screenings, immunizations, mental health counseling and referrals, working papers and sports physicals.

The commissioner of health would be required to annually provide a written report to the legislature, state comptroller and the public regarding how monies from the fund were used in the preceding year including the award process for disbursing monies, the recipients of awards and the purpose of said awards (State Fin. Law § 99-bb(3)).

Special Education Tuition Reimbursement

A.5618-A/S.4530-A amends Education Law § 4405(4)(a) to authorize the commissioner of education to develop multiple reimbursement methodologies for tuition reimbursement allowing for differentiation between tuition reimbursement rates for special act school districts and approved private schools. Any such methodologies must meet appropriate educational standards in accordance with commissioner's regulations.

State Administrative Procedure Act

A.9643/S.6916 amends the State Administrative Procedure Act to state that an agency must publish a revised notice of rule-making wherein substantial revisions to the proposed rule have been made at least 45 days prior to the adoption of the rule. The present comment period is only 30 days in length.

Substance Abuse Education and Assistance

A.7470/S.8318 requires the office of alcoholism and substance abuse in consultation with the state education department to develop or utilize existing educational materials to be provided to school district and BOCES for use in addition to or in conjunction with any drug and alcohol related curriculum. The materials must be age appropriate and include an increased focus on substances that are most prevalent among school aged youth and provide parents with information to identify warning signs and address the risks of substance abuse (Men. Health & Hyg. Law § 19.07(l)).

Additionally, the bill adds a new section to the education law (§ 3038) that requires each school superintendent and district superintendent of a BOCES to designate an employee to provide information to any student, parent or staff regarding where and how to find available substance abuse related services. Such designated individual, if possible, should be a school social worker, guidance counselor or any other health practitioner or counselor employed by the school or BOCES. The law provides that any information provided by a student, parent or teacher to such designated individual shall be confidential in the same manner as information provided to a social worker under Civil Practice Laws and Rules § 4508. Further any information learned by the designated individual may not be used in any school disciplinary proceeding. The section does not relieve the individual of any other duty to report such information imposed by other laws.

Wage Disparities Report

A.2549/S.3262 directs the president of the state civil service commission to study and publish a report evaluating among public employers (including school districts) the existence of wage disparities related to the job titles segregated by the gender, race and/or national origin of the employees in the titles. The report must be submitted to the legislature and governor's office of employee relations by January 1, 2019.

Extensions of Current Law

Employee Leave

A.11020/S.8757 extends the effectiveness of Labor Law § 202-m until December 1, 2021. Under this provision of law employers, including school districts, must grant health care professionals a leave of absence from their employment in order to fight Ebola overseas. Such leave of absence is unpaid unless the employee requests to utilize portions of his or her accrued paid leave.

III. Regulations Adopted by the Board of Regents or other Relevant Entity

Annual Professional Performance Reviews for Principals

8 NYCRR § 30-3.2(m) and 30-3.5- Commencing with the 2022-23 school year annual professional performance reviews for principals must incorporate the Professional Standards for Educational Leaders (PSEL 2015) as adopted and modified by the Board of Regents.

Certification as an Administrator

Out of State Applicants for Certification

8 NYCRR § 80-3.10- The Regents adopted changes to the requirements for certification as an administrator (SBL, SDL and SDBL certificates) relative to the educational requirement for applicants who earn their degrees outside New York. Candidates who complete out-of-state education leadership programs who apply for certification as an administrator on or after September 1, 2019, or who applied prior to September 1, 2019 but have not completed all the requirements for the certificate by that date must have completed an educational leadership program at an institution accredited by a regional accrediting body recognized by the U.S. Department of Education. Additionally, the out-of-state educational leadership program must lead to an initial certificate in the jurisdiction where the higher education institution is located that is equivalent to the New York certificate such applicant is seeking.

School Building Leader Preparation

8 NYCRR § 52.21- Amendments incorporate a phase-in requiring school building leader education programs commencing December 1, 2022 to be aligned with the Professional Standards for Educational Leaders as adopted by the Board of Regents.

Transitional H Pathway for Certification as a School District Business Leader

8 NYCRR § 80-5.25- This section adds the Transitional H certificate pathway which is only available to New York licensed certified public accountants (CPAs) with at least three years of experience auditing public school districts, board of cooperative educational services (BOCES) and/or municipalities. Qualified CPAs may seek certification as a school district business leader under a Transitional H certificate.

CPAs with the requisite experience will qualify for a Transitional H certificate if they hold a baccalaureate degree or higher in accounting, finance or related business field from an institution that meets regulatory requirements; are matriculated in a school district business leader certification program leading to a professional certificate as a school district business leader; and have a commitment of employment for at least three years from a school district or BOCES. Such employment commitment must include at least one year of mentoring.

The transitional H certificate is valid for 3 years from its effective date and is not renewable.

8 NYCRR § 52.21(c)(5)(v)- This section exempts holders of a Transitional H certificate who were employed by a school district or BICES under such certificate for more than a year from the required leadership experience outlined in § 52.21(a).

Continuing Teacher and Leader Education (CTLE)/ Professional Development

8 NYCRR § 80-6.3(a)(2)- An amendment provides that holders of a school district business leader certificate are exempt from the language acquisition CTLE requirements but must instead complete a minimum of 15% of the required CTLE clock hours dedicated to the needs of English Language Learners (ELLs) and federal, state and local mandates for ELLs.

8 NYCRR § 154-2.3(k)- Amendments were adopted to modify the professional development requirements for school business leaders to provide they must receive professional development related to the needs of English Language Learners (ELL) and the federal, state and local mandates for ELLs.

Dignity for All Students Act

8 NYCRR § 100.2(kk)(1)(x)- Amendments added examples of incidents which would require an investigation under the Dignity for All Students Act (DASA). The following types of incidents where the basis for the complained of action was a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex will require an investigation under DASA if reported:

- Denial of access to school facilities, functions, opportunities or programs, including but not limited to, restrooms, changing rooms, locker rooms and/or field trips.
- Application of a dress code, specific grooming or appearance standards.
- The use of name(s) and pronouns(s) or the pronunciation of name(s).
- Any other form of harassment, bullying and/or discrimination.

Diploma and Graduation Requirements

Diploma Requirements for Students Covered Under the Interstate Compact for Military Children

8 NYCRR § 100.20- Amendments added a new section to outline the procedures principals in New York schools must take to award transfer credit to military students now attending school in New York based upon prior out of state coursework and achievement on assessments.

8 NYCRR § 100.5(a)(4)- Amendments provide that students who enter a New York high school after having completed one or more semesters in a high school outside of New York are exempt from the required units of study for physical education but must enroll in physical education courses every semester they are registered in a New York high school to meet the diploma requirements.

8 NYCRR § 100.5(d)(5)- Amendments outline the specific circumstances under which transfer students may be exempted from the global history and geography credit requirements by substituting two units of credit in social studies.

High School Equivalency (HSE) Pathway

8 NYCRR § 100.7(a)(2)(i)- Amendments provide that candidates for a high school equivalency diploma who meet existing eligibility criteria for a HSE diploma and have passed Regents examinations in English Language Arts, mathematics, social studies and/or science may substitute those passing scores on a maximum of four of the five corresponding TASC subtests. The definition of passing score will differ for students with disabilities.

Superintendent Determination Option

8 NYCRR §§ 100.5(d)(12) and 200.4(d)(2)(ix)(b)(3)- Amendments were made to these two sections to rename the "superintendent determination pathway" for a local diploma to the "superintendent determination option." This option is available to students with disabilities who have an individualized education program.

In addition, § 100.5(d)(12) was amended to provide students with disabilities, otherwise eligible to graduate beginning January 2018 and thereafter who have not scored 55 on the English Language Arts (ELA) or mathematics Regents examinations or did not initiate an appeal of a score between 52 and 54, may meet ELA or mathematics eligibility conditions for the superintendent determination option by completing requirements for the career development and occupational studies (CDOS) commencement credential. The superintendent must conduct a review to determine if the student has demonstrated proficiency in ELA, mathematics or other subjects where the student did not receive a passing score on a Regents examination. A student who uses the CDOS commencement credential to meet ELA and/or mathematics Regents examination eligibility conditions for the superintendent determination option and has met all assessment requirements for remaining Regents examination would be eligible for consideration of a local diploma through the superintendent determination option.

For students with disabilities who are eligible to graduate in 2017-18 or 2018-19 but did not have the opportunity to work towards a CDOS commencement credential, the school principal must determine if the student has demonstrated knowledge and skills in specified CDOS learning standards in order for the CDOS commencement credential to be awarded. Similarly, for these students in the 2017-18 and 2018-19 school years the total hours of career

and technical education and/or work-based learning activities may be less than the required two units of study.

Health Education

8 NYCRR §§ 135.1 and 135.3- The amendments revise the definition of health education to include specific information about the misuse of alcohol, tobacco and other drugs and the prevention and detection of certain cancers. Additionally, health education must include several dimensions of health, including mental health and the relation of physical and mental health and must be designed to enhance student understanding, attitudes and behaviors that promote health, well-being and human dignity. Provisions relating to elementary health curriculum were revised to include mental health.

Medical Marihuana

Designation of a School as a Designated Caregiver

10 NYCRR § 1004.3, 1004.4- The Department of Health adopted amendments allowing a certified patient in New York's Medical Marihuana program to name a school as a designated caregiver. A properly registered designated caregiver may lawfully possess, acquire, deliver, transfer, transport and/or administer medical marihuana on behalf of the certified patient(s).

While a certified patient may designate a public or private school as a designated caregiver, a school is not obligated to accept such responsibility. If selected as a designated caregiver a public or private school, at its option, may apply to the State Department of Health for a registry identification card (10 NYCRR § 1004.4(b)).

School districts should consult with their counsel regarding establishing appropriate policies and procedures for receiving, storing, administering, and disposing of medical marihuana to be implemented at a designated school that applies for a registry identification card.

For more information see NYS Department of Health, *The New York State Medical Marijuana Program Frequently Asked Questions* (April 2018), at: https://www.health.ny.gov/regulations/medical_marijuana/faq.htm) and other resources on the Department of Health website at: https://www.health.ny.gov/regulations/medical_marijuana/about.htm.

Minimum Instruction Requirement for State Aid

8 NYCRR §§ 175.2 and 175.5- Education law requires 180 days of instruction for state aid purposes. Amendments provide that during the 180 days a school district must meet minimum annual instructional hours as follows:

- Half-day kindergarten- 450 instructional hours
- Full day kindergarten and grades one through six- 900 instructional hours
- Grades seven through twelve- 990 instructional hours.

Under the regulation instructional hours means an hour or fraction of an hour during which students are receiving instruction from a certified teacher and periods of time when students are engaged in supervised study activities, including homework. Instructional hours shall not include periods of time when instruction is not provided such as lunch or recess. The rules surrounding Regents examination days and days of administration for state assessments contributing to the minimum instructional hours are also laid out. The regulations provide unscheduled school delays and early releases of two hours or less due to extraordinary conditions

will not affect the total number of instructional hours for that particular day (i.e. the full day counts).

Additionally, districts may conduct up to four superintendent's conference days throughout a school year which count towards instructional days/hours. Districts may count any such conference days conducted in the last two weeks of August (subject to collective bargaining), as part of the required 180 days of instruction.

The financial apportionment from the state will be reduced by 1/180th for each day less than 180 days the school actually is in session.

School Nutrition

Breakfast After the Bell

8 NYCRR § 114.1- Amendments were adopted to establish procedures school districts must follow in setting up a program to provide breakfast after the instructional day has begun. Amendments were also adopted to conform the commissioner's regulations with changes to federal regulations for school nutrition programs.

Prohibition Against Meal Shaming

8 NYCRR § 114.5- A new section was added to commissioner's regulations regarding school districts' adoption of plans to prevent the shaming of any student whose parent may have unpaid meal charges. Plans must include an explanation of the training staff will receive to ensure no student is shamed, how affected parents and guardians will be provided assistance to apply for free and reduced price meals for their children, and the procedures to be used to notify parents of unpaid meal charges.

Regents Examinations

Laboratory Requirements for Students who are in State Agency Run Programs or Incarcerated

8 NYCRR § 100.5(b)(7)(iv)- Amendments provide that students who are enrolled in state agency run educational programs and in correctional facilities may meet the laboratory requirements for admission to science regents examinations through a combination of hands-on and simulated laboratory experience.

Teacher Certification

Admission Examinations

8 NYCRR § 52.21(b)(2)(i)(l)(1)- Amendments adopted provide that a currently certified teacher or administrator who already holds a graduate degree will not be required to take an admission examination (GRE or the like) to meet the minimum admission requirements for a graduate teacher or educational leadership program.

Computer Science Certification and Tenure Area

8 NYCRR § 30-1.8(a)(16)- Amendments add computer science as a special subject tenure area.

8 NYCRR § 80-3.2(e)(1) and 80-3.7 - Amendments add computer science (all grades) to the listing of teacher certifications. The amendments to § 80-3.7 establish the requirements for an individual to seek certification in computer science through individual evaluation.

8 NYCRR § 80-3.3(b) and (d)- Amendments provide that a computer science content specialty test will be required for certification when one is available and also establish the requirements for an initial certificate in computer science.

8 NYCRR § 30-1.2(d)- Amendments provide that teachers currently teaching computer science may remain in their present tenure area and continue to accrue tenure and seniority rights therein or may choose to give knowing consent to change tenure areas as of September 1, 2022 to the special subject tenure area of computer science from the date of assignment when he or she devoted 40% of time to the provision of instruction in the area of computer science.

Beginning September 1, 2022 a school district of BOCES that appoints a teacher to devote a substantial portion (at least 40%) of time to computer science must make the probationary appointment to the computer science tenure area. The amendments also address how computer science teachers affected by BOCES takeover or school district take back of programs shall be treated.

8 NYCRR § 80-3.14- Amendments added a new section that establishes a person teaching computer science in the five years preceding September 1, 2022 may apply for a statement of continued eligibility in order to keep teaching computer science courses. The statement of continued eligibility will be valid for 10 years and the teacher will not be required to hold a computer science certificate provided the teacher is certified in another classroom teaching area. The statement of continued eligibility is only valid for service in the school district or BOCES where the teacher was working when he or she applied for the statement.

Individual Evaluation Pathway

8 NYCRR §§ 80-3.3(a)(3)(iii) and 80-3.7- Amendments adopted reinstate the availability of the individual evaluation pathway for certificate titles in: early childhood education (birth-grade 2); childhood education (grades 1-6); generalist in middle childhood education (grades 5-9); English language arts (grades 5-9); English language arts (grades 7-12); literacy (birth-grade 6); and literacy (grades 5-12).

Mentoring Requirement

8 NYCRR § 80-3.4- Amendments provide that mentoring of a teacher with less than two years teaching experience must occur during the teacher's first 180 days of employment.

Pre-Professional Teaching Assistant Certificate

8 NYCRR § 52.21(b)(2)(ii)(c)(2)(iii)- Amendments enables those who hold a pre-professional teaching assistant certificate to complete student teaching or practica experience while employed under the pre-professional certificate provided the institution of higher education and employing school district or BOCES will provide candidates holding pre-professional certificate with the same and/or similar student teaching experience as required by the regulations.

Safety Net and Multiple Measure Review Process for edTPA

8 NYCRR § 80-1.5(c)- The period for the safety net for candidates who fail to achieve a passing score on the edTPA is extended through June 30, 2018. Previously, the safety net was set to expire at the earlier of the approval of a new passing score for the edTPA or June 30, 2018. This change allows more candidates to transition to the Multiple Measure Review Process.

8 NYCRR § 80-1.5(d)- The regulation was amended to provide that a candidate will qualify for the Multiple Measures Review Process if he or she achieves a score on the edTPA within two points below the passing score.

Safety Nets for Teacher Certification Examinations

8 NYCRR § 80-1.5- Amendments remove the requirement that candidates complete all other requirements for certification before taking advantage of the safety nets. Additionally, the amendments extend the safety net for Part Two (mathematics) of the Multi-Subject Grades 7-12 content specialty test until such time as a revised part two is operational. That safety net had been set to expire June 30, 2018.

8 NYCRR § 80-1.5(c)(2)- Amendments extend the availability of the safety net for candidates seeking certification as an Educational Technology Specialist, who failed to achieve a passing score on the revised Educational Technology Content Specialty test, through June 30, 2019.

8 NYCRR § 80-1.5(c)(1)(iii)- Amendments establish a safety net for candidates seeking certification as a Library Specialist who fail to achieve a passing score on the Library Specialist teacher performance assessment. Such candidates may prior to September 30, 2019 receive a satisfactory score on the written assessment of teaching skills after receipt of the score on the Library Specialist teacher performance assessment, or have passed the written assessment of teaching skills on or before April 30, 2014.

Special Education Teachers

8 NYCRR §§ 80-3.15, 80-4.3- The Board of Regents approved changes to commissioner's regulations establishing the requirements for issuance of a statement of continued eligibility for teachers holding a professional certificate in students with disabilities generalist (grades 7-12) who teach a special class in grades 7-12 but are not certified in the specific subject and also created a limited extension for teachers who do not qualify for the statement of continued eligibility.

Speech Language Pathway

8 NYCRR § 80-3.16- The Board of Regents adopted a certification pathway to an initial certificate as a teacher of speech and language disabilities (all grades) for candidates who have completed a speech language pathology program accredited by the American Speech Language and Hearing Association.

Transitional B Certificate

8 NYCRR § 80-5.1(a)(2)(iii)- Transitional B certificate holders are enrolled in an alternative teacher preparation (ATP) program. Previously Transitional B certificate holders were required to be employed full-time for three years by a school district or BOCES as a teacher of record while also enrolled in the ATP program. Amendments provide that holders of a Transitional B

certificate may be employed on a less than full-time basis at the beginning of his or her employment with the school. The employment must include at least one year of full-time mentored teaching in order to meet the experience requirements required for an initial teaching certificate.

Transitional G Certificate

8 NYCRR § 80-5.22- Amendments expand the availability of this certificate to advanced degree holders in any area for which there is a certificate title, who have two years of acceptable post-secondary teaching experience in any area for which there is a certificate title or a closely related subject area acceptable to the department. Such post-secondary teaching experience must have occurred within the past ten years. Previously the certificate was limited to those with degrees in a STEM field.