SCHOOL LAW – A RECAP

YEARLY REVIEW OF
SELECTED NEW LAWS AND REGULATIONS

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I. The Education Transformation Act of 2015 (ETA)\(^1\)

A. The New Probationary Period and Tenure Rules
(Chapter 56 of the Laws of 2015 – Part EE Subpart D)

The ETA amends the current law as concerns the length of probationary service required for tenure conferral for teachers and other members of the teaching staff, administrators, directors, supervisors, principals and all other members of the supervising staff, except associate, assistant and other superintendents who are employed by a school district or BOCES and appointed by the board of education on or after July 1, 2015 (§§ 2509[a][ii],[b][ii]; 2573[1][a][ii], [b][ii]; 3012[1][a][ii],[b][ii]; 3014[1][b]).

School board resolutions making a probationary appointment on or after July 1, 2015 must, with respect to the expiration date of the appointment reflect that...in order to be granted tenure the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if [they] receive an ineffective composite or overall rating in the final year of the probationary period [they] shall not be eligible for tenure at that time...(8 NYCRR § 30-1.3[d]).

Length of Regular Probationary Term

For the above specified employees, the ETA provides for a four year probationary period (§ 2509[1][a][ii],[b][ii]; see also §§ 2573[1][a][ii],[b][ii]; 3012[1][a][ii]). That constitutes an additional year beyond that applicable to pedagogical employees hired before July 1, 2015 (§ 2509[1][a][i],[b][i]; see also §§ 2573[1][a][i],[b][i]; 3012[1][a][i],[b][ii]; 3014[1][b]).

Shortened Probationary Term for Teachers

1. A teacher employed as a regular substitute teacher for two years prior to appointment to probation on or after July 1, 2015, is entitled to a shortened probationary term of two years. However, if the regular substitute being appointed to probation was “a classroom teacher” while serving as a regular substitute teacher, in order to qualify for the reduced probationary period, the regular substitute must have received composite APPR ratings in each of those [two] years” that he or she served as a regular substitute teacher to qualify for a reduced two year probationary term (§ 2509[1][a][ii]; see also §§ 2573[1][a][ii]; 3012[1][a][ii]).

2. A teacher who has previously secured tenure in a school district or a BOCES in New York State, including the school district of current employment, and who was not dismissed

\(^1\) The Education Transformation Act of 2015 (ETA) was enacted into law as part of the Governor’s Budget Bill at Chapter 56 of the Laws of 2015 – Part EE. It amended the Education Law by adding new provisions and making changes to other sections.
therefrom as a result of Education Law § 3020-a or § 3020-b\(^2\) charges, is entitled to a probationary period of three years (Id.; see also § 3014[1][b])., as opposed to two years as is applicable to those appointed to probation prior to July 1, 2015 (§ 2509[1][a][i]; see also §§ 2573[1][a][i]; 3012[1][a][i]; 3014[1][a]).

However, the teacher must demonstrate that he/she received an APPR rating under either Education Law § 3012-c or the new Education Law § 3012-d in his/her last year of service in any such other school district or BOCES (§ 2509[1][a][i]; see also §§ 2573[1][a][ii]; 3012[1][a][ii]; 3014[1][b]).

**Extension of Probationary Term**

1. At the expiration of their probationary term, classroom teachers and building principals who have met the requirements for being recommended for tenure “remain in probationary status until the end of the school year in which” they have “received such ratings of effective or highly effective for at least three of the four preceding school years exclusive of any break in service and subject to the terms [of this section]” (§ 2509[2][b]; see also §§ 2573[5][b],[6][b]; 3012[2][b]; 3014[2][b]).

   During that “extended” period of probation, the board:

   a. “Shall consider whether to grant tenure for those classroom teachers or building principals who otherwise have been found competent, efficient and satisfactory.”

   b. May confer a conditional grant of tenure “contingent upon a classroom teacher’s or building principal’s receipt of a minimum rating in the final year of the probationary period, pursuant to the requirements of this section.”

      If the contingency is not met after all appeals have been exhausted:

      - The grant of tenure shall be void and unenforceable, and

      - The board of education may extend the teacher’s or principal’s probationary period “in accordance with this subdivision”.

2. A board of education, “in its discretion, may extend the teacher’s probationary period for an additional year” if a teacher receives effective or highly effective ratings during each year of probation, but receives an ineffective rating during his/her final year of probation (§ 2509[2][b]; see also §§ 2573[5][b],[6][b]; 3012[2][b]; 3014[2][b]).

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\(^2\) Education Law § 3020-b contains a new streamlined procedure for the removal of tenured teachers who have been rated ineffective for multiple years.
Tenure Determinations and Extension of Probationary Period

1. Under the old tenure laws, it was permissible to confer an early grant of tenure after at least one year of competent, efficient and satisfactory service (see Weinbrown v. Bd. of Educ., 28 NY2d 474 [1971]). Under the new tenure laws, for those appointed on or after July 1, 2015, this early grant of tenure will no longer be permissible (see § 2509[2][b]; see also §§ 2573[5][b],[6][b]; 3012[2][b]; 3014[2][b]).

2. In addition to the existing requirement that the superintendent make a recommendation to the board of education recommending tenure based upon his/her finding that the candidate is “competent, efficient and satisfactory”, the ETA further requires that classroom teachers and building principals recommended for tenure also must have received an APPR rating of “effective” or “highly effective” in at least three of the four preceding years, exclusive of any break in service.

   However, a “teacher” or “principal” who receives an “ineffective” composite or overall APPR rating in his or her final year of probationary service is ineligible for tenure even if he/she had secured “effective” or “highly effective” APPR ratings in every other year of his/her probationary service. Such a candidate cannot be granted tenure at that time (Id.; 8 NYCRR § 30-1.3[d]).

3. When a teacher or principal becomes ineligible for tenure because of an ineffective APPR rating in the last year of probationary service:
   a. The board of education, in its discretion, may extend the teacher’s probationary period for an additional year.
   b. The teacher or principal immediately becomes eligible for tenure if he/she successfully appeals the ineffective rating in his or her final probationary year with the result that the teacher or principal is deemed to have been “effective” or “highly effective” in at least three of the preceding four years and not “ineffective” in the final year of probation. The board of education then may (but is not required to) appoint the successful appellant on tenure (Id.).

B. The New Face of APPR – Education Law § 3012-d and 8 NYCRR Subpart 30-3

   (Chapter 56 of the Laws of 2015 – Part EE Subpart E)

   Chapter 56 Part EE Subpart E of the Laws of 2015 added a new section 3012-d to the Education Law which establishes a new system for the evaluation of teachers and principals. Corresponding regulations were adopted by the Board of Regents on June 16, 2015. Below is a summary of the new statute and regulations, with regulatory language in italics.
In General

1. Collectively negotiated annual teacher and principal evaluation plans entered into after April 1, 2015 are governed by § 3012-d rather than § 3012-c, unless they apply to the 2014-15 school year only.
   
a. Collectively negotiated APPR plans in effect on April 1, 2015 remain in effect until a successor plan is agreed to. However, the successor agreement must be compliant with the provisions of new APPR law (§ 3012-d[12]; 8 NYCRR § 30-3.1[c]).
   
b. School districts that fail to submit documentation approved by the commissioner of education by November 15, 2015, or by September 1 of each subsequent year, that demonstrates they have fully implemented the standards and procedures for conducting teacher and principal evaluations in accordance with § 3012-d are ineligible for increased state aid for the 2015-16 school year (§ 3012-d[11]).
   
2. References to annual professional performance reviews are deemed to refer to annual professional performance reviews under § 3012-c or annual teacher and principal evaluations under § 3012-d (§ 3012-d[13]).

3. Nothing in the new APPR law may be construed to affect the unfettered statutory right of school districts to terminate probationary (non-tenured) teachers and principals for any statutorily and constitutionally permissible reasons (§ 3012-d[9]; 8 NYCRR § 30-3.1[d]).

APPR as a Significant Factor

APPR evaluations are a significant factor for:

1. Employment decisions such as promotion, retention, tenure determination, termination, and supplemental compensation.

2. Teacher and principal development, including coaching, induction support, and differentiated professional development (§ 3012-d[1]; 8 NYCRR § 30-3.1[d]).

Evaluation Categories

Teacher and principal evaluations consist of multiple measures in two categories – student performance and teacher observations (§ 3012-d[4]; 8 NYCRR § 30-3.4[a]).

1. The student performance category for teachers includes mandatory and optional subcomponents (§ 3012-d[4][a]; 8 NYCRR §30-3.4[b]).

   a. Which mandatory subcomponent applies depends on whether the teacher’s course ends in a state-created or administered test for which there is a state-provided growth model.
- If yes, and at least 50% of the teacher’s students are covered under the State-provided growth measure, the teacher receives a state-provided student growth score.

  Nonetheless, districts must develop back-up SLOs for all teachers whose courses end in a state-created or administered test for which there is a state-provided growth model, to use in the event that no state-provided growth score can be generated for such teachers (8 NYCRR § 30-3.4[b][1][iv]).

- If no, or where less than 50% of the teacher’s students are covered by a state-provided growth measure, the teacher receives a student growth score based on a student learning objective (SLO) developed in accordance with the process set by the commissioner.

  When a course ends in a state assessment for which there is no state-provided growth model, the state assessment must be used as the SLO’s underlying assessment (§ 3012-d[4][a][1]; 8 NYCRR § 30-3.4[b][1][ii],[iii]).

  When a course does not end in a state-created or administered test, or where a state – provided growth measure is not determined, districts may use SLOs based on a list of approved student assessments, or a school- or BOCES-wide group, team or linked results based on State/Regents assessments, as defined by the commissioner in guidance (8 NYCRR § 30-3.4[b][1][iii]).

b. The optional subcomponent consists of a second measure that is selected locally and applied in a consistent manner, to the extent practicable, across the district. This second optional measure may be either:

- A second state-provided growth score on a state-created or administered assessment provided that the state-provided growth measure is different than that used in the required subcomponent, which may include one or more of the following:

  • a teacher specific-growth score computed by the State based on the percentage of students who achieve a state-determined level of growth (e.g., percentage of student whose growth is above the median for similar students, 

  • school-wide growth results based on a state-provided school-wide growth score for all students attributable to the school who took the state ELA or math assessment in grades 4-8, or

  • school-wide, group, team or linked growth results using available state-provided growth scores that are locally computed; or

- A growth score based on a state-designed supplemental assessment that is calculated using a state-provided or approved growth model. Such growth score may include school- or BOCES-wide group, team, or linked results where the state approved
growth model is capable of generating such a score (§ 3012-d[4][a][2]; 8 NYCRR §30-3.4[b][2]).

Use of an optional subcomponent is subject to collective bargaining, including which measure to use from among those authorized by statute (§ 3012-d[10][a]).

c. The commissioner sets parameters for appropriate targets for student growth for both subcomponents (§ 3012-d[4][a]).

- All state-provided or approved growth model scores must control for poverty, students with disabilities, English language learners status and prior academic history. For SLOs, these characteristics may be taken into account through the use of targets based on one year of “expected growth”, as determined by the superintendent or his/her designee (8 NYCRR § 30-3.4[b][3]).

- Districts must measure student growth using the same measure(s) of student growth for all classroom teachers in a course and/or grade level in a district (8 NYCRR § 30-3.4[b][4]).

SED must affirmatively approve and may disapprove or require modifications to APPR plans that do not set appropriate targets, including after initial approval, provide options for multiple assessment measures that are aligned to existing classroom and school best practices and avoid unnecessary additional testing (§ 3012-d[4][a]).

2. The teacher observations category must be based on a state-approved teacher practice rubric (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][iv]), unless the district has an approved variance from the commissioner (8 NYCRR § 30-3.4[d][2][b][iv]). All observations for a teacher for the school year must use the same approved rubric; provided that districts may locally determine whether to use different rubrics for teachers who teach different grades and/or subjects during the school year (8 NYCRR § 30-3.4[d][2][v]).

Similar to the student performance category above, the teacher observation category includes mandatory and optional subcomponents.

a. The mandatory subcomponent is based on at least two observations, one of which must be unannounced.

- One of those observations must be conducted by a principal or other trained administrator

- The other must be conducted by one or more impartial independent trained evaluator(s) (ITEs) trained and selected by the district.

  • The ITE may be employed within the district but not in the same school building as the teacher being evaluated.
• The ITE observation may be conducted, instead, by one or more evaluators selected and trained by the district who are different than the evaluator(s) who conducted the other mandatory observation, in districts that obtain a hardship waiver from the commissioner for such purpose.

Such a hardship waiver will be granted to rural school districts and districts with only one registered school that because of their size and limited resources are unable to obtain an independent evaluator within a reasonable proximity without an undue burden on the district (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][i],[vi]).

b. The optional subcomponent is based on classroom observations conducted by a trained peer teacher who was:

- Rated effective or highly effective on his/her overall rating in the prior school year

- From the same school or another school within the district (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][i][ii],[vi]).

c. The frequency and duration of observations is determined locally (8 NYCRR § 30-3.4[d][2][iii]; see § 3012-d[4][b]).

- Nothing limits the discretion of a school board, superintendent, principal or other trained administrator to conduct observations in addition to those required, for non-evaluative purposes (8 NYCRR § 30-3.4[d][2][viii]).

- Observations may occur either live or via recorded video, as determined locally (8 NYCRR § 30-3.4[d][2][vii]).

d. Regarding the scope of the observations:

- Observations must be based only on observable rubric subcomponents.

  - The evaluator may select a limited number of observable rubric subcomponents for focus within a particular observation.

  - All observable teaching standards/domains must be addressed across the total number of annual observations

- New York State Teaching Standards/Domains that are part of the rubric but not observable during the classroom observation may be observed during:

  - any optional pre-observation conference or post-observation review, or

  - other natural conversations between the teacher and the evaluator
and incorporated into the observation score (8 NYCRR § 30-3.4[d][ix]).

e. How to implement the statutory provisions related to the teacher observations category and associated commissioner’s regulations is subject to collective bargaining (§ 3012-d[10][b]).

**Prohibited Evaluation Elements**

1. The following may not be used in any evaluation subcomponent:

   a. Evidence of student development and performance derived from lesson plans, other artifacts of teacher practice, and student portfolios, except for student portfolios measured by a state-approved rubric where permitted by SED;

   b. Parent/student feedback instruments;

   c. Use of professional goal-setting as evidence of teacher or principal effectiveness;

   d. District or regionally developed assessments not approved by SED;

   e. Growth/achievement targets that do not meet minimum regulatory standards set forth in commissioner’s regulations (§ 3012-d[6]; 8 NYCRR § 30-3.7).

2. Points may not be allocated based on any artifacts, unless such artifact constitutes evidence of an otherwise observable rubric subcomponent (e.g. a lesson plan viewed during the course of the observation may constitute evidence of professional planning) 8 NYCRR § 30-3.4(d)(2)(xi)).

**Performance Ratings**

Annual evaluations will rate teacher and principal effectiveness using four categories – highly effective, effective, developing, ineffective (HEDI) (§ 3012-d[3]).

1. The overall rating for teachers is determined pursuant to a statutory methodology for the placement of teachers within a HEDI matrix that integrates a teacher’s scores under the two evaluation categories (student performance and observations) prescribed under the new APPR law (§ 3012-d[5][b]; 8 NYCRR § 30-3.6[a]).

2. Special rules provide that a teacher or principal who is rated ineffective in:

   a. The student performance category using:

      - Two subcomponents must be rated ineffective overall, if the second subcomponent consists of a growth score that is based on a state-designed supplemental assessment.
- Only the state measure subcomponent, or two subcomponents with the second subcomponent consisting of a state-provided growth score on a state assessment, is ineligible to receive an overall rating of effective or highly effective (§ 3012-d[5][a]; 8 NYCRR § 30-3.6[b]).

b. The teacher observations category is ineligible for an overall rating of effective or highly effective (§ 3012-d[5][a]).

3. The weights assigned to the various subcomponents of the two evaluation categories to calculate a separate rating for each of those two categories are as follows:

   a. Student performance category

      - If the optional second student growth subcomponent is not used, the mandatory subcomponent is weighted at 100%.

      - If the optional second student growth subcomponent is used, the mandatory subcomponent is weighted at a minimum of 50% and the optional subcomponent is weighted at no more than 50% (§ 3012-d[4][a][2]; 8 NYCRR § 30-3.4[c][1][2]).

   b. Teacher observation category

      - Observations conducted by a principal or other trained administrator are weighted at a minimum of 80%.

      - Observations conducted by independent impartial observers, or other evaluator(s) selected by the district if a hardship waiver is granted, are weighted at a minimum of 10%.

      - If the optional third teacher observation subcomponent is used, the weight assigned to observations conducted by peers is established locally within the constraints of the minimum weightings for observations conducted by principals and independent impartial observers (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][xiii]; see also 8 NYCRR § 30-3.4[d][2][ii]).

4. The scores assigned to the two evaluation categories are calculated as follows:

   a. Student performance category

      - Each measure used in this category (state-provided growth score, SLOs, state designed supplemental assessments) must result in a score between 0 and 20.

      • SED will generate the scores for measures using a state-provided growth score.
• Districts will calculate scores for SLOs in accordance with the table that is set forth in commissioner’s regulations and translates ranges of percentages of students meeting target into a scoring range.

For teachers with courses with small “n” sizes as defined in SED guidance, districts will calculate SLO scores using a methodology also prescribed in guidance.

• For all other measures that are not state-provided growth measures, districts will compute scores for the student performance category in accordance with the state-provided or approved growth model used (§ 3012-d[4][a][2]; 8 NYCRR § 30-3.4[c][3]).

   - The multiple measures used will be combined using the weighting average set forth in commissioner’s regulations to produce an overall student performance category rating according to a minimum/maximum HEDI scoring range set forth in commissioner’s regulations (8 NYCRR § 30-3.4[d]).

b. Teacher observation category

   - Each observation is evaluated on a 1-4 scale based on a state-approved rubric aligned to the New York State Teaching Standards, and an overall score for each observation will be generated between 1 and 4.

   • Multiple observations will be combined using the weighting average set forth in commissioner’s regulations to produce an overall score of between 1 and 4 for this category.

   • If a teacher earns a score of 1 on all rated components of the practice rubric across all observations, a score of 0 will be assigned (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][xii]; 30-3.6[c]).

   • The overall observation score will be converted into an overall teacher observation category rating, using cut scores that are determined locally for each rating category consistent with the minimum/maximum HEDI scoring ranges set forth in commissioner’s regulations (§ 3012-d[4][b]; 8 NYCRR § 30-3.4[d][2][xiv]).

   - The school superintendent, the BOCES superintendent, or the chancellor in New York City and the union representative must certify in the APPR plan that the evaluation process will use the weights and scoring ranges provided by the commissioner (§ 3012-d[7]; 8 NYCRR § 30-3.6[c]).
5. School districts must ensure that the process by which weights and scoring ranges are assigned to evaluation subcomponents and categories is transparent, and available to those being rated before the beginning of each school year.

The process must make it possible for a teacher or principal to obtain any number of points in the applicable scoring ranges, including zero, in each subcomponent (§ 3012-d[7]; 8 NYCRR § 30-3.6[c]).

Prohibition against the Assignment of Students to Ineffective Teachers

1. A student may not be instructed, for two consecutive school years, in the same subject by any two teachers in the same district, who received an ineffective rating under Part 30-3 of commissioner’s regulations in the school year immediately preceding the school year in which the student is placed in such the teacher’s classroom.

2. A district may apply for a teacher-specific waiver from SED if it deems compliance with this requirement impracticable, on a form and timeframe prescribed by the commissioner (§ 3012-d[8]; 8 NYCRR § 30-3.14).

A district that assigns a student to a teacher rated ineffective in the same subject for two consecutive years must seek a waiver for the specific teacher in question. The commissioner may grant the waiver if:

a. The district cannot make alternative arrangements and/or reassign the teacher to another grade/subject because a hardship exists (for example, too few teachers with higher ratings are qualified to teach the subject in the district); and

b. The district has an improvement and/or removal plan in place for the teacher that meets guidelines prescribed by the commissioner (8 NYCRR § 30-3.14).

Principal Evaluations

Consistent with law, section 30-3.5 of the Rules of the Board of Regents align the building principal evaluation system set forth in § 3012-c with the new teacher evaluation system set forth in § 3012-d and set out the standards and criteria for conducting annual professional performance review of principals under the new teacher and principal evaluation law (§ 3012-d[14]; 8 NYCRR § 30-3.5]).

Overall, the architecture of the principal evaluation regulations mirrors the new teacher evaluation system in that it also:

1. Rates principals under the four HEDI categories based on multiple measures in two evaluation categories.
2. In the case of principals, the two evaluation categories consist of a student performance and a principal school visits category (each with mandatory and non-mandatory subcomponents).

3. Weights are assigned to the subcomponents of each category, and the overall rating for each category is based on a similar methodology.

   a. The score for the student performance category is based on the weighted average of the multiple measures used for each category to produce an overall rating score of 0-20.

   b. The score for the principal school visits category is based on the conversion of each school visit score into an overall rating score of between 0 and 4 using cut scores determined locally, and consistent with the permissible ranges for each HEDI category set out in regulation (8 NYCRR § 30-3.5).

4. The overall composite score for a building principal depends on the placement of the two evaluation categories within the matrix established by statute for such purposes (8 NYCRR § 30-3.6).

**Continuation of Certain Specified § 3012-c Provisions**

Consistent with law, the commissioner has determined to apply the following § 3012-c provisions to the new APPR system established by § 3012-d, some without any modifications or with an explanation, and others set forth in the applicable language of the new regulations (§ 3012-d[14]; 8 NYCRR § 30-3[15]).

- § 3012-c(2)(d) – Evaluator training
- § 3012-c(2)(k) – Submission of plans
- § 3012-c(2)(k-1) – Material changes to reduce Assessments (no modification)
- § 3012-c(2)(k-2) – Reduction of time spent on field tests (no modification)
- § 3012-c(2)(l) – Triborough amendment

- § 3012-c(4) – TIPs/PIP
- § 3012-c(5) – Appeals
- § 3012-c(5-a) – NYC Appeals (with an explanation)
- § 3012-c(9) – Monitoring
- § 3012-c(10) – FOIL/Personal Privacy of APPR data (with an explanation)

**Appeals of State-Provided Student Growth Scores**

**Appeal Criteria:**

1. Teachers and principals may appeal to SED their state-provided growth score if they submit sufficient documentation that, in their annual evaluation, they were rated:
a. Ineffective on their state-provided growth score but highly effective on the observation/school visit category in the current year, and

b. Either effective or highly effective on their state-provided growth score in the previous year.

2. High school principals in a building that includes at least all of grades 9-12 can challenge their state provided growth score also on the grounds that they were rated:

a. Ineffective on that score, but

b. The percent of students established by the commissioner in their school/program within four years of first entry into 9th grade received results on SED approved alternative examinations in ELA and/or math (such as advanced placement SAT II and/or International Baccalaureate exams) that scored at proficiency (Level 3 or higher).

**Key Timeline:**

1. Teachers/principals must submit an appeal to SED within 20 days of receipt of their overall annual APPR rating, with a copy to the school district/BOCES. They may not commence the appeal process prior to receipt of their overall rating from the district/BOCES.

2. School districts/BOCES have 10 days from the receipt of such a copy to submit a reply to SED.

**Score Revisions:**

If SED overturns the rating on the state-provided growth score, the district/BOCES must substitute the teacher/principal’s results on the back-up SLO.

1. If a back-up SLO was not developed, the teacher/principal’s overall composite score and rating shall be based on the portions of the APPR that are not affected by the nullified growth score.

2. Where the appeal was based on an “anomaly” between a teacher/principal’s state-provided growth score and the observation/school visit category rating, and a back-up SLO is used, the teacher/principal shall not receive a score/rating higher than developing on such SLO.

Additional rules set out in regulation apply to the use of back-up SLOs for principals of school buildings housing at least all of grades 9-12.
Rules during Pendency of Growth Score Appeals:

1. Evaluations that are the subject of a growth score appeal may not be offered or placed in evidence in a section 3020-a, section 3020-b, or negotiated alternate disciplinary proceeding until the appeal process is concluded.

2. Districts retain their full authority to grant or deny tenure to or terminate a probationary teacher/principal for statutorily and constitutionally permissible reasons, including the performance that is the subject of the appeal.

3. Districts/BOCES remain obligated to develop and implement a teacher/principal improvement plan (8 NYCRR § 30-3.16).

C. Receivership – The Taking Over and Restructuring of Struggling Schools
(Chapter 56 of the Laws of 2015 – Part EE Subpart H)

Type of Schools Eligible for Receivership

1. Struggling schools – Those identified under the State’s accountability system as a priority school for at least three consecutive school years, except as otherwise specified in the statute.

   They include those who fall among the lowest achieving five percent of public schools in the state (§ 211-f [1][a]; 8 NYCRR § 100.19[a][1],[3]).

2. Persistently struggling schools – Those identified under the State’s accountability system as a priority school for ten consecutive school years, as specified in the statute (§ 211-f [1][b]; 8 NYCRR § 100.19[a][2]).

3. Schools newly designated as struggling – Those designated as a struggling school after the 2016-2017 school year (§ 211-f [1][c][ii]).

4. The definitions of struggling and persistently struggling schools do not include schools within a special act school district or a charter school (§ 211-f [1][a],[b]; 8 NYCRR § 100.19[a][1],[2]).

5. A school under receivership continues to operate in accordance with laws applicable to other public schools, unless such other laws conflict with the provisions of the receivership statute (§ 211-f [2][c]).

Types of Receivership – School District Receivership

1. The term school district superintendent receiver refers to:
a. A school superintendent, or other chief school officer of a district with one or more schools designated as struggling or persistently dangerous, and in New York City, the chancellor or his/her designee, or

b. An educational partnership organization (EPO) that has assumed the powers and duties of the school superintendent for purposes of implementing the educational program of the school (8 NYCRR § 100.19[a][5],[9]).

2. A school district superintendent receivership is applicable to struggling and persistently struggling schools (§ 211-f [1][c][i],[ii]; 8 NYCRR §100.19[a][5]).

a. Persistently struggling schools:

- School districts continue to operate persistently struggling schools during the 2015-2016 school year, under a department-approved intervention model of comprehensive education plan.

- Throughout that year, the superintendent is vested with all powers granted to an independent receiver, except that the superintendent may not override any decision of the school board regarding his/her employment status.

- At the end of that school year, the State Education Department (SED) determines whether the school should:
  
  • Be removed from its designation,
  
  • Remain under school district operation, with the superintendent vested with the powers of a receiver, or
  
  • Placed into external receivership.

- A persistently struggling school will remain under district operation for an additional year if it makes demonstrable improvement, subject to annual review by SED (§ 211-f [1][c][i]; 8 NYCRR § 100.19[d]).

b. Struggling schools - Continue under operation by the school district subject to the same terms and conditions applicable to persistently struggling schools. The one exception is that, in the case of struggling schools, the initial duration of the school district superintendent receivership is two school years, instead of one (the 2015-2016 and 2016-2017 school years) (§ 211-f [1][c][ii]; 8 NYCRR § 100.19[d][1]).

3. By September 1 of each year in which a school is in a school district superintendent receivership, the commissioner will provide the school district and the superintendent with annual goals that must be met for the school to make demonstrable improvement.
To determine whether a school has made demonstrable improvement, the commissioner will consider:

a. The number of years the school has been identified as struggling or persistently struggling,

b. The degree to which the superintendent has successfully used the powers of a school receiver to implement the school’s department approved intervention plan or comprehensive education plan, and

c. Other metrics that include:
   - student attendance, discipline, and safety
   - student promotion and graduation and drop-out rates
   - student achievement and growth on state measures
   - progress in areas of academic underperformance and among student accountability subgroups
   - reduction of achievement gaps among specific student groups
   - development of college and career readiness, including at the elementary and middle school levels
   - parent and family engagement
   - culture of academic success among students and student support and success among faculty and staff
   - use of developmentally appropriate child assessments from pre-k through 3rd grade, if applicable, that are tailored to the needs of the school, and
   - measures of student learning (8 NYCRR § 100.19[d][2],[f][6]).

4. School board decisions regarding the superintendent’s employment status must be consistent with applicable laws and regulations and his/her employment contract, and may not be taken in retaliation for acts taken by the superintendent as a school receiver (8 NYCRR § 100.19[d][3]).

Types of Receivership – Independent Receivership

Independent receiverships are applicable to schools newly designated as struggling after the 2016-2017 school year, and to struggling and persistently struggling schools that fail to make demonstrable improvement under a school district superintendent receivership (§ 211-f [1][c][i],[ii]).

1. The term independent receiver refers to:
   a. a non-profit entity,
   b. an individual with a proven track record of improving school performance, or
c. another school district in good standing

appointed by a school district and approved by the commissioner.

If the independent receiver is an individual, such individual may not be an existing officer or employee of the school district at the time of such appointment (§ 211-f [2][a]; 8 NYCRR § 100.19[a][6]).

2. Schools newly designated as struggling are immediately eligible for the appointment of an independent receiver, except that the commissioner may determine that the school district will continue to operate the school under a school district superintendent receiver (§ 211-f[1][c][ii]; 8 NYCRR § 100.19[d][8]).

Independent Receivers – Appointment, Compensation, and Termination

1. School districts must appoint an independent receiver:

a. For schools newly designated as struggling after the 2016-2017 school year, immediately upon such designation, unless the commissioner the school continue to operate under a school district receiver for two additional school years (§ 211-f[1][c][ii]; 8 NYCRR § 100.19[f][8]), and

b. For struggling and persistently struggling schools, within 60 days of a determination by the commissioner that the school should be placed into receivership.

2. A school district’s appointment of an independent receiver is subject to approval by the commissioner of education.

a. A school district may appoint an independent receiver from among SED’s list of approved independent receivers, or one not on that list.

b. When a district appoints a receiver not on SED’s list, it must submit evidence that the prospective independent receiver meets the minimum qualifications set out in regulation and in SED’s request for proposals.

The district must submit such evidence to the commissioner, for approval, within 40 days of the commissioner’s determination to place a school in receivership.

3. The commissioner will appoint the independent receiver if a school district fails to appoint one that meets the commissioner’s approval within 60 days of the commissioner’s determination that the school should be placed into receivership (§ 211-f [2][a]; 8 NYCRR § 100.19[e][1]-[3]).
4. The commissioner contracts with the receiver. The contract may be terminated by the commissioner for a violation of law or commissioner’s regulations, or for neglect of duty (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][i]).

If the independent receiver’s appointment is vacated or otherwise terminated, the commissioner will appoint a new or interim independent receiver no later than 15 business days thereafter, until a new independent receiver is appointed (8 NYCRR § 100.19[e][3]).

5. The receiver’s compensation and costs are paid from:

a. A state appropriation for such purpose, or

b. By the school district as determined by the commissioner, except that costs are payable by a district only if the district has an open administrative staffing line available for the receiver and the receiver takes on the responsibilities of that open line (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][i]).

Independent Receiver Qualifications

1. In addition to the qualifications set out in SED’s request for proposal, all independent receivers must have a demonstrated record of successful experience:

   a. In education within the past three years, including at least five years of successful experience:

      - Improving student academic performance in low performing schools and/or districts, or

      - Dramatically raising the achievement of high needs students in moderate to high performing schools and/or districts.

   b. With at risk student populations in closing achievement gaps.

   c. Forming collaborative relationships or partnerships with school community stakeholders, including parents, teachers, administrators, school staff, collective bargaining unit, school boards and community members.

   d. Converting a school to a community school.

2. School districts appointed as independent receivers must be in good standing under the accountability system.

3. Individuals appointed as independent receivers, and individuals designated by a non-profit entity appointed as an independent receiver must hold:
a. New York State certification as a school district administrator or school district leader, or school administrator and supervisor, or school building leader, or

b. A substantially equivalent certification, as determined by the commissioner, from another state (8 NYCRR § 100.19[e][5]).

Independent Receivers - Employment Benefits and Status

1. Independent receivers and any of their employees providing services in the receivership are entitled to defense and indemnification by the school district to the same extent as a district employee (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][ii]).

2. The independent receiver or designee is an ex officio non-voting member of the school board entitled to attend all school board meetings, except properly convened executive sessions of the school board that pertain to personnel and/or litigation matters involving the receiver (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][iv]).

3. School boards and superintendents must fully cooperate with the receiver.

   Willful failure to cooperate, or interference with the functions of the receiver, constitute willful neglect of duty for purposes of removal from office by the commissioner (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][iii]).

Receiver’s General Authority

1. Manage and operate all aspects of the school (§ 211-f [2][a],[c]; 8 NYCRR § 100.19[a][6],[d][3],[g][1]).

2. Develop and implement a school intervention plan for the designated school that considers the recommendations of a statutorily established community engagement team (§ 211-f [2][a]; 8 NYCRR § 100.19[a][6], [e][4][v]).

3. Supersede any decision, policy or regulation of the superintendent or chief school officer, school board, another school officer, or the building principal that, in the receiver’s sole judgment, conflicts with the school intervention plan.

   a. Such authority does not apply to decisions that are not directly linked to the school intervention plan such as building usage plans, co-location, and student transportation to the extent that such decisions impact other schools in the district (§ 211-f [2][b]; 8 NYCRR § 100.19[g][6]).

   b. Before exercising this supersession authority, a receiver must follow the process set out in regulation, including:
- Giving notice to the school board, superintendent or chief school officer, and the principal at least 10 business day notice prior to the effective date of the supersession including the reasons therefor, what will replace what is being superseded, and the duration of the supersession.

  • The notified parties would have at least five business days to respond to the notice in writing and the receiver must consider their response their response before implementing the supersession.

  • At any time subsequent to a supersession, the superintendent or the school board may ask the receiver in writing to terminate the supersession, and the receiver must respond to such a request in writing within 15 business day, with his/her decision and rationale.

The receiver may dispense with the pre-supersession notice requirements if he/she deems the supersession necessary on an emergency basis to protect the health and welfare of the school’s students and staff, or to ensure the school’s compliance with law or commissioner’s regulations. In such an instance, the receiver must inform the school board, the superintendent or chief school officer, and the principal of the supersession within 24 hours or as soon as practicable thereafter, and give them an opportunity to respond.

- Providing the commissioner with an electronic copy of all correspondence related to the supersession (8 NYCRR § 100.19[g][7]).

4. A school district superintendent receiver and an EPO receiver have all the powers granted to an independent receiver, except as otherwise provided in regulation (8 NYCRR § 100.19[a][5];[d][3]).

**Receiver’s Authority – Instructional Programs**

1. If necessary, expand, alter or replace the school’s curriculum and program offerings. This includes, for example, the implementation of research-based early literacy programs, early interventions for struggling readers and the teaching of advanced placement courses, if such programs or courses are not already in place (§ 211-f [7][a][i]; 8 NYCRR § 100.19[g][3][i]).

2. Expand the school’s school day or school year or both, which may include establishing partnerships with community based organizations and youth development programs that offer appropriate programs and services in expanded learning time settings (§ 211-f[7][a][vi]; 8 NYCRR § 100.19[g][3][vi]).

3. Add pre-kindergarten and full-day kindergarten classes if the school does not offer such classes but does offer first grade (§ 211-f[7][a][vii]; 8 NYCRR § 100.19[g][3][vii]).
Receiver’s Authority – The School Budget

1. Review proposed school district budgets *no later than 30 business days* prior to presentation to district voters *at the budget hearing*.

2. Review school budget of a large city school district (population of 125,000 or more) prior to school board approval.

   *The school board must provide the receiver a copy of the proposed district budget including any school-based budget, at least 5 business days prior to the date that the superintendent submits the budget to the school board.*

3. Modify the proposed budget to conform to the school intervention plan.

   a. Any such modification must be limited in scope and effect to the struggling or persistently struggling school and may not unduly impact other schools in the district.

   b. *The receiver must inform the school board and superintendent or chief school officer of any modification he/she deems necessary no later than 5 business days after receiving the proposed budget.*

   c. *The requested modifications may not require that the school board seek voter approval of a budget that exceeds the tax levy cap.*

   d. *Upon receipt of the receiver’s modifications, the school board must either:*

      - Incorporate them into the proposed budget and present it to the public, or

      - Return the modifications to the receiver within 5 business days for reconsideration with the reasons for reconsideration in writing.

      - Within 5 business days of the request for reconsideration, the receiver must notify the school board in writing of his/her determination to either withdraw or revise the proposed modifications or resubmit the original. The receiver’s determination must be incorporated into the budget.

   e. *The receiver and the school board must provide the commissioner with an electronic copy of all correspondence related to modification of the school budget.*

   f. *Upon approval of the school district budget, any changes to the budget that would adversely affect the implementation of the school intervention plan/department-approved intervention model/comprehensive education plan must be approved by the receiver (§ 211-f [2][b]; 8 NYCRR § 100.19[g][8]).*
4. Reallocate the uses of the existing budget of the school (§ 211-f [2][a][v]; 8 NYCRR § 100.19[g][3][v]).

Receiver’s General Authority Over Employment Decisions

1. Supersede any employment decisions of the school board, except that the school board remains the employer of record for the school (§ 211-f [2][c]).

   a. A school district superintendent receiver may not override any decision of the school board regarding his/her employment status (8 NYCRR § 100.19[d][3],[g][6]).

   b. An EPO may not override any decision of the school board with respect to the contract with the EPO (8 NYCRR § 100.19[a][5]).

2. The school board must give the receiver written notice no later than 10 business days after it has acted upon an employment decision pertaining to staff assigned to the school, and such decision shall not go into effect until the receiver has reviewed it.

   a. Within 10 business days of the notification, the receiver must provide in writing any modifications he/she deems necessary and the rationale, along with an explanation as to how the modifications are limited in scope and effect to the school in receivership and do not unduly impact other schools in the district.

   b. The school board would have 10 days to either adopt the modifications at its next regularly scheduled meeting, or return the modifications to the receiver for reconsideration and the reasons therefor.

   c. The receiver would then have 10 business days to make his/her determination. The school board would need to adopt any modifications required by the receiver at its next regularly scheduled meeting.

   d. The receiver and the school board must provide the commissioner with an electronic copy of all correspondence related to such employment decisions (8 NYCRR § 100.19[g][9]).

3. Replace teachers and administrators who are not properly certified or licensed.

4. Increase salaries of current or prospective teachers and administrators to attract and retain high-performing teachers and administrators.

5. Establish steps to improve hiring, induction, teacher evaluation, professional development, teacher advancement, school culture and organizational structure (§ 211-f [7][b][ii],[iii],[iv]; 8 NYCRR § 100.19[g][3][ii]-[iv]).
Receiver’s Authority – Abolition of Positions

1. Abolish the positions of all members of the teaching and administrative and supervisory staff assigned to the school, and terminate any building principal assigned to the school, and require that they reapply for the positions in the school if they so choose (§ 211-f [7][a][viii]; 8 NYCRR § 100.19[g][4]).

   a. When a position is abolished, it is the services of the teacher or administrator or supervisor within the tenure area of the position with the lowest rating on the most recent annual professional performance review that is discontinued. Seniority within the tenure area is used solely to determine which position to discontinue in the event of a tie.

   b. Those whose position is abolished are eligible to be placed in a preferred eligibility list (PEL), except that a classroom teacher or building principal who has received two or more composite ratings of ineffective will not be deemed eligible for such placement (§ 211-f [7][b],[c]).

2. In determining whether to implement an abolition, a receiver must follow the process set out in regulation including:

   a. Conducting a comprehensive school needs assessment including an analysis of the professional development provided for staff in the abolished positions during the preceding two school years, and how the planned abolition will improve student performance.

   b. Giving, at least 90 day written notice of any planned abolition to the school staff and their collective bargaining representative, the superintendent of chief school officer, and the school board.

      - The notified parties would have 14 days to submit to the receiver a written request for reconsideration.

      - The receiver would have 30 days from the issuance of the notice of planned abolition to notify the school board of his/her decision, in writing.

   c. Providing the commissioner with an electronic copy of all correspondence related to the abolition (8 NYCRR § 100.19[g][4][i]-[v]).

3. Following an abolition of positions, define new positions for the school aligned with the school intervention plan, including criteria and expected duties and responsibilities for each position.

   a. The receiver has full discretion over all rehiring decisions involving administrators and pupil personnel service providers.
b. For teachers and pedagogical support staff, the receiver must convene a staffing committee (consisting of five members set out in statute) that will determine whether those reapplying for a position are qualified for the new position.

Otherwise, the receiver has full discretion regarding hiring decisions, except that the receiver must fill:

- at least 50% of the newly defined positions with the most senior former school staff determined by the staff committee to be qualified.

- Any remaining vacancies in consultation with the staffing committee.

4. Teachers re-hired maintain their prior status as tenured or probationary. The probation period of a re-hired probationary teacher does not change.

5. Members of the teaching and pedagogical support, administrative, or pupil personnel service staff who are not re-hired have no right to bump or displace any other person employed by the district (§ 211-f [7][c]).

6. Upon completion of the abolition and rehiring process, no further abolition of the positions of all members of the teacher and administrative and supervisory staff assigned to the school may occur without the prior approval of the commissioner (8 NYCRR § 100.19[g][4][vi]).

**Receiver’s Authority – School Conversions**

1. An independent receiver must, consistent with any applicable collective bargaining agreement(s) and Taylor Law provisions, and after consultation with stakeholders and the community engagement team, convert schools to community schools to provide expanded health, mental health and other services to students and their families (§ 211-f [7][a]; 8 NYCRR § 100.19[a][6],[8],[g][2]).

a. When converting a school in receivership to a community school, the independent receiver must follow the process and meet the minimum requirements set out in regulation including, for example,

- partnering with families and relevant community agencies,

- conducting a comprehensive school and community needs assessment, and

- designating a full-time staff person to manage the development of the community school strategy for the school and subsequently ensure the maintenance and sustainability of the community school (8 NYCRR § 100.19[f][8],[g][2]).

b. A community school refers to:
- a school that partners with one or more agencies with an integrated focus on rigorous academics and the fostering of a positive and supportive learning environment, and

- a range of school-based and school-linked programs and services that lead to improved student learning, stronger families and healthier communities,

and that, at a minimum, provide the programs set out in regulation (8 NYCRR § 100.19 [a][8]).

c. A school district superintendent receiver is not required to convert a struggling or persistently struggling school to a community school (8 NYCRR § 100.19[a][5],[d][3],[g][1]).

2. Receivers may order the conversion of the school into a charter school in accordance with the charter school law, and subject to other specified conditions including that such school will operate consistent with a community schools model (§ 211-f [7][a][xi]; 8 NYCRR § 100.19[g][3][x]).

**Receiver’s Authority - Professional Development**

In creating and implementing the school intervention plan, the receiver also has the authority to include a provision for job-embedded professional development for teachers and establish a plan for professional development for administrators at the school.

1. In the case of teachers, it must emphasize strategies that involve teacher input and feedback and, in the case of principals, strategies that develop leadership skills and use the principles of distributive leadership (§ 211-f [7][a][ix],[x]; 8 NYCRR § 100.19[g][3][vii],[ix]).

2. The professional development and planning time for teachers and administrators in a school with English language learners must include specific strategies and content designed to maximize the rapid academic achievement of such students (§ 211-f [7][d]).

**Parental Notice, Hearing and Community Engagement**

1. School districts must give written notice to the parents of students attending a school that may be placed into receivership (§ 211-f[1][c][iv]) and a description of the reasons therefor.

   The notice must be:

   a. In English and translated to the extent practicable in the parent’s native language or mode of communication, and

   b. Given no later than 30 calendar days following the school’s designation as struggling or persistently struggling.
School district also must provide such notice to parents at the time they enroll or seek to enroll the children in the school (8 NYCRR § 100.19[c][1][i]).

By June 30 of each year, school district must give parents similar notice when the school remains identified as struggling or persistently struggling (8 NYCRR § 100.19[c][1][ii]).

2. The school district must hold at least one public meeting or hearing annually to discuss the performance of the school and the construct of receivership (§ 211-f [2][c][iv]; 8 NYCRR § 100.19[c][iii]).

a. The initial meeting or hearing must be held no later than 30 calendar days following the school’s designation. Subsequent annual hearings within 30 calendar days of the first day of student attendance in September of each school year the school remains in such status (8 NYCRR § 100.19[c][iii]).

b. School districts must provide written notice of such meetings or hearings to both parents and the public in the manner set out in regulation, and translators at the meeting (8 NYCRR § 100.19[c][iii][a],[b]).

3. School districts must provide parents notice of the school intervention plan approved by the commissioner, and its availability (§ 211-f [9]).

4. No later than 20 business days after a school’s designation as struggling or persistently struggling, the school district must establish a community engagement team that consists of community stakeholders such as the school principal, parents of students attending the school, teachers and other school staff assigned to the school and students attending the school (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2],[2][i]).

a. The community engagement team develops recommendations for improvement of the school and solicits input through public engagement, which may include surveys, and public hearings or meetings arranged for by the school district in the manner set out in regulation (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2][ii]).

b. Presents its recommendations, and its assessment of the implementation of the school’s comprehensive education plan or department-approved intervention plan, periodically, but at least twice annually, to the school leadership, to the receiver, as applicable, and to the commissioner (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2],[2][iii],[iv]).

The school’s department-approved intervention model or comprehensive education plan must include all such recommendations and the efforts made to incorporate them, including a description of which recommendations were incorporated and how, and which were not and why not (8 NYCRR § 100.19[c][2][iii]).
5. The superintendent must develop a community engagement plan in the manner set out in regulation, and submit it to the commissioner for approval. Once approved, it will be incorporated into the school’s department-approved intervention model or comprehensive education plan (8 NYCRR § 100.19[c][3]).

**Intervention Models and Comprehensive Education Plans For School District Superintendent Receiverships**

Persistently struggling and struggling schools under a school district superintendent receivership must operate under an SED approved intervention model or comprehensive education plan that includes rigorous performance metrics and goals, such as measures of student academic achievement and outcomes that include those set out in the receivership statute (§ 211-f[c][i][ii][vi]).

1. A department-approved intervention model or comprehensive education plan refers to a:
   
   a. Comprehensive education plan under section 100.18(h)(2)(iii) of commissioner’s regulations,
   
   b. Plan for a School Under Registration Review (SURR) under section 100.18[l](3) of commissioner’s regulations, or
   
   c. School phase out or closure plan under section 100.18(m)(5) of commissioner’s regulations (8 NYCRR § 100.19[a][12]).

2. School districts may modify a previously approved intervention model or comprehensive education plan, subject to further SED approval.

3. The commissioner may require a school district to modify a previously approved intervention model or comprehensive education plan, with any such modifications subject to his/her approval (§ 211-f[c][iii]; 8 NYCRR § 100.19[d][9]).

4. Any proposed modifications to a previously approved intervention model or comprehensive education plan are subject to consultation with the community engagement team in accordance with the community engagement plan approved by the commissioner (8 NYCRR § 100.19[d][9]).

5. If SED revokes a prior approval of an intervention model or comprehensive education plan, the commissioner will require that the school district appoint an independent receiver and submit the appointment for his/her approval no later than 45 calendar days from the revocation of approval (8 NYCRR § 100.19[d][7]).
Intervention Plans for Independent Receiverships – In General

1. Independent receivers operating persistently struggling and struggling schools must develop and implement a school intervention plan within six months of appointment (§ 211-f [3]-[6]; 8 NYCRR § 100.19[a][13],[f],[g][2]). A school district superintendent receiver is not required to create and implement a school intervention plan (8 NYCRR § 100.19[a][5],[d][3],[g][1]).

   a. An independent receiver must submit a final school intervention to the commissioner for approval no later than five months after his/her appointment, and upon approval and within six months of the appointment, issue the plan (§ 211-f[9]; 8 NYCRR § 100.19[f][9]).

   b. The commissioner will approve a school intervention plan for a period of not more than three years. The independent receiver may make changes to a previously approved school intervention plan, subject to further approval by the commissioner (§ 211-f [10]; 8 NYCRR § 100.19[f][10]).

2. The independent receiver must ensure that within five business days after the commissioner approves the school intervention plan,

   a. The plan is made publicly available in the school district’s offices and posted on the district’s website, if one exists.

   b. A copy is provided to the school board, the superintendent and the collective bargaining representatives of teachers and administrators, the community engagement team, and the elected officers of the school’s parent-teacher and/or parent association

   c. The school district provides parents written notice of the plan and its availability (§ 211-f [9],[17]; 8 NYCRR § 100.19[f][12]).

3. The independent receiver is responsible for meeting the goals of the school intervention plan (§ 211-f [10]; 8 NYCRR § 100.19[f][11]).

4. If an independent receiver is unable to create an approvable school intervention plan, the commissioner may:

   a. Appoint a new or interim independent receiver, or

   b. Direct the school district to develop a plan to phase out or close the school, and implement the plan once approved by the commissioner (8 NYCRR § 100.19[f]9).

Intervention Plans – Consultation Requirements

1. Before developing the school intervention plan, the independent receiver must consult with:
a. Local stakeholders including the school board, the superintendent, the school building principal, teachers and administrators assigned to the school and their respective collective bargaining representative, parents, and others specified in statute and regulations, and

b. The school community engagement team the school district is required to establish when a school is designated as persistently struggling or struggling (§ 211-f [3]; 8 NYCRR § 100.19[f][2]), except that with respect to consultation with students attending the school, the community engagement team need not include students attending grades seven and lower (8 NYCRR § 100.19[f][2][xii]).

No later than 20 business days after the effective date of his/her contract, the independent receiver must submit to the commissioner for approval a local stakeholder consultation plan developed in the manner set out in regulation (8 NYCRR § 100.19[f][1][i],[ii]).

2. In creating the school intervention plan, the independent receiver must consult with and consider all recommendations of the community engagement team (§ 211-f [4][i]; 8 NYCRR § 100.19[f][3][i]).

3. In this context, consultation refers to a process by which the school receiver, whether a school district superintendent receiver or an independent receiver, seeks input and feedback through written correspondence and meetings (e.g. in-person meetings, site visits, telephone conferences, video conferences) (8 NYCRR § 100.19[a][14],[17]).

**Intervention Plans – Content Requirements**

An intervention plan must:

1. Include provisions intended to maximize the rapid academic achievement of the school’s students,

2. Address school leadership and capacity, school leader practices and decisions, curriculum development and support, teacher practices and decisions, student social and emotional developmental health, and family and community engagement (§ 211-f [4][ii],[iii]; 8 NYCRR § 100.19[f][3]-[7]).

3. Include research-based components that include strategies to:

   a. Address social service, health and mental health needs of the school’s students and their families to help students arrive and remain at school ready to learn (including mental health and substance abuse screening,

   b. Improve or expand access to child welfare services, and school community services to promote a safe and secure learning environment,
c. As applicable, provide greater access to career and technical education and workforce development services by both students and their families,

d. Address achievement gaps for English language learners, students with disabilities and economically disadvantage students, as applicable,

e. Address school climate and positive behavior support, including mentoring and other youth development programs,

f. *Provide professional development and other supports to the staff of the school to ensure that they have the capacity to successfully implement the school intervention plan and to sustain the components of the plan after the period of the school receivership has ended,*

g. *Improve student achievement through development of collaborative partnerships with the local school community that are designed to develop and sustain the capacity of the local school community to implement such strategies to ensure continued improvement in student achievement after the period of the school receivership has ended, and*

h. *Strategies by which the independent receiver will apply for allocational and competitive grants and other resources for the school to the extent practicable.*

4. Include a budget for the plan (§ 211-f [5][a]; 8 NYCRR § 100.19[f][5]).

As necessary, the commissioner of education and the commissioners of the department of health, the office of children and family services, the department of labor and other specified local and state agencies officials must coordinate regarding the implementation of such measures, and subject to appropriation, reasonably support such implementation as set out in statute (§ 211-f [5][b]).

5. To the extent practicable, be based on the findings of any recent diagnostic review or assessment of the school and, as applied to the school, student outcome data including that specified in the receivership statute (§ 211-f [4][ii],[iii]; 8 NYCRR § 100.19[f][3][iii],[4]).

6. Include measurable annual goals to assess the school across multiple measures of school performance and student success including student attendance, discipline safety, promotion and graduation and drop-out rates, and achievement and growth on state assessment; progress in areas of academic underperformance and among school accountability student subgroups; and parent and family engagement, among other specified measures (§ 211-f [6]; 8 NYCRR § 100.19[f][6]).

*In addition, the school intervention plan may include, as well, measurable annual goals on locally-selected measures, submitted to and approved by the commissioner (8 NYCRR § 100.19[f][7]).*
Collective Bargaining

1. The receiver may request the negotiation of a receivership agreement that modifies the applicable collective bargaining agreement(s) with respect to the school(s) in receivership during the period of receivership.

2. The scope of those negotiations can include:
   a. The length of the school day and/or school year
   b. Professional development for teachers and administrators
   c. Class size
   d. Changes to the programs, assignments, and teaching conditions in the school.

3. Receivership agreements may not:
   a. Reduce compensation unless there is also a proportionate reduction in hours. However, they must provide for a proportionate increase in compensation if the length of the school day or school year is extended.
   b. Alter the remaining terms of the existing/underlying collective bargaining agreement which must remain in effect (§ 211-f [8][a]; 8 NYCRR § 100.19[g][5][i]-[ii]).

4. Bargaining over a receivership agreement must be conducted in accordance with the process established in statute and regulation. Unresolved issues will ultimately be resolved by the commissioner of education in accordance with standard collective bargaining principals (§ 211-f [8][b],[c]; 8 NYCRR § 100.19[g][5][iii]).

Evaluation of Receiverships – In General

1. Receivers must provide quarterly written reports on the progress being made on the implementation of the school intervention plan to the school board, the commissioner, and the Board of Regents no later than October 30, January 31, April 30 and July 31 of each year of the receivership (§ 211-f [11]; 8 NYCRR § 100.19[d][4],[f][13]).
   a. The July 31 report shall serve as the basis for the commissioner’s annual evaluation of the school intervention plan.
   b. The independent receiver is not required to provide a quarterly report if the date for submitting the report is less than 45 days from the date the commissioner approved the receiver’s appointment and entered into a contract with the receiver (8 NYCRR § 100.19[f][13]).
2. Quarterly reports and a plain-language summary of the report must be made publicly available in the school district’s offices and posted on the district’s website, if one exists (8 NYCRR § 100.19[d][4],[f][13]).

3. Nothing prevents the commissioner, or the school district with approval from the commissioner, from closing the school in receivership, or the Board of Regents from revoking the school’s registration (§ 211-f [14]).

4. In this context, consultation and cooperation refers to a process by which the commissioner or his/her designee seeks input and feedback through written correspondence and/or meetings (e.g. in-person meetings, site visits, telephone conferences, video conferences) (8 NYCRR § 100.19[a][16]).

**Evaluation of Independent Receiverships**

1. The commissioner will evaluate each school with an independent receiver at least annually, in consultation and cooperation with the district and school staff to determine whether the school has met the intervention plan’s goals, and assess the plan’s implementation.

   a. The commissioner will submit a copy of the evaluation to the school board and the superintendent by September 1st for the preceding school year (§ 211-f [12][a]; 8 NYCRR § 100.19[h][1]).

   b. Based upon the evaluation findings, the commissioner may allow implementation of the school intervention plan to continue, or require that the plan be modified (§ 211-f [12][b]; 8 NYCRR § 100.19[h][2]).

2. Upon the expiration of a school improvement plan, the commissioner will evaluate the school, in consultation and cooperation with the district, to determine whether the school has either improved sufficiently, requires further improvement, or failed to improve.

   Based on the findings, the commissioner may:

   a. Renew implementation of the intervention plan with the independent receiver for an additional period of not more than three years,

   b. Terminate the receiver and appoint a new one if the school remains struggling and the terms of the intervention plan were not substantially met, or

   c. Remove the school from its struggling or persistently struggling status if it has improved sufficiently for such purposes (§ 211-f [13]; 8 NYCRR § 100.19[h][2],[i]).

   If the independent receiver is terminated, the commissioner may appoint an interim independent receiver. A newly appointed independent receiver must continue to implement the existing school intervention plan until a new one is developed and approved by the commissioner (8 NYCRR § 100.19[e][3],[i][1][ii][3]).
Evaluation of School District Superintendent Receiverships

1. The commissioner will conduct a performance review of a school operating under a school district superintendent receiver in consultation with the school district, the school’s staff and the community engagement team:
   a. At the end of one school year for persistently struggling schools,
   b. At the end of two school years for struggling schools, and
   c. Annually for any persistently struggling or struggling school that the commissioner determined made demonstrable progress and should continue under a school district superintendent receiver.

2. The purpose of the performance review is to determine whether the school will:
   a. Be removed from its persistently struggling or struggling designation,
   b. Remain under a school district superintendent receiver in which case the school remains subject to annual review, or
   c. Placed under an independent receiver, subject to the annual evaluation provisions applicable to independent receiverships (8 NYCRR § 100.19[d][5],[6]).

D. Discipline and Termination of Tenured Teachers and Administrators
   (Chapter 56 of the Laws of 2015 – Part EE Subpart G)

Chapter 56 Part EE Subpart G of the Laws of 2015 amended sections 3020 and 3020-a of the Education Law and added a new section 3020-b regarding procedures for the discipline and termination of tenured teachers and administrators.

New commissioner regulations applicable to standard and expedited hearings under sections 3020-a and 3020-b are found at 8 NYCRR Subpart 82-3.

Hearing Officers

1. All hearings commenced by the filing of charges on or after July 1, 2015 shall be heard by a single hearing officer (§ 3020-a[2][e][ii]).

2. Alternate disciplinary procedures negotiated in New York City that become effective on or after July 1, 2015 also are subject to the single hearing officer requirement (§ 3020[3],[4][a]).

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Such agreements also must comport to new requirements regarding prima facie evidence of incompetence based on consecutive ineffective APPR ratings under either section 3012-c or 3012-d of the Education Law (§ 3020[3],[4][a]).

**Hearing Procedures**

1. At a pre-hearing conference, the hearing officer shall set a schedule and manner for full and fair disclosure of the witnesses and evidence to be offered by the employee.

2. Witnesses under the age of 14 may be permitted to testify through the use of live, two-way closed-circuit television if the hearing officer determines by clear and convincing evidence, after consideration of factors referenced in the statute, that the child witness would suffer serious mental or emotional harm that would substantially impair the child’s ability to communicate if required to testify otherwise and the use of live, two-way closed-circuit television will diminish the likelihood or extent of such harm.

   a. The hearing officer must provide the employee an opportunity to be heard.

   b. The testimony of a child witness through the use of live, two-way closed-circuit television must be taken in a manner that comports with procedures referenced in the statute (§ 3020-a[3][c][i][C]).

**Misconduct Constituting Physical or Sexual Abuse of Students**

Commencing with charges brought on or after July 1, 2015, a school board may suspend without pay an employee charged with misconduct constituting physical or sexual abuse of a student, pending the conduct of an expedited hearing. New York City negotiated agreements entered into as of April 1, 2015 that provide for similar suspension without pay continue in effect and may be extended.

1. A probable cause hearing before an impartial hearing officer must be held within 10 days to determine if the decision to suspend without pay should be continued or reversed, in accordance with the procedures set forth in commissioner’s regulations.

   a. A hearing officer shall reverse the decision to suspend without pay and reinstate such pay upon a finding that probable cause does not support the charge(s).

   b. A hearing officer also may reinstate pay upon a written determination that the suspension without pay is grossly disproportionate in light of all surrounding circumstances.

   c. The employee would be entitled to reimbursement of the withheld pay and 6% interest compounded annually if the hearing officer rules in his/her favor either at the probable cause hearing or in a final determination after the expedited hearing.
2. Statutory limitations restrict the period of any such suspension to a maximum of 120 days from the board’s decision to suspend without pay, and exclude from the suspension benefits and guarantees other than compensation (§ 3020-a[2][c]).

3. The expedited hearing on charges constituting physical or sexual abuse of students must be conducted in accordance with the procedures set out in section 3020-a[3][c][i-a][A]). Pursuant to those procedures:

   a. The expedited hearing must be conducted before and by a single hearing officer, commenced within seven days, and completed within 60 days after the pre-hearing conference, pursuant to a hearing schedule established by the hearing officer at the pre-hearing conference to ensure completion within the required timeframes and an equitable distribution of days between the employing board and the charged employee.

   b. Extensions are available subject to conditions set in the statute (Id.).

   c. The commissioner must inform hearing officers annually that they must strictly follow the prescribed time period and failure to do so shall be considered grounds for their exclusion from the list of potential hearing officers for expedited hearings (§ 3020-a[3][c][i-a][B]).

   **Penalties**

   1. When determining what penalty or other action shall be imposed, a hearing officer is no longer required to but may, at the request of the employee, consider the extent to which the employing board made efforts towards correcting the behavior of the employee that resulted in the charges through means such as remediation, peer intervention or an employee assistance plan.

   2. In exercising their authority to determine a penalty or other action, a hearing officer shall give serious consideration to the penalty recommended by the employing board.

   3. Rejection of an employing board’s recommended penalty must be based on reasons based upon the record as expressed in the hearing officer’s written determination (§ 3020-a[4][a]).

   **Removal of Ineffective Teachers and Principals**

   1. A new section 3020-b of the Education Law establishes streamlined procedures for the removal of classroom teachers and principals who receive two or more consecutive annual ineffective APPR ratings under either section 3012-c or section 3012-d of the Education Law. Timelines set out throughout the statute apply to the new procedures.

   Pursuant to those procedures:
a. Employing school boards may bring charges of incompetence against those who receive two consecutive ineffective ratings, but must do so against those who receive three consecutive ineffective ratings (§ 3020-b[2][a]).

b. The employee may be suspended with pay pending a hearing on the charges (§ 3020-b[2][b]).

c. Charges must allege the employing board developed and substantially implemented an improvement plan for the employee in accordance with section 3012-c or section 3012-d after the first ineffective rating, and the immediately preceding evaluation if the employee was rated developing (§ 3020-b[2][d]).

d. For employees with three consecutive ineffective ratings, the commissioner appoints the hearing officer from the list provided by the American Arbitration Association.

For those with two consecutive ineffective ratings, the commissioner will appoint the hearing officer only if the employing board and the employee fail to agree on an arbitrator, or fail to notify the commissioner of a selection within prescribed timelines (§ 3020-b[3][a]).

e. Hearings must be conducted before and by a single hearing officer who meets the eligibility requirements set out in the statute (§ 3020-b[3][b]).

f. Employees acquitted must be restored to their position and the charges expunged from their employment record (§ 3020-b[4][b]).

g. An employing board or employee may ask a state supreme court to vacate or modify a hearing officer’s decision pursuant to section 7511 of the Civil Practice Law and Rules.

The filing or pendency of such an appeal shall not delay implementation of the hearing officer’s decision (§ 3020-b[5]).

h. Nothing prevents the use of any evidence of performance to support charges of incompetence brought pursuant to section 3020-a (§ 3020-b[6]).

2. The new section 3020-b also establishes a new legal standard applicable to incompetence cases subject to its procedures.

a. Two consecutive ineffective ratings constitute prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that the employee is not incompetent in light of all surrounding circumstances. A finding of incompetence based on a failure to overcome the prima facie evidence shall be just cause for removal, absent extraordinary circumstances.
b. Three consecutive ineffective ratings constitute prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that the calculation of one or more of the underlying APPR components was fraudulent. A finding of incompetence based on a failure to overcome the prima facie evidence shall be just cause for removal, absent extraordinary circumstances.

In this context, fraud shall include mistaken identity (§ 3020-b[3][c][5]).

II. Other New State Statutory Changes

Boards of Cooperative Educational Services (BOCES)

*Chapter 56 Part J* of the Laws of 2015 amended sections 1950(4)(h)(8) and 3202(6-a) of the Education Law to expand the authority of BOCES to contract with the office of children and family services for the provision of music, art and foreign language programs, in addition to the previously authorized special education and related services and career and technical education services.

*Chapter 56 Part Y* of the Laws of 2015 amends section 6306 of the Education Law by adding a new subdivision 10 that requires the board of trustees of the state university of New York community colleges to consult with BOCES to identify new or existing programs offered to students that would allow a student to pursue an associate of occupational studies (AOS) degree from a community college upon high school graduation.

BOCES would collaborate in making such path, identified programs, and AOS degree options known to make sure students know of such option as early as the seventh grade, avoiding any action to direct or suggest that a student should pursue a particular degree or pathway.

*Chapter 58 Part KK §§ 1, 2 and 4* of the Laws of 2015 amended sections 1950(4)(h)(9) and 3202(6-b) of the Education Law to expand the authority of BOCES to contract with the commissioner of mental health for the provision of educational services to individuals in hospitals operated by the office of mental health who are between the ages of 5 and 21 and have not received a high school diploma.

The amendments:

1. Extend, until June 30, 2018, the authority of BOCES to provide special education and related services pursuant to such a contract.

2. Authorize BOCES that provide alternative education programs to component school districts to contract for the provision of such programs with the commissioner of mental health.

Such programs must be approved by the commissioner pursuant to regulations promulgated pursuant to section 112 of the Education Law regarding education services and programs for
children in full-time residential care in facilities or homes operated by any state department or agency or political subdivision.

3. Provide that the commissioner of mental health will be directly responsible for reimbursing the costs of such services pursuant to the terms of the contract, rather than going through the commissioner of education.

School districts also have authority to contract with the commissioner of mental health for the provision of both special education and related services and alternative education programs.

**Charter Schools**

*Chapter 20 Part B Subpart A* amended the New York Charter Schools Act codified at article 56 of the Education Law to provide that:

1. The current cap of 460 on the total number of charters that may be issued under that law applies statewide.

   a. All charters issued on or after July 1, 2015 and counted toward the cap will be issued by the Board of Regents either upon direct application to the Board or on the recommendation of the SUNY Board of Trustees

   b. Only 50 of the charters issued on or after July 1, 2015 can be granted for a charter school in New York City.

   c. Not counted toward the 460 cap are:

      - Conversion charter schools,
      - Charter renewals or extensions approved by any charter entity,
      - Charters reissued after having been surrendered, revoked or terminated on or after July 1, 2015, provided that no more than 22 such charter may be reissued.

   For purposes of determining the total number of charters issued within the 460 cap the approval date of the charter entity will be the determining factor.

2. The total number of uncertified teachers employed by a charter school may not exceed the sum of 30% of the teaching staff or five teachers, whichever is less, plus five teachers of math, science, computer science, technology, or career and technical education, plus five additional teachers.

3. A charter school may provide admission preference to children of its employees or the charter management organization, provided such children do not constitute more than 15% of the school’s total enrollment.
Collective Bargaining

Chapter 47 of the Laws of 2015 extended, through June 30, 2017, the availability of an expedited process under the Taylor Law for obtaining injunctive relief in improper practice cases where it is deemed to be immediate and irreparable harm.

Disaster Preparedness

Chapter 227 of the Laws of 2015 amended the Executive Law to allow the state to participate in the intrastate mutual aid program.

1. Prior participation in the program was limited to local governments which could request the assistance of other program participants in preventing, mitigating, responding to and recovering from disasters that resulted in locally-declared emergencies.

2. The State is required to reimburse local governments for loss, damage or expenses incurred in the provision of assistance requested by the State.

Ebola Volunteers

Chapter 56 Part O of the Laws of 2015 added a new section 202-m that prohibits discrimination on the basis of an actual or perceived disability against healthcare professionals who volunteer to fight Ebola overseas, and require employers to grant healthcare professionals in the employment a leave of absence to render such service.

1. For purposes of this law,
   a. Employer includes a school district.
   b. Fight Ebola means to serve as a healthcare professional in a country classified as having widespread transmission of the Ebola virus disease by the centers for disease control and prevention at the U.S. Department of Health and human services.
   c. Healthcare professional includes licensed physicians, physician assistants, nurse practitioners, registered professional nurses, and others as added by the commissioner of education under the Education Law.

2. School districts may not retaliate against an employee who requests or obtains an Ebola volunteer service leave.

3. School districts would have to provide healthcare professionals in their employ with a leave of absence, upon the employee’s request, unless the employee’s absence would impose an undue hardship on the district’s operations.
a. The leave would be unpaid, unless the employee requests that such time, or a portion of it, be paid against the employee’s accrued paid leave.

The duration of the leave would be the full time period requested by the employee, including travel time, volunteer service, and a reasonable period of rest and recovery. It would be extended if the employees becomes subject to a mandatory quarantine period at the end of the voluntary service.

- If the school district determines the duration of the leave of absence requested would constitute an undue hardship, the district must work together with the employee to see if there is a shorter period of time that would be workable.

- The leave request would be deemed denied if the school district and the employee are unable to agree to a shorter leave period, subject to review by the labor commissioner.

b. Undue hardship entails economic hardship based on factors such as the identifiable costs of the absence including, for example, the costs of loss of productivity and retraining, hiring or transfer of employees, the employer’s overall financial resources, and the employer’s ability to hire temporary or new employees with the requisite skills.

a. As to their benefits, Ebola fighting volunteers:

a. Must be restored to the same or comparable position without loss of seniority upon their return, and allowed to participate in insurance or other employer provided benefits in effect at the time of the Ebola volunteer leave request.

b. Remain entitled to:

- Rights regarding any other employee benefits provided by law, rule or regulation.

- Rights and benefits that accrue through bona fide collective bargaining agreements.

Lobbying

Chapter 56 Part CC § 6 of the Laws of 2015 amended the Legislative Law to impose new requirements regarding individuals who engage in lobbying activities with school districts.

Education Standards

Chapter 20 Part B Subpart C § 6 of the Laws of 2015 directs the commissioner of education to conduct a comprehensive review of the education standards administered by the State Education Department with input from education stakeholders.

The review must be completed by June 30, 2016, except that the deadline may be extended if the commissioner determines more time is needed.
Physical Therapy Services

Chapter 27 of the Laws of 2015 amended section 2 of chapter 20 of the laws of 1998 to extend for an additional five years the ability of physical therapy assistants to provide services in public and private schools, without direct on-site supervision by a physical therapist.

Retirement Systems

Chapter 94 of the Laws of 2105 amended the Retirement and Social Security Law in relation to the calculation of employer contributions to the New York State and Local Employees Retirement System (ERS). Pursuant to the proposed changes:

1. The rate of contribution will be applied to the employee’s annual compensation earned during the previous fiscal year instead of as of the end of the fiscal year.
2. Salaries earned during such fiscal year will be used for the payment of contributions due for the next succeeding fiscal year.

School Governance

Chapter 20 Part B Subpart D of the Laws of 2015 extended, through June 30, 2015, the reorganization of the governance structure of the New York City school district under mayoral control, and the New York City school construction authority.

School Taxes

Chapter 20 Part A § 18 of the Laws of 2015 extended, through June 15, 2020, the tax levy cap law applicable to school district budgets and other municipalities.

Chapter 20 Part A Subpart C of the Laws of 2015 directed the commissioner of taxation and finance to, as appropriate, promulgate rules and regulations that may provide for adjustments to the calculation of capital local expenditures excluded from the tax levy cap and have that calculation reflect a school district’s share of additional budgeted capital expenditures made by a BOCES.

Chapter 20 Part A Subpart C of the Laws of 2015 directed the commissioner of taxation and finance to, as appropriate, promulgate rules and regulations regarding the calculation of the quantity change factor to have that calculation reflect development on tax exempt land.

Chapter 20 Part A Subpart H of the Laws of 2015 makes available money for municipal corporations and school districts that have suffered a reduction in tax collections and receipts from payments in lieu of taxes of at least 20% due to having had:

1. A fossil fuel electric generating facility located within their boundaries permanently cease operations, or
2. An adverse judicial determination (tax certiorari proceeding) regarding such a facility.

Such moneys will be available from the urban development corporation, contingent upon available funding not to exceed $19,000,000.

**Chapter 59 Part E** of the Laws of 2015 amended section 425 of the Real Property Tax Law to provide for the recoupment of improperly granted basic STAR exemptions.

1. Recoupment with interest is authorized when it is determined that a property improperly received a basic STAR exemption on one or more of the three preceding assessment rolls, other than final assessment rolls filed prior to April 1, 2011.

2. The property owners have the right to receive notice and an opportunity to show that the exemption was properly granted. They also have the right to appeal an adverse determination in accordance with the procedures set out in the statute.

The recoupment provisions do not apply to prior exemption revocations or to voluntary renunciations.

**Special Education**

**Chapter 35** of the Laws of 2015 extended, through June 30, 2018, the various provisions of the Education Law which serve to ensure compliance with the federal Individuals with Disabilities Act in relation to the provision of special education and related services to children with disabilities eligible for such services under that federal law.

**Chapter 217** of the Laws of 2015 amended the Education Law to permit multidisciplinary evaluation programs to employ a certified school psychologist to conduct a multi-disciplinary evaluation of a preschool child that has or is suspected of having a disability through June 30, 2016, while the State Education Department examines ways to address shortages of licensed psychologists required for such purposes.

**Student Health**

**Chapter 57 Part V** amends various sections of the Public Health Law and adds a new section 922 to the Education Law to permit school districts and BOCES, among others, to provide and maintain on-site in each instructional facility opioid antagonists for use during emergencies where a student or staff member is suspected of having an opioid overdose, whether or not there is a previous history of opioid abuse.

1. Districts and BOCES may elect to participate as an opioid antagonist recipient (one in a position to assist a person experiencing or at risk of experiencing an opioid-related overdose).
a. Any person employed by them who voluntarily chooses participate may administer an opioid antagonist in the event of an emergency, provided they have received training from a program approved under the Public Health Law to provide such training.
b. Districts/BOCES with any such trained employee must comply with Public Health Law requirements including appropriate clinical oversight, recordkeeping and reporting.

2. The commissioner of education, in consultation with the commissioner of health, will determine the quantities and types of opioid antagonists necessary at each instructional facility to ensure ready and appropriate access during an emergency.

Pursuant to the Public Health Law, districts/BOCES or any person employed by them that elect to participate in an opioid overdose prevention program as an opioid antagonist recipient would not be subject to criminal, civil or administrative liability when their actions are reasonable and in good faith.

Teacher/Teaching Assistant/School Leader Certificate Registration

Chapter 20 Part EE Subpart C § 1 of the Laws of 2015 amended section 3006 of the Education Law that adds a new subdivision 3 to require that holders of a teaching certificate in the classroom teaching service, a teaching assistant certificate or an educational leadership certificate that is valid for life, register with SED every five years.

1. This requirement goes into effect with the 2016-17 school year.

2. The commissioner will promulgate regulations for the implementation of this new requirement.

a. SED will renew the registration of each certificate upon receipt of a proper application.

b. Certificate holders who fail to register by the beginning of the appropriate registration period may be subject to late filing penalties.

c. Those who are not currently practicing in New York and do not wish to register must advise SED.

3. Certificate holders wanting to resume practice after a lapse in registration will not be allowed to practice without verification of re-registration.

4. Certificate holders must notify SED of any change of name or mailing address within 30 days of the change.

5. Willful failure to register or provide SED notice of a name or address change may constitute grounds for moral character review subject to action by the commissioner under section 305(7) of the Education Law.
Teacher Certificate Revocation

Chapter 56 Part EE Subpart G § 1 of the Laws of 2015 amended section 7-a of the Education Law to authorize the commissioner of education to revoke and annul the certification of a teacher convicted not only of a sex offense for which registration as a sex offender is required under the Correction Law, but also of any other violent felony offense(s) defined under Penal Law § 70.02(1) that are committed against a child when such child was the intended victim of the offense. Such offenses include, for example, sexual contact/abuse, assault against a child, kidnapping, and stalking, as well as felonies involving murder, criminally negligent homicide and manslaughter.

Teacher/Teaching Assistant/School Leader Continuing Education

Chapter 20 Part B Subpart C § 2 of the Laws of 2015 amended the Education Law by adding a new section 3006 that imposes new continuing education requirements on holders of a professional certificate in the classroom teacher service, a level III teaching assistant certificate, or a professional certificate in the educational leadership service.

1. In addition to having to register with SED every five years to practice in the state, such individual must complete a minimum of 100 hours of continuing teacher and leader education during each five-year registration period beginning on or after July 1, 2016.

   a. School districts and their union(s) may agree to additional hours.

   b. Continuing teacher and leader education requirements refers to activities that:

      - Are designed to improve the teacher or leader’s pedagogical and/or leadership skills, targeted at improving student performance including formal continuing education activities.

      - Promote the professionalization of teaching and are closely aligned to district goals for student performance which meet standards prescribed in commissioner’s regulations.

   c. SED will issue standards for courses, programs, and activities that qualify for continuing teacher and leader education.

      Programs to fulfill the new continuing teacher and leader education requirements must be taken from sponsors approved by SED, which shall include school districts.

2. Certificate holders who do not satisfy the continuing education requirements may not practice until they do and have been issued a registration or conditional registration certificate. SED will not issue a five-year registration certificate to any who have not satisfied the continuing education requirement.
a. Those not practicing in a school district or BOCES within the state are exempt from the continuing teacher and leader education requirements, upon filing a written statement with SED regarding their status.

b. Those who resume practice during the five-year registration period must notify SED prior to doing so and must meet the continuing education requirements.

c. SED may, in its discretion, issue a conditional registration to those who fail to meet the continuing education requirements but agree to make up any deficiencies and take any additional continuing education SED may require. SED will determine the duration of such conditional registration.

d. The commissioner may adjust the continuing teacher and leader education requirements for:

- Reasons of health certified by a healthcare provider,
- Extended active duty with armed forces of the United States, or
- Other acceptable good cause that may prevent compliance.

3. Certificate holders who are denied registration because of a failure to submit satisfactory evidence of compliance with the continuing teacher and leader education requirements and continue to practice without registration, will be subject to moral character review under section 305(7) of the Education Law.

**Teacher and Principal Evaluations**

*Chapter 20 Part B Subpart C § 3* of the Laws of 2015 amended section 3012-d of the Education Law to provide that the state-provided growth model used to generate a state-provided growth score under the first subcomponent of the student performance category of teacher and principal evaluations must:

1. Take into consideration certain student characteristics, as determined by the commissioner, including but not limited to students with disabilities, poverty, English language learner status and prior academic history, and

2. Identify educators whose students’ growth is well above or well below average compared to similar students for a teacher’s or principal’s students after the above student characteristics are taken into account.

Note: The student characteristics specified in the statute are already incorporated in the regulations adopted to implement the new teacher and principal evaluation law.
Testing

Chapter 20 Part B Subpart C § 1 of the Laws of 2015 amended section 305 of the Education Law by adding a new subdivision 51-a that directs the commissioner of education to:

1. Release by June 1, 2015, and each year thereafter, test questions, answers and corresponding correct answers from each of the most recently administered ELA and math exams in grades 3 – 8 of that year. The commissioner:

   a. May limit the number released only as necessary to avoid hindering or impairing the validity and/or reliability of future examinations.

   b. Must provide enough of an overview of each examination to provide teachers, administrators, principals, parents and students sufficient feedback on the types of questions administered.

2. Release by July 1, 2015, and each year thereafter, the general student success rate in answering such questions correctly.

Chapter 20 Part B Subpart C § 4 of the Laws of 2015 amended section 305 of the Education Law by adding a new subdivision 53 that, effective December 1, 2015, authorizes and directs the commissioner of education to establish a content review committee charged with reviewing all standardized test items and/or selected passages use on ELA and math state assessments for grades 3 – 8.

1. The purpose of such review is to ensure the test items/selected passages are:

   a. Presented at a readability level that is grade-level appropriate

   b. Within grade-level expectations

   c. Appropriate for measuring the learning standards approved by the Board of Regents applicable to such subject and/or grade level.

2. The committee must include classroom teachers and experienced educators in the content area and/or grade level of the items/passages being reviewed, including teachers of students with disabilities and English language learners.

3. The committee’s review of the test items/passages must occur prior to their use, except that items/passages not reviewed by the committee may be used for the 2015-2016 school year if the review requirement would prevent the ability to administer such assessments.

4. Regulations adopted by the Board of Regents to implement the new teacher and principal evaluation law also direct the convening of an assessment and evaluation workgroup comprised of stakeholder and experts in the field to provide recommendations on
assessments and evaluations that could be used for annual professional performance reviews in the future.

Chapter 20 Part B Subpart C § 4 of the Laws of 2015 amended section 305 of the Education Law by adding a new subdivision 54 that, effective December 1, 2015, provides teachers, principals and superintendents may not be required to sign a confidentiality agreement with their respective school district, BOCES or the State Education Department (SED) that prevents them from discussing the contents of any items on the ELA and math assessments in grades 3 – 8 after they have been released by SED or publicly disclosed by SED or other appropriate entity.

In addition, the commissioner must amend and/or modify any current confidentiality agreement that is inconsistent with the above prohibition, and issue regulations consistent with the prohibition.

Chapter 20 Part B Subpart C § 5 of the Laws of 2015 requires that any prior SED contracts related to standardized test items and/or passages for use on state assessments in grades 3 – 8 be amended to incorporate the ban on confidentiality agreements that prevent educators from discussing the contents of such items after their release/disclosure.

Any state agency required approval of such contract amendments must be expedited to ensure compliance with the confidentiality agreement prohibition.

Transportation

Chapter 49 of the Laws of 2015 extended, through June 30, 2020, the authority of the commissioner of education to continue to conduct regional transportation pilots.

III. Bills Approved by Both Houses But Awaiting Action by the Governor

After School Programs

Assembly A7750 would provide that school building regulations regarding health and safety issued by the commissioner of education preempt any contradictory regulations promulgated by other state agencies that affect the use of a school building by a registered third party providing school age child care.

Civil Service Examinations

Senate S4852 would amend the Military Law to extend the current opportunity available to service members to take a make-up examination if they miss the application deadline for a scheduled competitive examination for civil service employment due to a call to active duty, to those called for training.
**Early Learning**

*Assembly A6629* would establish an Early Learning Investment Commission, modeled after the one in Pennsylvania, to secure support for public and private investment in early learning for children up to age five by focusing on practices that are educationally, economically, and scientifically sound. In addition, the Commission would be responsible for conducting annual meetings for legislators and their staff related to the impact of investments in early childhood education.

**Employment Discrimination**

*Senate S4* would amend the Executive Law to prohibit discrimination in employment based on familial status.

*Senate S8* would amend the Executive Law to include in the definition of reasonable accommodation actions taken with respect to not only individuals with a disability, but also those with a pregnancy-related condition.

1. Pregnancy-related condition would mean a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.

   a. The term would be limited to conditions that, with a reasonable accommodation, do not prevent the employee or prospective employee from performing in a reasonable manner the activities involved in the job or occupation sought or held.

   b. Pregnancy-related conditions would be treated as temporary disabilities.

2. It would be an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations to the pregnancy-related conditions, the same as in the case of disabilities.

This bill would also require employees to cooperate in providing medical or other information necessary to verify the existence of a disability or pregnancy-related condition, or necessary for consideration of the accommodation. The employee would have the right to have such medical information kept confidential.

**Medicaid Claims**

*Assembly A8172* would excuse the submission of late claims for Medicaid payments when delays in the submission of such claims are due to circumstances outside the control of the provider such as delays in the determination of client eligibility, attempts to recover from a third-party provider, and an unforeseeable computer or systems malfunction unknown to the provider prior to the expiration of the 90 day period that generally applies to the submission of claims.
Property Tax Exemptions

Assembly A7375 would amend the Real Property Tax Law to require that all assessing units participate in the state STAR income verification program used to verify the income eligibility of enhanced STAR exemption applicants.

Senate S2938-A would amend the Real Property Tax Law to ensure that veterans already receiving a property tax exemption can move to a new home within the same county (or in New York City within the same city), without losing the exemption. Based on related provisions in the Real Property Tax Law, it would seem that, in the case of school districts, the ability to transfer such exemption would be subject to a public hearing and a school board resolution authorizing such transfer. Therefore, it also would seem that the ability to transfer the veteran’s exemption would not be automatically applicable when a move takes place within the same county but to a different school district.

Public Contracts

Assembly A796 would amend, in part, the General Municipal Law to prohibit school districts, boards of cooperative educational services (BOCES) and others, as owners of a construction project, from withholding any payment to a contractor for materials pertinent to the project that have been delivered, accepted and are covered by a manufacturer’s warranty, and/or are graded to meet industry standards.

1. Similarly, the contractor would have to pay applicable subcontractors in full, upon payment by the school district or BOCES, for all such materials, regardless of whether they were delivered to and accepted at the project site or off-site.

2. Except in the case of a materialman who is also contracted to install a product he/she has delivered, the contractor would not be able to retain anything from those payments representing proceeds owed the materialman from the public owner’s payments to the contractor.

Retirement Systems

Senate S4006 would amend the Education Law to allow the Teachers’ Retirement System to provide that, commencing January 1, 2016, lump sum payments of de minimis service retirement services would be calculated using the average annual interest on ten year U.S. treasury obligations for the days during the calendar year that precedes the calendar year in which the retirement becomes effective.

1. Similar amendments to the Retirement and Social Security Law would allow use of the same methodology for calculating retirement allowance reductions when there is a loan from the retirement system that is outstanding at the time of retirement.
2. Currently, the interest rate on ten year U.S. treasury obligations as of January 1 of the calendar year in which the retirement becomes effective is used for both calculations.

*Senate S5937* would amend the Retirement and Social Security Law to remove references to certain time periods that otherwise limit the ability of veterans who have served in the military to receive up to three years of service credit for up to three years of military service, when applying to a state public retirement system, if they were honorably discharged from the military.

**School District Records**

*Assembly A1438-B* would amend the Freedom of Information Law (FOIL) to *require* that courts award attorneys’ fees and other litigation costs against a governmental entity in cases involving an appeal from a denial of a FOIL request if the court finds that:

1. The person challenging the denial of access to public records has substantially prevailed, and
2. The governmental entity denied the request in material violation of FOIL and had no reasonable basis for denying access to the requested records.

It also would expand the discretion of a court to award attorneys’ fees and costs to situations where a governmental entity fails to respond to a FOIL request within the prescribed statutory timelines, even if the appellant does not substantially prevail.

*Assembly A114* would impose stricter timelines for a governmental entity to file an appeal from an adverse judgment in a FOIL lawsuit, and for deeming such an appeal abandoned.

**School Receivership**

*Assembly A7013* would amend Education Law § 211-f (the receivership law) to change the designation of schools subject to takeover and restructuring by a receiver from failing and persistently failing schools to struggling and persistently struggling schools.

Regulations adopted by the Board of Regents to implement the receivership law already reflect this change.

**STEM Grants**

*Assembly A968* would amend the New York State Urban Development Corporation Act to authorize science, technology, engineering and mathematics (STEM) grants intended to provide assistance to encourage women and minorities to pursue technology careers.

1. The grants would be available, on a competitive basis, to school districts, charter schools, or BOCES.
2. Grant money would be used in public and private schools to develop new and enhance current STEM programs in grades six through twelve, including career exploration activities, opportunities for technical skills attainment and partnerships with postsecondary education and training programs.

3. Development of grant proposals and selection of grant recipients would be carried out in cooperation with the commissioner of education.

4. Grants would be made for a recurrent period of five years and their effectiveness would evaluated based on criteria that is developed in cooperation with the commissioner of education in accordance with criteria set out in the bill.

**Student Health**

*Senate S1528-A* would amend the Public Health Law, in part, to better coordinate efforts between the Department of Public Health and the State Education Department regarding:

1. Strategies to curtail the incidence of asthma, chronic bronchitis and other chronic respiratory diseases to enable adults and children to safely increase physical activity.

2. The collection and analysis school information to determine the prevalence of childhood obesity, and assess the effectiveness of the childhood obesity prevention program.

3. The establishment of school-based childhood obesity prevention and physical activity programs.

*Senate S4324-A* would amend the Public Health Law to add meningococcal disease to the list of school vaccination requirements.

The new vaccination requirement would apply to students entering or having entered 7th and 12th grade, or a comparable age level special education program with an unassigned grade, on or after September 1, 2016.

**Whistleblower Protection**

*Assembly A7951* would amend the Civil Service Law to remove the current requirement that a public employee whistleblower make a good faith effort to first disclose information to his/her supervisor of an alleged violation of law or improper government activity.
IV. New State Regulatory Changes

Academic Intervention Services

*8 NYCRR § 100.2(ee)* – Amendments to section 100.2(ee) adopted in emergency action provide continued flexibility to school districts in the provision of academic intervention services (AIS) through the 2015-16 school year for those students who perform below Level 3 on the grades 3-8 ELA and Math assessments but at or above the cut scores established by the Regents.

**Coaches**

*8 NYCRR §§ 57-1, 135.4 and 135.7* – Amendments to sections 57-2 and 135.4, and the addition of a new section 135.7 to the commissioner’s regulations implement Chapter 205 of the Laws of 2014 by expressly requiring that individuals holding, or applying for, a temporary or a professional coaching certificate complete two hours of coursework or training for identifying and reporting child abuse and maltreatment.

1. Such training must be received from an SED approved provider.

2. Individuals that held a temporary or professional coaching certificate on August 6, 2014 had until July 1, 2015 to complete the training and submit to SED satisfactory documentation of such completion.

**CPR and AED Instruction**

*8 NYCRR § 100.2(c)* – Amendments to section 100.2(c)(11) of the commissioner’s regulations to implement Chapter 417 of the Laws of 2014, which added a new Education Law § 305(52) and required the commissioner to make recommendations to the Board of Regents as to whether instruction in cardiopulmonary resuscitation (CPR) and the use of automated external defibrillators (AED) should be mandated rather than left to the discretion of a school district.

1. School districts would still be able to offer comprehensive CPR instruction in their discretion. However, those that do not must provide hands-only CPR instruction to all high school students, as well as instruction in the use of AEDs.

2. The hands-on only CPR and AED use instruction must be based on nationally recognized instructional programs that follow guidelines from the American Heart Association or a substantially equivalent organization, and the program requirements adopted by the American Heart Association or the American Red Cross. Students must learn:

   a. How to recognize the signs of a possible cardiac arrest and calling 911

   b. How to use the psychomotor skills necessary to perform hands-only compression CPR, and
c. Awareness in the use of AEDs.

**English Language Learner’s (ELL) Placement**

**8 NYCRR § 154-2.3** – Amendments to section 154-2.3(f)(3) of the commissioner’s regulations provide parents of ELL students 10, rather than 5, school days to sign and return a statement that they either are in agreement with their child’s placement in a bilingual education program, or want their child placed in an English as a New Language program, instead.

**8 NYCRR § 154-2.3(h)** – Amendments to section 154-2.3 of the commissioner’s regulations clarify the units of study mandated for and credits given to:

1. All ELL students for Integrated English as a New Language instruction

2. ELL students in Bilingual Education programs for English as a New Language and bilingual core content area instruction.

**Graduation Requirements**

**8 NYCRR §§ 100.2 and 100.5** – Amendments to sections 100.2(f),(mm) and 100.5 of the commissioner’s regulations established a “4 + 1” assessment pathway to graduation for all students who first enter 9th grade in September 2011 and thereafter, or are otherwise eligible to receive a high school diploma in June 2015 and thereafter.

1. Students still must pass the four Regents exams required in the areas of English, math, science and social studies.

2. They can satisfy the fifth assessment graduation requirement by taking any one of the following assessments associated with pathway areas in the Humanities, STEM, Biliteracy, CTE and the Arts.

   a. One additional Regents exam in a different course of social studies, or an SED approved alternative.

   b. One additional Regents exam in a different course in math or science or an SED approved alternative.

   c. One additional exam in a different course in English selected from the list of SED approved alternatives.

   d. A pathway assessment (e.g. languages other than English) approved by the commissioner.

   e. A career and technical education (CTE) pathway assessment approved by the commissioner, following successful completion of an approved CTE program.
f. An arts pathway assessment approved by the commissioner.

3. The 4 + 1 assessment pathway option does not change graduation course or credit requirements.

8 NYCRR § 100.5(d)(7) – Amendments to section 100.5(d)(7) of the commissioner’s regulations allow English language learner (ELL) students who first enter the United States in 9th grade or above to obtain a local diploma via the appeal process if they fail to obtain a score of 65 or above on the required Regents English exam after two attempts, but are otherwise eligible to graduate in January 2015 or thereafter.

To be eligible for a local diploma via appeal, the student must have scored between 55 and 61 on the required Regents English exam, be successful on the appeal, and either:

1. Score at least 65 on each of the four remaining required Regents exams (or satisfy the corresponding graduation requirement via an approved alternative assessment or a pathway assessment), or

2. Score at least 65 on three other required Regents exams (or satisfy the corresponding graduation requirement via an approved alternative assessment or a pathway assessment) and between 62 and 64 on one other required Regents exam and successfully appeal that exam.

8 NYCRR § 100.8 – Amendments to section 100.8 of the commissioner’s regulations extend until June 30, 2017 the authority of school districts specified by the commissioner to award local high school equivalency diplomas based on experimental programs approved by the commissioner.

Professional Development

8 NYCRR §§ 80-3.6, 100.2(dd) and 154-2.3(k) – Amendments to various provisions of the commissioner’s regulations clarify that for any professional development period beginning on July 1, 2015, a minimum of 15% of the required professional development clock hours must be dedicated to language acquisition addressing the needs of English language learners (ELL), including:

1. For teachers and administrators, a focus on best practices for co-teaching strategies, and integrating language and content instruction for such students.

2. For teaching assistants holding a Level III certificate, integrating language and content instruction for such students.

Districts may request from the commissioner an exemption from these requirements, on an annual basis, if:
1. There are less than 30 ELL students enrolled, or

2. ELL students make up less than 5% of the total student population as of a date established by the commissioner.

**School Accountability**

8 NYCRR § 100.18 – Amendments to various provisions of section 100.18 of the commissioner’s regulations align New York’s ESEA Accountability System with the:

1. Latest ESEA flexibility waiver renewal approved by the federal government for the 2015-16 through 2018-19 school years. Some of the changes required by the approved waiver include:

   a. Revisions of the grades 3-8 Performance Index so that it no longer includes a “growth to proficiency” component but continues the use of student growth percentiles for elementary and middle school accountability determinations.

   b. Revisions to the methodologies used to identify and remove schools from priority, focus, and local assistance plan status and districts from focus status.

   c. Extending through the 2018-19 school year the ability of districts to forgo testing students on the Grade 7 and 8 math assessments if they have taken a Regents math exam.

   d. The ability of SED to combine current year and prior year assessment results for accountability determinations when an accountability group has fewer than 30 valid test scores in the current school year and fails to meet the 95% participation rate requirement.

   e. More rigorous interventions and supports for re-identified focus schools.

2. Commissioner’s receivership regulations at section 100.19 (see summary of amendments to 8 NYCRR § 100.18(k) and (l) immediately below).

8 NYCRR § 100.18(k),(l) – Amendments to various provisions of commissioner’s regulations pertaining to the process for registration review of public schools under New York’s ESEA Accountability System:

1. Add to the list of conditions that the commissioner may consider to identify a school as a poor learning environment, and to preliminarily place it under registration review on that basis. They include:

   a. Evidence that the school does not maintain required programs and services;

   b. Evidence of failure to appropriately refer for identification and/or provide required programs and services to students with disabilities pursuant to Part 200 of the commissioner’s regulations; and
c. Evidence of failure to appropriately identify and/or provide required programs and services to English language learners pursuant to Part 154 of commissioner’s regulations.

2. Indicate that schools identified as a school under registration review (SURR) either because of conditions that threaten the health, safety and/or educational welfare of students, or as a poor learning environment shall also be identified as a priority school.

3. Elaborate on the types of actions that a SURR school must take once placed under registration review, depending on whether the school also has been identified as a struggling or persistently struggling school under the commissioner’s receivership regulations at section 100.19.

a. Struggling and persistently struggling schools identified for registration review pursuant to the commissioner’s receivership regulations must implement the school receivership requirements of those regulations.

   - If such a school fails to make demonstrable improvement under those regulations for two consecutive years, the commissioner may direct that the receivership be terminated and provide the school district an opportunity to either:
     
     • Convert the school to a charter school,
     
     • Contract with SUNY, subject to approval from the commissioner, for the education of the school’s children (or CUNY in the case of New York City).

   - If the district does not submit an acceptable plan to implement either of these two options, the commissioner may direct that the district close or phase out the school pursuant to a plan approved by the commissioner.

b. SURR schools not also identified as a struggling or persistently struggling school pursuant to the commissioner’s receivership regulations still have to have an integrated intervention team recommend to the commissioner whether the school should continue to implement its current improvement plan, as modified by the team’s recommendations, implement a new one, or be phased out or closed.

However, the new amendments provide that a district may fulfill the requirements of the first two options by:

   - Contracting with an Educational Partnership Organization,

   - Converting the school to a charter school,

   - Entering into a contract with SUNY trustees for the education of the school’s children (or CUNY in the case of New York City), or
- Implementing a plan to provide enhanced support and oversight of the school through an alternative governance structure.

The alternative governance structure must, at a minimum, include:

- A separate and distinct management structure within the district for identified schools,
- A mechanism to ensure the affected schools receive enhanced district resources,
- Dedicated resources for professional development, coaching, and mentoring,
- Additional flexibility in recruiting, hiring, retaining, and removing staff, including recruitment incentives for teachers and administrators,
- Evidence of collective bargaining agreements the provide for:
  • The screening of staff and administrators at the participating schools, and expedited replacement of ineffective administrators and staff, prior to the August before plan implementation,
  • Changes to the school day length and schedule that support the implementation of an expanded learning time program,
  • Full staff and administrator participation in additional professional development in the summer preceding plan implementation,
  • An extended learning time component focused on supporting student achievement and improvement of teacher practices, and
  • Implementation of a department approved intervention model.

Special Education

8 NYCRR § 200.9(ix) – Amendments to section 200.9 of the commissioner’s regulations provide that, starting with the 2015-16 school year, special education itinerant services (SEIS) for preschool children with disabilities ages 3-4 will be reimbursed based on the actual attendance of children receiving SEIS services rather than on the basis of enrollment in such services.

1. SEIS rates will be paid for each unit of service delivered, not to exceed IEP recommendations for such services.

2. Billable time includes time spent providing SEIS.
Student Enrollment (Proof of Age and Residency)

8 NYCRR § 100.2(y) – Amendments to section 100.2(y) of the commissioner’s regulations establish new rules applicable to student residency and age determinations.

Residency:

1. Burden remains with the parents, or the child as appropriate, to establish residency within a district through physical presence as an inhabitant and intent to reside in the district.

2. School districts must make publicly available their enrollment forms, procedures, instructions and requirements for student residency and age determinations, as well as a non-exhaustive list of the forms of documentations parents may submit (including those set in regulation).

   Districts must provide such information to all parents seeking enrollment in the district, as well as post it in their website if one exists.

3. Children must be enrolled and begin attendance on the next school day, or as soon as practicable, from the day their parent seek enrollment unless the district makes a non-residency determination that same day.

   a. Otherwise, the parents have up to three business days from the date of initial enrollment to submit proof of residency. If parents do not submit documentation and/or information in support of residency until the third business day, the district has an additional business day to make its residency determination.

   b. Notwithstanding a prior determination to the contrary at the time of a child’s initial enrollment or re-entry into the district’s schools, nothing prevents a district from making a non-residency determination at a later date.

4. To establish their physical presence within a district, parents can submit a copy of a residential lease or a deed or mortgage statement on a house or condominium within the district. Also a statement by a third-party landlord, owner or tenant from whom the parents lease or with whom the parents share property, other third-party statements relating to the parent’s physical presence in the district and other forms of documentation and/or information establishing such physical presence.

   a. School district also may consider other documentation including, for example, pay stubs, income tax forms, utility or other bills, voter registration documents, official driver’s license, government issued identification.

   b. However, school districts may not ask for documentation and/or information such as a social security card or number, or that would tend to reveal the immigration status of the
child or the child’s parents such as copies of or information regarding visas and other documentation indicating immigration status.

5. In seeking to verify a parental relationship or a child’s residency with the parents, a school district may not require a judicial custody order or an order of guardianship as a condition of enrollment.

For such purposes, persons in a parental relation to the child may submit an affidavit indicating they are the parents with whom the child lawfully resides, or the person in parental relation to the child over whom they have total and permanent custody and control with an explanation of how they obtained such custody and control (guardianship or otherwise).

Age:

The types of documentation that may be used to determine a child’s age depends on the circumstances.

1. If a certified transcript of a birth certificate or record of baptism (including from another country) giving the date of birth is available, no other form of evidence may be used. If not, a passport (including a foreign one) may be used.

2. When neither of the above is available, a district may consider other documentary or recorded evidence (other than an affidavit of age) that has been in existing for at least two years including, for example, an official driver’s license, government issued identification, a school photo identification with date of birth, hospital or health records, a consulate identification card and court orders or court issued documents.

When such evidence originates from a foreign country, the district may request verification from that government or agency consistent with the requirements of the federal Family Educational Rights and Privacy Act, and provided that the child must be allowed to attend school while such verification is sought.

Other:

1. Nothing requires the immediate attendance of a lawfully enrolled child that is temporarily excluded from school because of a:

   a. Communicable or infectious disease that poses a significant infection to others, or

   b. Failure to submit proof of immunization within the time period prescribed in law.

2. Nothing requires the immediate attendance of an enrolled student who is suspended from school for disciplinary reasons.
Student and Staff Health

8 NYCRR § 136.6 – Amendments to commissioner’s regulations add a new section 136.6 for the implementation of Chapter 424 of the Laws of 2014. In accordance with the statute, the new regulation permits school districts and BOCES, among others, to:

1. Administer epinephrine auto-injectors during an emergency pursuant to the requirements of the Public Health Law.

2. Maintain a sufficient quantity of epinephrine injectors on-site in each of their instructional facilities epinephrine auto-injectors to ensure ready and appropriate access for use during emergencies to pursuant to applicable provisions of the Public Health Law, whether or not there is a prior history of severe allergic reaction.

The quantity and placement of epinephrine injector devices must be determined:

a. In collaboration with the emergency health care provider, who can be a physician knowledgeable and experienced in the delivery of emergency care, or a licensed hospital that provides emergency care, and

b. Upon consideration of the number of students and staff normally and reasonably anticipated to be in the school and the physical layout of the school.

3. Trained school personnel may not administer an epinephrine auto-injector unless the district/BOCES has filed a collaborative agreement with a regional emergency medical services council established under applicable provision of the Public Health Law.

4. Districts/BOCES must immediately report every use of an epinephrine auto-injector device to the emergency health care provider.

8 NYCRR § 136.7 – Amendments to commissioner’s regulations add a new section 136.7 for the implementation of Chapter 423 of the Laws of 2014 which requires that school districts and BOCES permit students diagnosed with asthma or other respiratory conditions, allergies and diabetes to carry and self-administer during the school day on school property and at any school function:

1. Prescribed inhaled respiratory rescue medications,

2. Epinephrine auto-injectors,

3. Insulin administered through an appropriate medication delivery device, glucagon, and necessary supplies and equipment to manage their diabetes including blood glucose or ketone testing.

Pursuant to the new section 136.7:
1. School districts must allow students to carry and self-administer such medications if, for example, they have:

   a. Written parental consent for such purposes, and

   b. Written permission and an attestation from a duly authorized health care provider regarding the student’s medical condition, his/her ability to self-administer, and certain specified information regarding, for example, the medication doses and times when it needs to be administered.

Students with diabetes may also carry food, oral glucose, or other similar substances necessary to treat hypoglycemia pursuant to district policy, provided that such policy does not unreasonably interfere with the student’s ability to treat hypoglycemia.

2. School districts must maintain written consents in the student’s cumulative health record.

3. Upon parental request, school districts must allow students to maintain extra medication and related supplies and equipment in the care and custody of a licensed nurse, nurse practitioner, physician assistant, or physician employed by the district, all of which must be readily accessible to the student and made available as needed in accordance with school policy and the orders prescribed by the duly authorized health care provider.

Districts do not have to retain such individuals solely for the purpose of taking custody of medication, or require that they be available at all times in a school building for the purpose of taking such custody.

4. Students with permission to carry and self-administer medication in school should have an emergency action plan on file with the district.

For students with diabetes, such a plan must be provided.

5. Licensed nurses, nurse practitioners, physician assistants, or physicians employed by the district are authorized to administer prescribed epinephrine to students otherwise permitted to self-administer.

Districts can, but are not required to, have such professionals train unlicensed school personnel to administer prescribed epinephrine auto-injectors in emergency situations to students who otherwise are permitted to self-administer, when an appropriately licensed health professional is not available. This applies as well, regarding the administration of glucagon to students with diabetes who otherwise are permitted to self-administer.

8 NYCRR § 136.8 – Amendments to commissioner’s regulations add a new section 136.8 for the implementation of Chapter 57 of the Laws of 2015 to permit, among others, school
districts and BOCES and any person employed by them to administer an opioid antagonist in an
emergency situation, in accordance with the requirements of Public Health Law § 3309(3).

The new section 136.8 sets standards for the provision, maintenance, and use of opioid
antagonists. Those standards emphasize that:

1. School districts and BOCES and not required to participate in an opioid overdose prevention
program and that participation by any of their employees must be voluntary.

2. Only individuals trained by a program approved under Public Health Law § 3309 may
administer an opioid antagonist, and must do so in accordance with the requirements of that
law.

3. Use of an opioid antagonist by school districts, BOCES and their employees is considered
first aid or emergency treatment for purposes of any statute relating to liability, except that
when action reasonably and in good faith in compliance with the provisions of Public Health
Law § 3309 they shall not be subject to criminal, civil or administrative liability solely by
reason of such action.

4. When determining the quantities and placement of opioid antagonists on-site in an
instructional school facility, consideration must be given to the number of students, staff and
other individuals that are customarily or reasonably anticipated to be within such facility, and
the physical layout of the facility.

In this context, an instructional school facility refers to a building or other facility maintained
by the school district or BOCES where instruction is provided to students pursuant to its
curriculum.

Teacher Certification

8 NYCRR § 80-1.6 – Amendments to section 80-1.6(c) of the commissioner’s regulations
extend for up to one year the time validity of an expired initial or transitional certificate, or a
conditional initial certificate, for teachers who take one of the revised content specialty (CST)
exams on or after September 2014 and do not receive a score on such exam within the timeframe
prescribed by the commissioner.

This time extension is available only if the teacher has met all other certification
requirements for the next level certificate.

8 NYCRR §§ 52.21, 80-1.5, 80-3.3, 80-3.4 and 80-5.13 – Amendments to various
sections of the commissioner’s regulations provide safety nets related to the administration of the
State’s new teacher certification assessments.

8 NYCRR §§ 29.2, 59.14, 52-44, 51.45 and Subparts 79-17 and 79-18 – Amendments to
various provisions of the Rules of the Board of Regents and commissioner’s regulations
implement Chapter 554 of the Laws of 2013 and Chapter 8 of the Laws of 2014, which established and defined the practice of the profession of applied behavior analysis (ABA), and established licensure requirements for behavior analysts and certification requirements for behavior analyst assistants.

**Teacher and Principal Evaluations**

8 NYCRR Subparts 30-2 and 30-3 and 8 NYCRR § 100.2(o)(1)(ii) – Amendments to Subpart 30-2 and the addition of a new Subpart 30-3 of the Rules of the Board of Regents and section 100.20 of commissioner’s regulations implement the provisions of the new teacher and principal evaluation law codified at section 3012-d of the Education Law and enacted as part of the Education Transformation Act of 2015 in Chapter 56, Part EE Subpart D of the Laws of 2015.

The regulatory language appears in italics in a summary of section 3012-d in another section of this outline.

**Teacher and Principal Probationary Appointments**

8 NYCRR § 30-1.3 – Amendments to the Rules of the Board of Regents now require that with respect to the expiration date of teacher and principal probationary appointments, the school board resolution making such an appointment must indicate that:

1. To be granted tenure, the teacher/principal must have received composite or overall APPR ratings under Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least 3 of the 4 preceding years, and

2. If the teacher/principal receives an ineffective composite or overall rating in the final year of the probationary period, he/she will not be eligible for tenure at that time.

**Tenured Teacher/Administrator Disciplinary Hearings**

8 NYCRR Subpart 82-3 – Amendments to the Rules of the Board of Regents add a new Subpart 82-3 to implement changes to Education Law § 3020-a and the addition of a new section 3020-b enacted into law by the Education Transformation Act of 2015 at Chapter 56 Part EE Subpart G §§ 2-5.
SCHOOL LAW- A RECAP
Yearly Review of
Selected New Court Cases and Other Rulings

Presented by
Kimberly A. Fanniff
Senior Staff Attorney

19th Annual
Pre-Convention Law Conference
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EMPLOYMENT ISSUES

Seniority Credit


   In *Matter of Cronk,* the school board appointed Cronk to a three-year probationary term and granted her tenure in the English 7-12 tenure area. However, she never served in that area because the district immediately assigned her to teach computer applications courses.

   Generally, when teachers are assigned work outside their tenure area without their consent, they are deemed to perform such work within their assigned tenure area for purposes of seniority credit. In addition, teachers can be deemed to serve only within an authorized tenure area that encompasses the functions of their position.

   At issue was the fact that Cronk had not spent a substantial portion (at least 40%) of her time teaching English. Cronk performed approximately 11 years of continuous service teaching only computer applications courses for which there is no authorized tenure area. When the school board needed to abolish positions in the English 7-12 tenure area, it determined that Cronk had earned no seniority in that area since she had only taught computer classes and terminated her employment.

   In ruling for Cronk, the court focused on the absence of any evidence that Cronk was aware that she was given an out-of-area assignment or that she consented to it in writing. Section 30-1.9 (c) of the commissioner’s regulations preserves a teacher’s seniority rights when the teacher is transferred to an out-of-area assignment without his/her prior written consent.

   The issue addressed by the court was whether the protections of 8 NYCRR §30-1.9 (c) applied given the fact that petitioner never spent a substantial portion of her time in the English 7-12 tenure area. At the administrative level, the commissioner of education concluded that 8 NYCRR §30-1.9 (c) did not apply because, from the inception of her employment, she never devoted a substantial portion of her time within the 7-12 English tenure area. The Appellate Division, Third Department, disagreed with the commissioner’s interpretation of the regulation. According to the Third Department, “Nowhere in the language of 8 NYCRR §30-1.9 (c) is there a requirement that professional educators must first spend some of their time teaching within their probationary or acquired tenure areas before earning the right to consent to an out-of-area assignment.” In the court’s view, the commissioner’s interpretation was also contrary to the “twofold protective purpose” of the regulation – to protect teachers from being required involuntarily to accept out-of-area assignments and to protect teachers from being deprived of seniority credit in a previously appointed tenure area if they unwittingly accept, and serve in, such an assignment.

Administrative Tenure Areas


   In *Appeal of Alexander and Gonzales,* two assistant principals who were laid off successfully argued that the district’s actions violated their tenure and seniority rights. School districts have leeway to design the parameters of administrative tenure areas. A board of education may establish one district wide administrative tenure area or multiple defined tenure areas. In this case, the dispute arose as to whether the petitioners were serving in the narrow tenure area of “elementary assistant principal” or the broader tenure area of “assistant principal.”

   Petitioner Alexander was appointed to a probationary position in the tenure area of “assistant principal” on August 20, 2002 and was awarded tenure in the area of “elementary
assistant principal” effective in August 2005. Similarly, petitioner Gonzales was appointed to a probationary position in the tenure area of “assistant principal” in July 2002 and granted tenure in the area of “elementary assistant principal” in May 2005. The district abolished all positions in the “elementary assistant principal” tenure area effective June 30, 2012. This appeal ensued.

Petitioners argued that they hold tenure in the broader “assistant principal” tenure area and that the district wrongfully granted them tenure in the narrower tenure area of “elementary assistant principal” without their consent. Additionally, petitioners allege they are more senior in the “assistant principal” tenure area than other individuals and should be reinstated with back pay.

Public policy favors the protection of employees’ seniority rights. According to the commissioner, a board of education must demonstrate that it has established a narrow, specific tenure area consciously and by design and an employee must be sufficiently alerted to that fact. In order to prevail, the board needed to demonstrate that at the time of their appointments the two categories had been treated separately by the district and that petitioners were sufficiently alerted to the fact that they were entering entirely separate and independent areas apart from the broader “assistant principal” area.

Tenure areas are fixed at the time of appointment and cannot be applied retroactively. The board minutes and petitioners’ letters of appointment clearly state they were appointed to positions in the “assistant principal” tenure area. While the 2005 board minutes and notice of tenure sent to petitioners state that each was granted tenure in the “elementary assistant principal” tenure area the board failed to show that the petitioners’ were sufficiently alerted to their appointment in this narrow tenure area at the time of appointment or that they consented to a change in tenure area after such appointment.

In abolishing the elementary assistant principal positions the district was required to excess the administrators with the least seniority in that tenure area. Based upon the commissioner’s findings, petitioners were not serving in that tenure area. Therefore, the commissioner remanded the case and ordered the school district to determine petitioners’ seniority in the tenure area of “assistant principal” and make a new determination as to whether they are to be restored to tenured positions as “assistant principal” with back pay and benefits.

**Recall Rights**


   A Spanish teacher whose position was abolished was not entitled to appointment to a full-time position of French/Spanish teacher later created by the school district. In *Regini v. Board of Education of Bronxville Union Free School District*, the Appellate Division Second Department upheld the lower court’s denial of Regini’s petition to be re-appointed given she lacked certification in French.

   When a teacher is excessed he or she is placed on a preferred eligible list for reappointment to a similar position for a period of seven years from the date his or her position was abolished. Regini was appointed as a full time Spanish teacher is 2001 and later acquired tenure in that position, but in 2010 her position was abolished. In 2011, Regini challenged the appointment of another teacher to a full time position that was equally split between French and Spanish. Regini alleged that the board in effect created a part time Spanish and a part time French position and she was, therefore, entitled to be appointed to the Spanish position.

   The Second Department noted in its decision, that a threshold question of whether a teacher possesses the requisite certification must be answered to determine whether a teacher...
is entitled to reappointment to a particular position. Absent appropriate certification re-employment rights cannot attach. Regini did not challenge the propriety of the board’s decision to create a single full time position encompassing Spanish and French instruction. The court found that her petition could not be granted because Regini is not certified in French and thus lacked the necessary dual certification for the full time position.


   In **Matter of Kwasnik v. King**, the petitioner was previously tenured as an English teacher but resigned that position in July 2005 to be appointed to the position of library media specialist (LMS). When the LMS position was subsequently abolished, Kwasnik had the least seniority and was terminated. Kwasnik appealed to the commissioner of education seeking reappointment to a position in the English tenure area as she had greater seniority than the least senior teacher in the English tenure area. The commissioner determined that Kwasnik had freely and voluntarily waived her tenure and seniority rights by resigning from her English position and upheld the district’s decision.

   Kwasnik challenged the commissioner’s decision and a state supreme court annulled the commissioner’s decision and ordered Kwasnik reinstated to a tenured English position with back pay and benefits. On appeal, both the commissioner and the school district argued that the commissioner’s decision was not arbitrary and capricious given that Kwasnik voluntarily resigned her English position.

   The Appellate Division Third Department, found that the petitioner did not take “affirmative steps to terminate all aspects” of her employment and therefore did not waive her tenure and seniority rights. According to the court, the record showed that Kwasnik expressed reluctance to resign and asked for a leave of absence but was told by the interim superintendent that a resignation would be required. Furthermore, Kwasnik received a longevity pay increase after tendering her resignation and continued to accrue sick and personal leave time that had carried over from her English position. Also notable was that Kwasnik moved into the LMS position without any interruption of service and she received a longevity payment that would not have been made if petitioner voluntarily severed her employment. Based on these facts, the court determined the commissioner’s decision was lacking a rational basis and upheld supreme court’s judgment annulling the commissioner’s determination.

**Tenure by Estoppel**


   A teacher acquires tenure by estoppel when a school board fails to take action required by law to grant or deny tenure and permits the teacher to serve beyond the expiration of the probationary period. School districts may properly exclude an unpaid leave of absence from the computation of a teacher’s probationary period. However, in such an instance, they must recalculate the teacher’s probationary period and extend the end date of that term. According to the Second Department, in **Matter of Brown v. Board of Educ. of Mahopac CSD**, that recalculation must be performed by utilizing a workday-to-calendar day methodology.

   In this case, the petitioner, a probationary teacher, was absent for a period of time due to an approved unpaid maternity leave. Based on the district’s recalculation, the petitioner had not worked beyond the new probationary period end date and therefore did not acquire tenure by estoppel.
But the Second Department indicated that the district’s recalculation did not use a “workday-to-calendar day” methodology which requires that “for each workday missed as a result of a teacher’s unpaid leave, the three-year probationary period is to be extended by the corresponding number of calendar days.” Applying that methodology, the Second Department concluded that the petitioner worked past her extended probationary period end date and, therefore, acquired tenure by estoppel.

In addition to her claim for tenure by estoppel, the petitioner sought to enforce a “Side Letter Agreement” pursuant to which she and union withdrew certain grievances and the District, by its Superintendent, agreed to expunge certain records from the petitioner’s personnel file. The District argued that it was not obligated to abide by the terms of the agreement because it was not approved by the school board. On this issue, the Second Department also ruled in favor of the petitioner. Pursuant to the Taylor Law, “agreements that are negotiated between a public employer, by its chief executive officer, and a union and/or a unionized employee are enforceable and binding upon the public employer to the extent that the provisions thereof do not require approval by a legislative body.” The Superintendent, as chief executive officer of the district, and pursuant to the powers and duties set forth in the Education Law, was authorized to enter into the agreement “insofar as it pertained to the maintenance of the petitioner’s personnel file.”


In this case, Christian challenged her termination from the school district without a hearing claiming she had acquired tenure by estoppel. The petitioner is certified in elementary and special education and was employed by the school district as a permanent substitute in a general education kindergarten class in 2008-09. She served as a probationary special education teacher during the 2009-2010, 2010-11 and 2011-12 school years. Christian was notified of her termination effective June 22, 2012.

According to the court, the petitioner was not entitled to a shortened probationary period based upon the year she served as a permanent kindergarten substitute as such service was not in the same tenure area as her probationary appointment. Similarly, Christian failed to establish she had earned tenure by estoppel in the elementary tenure area. While her nearly three years of service in special education tenure area involved service in co-teaching classrooms, Christian failed to establish that she devoted at least 40% of her time to teaching elementary education in the co-teaching classes.

3020-a Issues


Mazzella, a tenured music teacher challenged her termination for incompetence. Under Education Law § 3020-a a school district may pursue an expedited disciplinary process when a teacher has received two consecutive annual professional performance review (APPR) ratings of “ineffective.” Mazzella received satisfactory evaluations for close to ten years but after the implementation of (APPR) Mazzella was rated as developing in 2011-12 and ineffective the two subsequent years. She appealed her ineffective ratings to the district’s joint review board but each year the ratings were upheld. Mazzella appealed the joint review board’s ruling upholding her ineffective rating to the superintendent in 2013-14 but the superintendent also upheld the ineffective rating. The school district preferred charges of incompetence detailing Mazzella’s failure to engage students, design appropriate lessons, differentiate instruction and her failure
to improve her performance in these areas despite implementation of a teacher improvement plan.

The §3020-a hearing officer determined the district established petitioner’s incompetence by a preponderance of the evidence. He credited the testimony of the principal and assistant superintendent that Mazzella’s lessons were teacher-centered and failed to improve despite weekly coaching.

On appeal, Mazzella claimed the district failed to implement a teacher improvement plan (TIP) in 2012-13, that she was not given credit for achieving goals and that she substantially improved by complying with the TIP in 2013-14. She also argued that the joint review board exceeded its authority by reviewing additional documentation beyond what she submitted.

The court upheld the termination finding that the hearing officer’s determination was supported by the record and not arbitrary and capricious. Under the law two ineffective ratings constitute “very significant evidence of incompetence”. In addition to the ineffective rating further evidence exhibited that Mazzella continued to fail to engage her students and design effective lesson plans. Based on the foregoing, the court concluded that the penalty of termination was not shocking to one’s sense of fairness.


   Plaintiff, a tenured teacher, administered New York State’s standardized exams in English and Math. A parent reported concerns about “possible testing irregularity”. In May 2013, the district administratively reassigned the plaintiff to home with full pay and benefits pending a district investigation. She was instructed not to speak with parents and, if asked about her absence, to say she was ill. She was not permitted on school grounds without written permission. She spent her administrative reassignment at home until late October 2013, when she was instructed to report to a building assignment to “level” books which entailed looking the book up on the website of publisher Scholastic and making a label to put on a binder that showed the book’s grade level. She was also assigned to work on a program used to track the District’s curriculum which involved “nothing more than cutting and pasting.”

   As a result of her exclusion from school premises, she could not pick up her daughter from school and had to seek permission to attend school events related to her daughter. Permission was generally denied.

   No charges were brought and the district admitted that it did not have sufficient evidence to prove that she engaged in wrongdoing. She demanded “either that charges be brought forward or the matter be put to rest ...” She brought claims alleging deprivation of various protected interests without due process of law, including deprivation of a property interest in her employment as a tenured teacher and her liberty interest in directing and participating in her daughter’s education – she alleged that she was denied “normal parental contact” with her daughter, including the right to attend school events and parent-teacher conferences etc.

   The court dismissed the case and concluded, in part: (i) that a suspended teacher cannot sustain a claim for deprivation of property without due process if she continues to be paid. Tenured teachers may be reassigned to perform other duties as long as they bear a “reasonable relationship to the ... teacher’s competence and training and [are] consistent with the dignity of the profession.” She continued to receive full salary and benefits and her reassignment duties were no less reasonably related to her competence than other reassignment duties approved by the Court of Appeals such as supervision of the school library or work in the school district office; and (ii) that while plaintiff “does have a liberty interest in directing the education of her daughter, that interest does not give her the right to access school property or her daughter’s teachers.” There was no indication that her exclusion from school property prevented her from
communicating with her daughter’s teachers or making informed decisions about her daughter’s education through alternative channels.


   Tenured teacher was terminated because he failed to hold a valid New York State teaching certificate in his license area. The teacher argued, in part, that the termination was unlawful because it was done without just cause and not pursuant to the procedures set forth in Education Law Section 3020-a.

   The court concluded that the teacher was not entitled to a hearing pursuant to Education Law Section 3020-a because his employment was terminated for “failing to maintain minimum qualifications, and not for disciplinary reasons.”

**Teaching Assignments**


   A physical education teacher claimed that his teaching assignment violated Commissioner regulations in that the district assigned him a daily teaching load in excess of 150 students without justification. The record indicated that the teacher’s workload exceeded 150 students on three days each week, with assignments of 165 or 166 students. The teacher claimed, among other things, that the assignment precluded him from effectively teaching and that he lacked sufficient resources. The regulations states, in pertinent part, “A school requiring of any teacher more than six teaching periods a day, or a daily teaching load of more than 150 pupils, should be able to justify the deviation from this policy.” The Commissioner noted that the regulation contemplates circumstances that would permit deviation from the daily student limit with sufficient justification. According to the Commissioner, determinations regarding the sufficiency of the justifications are determined on a case by case basis and the central inquiry is whether a particular assignment precludes effective teaching in a manner that diminishes quality instruction for students. The district asserted that the teacher’s assignments resulted from the unique, complex scheduling situation at its high school, whereby students were required to be scheduled with competing science labs, limiting the number of available physical education classes in which to place students. The district further asserted that the teacher had sufficient unassigned preparation time to plan for instruction; his classes did not require assessments and did not have homework, testing and projects commensurate with other courses. The Commissioner determined that the teacher failed to prove that the assigned workload precluded effective instruction or that his students had been adversely affected.

**EMPLOYMENT DISCRIMINATION**

**Race Discrimination**


   In **Tolbert v. Smith**, an African-American culinary arts teacher who was denied tenure commenced litigation against the teacher’s school building principal and the school district that alleged claims of defamation, discrimination and hostile work environment in violation of federal and state anti-discrimination laws. A federal district court dismissed all the claims, but
the U.S. Court of Appeals for the Second Circuit, with jurisdiction over New York, reinstated the
discrimination claim and sent the case back to the lower court for further proceedings.

The relevant facts indicate that the school board itself did not approve the denial of tenure. The
school superintendent made a final decision to deny tenure based on the principal’s
recommendation and review of part of the teacher’s performance record. Furthermore,
notwithstanding the denial of tenure, the district offered the teacher the opportunity to enter
into a Juul agreement that would have extended his period of probation for an additional fourth
year. However, the teacher rejected that offer. The claims against both the principal and the
school district turned on the principal’s alleged discriminatory conduct.

At issue before the Second Circuit was whether the teacher had met his initial burden of
establishing, that he was a member of a protected class, was qualified for his position, suffered
an adverse employment action, and the adverse action occurred under circumstances giving rise
to an inference of discriminatory intent. In its decision allowing the discrimination claim to
proceed, the Second Circuit rejected the argument that the teacher had not suffered an adverse
employment action and that the teacher’s allegations did not give rise to an inference of
discrimination.

The principal and the school district did not dispute that the denial of tenure is an adverse
employment action. Instead, they argued that their case was different because of the offer to
extend the teacher’s probationary employment into a fourth year and that his employment
situation would have been no worse had he accepted the offer. According to the Second Circuit,
however, the offer of a fourth year of probation was intertwined with the denial of tenure which
constituted “the denial of a material improvement” in the teacher’s employment condition.
With tenure he was protected from dismissal without cause. While in probation, he could have
been terminated for any lawful reason. Therefore, the teacher had sufficiently alleged he had
suffered an adverse action for his lawsuit to proceed. In so ruling, the Second Circuit expressly
acknowledged that districts can defer a decision on tenure and retain a teacher for another year
of probation. However, such a decision cannot be made for unlawful reasons including racial
discrimination, which is what the teacher in Tolbert claimed.

Regarding the inference of discrimination requirement, the teacher’s claim was based on
undisputed remarks by the school principal, including asking the teacher whether he only know
to cook black, or American too, asking one student how she expected to learn how to cook if she
was only learning about black food, and telling another student that black kids are unable to
learn in a cooking class because they only want to eat. The lower court had found that such
remarks were “too attenuated” from the tenure decision and did not prove the principal’s
intent. The Second Circuit disagreed explaining that there is no “bright-line” rule for
determining whether remarks are “too attenuated to be significant” to a finding of
discriminatory intent. In this case, the remarks at issue were all made during a single school
year, and one of them within three months of the principal’s decision to recommend that the
teacher be denied tenure. Therefore, none was attenuated enough to be ignored. Furthermore, the teacher was not required to show that the principal has made any statement
declaring the tenure decision was tied to the teacher’s race. Statements showing an employer’s
racial bias will suffice and allow a discrimination claim to proceed.

In a footnote, the Second Circuit noted that although the school superintendent made the
ultimate tenure decision, he relied on the principal’s recommendation. “The impermissible
bias of a single individual at any state of the promoting process may taint the ultimate
employment decision...even absent evidence of illegitimate bias on the part of the ultimate
decision maker, so long as the individual shown to have the impermissible bias played a
meaningful role in the promotion process.”
Religious Discrimination

   
   Issue: whether a plaintiff, who alleged discrimination in employment on the basis of religion, could establish a *prima facie* case under the State Human Rights Law, by alleging that he was discriminated because of the religion of his spouse. The plaintiff, who was not Jewish, was married to a Jewish woman. He claimed that co-workers made repeated anti-Semitic remarks in his presence. The comments persisted even after he made numerous complaints to his supervisors. After the plaintiff commenced a discrimination action, he was brought up on charges of misconduct and eventually terminated.
   
   The defendants argued that the plaintiff could not establish a case since he himself was not a member of a protected class, and there was no authority for allowing a claim of discrimination under the State Human Rights Law to proceed based upon a spouse’s religion.

   The Second Department rejected the defendants’ arguments. Referring to cases interpreting Title VII, the court concluded that the plaintiff sufficiently demonstrated his membership in a protected class by virtue of the defendants’ alleged discriminatory conduct stemming from his marriage to a Jewish person. The court also concluded that the plaintiff raised an issue of fact as to whether his discharge occurred under circumstances giving rise to an inference of discrimination. The court also noted that “verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue.”

Age Discrimination

   
   The plaintiff established the first three elements of a *prima facie* case of age discrimination by showing that she was a member of a protected class based on her age, was qualified for the position and was subjected to an adverse employment action. At issue in this case, did the plaintiff’s discharge occur under circumstances giving rise to an inference of discrimination?

   The First Department denied the defendants’ motion for summary judgment. The plaintiff testified that a board member, who succeeded plaintiff as executive director, “very frequently” made references to her age, including by saying, “Are you sure you’re up for this? You know you’re at that age where you...need more rest. You look tired,” and asking whether plaintiff was “up for” meetings that “might be too much” for her and would “tire [her] out.”

   The court concluded that these remarks weren’t just stray remarks but rather remarks which directly reflected age-based discriminatory bias on the board member’s part and raised an inference of age-related bias sufficient to make out a *prima facie* case of employment discrimination. In addition, the fact that several of the persons involved in the decision to fire the plaintiff were close to her in age did not eliminate the inference of discriminatory animus raised by the board member’s claimed remarks.

Prior Convictions

   
   In *Dempsey v. New York City Department of Education*, the Court of Appeals upheld New York City Department of Education’s (DOE) denial of employment clearance for a school bus driver who was convicted of drug related felonies and misdemeanor thefts more than twenty
years ago. In rejecting Dempsey’s application for clearance, DOE found that his convictions rendered him unsuitable to perform the duties associated with being a school bus driver. As part of his application, Dempsey submitted letters from private bus companies where he had worked as a school bus driver as well as other employers and a court issued certificate of relief from disabilities (such certificates relieve the holder of disabilities or bars to employment automatically imposed by law based upon conviction).

The DOE still denied Dempsey clearance explaining that the convictions made him unsuitable for the “close supervision of school children in the relatively unsupervised environment of a school bus.” The DOE also found significant Dempsey’s “mature age” at the time of the offenses (41 at the time of the last conviction), citing concern that he had shown “such poor judgment and control” as a mature adult.

New York law provides that employers may not discriminate in hiring against persons solely by reason of a previous conviction unless said conviction directly relates to the employment, or employing the individual presents an unreasonable risk to the safety or welfare of specific individuals or the general public. The correction law lays out eight factors an employer must consider when deciding whether one of these exceptions applies. A failure to consider each of these factors violates the law’s directive, according to previous court precedent. The Court of Appeals found Dempsey failed to provide any evidence that the DOE failed to consider the information he supplied with respect to his employment history, finding instead that the record indicated the DOE gave greater weight to the circumstances of his convictions rather than his subsequent accomplishments.

Dempsey also challenged what he saw as DOE’s failure to appropriately give weight to his certificate of relief from disabilities. Under the law, issuance of a certificate of relief from disabilities or a certificate of good conduct creates a presumption of rehabilitation to the offenses specified therein. The Court of Appeals found however, that a presumption of rehabilitation does not create a “prima facie entitlement to the license or employment” sought. While rehabilitation is an important factor other factors mandated to be considered may justify denial of an application. The court noted that the drug convictions were of particular sensitivity to DOE given a chancellor’s regulation which requires the agency to take into account the DOE’s particular concern of the public school system with offenses involving possessing, distributing or selling controlled substances. The Court of Appeals also noted that the more recent offenses were at a time when Dempsey was of a mature age as opposed to an age at which an individual’s moral values are still developing. Based on these circumstances, the court could not find that the decision to deny employment clearance was arbitrary and capricious.

SCHOOL DISTRICT LIABILITY

Assumption of the Risk


The Appellate Division, Fourth Department, concluded that a school district was not liable for injuries sustained to a hockey player from the blade of a teammate’s skate while walking barefoot to the showers in the locker room after practice. The court determined that the district and its coach successfully demonstrated that the risk of being injured by a skate blade is “inherent in the sport” of hockey and that the injured hockey player was aware of, appreciated the nature of, and voluntarily assumed that risk. The court rejected the injured player’s claim
that the assumption of the risk doctrine did not apply because he was no longer playing hockey when the injury occurred. The court concluded that the player was still involved or participating in the sport at the time of his injury because it occurred immediately after practice in the school’s designated athletic venue.


The Appellate Division, Fourth Department, concluded that a school district was not liable for injuries sustained by a student while practicing a choreographed stunt during cheerleading practice. The student’s parent claimed that the district was negligent in allowing a teammate to practice with an injured ankle which caused the student’s injury and that his daughter did not assume that concealed risk. However, the student admitted that she was aware of her teammate’s injury, that her teammate had not been cleared for practice by the trainer and that when she previously practiced the stunt the base anchored by her injured teammate was “a little more shaky” than usual. Finding that the doctrine of assumption of the risk applied, the court concluded that “practicing with the teammate while knowing that the teammate had an injured ankle is analogous to a cheerleader practicing without a mat... or to an athlete playing on a field that is in less than perfect condition.”

**Failure to Supervise**


The Appellate Division, Second Department, rejected the school district’s motion to dismiss a lawsuit against it for negligent supervision. The student sustained injuries when another student held him partially outside a fourth floor window of a school building. The court determined that the district failed to demonstrate that it lacked sufficiently specific knowledge or notice of the dangerous conduct that caused the injury because there was an indication from the papers submitted to the court that the district may have had knowledge of the offending student’s dangerous propensities based on other altercations with students in the recent past. Therefore, the case was scheduled to proceed to trial.


The Appellate Division, First Department, dismissed a parent’s claim for negligent supervision after the school’s track coach had unlawful sexual intercourse with her minor daughter. Given that the misconduct occurred at a motel off school premises and after school hours, the district did not breach its duty to adequately supervise the student. There was no evidence that school officials had any specific knowledge or notice of the teacher’s misconduct or that the misconduct could reasonably have been anticipated. The coach had no prior criminal record, and there were no complaints against him other than regarding the end time of practices. The fact that the coach drove the student and others home from school in violation of a Chancellor regulation was insufficient to raise an issue of fact as to whether the district had actual or constructive notice of sexual misconduct.


In 2007, the student, who was at a football camp, was standing outside of the cabin to which he was assigned, looking through the window, when another student punched the window causing the window to break and injure the student’s eye. Plaintiff sought to recover based, in part, on the theory of negligent supervision. The court reversed the lower court’s
decision, indicating that the New York City Department of Education had established its *prima facie* entitlement to judgment by demonstrating that there was adequate supervision and that the level of supervision was not a proximate cause of the accident.

The fact that the student who broke the window was involved in an altercation in 2006, for which he received an in-school suspension, was insufficient to place the defendants on notice of dangerous conduct which required a greater level of supervision. The court noted; “The infant plaintiff’s injury was the result of a spontaneous, unanticipated act which could not have been averted through the exercise of greater supervision.”

**Substantive Due Process**


   Plaintiffs alleged that defendants unlawfully provided their minor daughter access to birth control pills. They alleged that Mr. T., a school counselor and/or psychologist removed the student from her class and escorted her out the back entrance of the school to avoid detection. They alleged that the district allowed Ms. T. (an employee of the Hudson River Community Clinic) to enter the district premises in order to drive the student to the Health Clinic. It was alleged that the student was physically examined and prescribed birth control pills while at the clinic and that Ms. T. arranged for a co-worker to transport the student secretly back to school. Plaintiffs alleged that the student was transported to and from the clinic and provided health services without their consent. They claim that the T’s and Superintendent callously disregarded their right to raise and educate the student in accordance with their own views, in violation of the Fourteenth Amendment.

   According to the court, in order to succeed the plaintiffs must show that: (i) they had a valid liberty interest or property interest, and (ii) defendants infringed on that interest in an arbitrary or irrational manner. Concerning the first element, the court noted that the parental interest “in the care, custody, and control of their children” is “perhaps the oldest of the fundamental liberty interests recognized.” Regarding the second element, the court noted that while it was not alleged that the defendants required (or coerced) the student to submit to the examination and take contraception, the plaintiffs alleged the T’s did more than simply counsel the student. Their role, according to the court, was neither passive nor plain coercion. The court stated: “This alleged action, which goes far beyond mere counseling or exposure to an idea, provided Jane Doe the means to access birth control. Further, Jane Doe was obliged to be at school - and while plaintiffs believed she was receiving instruction in her ... class, she was allegedly aided in accessing healthcare services.”

   The court concluded that the plaintiffs sufficiently alleged that the T’s arbitrarily and irrationally deprived plaintiffs of their right to raise their daughter as they chose. The court, however, dismissed the case because it concluded that the T’s had qualified immunity. The court also dismissed the case against the District and the Board of Education because there was no District custom, policy or practice which caused the events in question, and plaintiffs did not allege that the District was aware of and was deliberately indifferent to a pattern of misconduct so permanent and widespread it implies the District tacitly organized it.
STUDENT RESIDENCY AND HOMELESS STUDENTS

Adequacy of Surveillance


In *Appeal of Gannon* the petitioner successfully rebutted surveillance evidence relied upon by the district in ruling that his son was not a district resident. Petitioner and his ex-wife share physical custody of his son, Brandon, who is enrolled in the district where petitioner resides. In October 2014 the district began a residency investigation after the petitioner informed the district of his re-marriage. The district claims the petitioner informed the district he and his son would be living with his new wife at an out of district residence. The district engaged in surveillance on 7 days. On two of the days petitioner’s ex-wife was seen dropping their son off at the in-district address to catch the bus. On four occasions Brandon was observed leaving the out of district residence with his step-mother and on one occasion petitioner and Brandon were observed at the out of district residence.

On appeal the petitioner explained he and his wife do not reside together and that he resides with his son at his parents’ house in the district. Furthermore, the petitioner stated that he works in the construction industry and that hours and locations of work vary and that depending on the circumstances Brandon either stays at the in-district house with his paternal grandparents or with his step-grandparents at the out of district residence. As proof of residency he provided w-2s from multiple employers, his driver’s license, most recent tax documentation and a bill for heating oil all listing the in-district address. Based on the foregoing, the commissioner found that it was not unexpected that Brandon would be transported from the out of district residence at times and that the documentation submitted by the petitioner contradicted the limited surveillance. The commissioner ordered the school district to admit Brandon without the payment of tuition.

IMMUNIZATION EXEMPTIONS


The Second Circuit upheld the constitutionality of New York’s mandatory vaccination requirements for public school attendance. The court also upheld the authority of school officials to temporarily exclude from school students exempted from the immunization requirements during an outbreak of a vaccine-preventable disease. The State’s vaccination requirements prohibit schools from admitting students who have not been immunized or allowing them to attend for more than 14 days unless they qualify for either a medical or religious exemption. Applicable regulations permit the temporary exclusion from school of students with a medical or religious exemption during an outbreak of a vaccine-preventable disease.

Parents challenged both the law and regulations on several grounds, including a claim that they violated the Free Exercise Clause of Religion contained in the First Amendment. The court relied on a 1905 decision from the United States Supreme Court which determined that mandatory vaccination is in the interest of the whole population and was within a State’s police power. The parents argued that a growing body of scientific evidence demonstrates that vaccines cause more harm than good. The court, however, concluded that that is a determination for the State legislature, not individual objectors. With respect to the Free Exercise claim, the court concluded that a parent’s “right to practice religion freely does not
include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”


In this case, the parents’ appealed the district’s decision to exclude their son from school for failure to be properly immunized and rejecting their request for a medical exemption. The parents previously submitted doctors’ notes regarding a medical exemption from immunizations. When their son was in junior high however, the school nurse notified district staff that the student lacked several immunizations and his file did not contain sufficient information to warrant a medical exemption.

The record contained two letters from the student’s physicians stating that the student’s father and half-brother had adverse reactions to vaccinations and that the student be exempt from vaccinations based on family history. The district mailed the parents notice of intent to exclude the student for lack of required immunizations and included information regarding medical exemptions and the forms to request such exemption. The petitioners submitted forms requesting exemptions from diptheria, MMR, varicella and hepatitis B vaccine series based upon the severe nature of the adverse reactions of his father and half-brother. The district investigated the appropriateness of the request and contact staff at the NYS Department of Health (DOH). The DOH ultimately replied that the familial adverse reactions (post-immunization paralysis after unknown immunization (father), seizure after DPT vaccine (half brother)) are not contraindications or precautions against immunization of the student in question.

Petitioners challenged the district engaging in research to evaluate their exemption request. The commissioner citing prior court precedent, stated a district is not required to accept at face value a doctor’s note. A medical certification must identify the contraindication and the time at which vaccination will no longer be detrimental, without such specificity the medical exemption may not be granted. Therefore, a district is able to demand further information to ascertain if the immunization would be detrimental. The commissioner determined the district properly engaged in further inquiry to determine whether the student was entitled to the exemption. Based on information from the Centers for Disease Control and DOH analysis, the familial adverse reaction was not sufficient reason to grant the exemption and the commissioner dismissed the appeal.


The commissioner of education recently sustained the appeal of a parent who requested a religious exemption from the MMR vaccine. The petitioner’s objection arises from the fact that the MMR vaccine is derived from cells of aborted fetuses and abortion is contrary to her Russian Orthodox Christian beliefs. She believes to financially support companies which create vaccines with such cells would make her complicit in their sin. Additionally, she objects to vaccinations because they contain cells of animal origin which is counter to religious teachings that blood is sacred and should not be mixed with foreign blood or other impurities.

The school district rejected petitioner’s request and that rejection was upheld upon appeal at the local level. The district claimed that the documentation submitted failed to substantiate that petitioner holds a genuine and sincere religious belief contrary to immunization and remarked that the student had received all other required vaccines besides MMR.

Before the commissioner the district argued that the petitioner failed to provide any evidence that the Russian Orthodox Church objects to vaccination and that quoting biblical passages does not warrant a finding that petitioner’s beliefs are religious in nature. The
commissioner pointed out that a person does not need to be a member of a recognized religious organization oppose to immunization to claim a statutory exemption. Furthermore, the commissioner states that while the petitioner supports her claim with biblical passages she explained in her own words how her beliefs are based upon her own interpretation of the bible, in accordance with her Christian upbringing. There is no evidence that petitioner’s beliefs are based on philosophical, scientific, medical or personal preference. The commissioner further remarked that individuals do not have to oppose all medical treatment to qualify for an exemption but must assert only that they believe in reactive as proposed to proactive medical treatment. According to the commissioner, the petitioner provided information from both the Center for Disease Control and vaccine manufacturers that the MMR vaccine is derived from aborted fetus cells lines and this supported her religious objection to this vaccine. The commissioner ordered the district to grant the exemption for petitioner’s son.

STUDENT BULLYING


   Petitioner’s daughter was allegedly bullied at respondent’s school. The initial allegations arose prior to the Dignity for All Students Act (DASA) legislation, however, it persisted after DASA and ultimately an investigation was conducted pursuant to the Act.

   During the investigation, petitioner refused to make her daughter available to assist in the investigation. The resulting investigation found that the incidents reported were contradicted and were not substantiated by petitioner’s daughter; therefore it was found that the district sufficiently attempted to resolve the reported incidents of bullying. The appeal was dismissed on procedural grounds. The Commissioner, however, noted that with regard to petitioner’s request for declaratory relief, he would not “issue advisory opinions or declaratory rulings” in an appeal pursuant to Education Law §310.

STUDENT FREE SPEECH


   District had history of violence among students, some gang-related and some based along racial lines. High school was having a Cinco de Mayo event to honor the pride and community strength of the Mexican people. During the prior year’s Cinco de Mayo event, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students – the groups had exchanged profanities and threats.

   During the Cinco de Mayo event in question, a group of Caucasian students wore American flag shirts to school. The Assistant Principal was approached by a Caucasian student indicating that there “might be some issues.” He was also approached by a Mexican student who indicated that “there might be problems.” A group of Mexican students asked the AP why the Caucasian students “get to wear their flag out when we don’t get to wear our flag.”

   The students were directed to either turn their shirts inside out or remove them. The students refused, but did not dispute that their attire put them at risk of violence. Some of the students were allowed to return to class since the imagery on their shirts was less prominent and less likely to get them targeted. The remaining students chose to go home instead of
turning their shirts inside out. In the aftermath, the students received numerous threats from other students.

The students brought suit alleging violations of their Federal and State Constitutional rights to freedom of expression. The Ninth Circuit held that requiring the students to change their clothing did not violate the students’ First Amendment right to expression. There was escalating violence at the school: on the morning in question, each of the three students was confronted about their clothing by other students. The AP learned of the threat of a physical altercation and was warned about impending violence – all in the context of ongoing racial tension and gang violence with the school and after a near-violent altercation had erupted during the prior Cinco de Mayo event over the display of an American flag. The school officials were clearly concerned about school safety.


Upon learning that he received a “C” from his teacher, and subsequently being grounded by his mother for a portion of the summer, the 14 year old student posted a series of comments on his personal Facebook page: “start a petition to get Mrs. Bouck fired, she’s the worst teacher ever.” “She’s just a bitch haha.” “Ya haha she needs to be shot.” Comments were posted from his home computer on a day that school was not in session. Only those Facebook users whom he had confirmed as “friends” would have been able to view the comments he posted. He was not a Facebook friend of the teacher or any other district employee. He deleted the entire post within 24 hours of its posting.

The principal found out about the postings and gave the student an in-school suspension of three and a half days. Family sued pursuant to Section 1983 for violations of student’s First Amendment right to free speech.

The Magistrate Judge applied the Tinker standard and concluded that the comments did not fit within the exception to First Amendment protections because the comments did not have a “material and substantial” impact on either classroom activities or administrative responsibilities. The court agreed and found that the district violated the student’s First Amendment rights to free speech. The comments did not cause a “widespread whispering campaign” at school or anywhere else. No students missed class and no employee, including the teacher in question, missed work. Although the teacher was allegedly “scared,” “nervous,” and “upset,” – without more, her response was insufficient to constitute a material and substantial interference with appropriate discipline at the school. The court also found it significant that the district did not take any actions indicating that it reasonably foresaw a threat; for instance, neither the principal nor the superintendent asked the student or his parents if the student had access to a gun or even contacted police. “Without taking some sort of action that would indicate it took the comments seriously, the school can not turn around and argue that [the student’s] comments presented a material and substantial interference with school discipline.”

TAYLOR LAW ISSUES

Improper Practice


   In *East Meadows Teachers Association v. East Meadow Union Free School District*, the Public Employment Relations Board (PERB) recently found that the school district did not engage in
retaliatory activity in violation of the Taylor Law by bringing disciplinary charges against four teachers for engaging in various forms of disruptive picketing activities.

The four improper practice charges stemmed from incidents in 2006 and 2007 and were originally consolidated before a single administrative law judge (ALJ). The ALJ dismissed charges concerning Richard Santer finding that the imposition of discipline and Santer’s subsequent transfer to a different school did not constitute retaliation for protected activity. The ALJ found the disciplinary charges brought against the other three teachers (Fortney, Golden and Malone) arising from discrete instances of informational picketing and leafleting were brought in retaliation for protected activity. Both sides filed exceptions to the ALJ’s decision seeking to overturn parts of the decision. PERB ruled in favor of the school district upholding the ALJ’s rulings with respect to Santer and vacating or overturning the decisions in the other cases.

Santer

In 2007 Santer and others parked their cars along both sides of the street in front of the middle school and displayed signs. By parking their cars in this manner parents were forced to drop their children off in the middle of the street and traffic was slowed causing sixteen teachers to report late to work. Santer was found guilty of intentionally creating a health and safety hazard and fined $500. Santer challenged this decision claiming his activity was protected by the First Amendment. In 2014, the Court of Appeals in Santer v. East Meadow Union Free School District, found the district’s interest in maintaining an orderly and safe school outweighed the teachers’ interest in engaging in speech in a manner that interfered with the safety of students and upheld the hearing officer’s decision. Based on the Court of Appeals decision the union withdrew its exception to the ruling regarding disciplinary charges against Santer. However, it proceeded with its exception to the ALJ’s decision regarding Santer’s transfer to the elementary school.

On May 30, 2007, after the March parking activity, Santer notified the principal he was re-elected union building president. On June 7th Santer received a letter notifying him of his transfer to the elementary school the following year. PERB determined that the district articulated a nondiscriminatory reason for the transfer. The elementary principal needed to fill a fifth grade position due to a retirement and requested someone with a strong science background who could implement planned improvements to the science program. Santer met these requirements. That coupled with a district’s statutory right to transfer teachers and the contractual obligation to notify a teacher who is to be transferred by June 10 constituted legitimate business reasons for the transfer.

Malone

In October 2006 Malone, a teacher at the high school, engaged in leafletting by standing at the end of the high school driveway waving leaflets to attract drivers’ attention. If a driver stopped Malone would step into the driveway and hand them a leaflet. Malone refused to cease this activity when directed by the school principal. The school district charged Malone with misconduct and insubordination. The ALJ determined Malone’s actions were protected activity and the disciplinary charges were improperly motivated and unsupported by a legitimate nondiscriminatory reason. However, at the same time as the ALJ issued his decision Malone was found guilty in the section 3020-a disciplinary proceeding. The hearing officer fined him one day’s pay after determining Malone’s activity implicated the district’s right to ensure safety and see that traffic progresses without interference. The school district sought to re-open the record to include the section 3020-a decision and have the ALJ reconsider his decision but the ALJ declined to do so.

PERB began its discussion explaining that this charge represented an unusual circumstance of inconsistent adjudication between the Taylor Law proceedings and the education law
disciplinary hearing and it must determine whether to defer to the findings of the hearing officer in the disciplinary arbitration proceeding. PERB determined the activity at issue in both proceedings and the questions of fact were identical and that deferral to the hearing officer’s factual findings was not repugnant to the Taylor Law. The board went on to conclude that Malone’s leafletting did lose its protected status because an actual obstruction of traffic resulted from Malone’s behavior such that the conduct was disruptive.

PERB also noted the section 3020-a hearing officer’s decision was upheld by both state supreme and appellate courts and has been the status quo between the parties for almost five years. In contrast, the ALJ’s decision is not considered final. These factors also supported adopting the hearing officer’s findings.

**Fortney and Golden**

Disciplinary charges were brought against Fortney and Golden after they engaged in a parking activity on March 30, 2007 which was similar to Santer’s March 2nd activity. Fortney and Golden parked their cars blocking a driving lane designated to drop off students and delineated by cones placed on the street by the elementary principal. Both refused to move their cars when requested to do so. The ALJ determined that the district engaged in retaliatory action by filing the disciplinary charges. The union argued the district’s exceptions to the ALJ’s findings were rendered moot by Fortney and Golden’s subsequent retirements. The district objected to the finding escaping review through a mootness declaration. PERB determined that the charge is moot but vacated the ALJ’s order to “prevent it spawning any legal consequences or precedent.”

**Contracting out UPK**

1. **Lawrence Teachers Association v. Lawrence UFSD, 48 PERB ¶ 3007 (June 5, 2015).**

School districts are authorized under Education Law § 3602-e to operate prekindergarten programs. Specifically that statute provides “Notwithstanding any other provision of law, the school districts shall be authorized to enter any contractual or other arrangements necessary to implement the district’s prekindergarten plan.” Generally, decisions to contract out union work would be mandatorily negotiable. PERB previously determined that the Legislature clearly intended override the duty to negotiate with the union concerning contracts with outside entities to provide the services and staff for prekindergarten programs. Therefore, school districts may unilaterally contract for necessary services to implement a prekindergarten program even if the work was exclusively performed by union members previously. In Lawrence Teachers Association v. Lawrence Union Free School District, the union sought to overturn the Springs decision claiming the prior interpretation was too broad and the notwithstanding clause is only applicable to other education law provisions. PERB rejected this argument, affirming the broad interpretation of the statute based on both the plain language and legislative intent. In so doing, PERB affirmed the ALJ’s decision that the district did not violate the act when it unilaterally contracted with an independent vendor to provide its prekindergarten program.

**Provision of Employee Names and Addresses**

1. **Service Employees International Union, Local 200United v. Utica City School District, 48 PERB ¶ 3008 (June 5, 2015).**

In Service Employees International Union, Local 200United v. Utica City School District, the district filed exceptions to an administrative law judge’s (ALJ) determination it engaged in an
improper practice by refusing to provide updated names, addresses and telephone numbers for unit members to the union. Under the contract, the district provides a form entitled “application for membership" completed by new employees to the union. Given the passage of time, the union requested updated information. The district argued that the union’s failure to explain the need and relevance of the requested information negated its obligation to respond to the request. The district also argued responding to the request would be burdensome and to provide the information would violate the statutory right to privacy of the employees.

PERB rejected the district’s argument that it was absolved of a duty to respond because the union failed to specify the reason for its request. According to PERB, the general right to receive documents and information is subject to three limitations reasonableness, relevancy and necessity.

In finding the documents relevant and necessary to union business, PERB explicitly adopted the National Labor Relations Board’s holding in its past decisions that the names and addresses of unit members are presumed to be relevant to the union’s role as bargaining representative; PERB said this same rationale should be applied to members’ telephone numbers as well. The district’s contention that providing the information would be burdensome was similarly rejected given the district failed to provide an explanation of the steps necessary to compile the information or an estimate of the time required. Lastly, PERB found providing the information would not violate the employees’ right to privacy as a union is not similarly situated to the general public making a freedom of information request. A union is entitled to demand and receive relevant information to enable it to exercise rights and responsibilities imposed by the Taylor law. PERB ordered the district to provide the names, addresses and telephone numbers to the union.

Transfer of Unit Work


The New York Public Employment Relations Board (PERB) determined that a school district committed an improper practice under the Taylor Law when it unilaterally transferred duties previously performed by department chairpersons at the high school level to non-unit administrators.

The district employed department chairpersons at its elementary, middle and high schools for more than 15 years. For budgetary reasons, it decided to eliminate 12 positions and reassigned the tasks to principals and other administrators. The district unsuccessfully argued that it was permitted to make the transfer because the work was “incidental” to the “core components” of the administrators’ final decision-making process. PERB found that there was a discernable boundary between the work that had been performed by the chairpersons and that performed by the administrators. The job descriptions of the chairpersons had four areas of responsibility including curriculum, budget, personnel and departmental organization. They met monthly with teachers to discuss, develop and determine department plans and make recommendations to non-unit administrators. The fact that the non-unit administrators were involved in the review and approval of such plans and recommendations did not defeat the claim of exclusivity over the work of the high school chairpersons. The chairperson tasks were a “discreet departmental function” that the district facilitated by reducing the teaching workload of chairpersons and paying them a separately negotiated salary to perform those tasks.

PERB reached a different conclusion with the transfer of work from chairpersons to administrators at the middle and elementary school levels because the chairperson type work
had been performed by both chairpersons and administrators at those levels and therefore was not exclusive unit work.

Unilateral Change of Work Week

1. **Orchard Park School Related Professionals Ass’n v. Orchard Park Cent. Sch. Dist.,** 47 PERB ¶ 3029 (December 29, 2014).

   The New York Public Relations Board upheld the dismissal of an improper practice charge against a school district that unilaterally changed the work week of custodial workers from Monday through Friday to Tuesday through Saturday. PERB determined that the language of the contract established that the union waived its right to negotiate over the change. The language of the agreement included following:

   - 1.4 This agreement is the complete record of all commitments between the parties.
   - 2.1 Agreement Restrictions – Except as otherwise set forth in this Agreement, the District, Board of Education, Superintendent, and his/her designated supervisory officials shall be solely responsible for the operation and control of the district and its personnel... All terms and conditions of employment not covered by this Agreement shall continue to be subject to the discretion and control of the District.
   - 2.3 Reserved Rights – Selection, recruitment, hiring...assignment, and transfer as well as the direction, deployment and utilization of staff are rights reserved to management.

SCHOOL DISTRICT ELECTIONS


   In March 2015, the district held a bond vote to approval $69 million bond for renovations, repairs and new construction on the district’s schools and administrative offices. Petitioner challenged the outcome of the bond vote alleging the district provided “grossly incorrect” statement regarding the tax impact of the referendum. In order to invalidate a school district vote a petitioner must establish not only the irregularities occurred but that the irregularities actually affected the outcome of the election, were so pervasive they vitiated the electoral process or demonstrate informality to the point of laxity in adherence to the Education Law. According to the petitioner, the board understated the impact of the bond referendum stating that the total additional cost would be $106/year on the average tax payer. Petitioner alleged the actual impact is $106/year only until 2023 and thereafter it will be approximately $500/year. The district explained that it characterized the impact as a “net” tax impact as the district will retire a 2001 bond previously approved in 2023 and that the tax impact of the 2015 bond would essentially replace the impact of the retired bond. The district felt it was easier to describe a net impact rather than characterizing a decrease in taxes when the 2001 bond was retired and an increase in taxes based upon the 2015 bond. The district also stated that it held numerous informational meetings at which the tax impact of the proposed bond was discussed and explained.

   The commissioner determined that even if the information provided by the district was incorrect or misleading that petitioner failed to prove such information affected the outcome of the election. Petitioner’s claim was merely speculative and she failed to sustain her burden of proof because mere speculation as to the effect of alleged irregularities does provide a sufficient basis to overturn an election.

In **Appeal of Leger-Vargas**, **Appeal of O’Brien**, and **Appeal of Munoz-Feliciano** three unsuccessful candidates outlined the same or similar alleged irregularities regarding the election. The petitioners claimed the district violated the prohibition against exhorting the voters through certain email correspondence and allowing “robo-calls” supporting certain candidates to be made from a district system. Additionally, the petitioners challenged the appointment of the election chairperson and procedure used to tally the votes.

To invalidate election results a petitioner must establish that irregularities occurred and that such irregularities actually affected the outcome of the election, were so pervasive as to vitiate the electoral process or demonstrated a clear and convincing picture of informality to the point of laxity in adherence to the Education Law.

A sitting board member sent emails from her personal account to a number of residents questioning the impartiality of the petitioners and indicating they were aligned with a special interest group in the district. The petitioners alleged the emails amounted to slander, libel, defamation, intimidation, cyberbullying and more.

According to the commissioner, because the board member sent the emails from her personal account and did not indicate that she was speaking on behalf of the board no improper advocacy occurred. Individual board members are entitled to express their individual views about issues concerning the district and engage in partisan activities provided no district funds are expended.

The superintendent received an email the day before the election with an attached flyer in support of certain candidates that bore the district’s logo. He forwarded the email to several staff members asking if anyone knew of the source of the email or flyer. The district argued it only shared the email for investigative purposes. The commissioner concluded such investigatory activities did not constitute improper advocacy.

The appeals also asserted that a “robo-call” in support of the winning candidates was made from the district’s parent notification system. The candidates who sponsored the robo-call provided an invoice with proof of payment to an outside company and also stated telephone numbers were not obtained through the district. Additionally, district staff asserted only they had access to the parent notification system and it was not used as alleged. The commissioner determined the petitioners did not establish district resources were improperly used.

The education law requires school boards to appoint a qualified voter as chairperson of the election. In 2012, the board appointed as chairperson its then president, who was present for the election and tallying the ballots. Petitioners alleged this was improper. The commissioner explained that the education law does not contain any restriction barring a board member from serving as chairperson.

An allegation the ballots were improperly counted behind closed doors was rejected as well. The chairperson provided an affidavit stating that the ballots were counted in the presence of others and no one was excluded from witnessing the tally. The mere presence of the president was not enough to invalidate the results.

The commissioner declined to annul the election results based upon any of the alleged irregularities and noted removal of the superintendent or board members was moot since they no longer served in those positions. The commissioner noted that the petitioners failed to submit any voter affidavits demonstrating that the alleged actions of the respondents influenced his or her vote and therefore, did not establish any election irregularity occurred. The decision also reiterates the commissioner lacks authority to resolve defamation or slander.
claims, issue reprimands or fines or order someone to issue an apology. Nonetheless, the
commissioner urged the board to ensure school officials and employees are mindful to avoid
even an appearance of impropriety.


An unsuccessful write-in candidate challenged the results of the 2014 district election
alleging electioneering and other improprieties affected the outcome of the election. Emond
was serving as a per diem substitute in the district at the time of the election. She understood
that if elected she would be unable to continue to substitute teach. In her petition, Emond
claimed that an election inspector told voters that votes cast for Emond would not be counted
because she was a school employee and that such statement discouraged individuals from
voting for her. While Emond, submitted 9 voter affidavits only 6 affidavits addressed the issue
of the comment. According to the commissioner, she failed to establish that the alleged
irregularity affected the outcome of the election because petitioner lost by 95 votes.

Additionally, the petitioner argued the district failed to provide for voter privacy. The
district was using lever voting machines but was unable to secure additional paper for those
machines to accommodate a large write in vote. Instead, the district prepared paper ballots for
anyone to use who wished to vote for a write in candidate. Further detracting from voter
privacy was the failure of the district to provide any sort of screened area for voters to fill out
the ballot. The district acknowledged that it improperly provided separate paper ballots only for
write-in candidates contrary to prior commissioner’s decisions. The four voters who submitted
affidavits addressing voter privacy each stated that while uncomfortable with the lack of privacy
they still cast a vote for the candidate of his or her choice. Therefore, the commissioner found
these irregularities did not affect the outcome of the election. However, the commissioner
cautioned the district to ensure full compliance with commissioner’s decisions in future
elections and to review its election practices with respect to voter privacy.

**TRANSGENDER ISSUES**

1. **Colorado Civil Rights Division Investigation**, (June 2013).

Student, a six year old transgender girl (born male but identified with female gender),
began exhibiting strong and persistent female characteristics, including wearing girls’ clothing.
The school district barred the student from using the girls’ restroom. Student was directed to
use the boys’ restroom or one of the single-user restrooms – the adult staff restrooms or the
health office restroom. Family conveyed its concern about safety if the student was required to
use the boys’ restroom and ultimately removed the child from school. School district also raised
safety issues – restricting restroom access based on sex would have a bona fide relationship to
the operation of the school district in that a transgender student will be less likely to be
subjected to harassment from other students if the restrooms remain segregated. Family
alleged that the student was discriminatorily denied the use of the girls’ restroom. School
district claimed that the student was a biological male and should use the boys’ restroom.

Colorado adopted a specific anti-discrimination rule regarding restroom usage: “[A]ll
covered entities shall allow individuals the use of gender-segregated facilities that are consistent
with their gender identity. Gender-segregated facilities include, but are not limited to,
restrooms ...”

The Colorado State Division of Civil Rights found probable cause that unlawful discrimination
occurred based on its anti-discrimination statute. It also rejected the district’s safety arguments
and referred to Title IX. Pursuant to Title IX, the district is obligated to protect all students from bullying and discriminatory harassment, including gender-based discrimination. The purpose of the statute is not to penalize the student who is harassed. Rather, appropriate steps should be taken to discipline the alleged harassers.

2. **John Doe et al v. Regional School Unit 26,** 2014 ME 11, 86 A.3d 600 (Me. 2014).

The student was born a male but was dressing and appearing exclusively as a girl. She was diagnosed with gender dysphoria which is psychological distress resulting from having a gender identity issue. During fifth grade, the student was permitted to use the girls’ restroom until a controversy emerged whereby a guardian of a male student was strongly opposed to the school’s decision to allow the student to use the girls’ bathroom. The male student was instructed by his guardian to follow the transgender student into the girls’ bathroom and claim that he too was entitled to use the girls’ bathroom. As a result, the district terminated her use of the girls’ bathroom and required her to use the single-stall unisex staff bathroom. School admitted that the student was a girl and should use the girls’ bathroom, but changed that decision based on the complaints of others.

The public-accommodations and educational-opportunities provisions of the Maine Human Rights Act were amended in 2005 to prohibit discrimination against transgender students in schools. The court concluded that the student was treated differently from other students solely because of her status as a transgender girl. “Where, as here, it has been clearly established that a student’s psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of MHRA.”


Federal case in Eastern District of Michigan (**Tooley v. Van Buren Public Schools**), involving a 14 year old student who was assigned the female sex but whose gender identity is male. Claims he was subject to severe and pervasive sex-based harassment in violation of Title IX. Student alleges that school personnel refused the family’s request to use the boys’ restroom. The school district required him to use the “staff ladies’ room” or a unisex restroom. There were alleged incidents of harassment when the student used the women’s restroom.

The United States Department of Justice filed a “Statement of Interest” and argued: (1) Title IX prohibits sex discrimination against all persons, including transgender individuals; (2) Title IX and the Equal Protection Clause prohibit discrimination against an individual based on that individual’s gender identity or transgender status; and (3) Title IX and the Equal protection Clause prohibit discrimination against an individual, including a transgender individual, on the basis of sex stereotypes.


Core principle: “All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.” In addition, OSHA writes that policies should provide options which employees may choose, but are not required, to use including: (i) single-occupancy gender-neutral (unisex) facilities; and (ii) use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

According to the guidance, employees are not required to provide medical or legal documentation of their gender identity in order to access gender-appropriate facilities and no
employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status.

OSHA does not have jurisdiction over public schools. Awaiting position, if any, from the New York State Public Employees Safety and Health (PESH) on this issue.

MISCELLANEOUS

Charter School Funding


   Parents of charter school students and an advocacy organization comprised of member charter schools challenge the constitutionality of the funding scheme used by the State to allocate funds to charter schools. They allege that charter schools receive less funding than traditional public schools because they do not receive facilities funding to cover the cost of items such as construction or repairing school buildings. They claim that this lack of funding results in a failure to provide a “sound basic education” guaranteed by the State Constitution and has a disparate impact on the education of minority students. They claim that Buffalo and Rochester charter schools receive approximately 60 cents on every dollar of spending per pupil versus students in traditional district schools.

   Supreme Court, Erie County, denied the State’s motion to dismiss and concluded that the plaintiffs had standing to sue and that the complaint sufficiently pleads a violation of the New York State Constitution and a claim of disparate impact discrimination.

Commissioner’s Jurisdiction as to IDEA Enforcement


   A school district does not have the right to challenge in court a regulatory enforcement determination by the New York State Education Department finding that the district violated federal and state laws pertaining to students with disabilities and directing the district to take certain corrective action, according to an appeals court in **East Ramapo Central School District v. King**.

   In 2010, during a department compliance review, department staff reviewed various student records and found, among other things, that the district failed to comply with the Individuals with Disabilities Education Act (IDEA) and related federal and state law and regulations pertaining to negotiated settlements with parents of students with disabilities who challenged the district’s proposed special education placement of their children. A significant number of those settlements resulted in private school placements. The department ordered the district to take corrective action and indicated that it would be closely monitoring the district’s resolution of the identified areas of noncompliance. In 2012, SED conducted a follow-up monitoring review and identified a number of legal deficiencies and threatened to withhold federal special education grant money or take other adverse action against the district if it failed to change the way it resolved parental complaints and negotiated settlements. The district commenced a lawsuit against the Department challenging its findings and the corrective actions imposed on the district.

   The Appellate Division of state Supreme Court, Third Department noted that the Department is required under the Individuals with Disabilities Education Act (IDEA) to regulate and enforce school district compliance with the mandates of that law. The issue before the
court was whether IDEA provided a mechanism for a school district to challenge the Department’s enforcement determination. The court ruled in favor of the Department finding that in enacting IDEA, Congress did not intend to grant school districts the right to challenge the Department’s enforcement of state laws and regulations promulgated under IDEA.

Confrontation Clause


In this case, the U.S. Supreme court was asked to determine whether statements by a three year old child, L.P., made to his preschool teachers regarding who abused him were admissible in court. The defendant, Clark challenged the admission of the statements which implicated him as the abuser, claiming they were in violation of the confrontation clause of the Sixth Amendment of the U.S. Constitution. Under the confrontation clause, testimonial statements by a non-testifying witness are not admissible unless the witness is unavailable to testify and the defendant had had a prior opportunity for cross-examination. A statement is considered testimonial if the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. Under Ohio law, due to his age L.P. was not competent to testify at trial. His preschool teachers, who discovered the injuries and reported the abuse to child protective services pursuant to a mandated reporting law, did testify that L.P. stated Clark was responsible for his injuries.

In the majority opinion the court explained it had not previously addressed the issue of whether statements made to individuals other than law enforcement officers would implicate the confrontation clause. The court declined to create a categorical rule that all statements to non-law enforcement would be admissible but did state that such statements are much less likely to implicate the Sixth Amendment. The court found that L.P.’s statements were clearly not made for the primary purpose of creating evidence for Clark’s prosecution and that their introduction did not violate the confrontation clause. Moreover, L.P.’s young age also belied the idea that they were created as an out-of-court substitute for testimony because very young children do not understand the justice system.

The court elaborated that the teachers’ first objective was to protect L.P. and explained that “statements made to someone not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.” By so stating, the court rejected Clark’s argument that Ohio’s mandatory reporting laws made teachers the functional equivalent of law enforcement when dealing with suspected child abuse. According to the court, “mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for the prosecution.”

This case is important in that the court recognized school staff should not be considered law enforcement officers in the context of child abuse reporting.

Redacting § 3020-a decisions


The Executive Director of the Committee on Open Government, Robert Freeman, issued an opinion supporting the actions of a district that redacted references to the conduct and actions of district employees who were not parties to the underlying §3020-a proceeding. The redacted
information made “potentially adverse conclusionary ‘factual’ findings” about those employees, even though they were not represented by counsel and had no opportunity to present a defense at the hearing. Mr. Freeman determined that the redactions were proper based on two Freedom of Information Law exemptions. First, charges and allegations against employees not yet determined in a §3020-a proceeding are exempt under the inter-agency or intra-agency exemption. Second, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld under the unwarranted invasion of privacy exemption.

Real Property Tax Refunds

   
   A developer of commercial real estate applied for and was granted an exemption in 2008. The company challenged the 2008 assessment claiming that the assessor had undervalued the business investment exemption granted to the company for real property improvements. While that challenge was pending, the company did not file separate assessment challenges for 2009, 2010, and 2011. The lower court ordered the district to repay taxes for 2009-2011 but did not order the district to repay taxes from 2008 because the district used the 2007 assessment roll to calculate those taxes and the exemption was not granted until 2008. On appeal, the court ruled in favor of the district finding that even though the business investment exemption is granted based on a single application, property owners must preserve their right to relief through annual challenges to the assessment pending the determination of the original assessment challenge.

   
   The Appellate Division, Fourth Department ruled that individuals are not required to file tax certiorari challenges in each successive year after their initial filing in order to obtain relief in subsequent years. The petitioners in this case challenged the 2007 assessment and reached a settlement reducing the assessment and the parties agreed that a provision in the Real Property Tax Law would apply whereby the assessed valuation would not change for three succeeding assessment rolls. The district argued that precedent from the Appellate Division, Third Department required petitioners to file tax certiorari challenges in each succeeding year in order to obtain relief for subsequent years. This decision marks a split in the Appellate Divisions on this issue.

School Closings and Redistricting

   
   The petitioner in *Appeal of Jiava* challenged the board’s adoption of a plan for redistricting and grade reconfiguration. In March 2015, the board adopted a resolution to implement the recommendations of the superintendent with regard to redistricting and grade configuration. The recommendations included reorganizing the elementary schools with a K-6 configuration, decreasing enrollment at an elementary school, decreasing middle school enrollment by moving 6th grade to elementary schools, eliminating modular classrooms for classroom student use, and decreasing class sizes in primary grade levels. The petitioner challenged these recommendations as contrary to law.
The commissioner dismissed the appeal on procedural grounds, finding the petitioner had not stated any way she or others she purported to represent were aggrieved and thus lacked standing to bring the appeal. However, the commissioner felt compelled to comment on the merits of the appeal.

The district established a “District Facilities Advisory Committee” (“DFAC”) which was tasked with assisting the board and administration with the efficient and effective use of building facilities. Petitioner argued this was a committee set up pursuant to Education Law §402-a regarding building utilization and to investigate proposed school closings and that pursuant to statute the district was required to hold a public hearing and failed to do so. The commissioner pointed out that Education Law §402-a is discretionary and that provisions of that law only apply when the board chooses to establish such a committee. There is nothing in the charter for DFAC that references it is a committee established pursuant to §402-a, and therefore, the obligations laid out by that statute do not apply, including the requirement for a public hearing.

Furthermore, the commissioner pointed out there is no general requirement under law to hold a public hearing on any particular matter nor does law require that a person have a right to be heard. The commissioner pointed out that decisions regarding reorganization and closing of buildings are within the discretion of the board. Additionally, the approved plan would alleviate overcrowding, provide for consistency in curriculum, alleviate scheduling problems associated with professional development and allow classroom art instruction for all students, among other items. Accordingly, the commissioner found the plan did not lack a rational basis and refused to overturn it.


In **Appeal of Fuller**, the petitioner challenged the decision of the board of education of the Cattaraugus-Little Valley central school district to close its Little Valley campus as violating assurances the Cattaraugus board of education had adopted prior to merging with Little Valley.

In 1999 prior to a vote to merge the Cattaraugus and Little Valley districts, the Cattaraugus board passed a resolution assuring that an elementary building would be maintained in Little Valley with a comparable program to that of the elementary school in Cattaraugus and that all Cattaraugus students would continue to attend school at the Cattaraugus campus and not be bussed to the Little Valley campus. Both districts voted to merge and the Cattaraugus-Little Valley school district was formed as of July 1, 2000. In April 2012, the school board voted to consolidate district operations on one campus, resulting in the closing of the Little Valley campus. Petitioner appealed arguing that the closing of the Little Valley campus violated the assurances and was contrary to a referendum adopted by the voters in 2007 approving renovations to the Little Valley campus that included communications and technology upgrades.

The commissioner declined to order the board to comply with assurances made by the Cattaraugus board more than thirteen years earlier. The commissioner noted that the assurances were superseded and “effectively nullified” by the board’s adoption of the 2012 resolution to reorganize the district and consolidate operations to one campus. Additionally, the commissioner cited the public policy principle that a board cannot bind a successor board in areas relating to governmental matters unless a longer term is expressly authorized in statute or the agreement/contract contains adequate provisions for a successor board to terminate. Pursuant to this public policy, the school board could not be bound by its prior assurances with respect to the school closing.

A decision to close school buildings will not be set aside unless they lack a rational basis, are arbitrary and capricious or contrary to sound educational policy. According to the record, the school board carefully reviewed the fiscal and operational impact of operating two campuses.
Notably, the district experienced an 18.7% decline from the district’s pre-annexation student enrollment and faced a projection of further decline through the 2017-18 school year (22.6%). In January 2012, the board established an ad hoc committee of board members, administrators and the superintendent to consider “the feasibility and desirability” of a single campus. That committee held public informational meetings in both Cattaraugus and Little Valley and reviewed financial, operational and educational impacts of a single campus and reported its findings to the board in February.

The board subsequently reached a consensus that a single campus option was in the best interests of the district based on budgetary savings of approximately $250,000, the avoidance of additional expenditures of over $200,000 to make necessary technological improvements so the Little Valley campus could handle on-line testing, lower transportation costs and a more unified approach to the district’s curriculum and instruction. The commissioner could not find that the board’s decision was irrational, arbitrary, capricious or contrary to sound educational policy.

Sex Offender Local Laws

1. **People v. Diack**, 24 N.Y.3d 674 (February 17, 2015).

   A sex offender challenged the validity of a local law which went beyond State law and prohibited registered sex offenders from residing within 1,000 feet of a school. The New York State Court of Appeals ruled that the adoption of local residency restrictions encroaches upon the State’s authority and hinders statewide uniformity concerning sex offender placement. It is not appropriate for any one community or county to bear an inappropriate burden in housing sex offenders because another community has created residential restrictions, according to the court. The court concluded that the State had intended to pre-empt local municipalities from exercising their police power to adopt residency restrictions aimed at sex offenders.

Student Transportation


   Petitioner appealed the district’s denial of her transportation request for her son to a non-public school. Under Education Law §3635, a student is entitled to transportation if he or she lives within 2 and 15 miles (elementary level) or 3 and 15 miles (secondary level), unless the district voters have authorized expansion of these statutory limits. In 2014-15 the district provided transportation to petitioner’s son to his private school which is located more than 15 miles from his home. The education law requires a school district to transport non-public students who live a distance greater than 15 miles from their school of attendance if the district is providing transportation to a student who lives within the mileage limitations (often referred to as the “anchor student”). In that case, the student is transported from a centralized pick up point. Additionally, if a district provided transportation to an anchor student within one of the preceding three school years it may choose to offer transportation to students who do not otherwise qualify, again using a centralized pick up point.

   The commissioner of education upheld the district’s decision to deny transportation because petitioner resides more than 15 miles from her son’s school. Although, the district transported petitioner’s son in the 2014-15 school year, it did so in error. According to the commissioner, a district has no authority to make an exception to the eligibility requirement because transportation was previously provided in error. Petitioner also argued that the district should provide the transportation because it transports students to other schools within reasonably proximity to her son’s. The district acknowledged that it previously, provided transportation under this model but in 2014 corrected this error and advised non-public school
parents and the non-public schools themselves that transportation would no longer be provided in excess of 15 miles unless statutory conditions were met. The commissioner determined petitioner’s son was not entitled to transportation and dismissed the appeal.