LEGAL ISSUES SCHOOL BOARD MEMBERS MAY ENCOUNTER

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I. CORPORATE IDENTITY AND LEGAL AUTHORITY OF A SCHOOL BOARD

LEGAL STATUS OF A SCHOOL BOARD

1. A school board is a *corporate body* that oversees and manages a public school district's affairs, personnel, and properties (§§ 1601, 1603, 1701, 2502(1), 2551).

2. As a corporate body, a school board is a legal entity that has an existence distinct and apart from its members. As such, it has the capacity for continuous existence without regard to changes in its membership. In general, the legality of a school board's contracts, policies and resolutions do not depend on its individual members.

INTERNAL STRUCTURE OF A SCHOOL BOARD

1. A school board is composed of members who are elected by the residents of the school district that the board oversees, except in some city school districts where board members are appointed by the city's mayor.

   Not more than one member of a family sharing the same household may be a member of the same school board in any school district (Educ. Law § 2103(3); *Matter of Rosenstock v. Scaringe*, 40 N.Y.2d 563 (1976); Opn. Atty. Gen., 48 St. Dep't Rep. 779 (1933); Opn. Atty. Gen., 48 St. Dep't Rep. 132 (1933)).

2. Members of a school board elect one of their own as president at the board's annual organizational meeting (§ 1701).

3. At its discretion, a school board may provide for the election of a vice president, who exercises the duties of the president in case of the president's absence or disability. If the office of school board president becomes vacant, the vice president acts as president until a new president is elected (§ 1701).

LEGAL AUTHORITY OF A SCHOOL BOARD

In General

1. The purpose and authority of a school board are found in New York's Education Law and other state laws applicable to municipal corporations and public officers.

2. "A board of education has no inherent powers and possesses only those powers expressly delegated by statute or necessarily and reasonably implied therefrom" (*Appeal of McKenna*, 42 Ed Dept Rep 54 (2002); *Appeal of Rosenkranz*, 37 Ed Dept Rep 330 (1998); *Appeal of Bode*, 33 Ed Dept Rep 260 (1993)).

3. Generally, school boards are responsible for the admission, instruction, discipline, grading, and, as appropriate, classification of students attending the public schools in their districts; for the employment and management of necessary professional and support staff; and for purchasing, leasing, maintaining, and insuring school buildings, properties, equipment, and supplies

(see generally § 1709). With the exception of large city school districts, they also must present a detailed statement of estimated expenditures (i.e., the proposed budget) for the ensuing school year, which must be submitted to the district voters annually for approval (§§ 1608, 1716, 2022, 2601-a).

Consistent with law, school boards also have the authority and duty to adopt whatever policies, rules, and bylaws they deem will best meet their statutory responsibilities and secure the best educational results for the students in their charge (see, e.g., §§ 1709(1), (2), 2503(2)), including rules and regulations concerning the order and discipline of the schools (§ 1709(2); *Appeal of Anonymous*, 48 Ed Dept Rep 503 (2009)).

4. School boards with jurisdiction over schools that have been designated as struggling or persistently struggling pursuant to the state's accountability system are required to cede authority over the struggling or persistently struggling school to a receiver (Educ. Law §211-f; see also 8 NYCRR§ 100.19).

   a. The receiver will manage and operate all aspects of the school. The receiver shall review the proposed school district budget prior to presentation to the district voters and shall have the power to modify the proposed budget to the extent it interferes with the receiver's plan to turn the school around. Any such modifications may not unduly impact other schools of the district (Educ. Law §211-f(2)(b)).

   c. The receiver shall have the power to supersede any decision, policy, or regulation of the superintendent of schools, the board of education, another school officer or the building principal that the receiver finds conflicts with the school improvement plan (*Id.*). The receiver cannot override decisions which are not directly linked to the school improvement plan, including for example, building usage and transportation of students (*Id*.).

      i. In addition, the superintendent receiver may not override a decision of the board with respect to his or her employment (Educ. Law § 211-f(1)(c)).

Exercise of Board Authority

3. As a corporate body, a school board must transact business by adopting resolutions or motions at a duly convened meeting.

   a. A quorum of the board must be present at the meeting. A majority of the board (more than half) constitutes a quorum (Gen. Constr. Law § 41). For example, three members in a five member board constitute a quorum of that board, and four members constitute a quorum in a seven member board.

   b. Resolutions and motions must be duly adopted by a majority of the whole board, not simply a majority of those board members present (Gen. Constr. Law § 41; *Matter of Coughlan v. Cowan*, 21 Misc.2d 667 (Sup. Ct. Suffolk Cty. 1959); *Downey v. Onteora CSD*, 2009 WL 2259086 (N.D.N.Y. July 29, 2009); *Appeal of Instone-Noonan*, 39 Ed Dept Rep 413 (1999); *Matter of Ascher*, 12 Ed Dept Rep 97 (1972); Opn. of Counsel #70, 1 Ed Dept Rep 770 (1952); see also *Appeal of Greenwald*, 31 Ed Dept Rep 12 (1991)). For example, if a board has five members and three are present at a meeting, all three

would have to vote in favor of a resolution for it to pass; a two-to-one vote would not be sufficient.

However, under certain statutes, a supermajority rather than a majority of the board is required for the following types of action:

(1) employing or appointing to tenure a teacher who is a relative of a school board member either by blood or marriage (2/3 vote required) (N.Y. Educ. Law § 3016; Opn. State Comp. 80-34; see also *Appeal of Gmelch*, 32 Ed Dept Rep 167 (1992); *Talley v. Brentwood UFSD*, 728 F.Supp.2d 226 (E.D.N.Y. 2010)).

(2) determining that standardization on a particular type of equipment or supplies is in the best interest of the district (3/5 vote required) (Gen. Mun. Law §103(5)).

(3) discontinuing a designated textbook within five years of adoption (3/4 vote required) (N.Y. Educ. Law § 702).

(4) placing a proposition before the voters for an object or purpose for which bonds may be issued, such as a capital project (3/5 vote required) (Local Fin. Law §33.00).

Note: This would be the case where bond counsel requires that the board approve the bond resolution prior to going to the voters for approval of the capital project. Otherwise a majority vote would be sufficient.

(5) employing a school board member as school physician (2/3 vote required) (Gen. Mun. Law §802(1)(i)).

(6) making an emergency expenditure from the district's Repair Reserve Fund (2/3 vote required) (Gen. Mun. Law §6-d(2)).

(7) to authorize a change is status of a military monument or military memorial site located on school property (2/3 vote required) (Gen. Mun. Law §99-w(2)).

c. School board meetings must be conducted in accordance with the requirements of the Open Meetings Law [Pub. Off. Law § 100 *et. seq.*; see also, Educ. Law § 1708(3)] (see section VI of these materials).

LEGAL AUTHORITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

1. Individual school board members have no inherent powers by reason of holding office (see Gen. Constr. Law § 41; *Coughlan v. Cowan*, 21 Misc.2d 667 (Sup. Ct. Suffolk Cty. 1959); *Downey v. Onteora CSD*, 2009 WL 2259086 (N.D.N.Y. July 29, 2009); *Appeal of Silano*, 33 Ed Dept Rep 20 (1993); *Matter of Bruno*, 4 Ed Dept Rep 14 (1964)).

2. Absent a specific delegation of authority by the school board to act as the representative of the board for a particular purpose, individual board members have no greater rights or authority than any other qualified voter of the district (*Id*.).

For example, individual school board members have the same right as parents or district residents to visit the schools in accordance with the procedures that apply to the public in general. They need board authorization to enter schools for official purposes, such as for building inspection or interviewing staff (*Appeal of Silano, Matter of Bruno*; see also *Appeal of Balen*, 40 Ed Dept Rep 479 (2001) (individual board members lack authority to direct supervisors regarding employees' overtime work)

3. School board members have a right to express their own personal views on school district issues. However, school board members who wish to express their personal opinions about issues before the voters must:

   a. Clearly distinguish their personal views from those of the board. For example, when writing a letter to the editor of a newspaper in support of a voter proposition, school board members must be sure to explicitly state that the letter expresses their personal views (*Appeal of Wallace*, 46 Ed Dept Rep 347 (2007)).

   b. Not use district funds, facilities or channels of communication to encourage voters to vote in support of or against the school budget or any proposition (*Appeal of Johnson*, 45 Ed Dept Rep 469 (2006); *Appeal of Goldin*, 40 Ed Dept Rep 628 (2001); see also *Appeal of Grant*, 42 Ed Dept Rep 184 (2002); *Appeal of Allen*, 39 Ed Dept Rep 528 (2000)).

4. Individual school board members are empowered to call a special meeting of the school board pursuant to Education Law § 1606(3). Any meeting called by an individual school board member must comply with the provisions of the Open Meetings Law (see section VI of these materials).

II. SCHOOL BOARD ETHICS

STATUTORY CONFLICTS OF INTEREST

Prohibition against Conflicts of Interest

1. The term *conflict of interest* describes a situation in which a school board member, district officer, or employee is in a position to benefit personally from a decision he or she may make on behalf of the district through the exercise of official authority or disposing of public funds.

   a. *Interest* is defined as a direct or indirect pecuniary or material benefit that runs to the officer, or employee as a result of a contract with the school district (Gen. Mun. Law § 800(3), see *Appeal of Chiacchia*, 53 Ed Dept Rep, Dec. No. 16,593 (2014)).

   b. *Contract* is defined to include any claim, account or demand against, or agreement, express or implied, as well as the designation of a depository of public funds or a newspaper for use by the school district (Gen. Mun. Law § 800(2)).

2. Article 18 of the General Municipal Law identifies the specific type of situations that give rise to prohibited conflicts of interest for municipal officers and employees, along with some exceptions. The Legislature has expressly made those provisions of law applicable to school districts and boards of cooperative educational services (BOCES) (Gen. Mun. Law § 800(4)).

Prohibited Interests

The General Municipal Law prohibits school board members, district officers and employees from having the following personal interests:

1. Interest in a contract with the school district where a school board member, district officer or employee has the power or may appoint someone who has the power to negotiate, authorize, approve, prepare, make payment, or audit bills or claims under the contract unless otherwise exempted under law (Gen. Mun. Law §§ 801(1); 802).

2. Interest by a chief fiscal officer, treasurer, or his or her deputy or employee in a bank or other financial institution that is used by the school district he or she serves (Gen. Mun. Law §801(2)).

   Note: Interests which are not prohibited but which nonetheless may create an appearance of impropriety may be restricted by a school board's code of ethics, as long as the restriction is not inconsistent with other provisions of law (Opn. St. Comp. 88-77; *Appeal of Behuniak and Lattimore*, 30 Ed Dept Rep 236 (1991)). (Code of ethics requirements are discussed at pp. 8-10).

Interests That May Give Rise to a Prohibited Conflict

School board members, district officers and employees are deemed to have an "interest" in a contract between their school district and

1. Their spouse, minor child or dependent, except a contract of employment (Gen. Mun. Law § 800(3)(a); *Appeal of Budich*, 48 Ed Dept Rep 383 (2009); *Appeal of Lombardo*, 44 Ed Dept Rep 167 (2004); *Appeal of Lawson*, 42 Ed Dept Rep 210 (2002); *Appeal of Kavitsky*, 41 Ed Dept Rep 231 (2001)).

   a. The Education Law requires a two-thirds vote by the board to employ a *teacher* who is related to a board member by blood or by marriage (Educ. Law § 3016).

      (1) The two-thirds vote requirement does not apply and has no effect on the continued employment of a teacher hired and tenured before the board member is elected or appointed to the board (*Appeal of Heizman*, 31 Ed Dept Rep 387 (1992)).

      (2) The two-thirds vote does not apply to the reinstatement from a preferred eligibility list of a former employee whose position was abolished because the reinstatement implements a statutory mandate (*Appeal of Gmelch*, 32 Ed Dept Rep 167 (1992))

   b. In a case involving the president of a public library board, the New York State Comptroller opined that there was no prohibited conflict of interest preventing the library board from contracting with an architectural firm that employed the board president's daughter because she was an adult and not a "minor child or dependent." However, the comptroller stated in this same opinion that the library president should recuse himself from any discussions or votes relating to the contract to avoid even the appearance of impropriety (Opn. St. Comp. 91-26).

2. A firm, partnership, or association in which they are a member or employee (Gen. Mun. Law § 800(3)(b)).

3. A corporation of which such officer or employer is an officer, director or employee (Gen. Mun. Law § 800(3)(c)).

4. A corporation in which they directly or indirectly own or control stock (Gen. Mun. Law § 800(3)(d)**;** see also *Appeal of Golden*, 32 Ed Dept Rep 202 (1992) (board member had a prohibited conflict of interest when the district purchased heating oil from a company where he served as president and owned more than 5% of the stock)).

Exceptions

The General Municipal Law identifies certain situations in which a contract does not involve a prohibited conflict of interest. In addition to a contract of employment as discussed above, some of those exceptions include the following circumstances:

1. The school board member, district officer or employee is merely an employee of the entity that has a contract with the school district, and their compensation is not directly affected as a result of the contract, and their duties do not directly involve the procurement, preparation or performance of any part of the contract (Gen. Mun. Law § 802(1)(b); see *Appeal of Vivlemore*, 33 Ed Dept Rep 174 (1993)).

2. The contract is between the district and a membership corporation or other voluntary not-for-profit corporation or association – such as a collective bargaining agreement between a district and one of its employee organizations (Gen. Mun. Law § 802(1)(f)).

   Regarding this exception, it has been expressly ruled that:

   a. A personal interest arising out of a collective bargaining agreement is not a prohibited interest under the law (*Stettine v. County of Suffolk*, 66 N.Y.2d 354 (1985); see also Opn. St. Comp. 89-24).

   b. Board members may vote on collective bargaining agreements applicable to their relatives (*Appeal of Budich*, 48 Ed Dept Rep 383 (2009); *Appeal of Behuniak and Lattimore*, 30 Ed Dept Rep 236 (1991)).

   c. Board members who are retired district employees may vote on a collective bargaining agreement even though they receive medical insurance benefits under the agreement as a result of their status as retired district employees (*Application of Casazza*, 32 Ed Dept Rep 462 (1993); *Appeal of Samuels*, 25 Ed Dept Rep 228 (1985)).

3. The contract was already in existence prior to the time of election or appointment, except that the contract may not be renewed (Gen. Mun. Law § 802(1)(h); see also Opn. St. Comp. 86-58 (no conflict where newly elected board member was employed by corporation that prior to his election was awarded contract to install and maintain telephone system, but renewal may be problematic)).

4. The contract is for employment as school physician for a school district upon authorization by two-thirds vote of the school board (Gen. Mun. Law § 802(1)(i)).

5. The contract is between a district and a corporation in which a school board member, district officer or employee holds less than 5% of the corporation's outstanding stock (Gen. Mun. Law § 802(2)(a)).

6. The total amount paid pursuant to the contract or multiple contracts during the fiscal year is less than $750 (Gen. Mun. Law § 802(2)(e)).

Determining the Existence of a Prohibited Conflict

To decide if one of its members has a prohibited conflict of interest, a school board must determine whether:

1. There is a "contract" with the school district.

2. The board member in question has an interest in that contract.

3. The board member is authorized to exercise any of his or her powers or duties with respect to the agreement such as, for example, negotiating, preparing, authorizing or approving the contract and payments under the contract.

4. There is any applicable exception.

Disclosure of Interest Requirement

1. School board members, district officers or employees must publicly disclose any interest they or their spouse may have, will have, or later acquire in any actual or proposed contract, purchase agreement, lease agreement or other agreement involving the district, including oral agreements, even if the interest is not a prohibited interest (Gen. Mun. Law § 803(1)).

2. The disclosure must be made:

    a. to the school board, and immediate supervisor where applicable, as soon as an actual or prospective interest is discovered;

    b. in writing and indicate the nature and extent of the interest;

    c. part of the official record of the district (Gen. Mun. Law § 803(1)).

3. Disclosure is not required in the case of an interest in a contract that falls under one of the exceptions to the conflicts of interest prohibition (Gen. Mun. Law § 803(2)).

Consequences for Violations of the Conflicts of Interest Prohibition

1. A school board member, district officer or employee who knowingly and willfully violates the conflicts of interest law or fails to disclose an interest, is guilty of a misdemeanor (Gen. Mun. Law § 805).

    A school board member who engages in such misconduct is also subject to removal from office by the commissioner of education (*Appeal of Golden*, 32 Ed Dept Rep 202 (1992)).

2. Any contract willfully entered into in violation of the conflicts of interest prohibition is void and unenforceable (Gen. Mun. Law § 804).

3. A court may invalidate board action that technically does not involve a violation of the statutory conflict of interest prohibition if there is, nonetheless an appearance of impropriety on the part of one of the board members regarding the subject matter of that action. That was the case, for example, where a member of a town board voted to grant a construction permit to a client of his advertising agency (*Matter of Tuxedo Conservation and Taxpayers Assoc. v. Town Board*, 69 A.D.2d 320 (2d Dep't 1979); see also *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281 (2d Dep't 1985); *Matter of Conrad v. Hinman*, 122 Misc.2d 531 (Sup. Ct. Onondaga Cty. 1984)).

Posting Requirement

1. The superintendent of schools also must ensure that the district posts a copy of General Municipal Law sections 800-809 in each public building owned by the district in a place conspicuous to its officers and employees (Gen. Mun. Law § 807).

2. Failure to post a copy of Article 18 does not affect the duty to comply with the prohibited conflicts of interest law or with the enforcement of that law (Gen. Mun. Law § 807).

THE CODE OF ETHICS

Basic Requirement

1. School boards must adopt a code of ethics for the guidance of its officers and employees that sets forth the standards of conduct that are reasonably expected of them (Gen. Mun. Law § 806).

2. Pursuant to law, the code of ethics must provide standards with regard to:

    a. disclosure of interest in legislation before the school board;

    b. holding of investments in conflict with official duties;

    c. private employment in conflict with official duties;

    d. future employment; and

    e. such other standards relating to the conduct of officers and employees as may be deemed advisable (Gen. Mun. Law § 806(1)(a); see also *Appeal of Hubbard*, 43 Ed Dept Rep 164 (2003); Opn. St. Comp. 82-189). For example, it would be appropriate for a school board to require that a board member recuse himself or herself:

        (1) when the board is discussing or voting on accepting a gift from a not-for-profit corporation when the member also sits on the board of the not-for-profit (Opn St. Comp. 2008-1); or

        (2) granting defense and indemnification to school officers and employees in a lawsuit when the member is a plaintiff (*Appeal of Laub et al*, 48 Ed Dept Rep 481 (2009)).

Prohibited Actions Notice Requirement

1. A school board's code of ethics must include notice of the types of conduct that are specifically prohibited by law.

2. School board members, district officers, and employees are specifically prohibited from:

    a. Soliciting or accepting gifts worth more than $75 under circumstances where it reasonably could be inferred that the gift was intended to influence or reward official action, except that the code of conduct can set that figure lower, though not higher (Gen. Mun. Law § 805-a(1)(a); Opn. Att'y Gen. 95-10; see also Penal Law §§ 200.00, 200.10).

        (1) According to the commissioner of education the gift prohibition applies not only when there is actual intent to influence a school official's decision but also when, regardless of intent, "there is an appearance that a gift will influence the official." Therefore, individual board members must be "scrupulous in their adherence to the gifts prohibitions contained in [law] and board policy" and avoid even the appearance of impropriety. For example, where board members attended a client reception hosted by a school district's law firm**,** the commissioner said that even if there is already an existing attorney-client relationship, it could "reasonably be inferred" that the reception was intended to influence or "could reasonably be expected to influence" a board's decision to continue its business relationship with the law firm, or that it was intended to reward the board for past actions including the retention of the firm's services (*Appeal of Dafshefsky*, 46 Ed Dept Rep 219 (2006)).

        (2) The commissioner recommends that school board members review a 1994 advisory opinion from the State Ethics Commission, as well as a 2008 review of the 1994 advisory opinion by the State Commission on Public Integrity, to better understand how they can scrupulously observe the gift prohibitions applicable to them. Even though that decision and the 2008 review are not otherwise binding on school districts, the commissioner of education deems them instructive in guiding board members' actions (*Id.*). The 2008 opinion can be found online at: http://www.jcope.ny.gov/advice/cpi/2008/Advisory_Opinion_08-01.pdf

    b. Disclosing confidential information acquired during the course of a school district officer's or employee's official duties or using such information to further a personal interest (Gen. Mun. Law § 805-a(1)(b); *Appeal of Nett and Raby*, 45 Ed Dept Rep 259 (2005)).

    c. Representing clients for compensation before the board or district (Gen. Mun. Law § 805-a(1)(c)).

    d. Entering into contingency arrangements with clients for compensation in any matter before the school board or district (Gen. Mun. Law § 805-a(1)(d)).

    e. With certain limited exceptions, having an interest in any contract, lease, purchase or sale over which a school district officer or employee has any responsibility to negotiate, prepare, authorize, approve or audit (Gen. Mun. Law §§ 800-805).

Penalties for Prohibited Actions

1. In addition to any penalty contained in any other provision of law, section 805-a(2) of the General Municipal Law subjects individuals who knowingly and intentionally engage in any of the above types of prohibited conduct to a fine, suspension, or removal from office or employment (Gen. Mun. Law §§ 800-805).

2. A school board member or district officer who is convicted of certain crimes involving the school district may be required by the court to make restitution up to the full amount of the actual out-of-pocket loss suffered by the district (Penal Law §§ 60.27).

Local Code Development Flexibility

1. School boards can adapt their district's code of ethics to their unique needs and circumstances. However, a code of ethics may not include provisions that are inconsistent with state law (*Appeal of Grinnell*, 37 Ed Dept Rep 504 (1998); *Appeal of Behuniak and Lattimore*, 30 Ed Dept Rep 236 (1991)).

2. A code of ethics provision is inconsistent with state law if it "contradicts, is incompatible or inharmonious with it" (*Appeal of Behuniak and Lattimore*, citing *Town of Clifton Park v. C.P. Enterprises*, 45 A.D.2d 96 (3d Dep't 1976)). For example, a code of ethics may not:

    a. impose eligibility requirements for board membership beyond those set forth in section 2102 of the Education Law because the Legislature has specifically limited those requirements to the ability to read and write, being a resident of the district within the statutorily prescribed time, and being a qualified voter of the district (*Matter of Board of Educ. of the Guilderland CSD*, 23 Ed Dept Rep 262 (1984).

    b. prohibit board members from negotiating or voting on the employment contract of their spouses because the General Municipal Law exempts from the list of prohibited conflicts of interest an interest in the employment contract of a spouse, minor children and dependents (Gen. Mun. Law §§ 800(3), 801; *Appeal of Lombardo*, 44 Ed Dept Rep 167 (2004); *Appeal of Grinell; Appeal of Behuniak and Lattimore*). Furthermore, in the case of teachers, section 3016(2) of the Education Law allows the employment of school board member relatives as teachers if their employment is approved by two-thirds vote of the board members (*Appeal of Behuniak and Lattimore*).

        However, requiring recusal when a board is addressing employment issues of a relative other than a spouse, minor child or dependent may be appropriate (see Opn. St. Comp. 91-26; Opn. Att'y Gen. 88-34; 96-17; 99-21).

    c. impose a board supermajority voting requirement without specific statutory authority because section 41 of the General Construction Law generally requires only a majority of the whole number for board action (*Matter of Miller*, 17 Ed Dept Rep 275 (1977)).

Distribution, Filing, and Public Access Requirements

1. The superintendent of schools must distribute a copy of the code of ethics to every district officer and employee. However, school district officers and employees must enforce and comply with the code of ethics even if they do not actually receive a copy of it (Gen. Mun. Law § 806(2)).

2. The code of ethics is subject to public review and access under the Freedom of Information Law and section 806(3) of the General Municipal Law.

DUTY OF CONFIDENTIALITY

1. Pursuant to the General Municipal Law, school board members, district officers and employees may not disclose confidential information acquired by them in the course of their official duties (Gen. Mun. Law § 805-a(1)(b)).

   a. The General Municipal Law does not define the term "confidential information". According to one state court, interpretation of what is confidential in the school context is best left to the commissioner of education (*Komyathy v. Board of Educ. Wappinger CSD No. 1*, 75 Misc.2d 859 (Sup. Ct. Dutchess Cty. 1973)).

      According to the commissioner of education, matters discussed in a lawfully convened executive session are confidential and their disclosure constitutes a violation of the General Municipal Law's prohibition as well as a violation of a school board member's oath of office, which subject a school board member to removal from the board (*Application of Nett and Raby*, 45 Ed Dept Rep 259 (2005); see also *Application of Nett and Raby: Disclosure of Confidential Information Learned During Executive Session*, Dec. 9, 2005, from State Education Department counsel Kathy A. Ahearn, available at http://www.counsel.nysed.gov/memos/nett.html). There would be no such violation where a board collectively decides to release such information, or where an individual board member is compelled to disclose such information pursuant to law in the context of a judicial proceeding (*Id.*). (Executive sessions and the Open Meetings Law are discussed in more detail in section VI of these materials).

      Note: Taking a contrary view, the Executive Director of the Committee on Open Government has stated that information discussed in executive session may be disclosed unless a specific statute confers or requires confidentiality (OML-AO-3463 (2002); OML-AO-3449 (2002); OML-AO-3219 (2000)). The commissioner disagrees, considering that opinion a "narrow interpretation of the term 'confidential'" (*Application of Nett and Raby*). According to the state supreme court, taping an executive session violates the confidentiality of the session (*Stephenson. v. Bd. of Educ. of Hamburg Cent. School Dist.*, 31 Misc.3d 1227(A) (Sup. Ct. Erie Cty. 2011)).

   b. The Family Educational Rights and Privacy Act, also known as the "Buckley Amendment" or "FERPA" prohibits the disclosure of personally identifiable information about a student without prior consent from the student's parent or the student if the student is 18 years of age, unless one of the exceptions specified in the law and its implementing regulations apply (20 U.S.C. § 1232g(b)(2)(B); *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002); *Taylor v. Vermont Dep't of Education*, 313 F.3d 768 (2d Cir. 2002)).

INCOMPATIBILITY OF OFFICE

The term *incompatibility of office* applies to situations where two public offices or positions of employment may be in conflict with each other, and relates to whether an individual may hold two such offices or positions simultaneously (*People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874)). School board

members, district officers or employees may be prohibited from simultaneously holding such positions either by statute or under the common law doctrine of compatibility of office.

Statutory Prohibitions

1. The Education Law expressly prohibits school board members from simultaneously holding certain other offices or employment positions. These include:

    a. District superintendent, school tax collector, treasurer, librarian, and clerk, except that in union free and central school districts a school board may appoint one of its members as board/district clerk (Educ. Law §§ 2103(1); 2130(1); 1804(1)); *Matter of Hurtgam*, 22 Ed Dept Rep 219 (1982)).

    b. Employment positions in the school district in which they serve as a board member (Educ. Law § 2103(4)).

        In addition, board members of a board of cooperative educational services (BOCES) may not be employed by any of the BOCES' component districts (Educ. Law § 1950(9); *Appeal of Reynolds*, 42 Ed Dept Rep 278 (2003), including in an occasional employment capacity such as a per diem substitute teacher (Opn. Att'y Gen. I 2007-2).

    c. Members of a small city school board may not hold any city office other than that of police officer or firefighter (Educ. Law § 2502(7); Opn. Att'y Gen. I 96-2; Opn. Att'y Gen. I 90-80; Opn. Att'y Gen. I 87-6; Opn. Att'y Gen. I 84-61; *Application of Washock*, 41 Ed Dept Rep 280 (2002)).

2. The Town Law prohibits a town supervisor from serving simultaneously as a school board member (Town Law § 23(1)).

3. The Election Law prohibits an individual from simultaneously serving as a county elections commissioner and a school board member in a city school district (Elec. Law § 3-200(4); see also *Appeal of Fries*, 50 Ed Dept Rep, Dec. No. 16,182 (2011); Opn. Att'y Gen. I 87-50).

Common Law Incompatibility

1. Under the common law doctrine of compatibility of office, school board members, district officers and employees are prohibited from simultaneously holding positions that are incompatible with each other either because:

    a. one of them is subordinate to the other, such that the person would essentially be his or her own boss, or
    b. the functions of both positions are inherently inconsistent with each other, such as the positions of district's finance office and auditor responsible for the integrity of the district's finances (see *O'Malley v Macejka*, 44 N.Y.2d 530 (1978); Opn. Att'y Gen. I 92-13).

2. The Office of the State Attorney General has determined that, under the common law doctrine of compatibility of office, school board members may not simultaneously serve, for example, as a:

a. Member of a board of education of a private school located within their school district (Opn. Att'y Gen. I 87-58).

b. District attorney with jurisdiction over the school district (Opn. Att'y Gen. I 2000-13).

3. The State Advisory Committee on Judicial Conduct has determined that a part-time judge may not seek election to or serve as a local school board member (Advisory Committee on Judicial Ethics Opns. 09-90, 90-79, 89-157/90-7; 22 NYCRR § 100.5(A)(1)(c), (d)). In contrast, the Advisory Committee has opined that a part-time judge may serve on a BOCES board because that board is not popularly elected and does not levy taxes (Advisory Committee on Judicial Ethics Opn. 03-135). Similarly, part-time justices may accept "appointment" as a school board member to a publicly-funded school district for children with disabilities (special act school districts) (Advisory Committee on Judicial Ethics Opns. 13/166/ 13-166(A); 94-59).

Consequences of Incompatibility

1. The common law doctrine of compatibility of office does not disqualify an incumbent from running for a second office, but once elected the doctrine would prevent that individual from holding both offices (Opn. Att'y Gen. I 89-62).

   Upon accepting the second office or position, an individual vacates the first office automatically, by operation of law (Opn. Att'y Gen. I 89-62; *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874)).

2. School board members, district officers or employees may be candidates for a second office or position that is incompatible with their first, if they intend to resign from the first one if elected or appointed to the second.

   However, according to the Office of the Attorney General, a statute that establishes incompatibility disqualifies an individual from being a candidate for election to the second office (*Id*.; Opn. Att'y Gen. I 87-50).

III. SCHOOL DISTRICT AND BOARD MEMBER LIABILITY

IN GENERAL

1. A school district may be liable as a corporate entity for:

   a. its own negligence and other improper actions such as breach of contract;

   b. the wrongful actions of school board members; and

   c. the negligence of its employees under the doctrine of *respondeat superior* which makes a master responsible for the negligence of its employees when the negligence occurs during the performance of an employee's responsibilities and results in injury to others (*Helbig v. City of New York Board of Educ*., 212 A.D.2d 506 (2d Dep't 1995)).

   Negligence is a legal principle that imposes liability on entities and individuals who breach a duty they owe to others, thereby causing them injury.

2. School board members are not exempt from lawsuits brought against them personally. However, there is immunity for school board members when they carry out official functions within the context of a school board meeting if those functions:

   a. are not exclusively ministerial (one that occurs by virtue of direct adherence to a rule or standard); and

   b. involve the exercise of discretion or expert judgment in policy matters (see *Haddock v. City of New York*, 75 N.Y.2d 478 (1990); *Frank v. Lawrence UFSD*, 688 F.Supp.2d 160 (S.D.N.Y. 2010)).

3. School districts must defend and indemnify school board members and employees for all reasonable costs and expenses, including awards that result from any action or proceeding arising out of the exercise of their powers or the performance of their duties (Educ. Law §§ 3023, 3811).

   Any such costs and expenses must be approved pursuant to a board resolution that also authorizes the levying of a tax for such purposes (Educ. Law § 3811(1)). These costs are included in the next annual budget (Educ. Law § 3812).

4. There are two exceptions to a school district's general duty to defend and indemnify school board members and employees:

   a. The action or proceeding is one brought by the school district itself;

   b. The action is a criminal action brought against the individual (Educ. Law § 3811(1); *Appeal of Jones-White*, 44 Ed Dept Rep 347 (2005)), except that a school district must defend and indemnify teachers or authorized volunteers in a criminal action arising out of disciplinary action taken against a student during the performance of duties within the scope of employment or authorized volunteer duties when the disciplinary action was taken (Educ. Law § 3028; *Inglis v Dundee CSD Bd. of Educ.*, 180 Misc.2d 156 (Sup. Ct. Yates Cty. 1999); see also *Cromer v. City School Dist. of Albany Bd. of Ed.*, NYLJ, Apr. 15, 2002, Sup. Ct. Albany Cty. (2002)).

5. Before a school district can defend or indemnify a school board member or employee, such individual must comply with the procedures set forth in law, including but not limited to:

   a. Notifying the board in writing of the commencement of a proceeding against him or her within five days after being served (Educ. Law § 3811(1)) and delivering to the school board a copy of the litigation papers in the manner required by law (see Educ. Law §§ 3023; 3028).

      The school board has 10 days to designate and appoint legal counsel for the board member or employee. Failure to do so means the board member or employee may select his or her own counsel (*Id.*).

   b. Obtain a "certificate of good faith" from an appropriate court or the commissioner of education that certifies the individual appeared to have acted in good faith with respect to the exercise of his or her powers or the performance of duties (Educ. Law § 3811(1)). Generally, a certificate of good faith will be issued unless the individual is found to have

acted in bad faith (*Applications of Zimmerman and Christofides*, 42 Ed Dept Rep 205 (2002)).

6. A school board may adopt a resolution containing alternative defense and indemnification provisions pursuant to section 18 of the Public Officers Law.

   a. Depending on the exact language of the resolutions, coverage under section 18 of the Public Officers Law may supplant or supplement the protection provided under the Education Law discussed above. In order to supplement the Education Law protection, the resolution must do so explicitly (see *Matter of Percy*, 31 Ed Dept Rep 199 (1991)).

   b. Under section 18 of the Public Officers Law, a school district's responsibilities would be limited to the type of cases covered by the statute, provided that the school board member or employee was acting within the scope of his or her duties when the allegedly wrongful act occurred. It is not necessary to obtain a good faith certificate to be protected under the statute.

CIVIL RIGHTS LIABILITY

1. Civil rights liability (also known as "Section 1983 actions") arises under section 1983 of the federal Civil Rights Act of 1876 under which liability attaches to any person who, "acting under color of state law" deprives a person of his or her federal constitutional and/or statutory rights. Section 1983 provides a mechanism through which a plaintiff can bring a lawsuit against a school district or official for violation of a federal right, when there otherwise would be no remedy for the violation (*Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *Bracey v. Board of Educ. of City of Bridgeport*, 368 F.3d 108 (2d Cir. 2004)).

   Liability is based not on the negligent acts of a school district or its officials or employees, but rather on whether the individual who is suing enjoyed a protected federal right, a school district official or employee deprived him or her of that right, and the cause of that deprivation was an official practice, policy or custom (42 U.S.C. § 1983; *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Connick v. Thompson*, 131 S.Ct. 1350 (2011)).

2. Policy, for purposes of a civil rights action, includes:

   a. policies and decisions officially adopted by a school board;

   b. regulations and decisions adopted and promulgated by school officials to whom the school board has delegated final policy-making authority in the particular area in question, and

   c. widespread practices of school officials and employees which, although not authorized by adopted policy, are so common and well settled as to constitute a custom that fairly represents district policy (*St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Vives v. City of New York*, 524 F.3d 346 (2d Cir. 2008); *Delrosario v. City of New York*, 2010 U.S. Dist. LEXIS 20923 (S.D.N.Y. Mar. 4, 2010); *Lopez v. Bay Shore UFSD*, 668 F.Supp.2d 406 (E.D.N.Y. 2009)).

3. Courts have established numerous theories under which school districts and school officials could be subjected to civil rights liability, including:

a. Deliberate indifference by school officials to the federal constitutional and statutory rights of others, such as the failure to properly train staff or to effectively address a hostile environment created by repeated incidents of harassment (*Canton v. Harris*, 482 U.S. 378 (1980); see *Zeno v. Pine Plains* CSD, U.S. Dist. LEXIS 42848 (S.D.N.Y. May 19, 2009), *aff'd,* 702 F.3d 655 (2d Cir. 2012); *T.K. v. New York City Dep't of Educ.*, 779 F.supp.2d 289 (EDNY 2011), 32 F.Supp.3d 405 (EDNY 2014), aff'd 810 F.3d 869 (2d Cir. 2016); Holt *v. Carmel CSD*, 994 F.Supp. 225 (S.D.N.Y. 1998)).

b. The existence of a special relationship that imposes on school officials an affirmative duty of care and protection (*DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

c. A violation of an individual's substantive due process rights as a result of "…egregious conduct which goes beyond merely 'offending' some fastidious squeamishness or private sentimentalism' and can fairly be viewed as so 'brutal' and 'offensive to human dignity' as to shock the conscience" (*Smith v. Half Hollow Hills CSD*, 298 F.3d 168 (2d Cir. 2002)).

d. The existence of a state-created danger where injury results from the creation of a substantially dangerous environment by state actors who knew about the danger, and the opportunity for injury would not have existed but for the exercise of governmental authority creating that opportunity (see *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998); but see *Martin v. Shawano-Graham Sch. Dist.*, 295 F.3d 701 (7th Cir. 2002)).

4. The availability of immunity from personal liability in a civil rights action will depend on the specific circumstances of the case.

a. In general, school board members and district employees may be held individually liable if (a) the law is defined with reasonable clarity, (b) the U.S. Supreme Court or the Second Circuit Court of Appeals (the federal appeals court with jurisdiction over New York State) has recognized the right alleged to be violated, and (c) a reasonable defendant would have known from existing law that his or her conduct was unlawful (*Talley v. Brentwood UFSD*, 728 F.Supp.2d 226 (E.D.N.Y. 2010); *Luna v. Pico*, 356 F.3d 481 (2d Cir. 2004)).

They would enjoy "qualified immunity" if their actions or their performance of "'discretionary functions'…do not violate a clearly established federal constitutional or statutory right of which a reasonable person would have known" (*Davis v. Scherer*, 468 U.S. 183, 191 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Harhay v. Town of Ellington Board of Educ.*, 323 F.3d 206 (2d Cir. 2003); *Doninger v. Niehoff*, 2011 WL 1532289 (2d Cir. 2011); *DT v. Somers Cent. Sch. Dist.*, 588 F.Supp.2d 485 (S.D.N.Y. 2008), *aff'd* 348 Fed. Appx. 697 (2d Cir. 2009).

b. School board members may not be held personally liable in a civil rights lawsuit related to their performance of legislative activities. But they would be personally liable in connection with actions that are not legislative in nature.

An example of a legislative activity would be a determination to abolish staff positions, but not the hiring and firing of a particular employee (*Bogan v. Scott-Harris*, 523 U.S. 44

(1998); see also *Harhay v. Town of Ellington Board of Educ.*, 323 F.3d 206 (2d Cir. 2003)).

5. A prevailing party in a civil rights lawsuit against school district would be entitled to recover attorneys' fees from the district (42 U.S.C. § 1988)).

6. Under the New York State Human Rights Law, school districts may be assessed civil fines and penalties of up to $100,000 under specified circumstances (Exec. Law § 297(4)(c)(vi)). Such a fine or penalty does not offset or reduce any damages or payments that may otherwise be awarded to a successful plaintiff alleging a state Human Rights Law violation (Exec. Law § 297(4)(e)).

   Note: The New York State Court of Appeals has ruled that the State Division of Human Rights lacks jurisdiction to investigate complaints against school districts under that provision (*North Syracuse Cent. School Dist. v. New York State Division of Human Rights*, 19 NY3d 481 (2012)).

IV. DISCIPLINE AND REMOVAL OF SCHOOL BOARD MEMBERS

CENSURE OR REPRIMAND

1. There is no authority for either a school board or the commissioner of education to censure or reprimand a school board member (*Appeal of L.S.*, 44 Ed Dept Rep 142 (2004)).

2. A school board may criticize the exercise of poor judgment by one of its members (*Appeal of Silano*, 33 Ed Dept Rep 20 (1993)). Any criticism must be carefully worded to avoid the tone of formal disciplinary charges, or it will be found invalid (*Appeal of L.S.*).

REMOVAL FROM OFFICE BY THE COMMISSIONER

1. A school board member may be removed from office by the commissioner of education for willful violation or neglect of duty or the willful disobedience of a law or decision, order or regulation of the commissioner or the Board of Regents (Educ. Law §§ 306, 1706, 2559; see also 8 NYCRR Part 277).

   a. To be considered willful, a school board member's actions must have been "intentional with a wrongful purpose" to disregard a lawful duty or violate a legal requirement (*Appeal of Budich*, 48 Educ Dept Rep 383 (2009); *Application of Student with a Disability*, 43 Ed Dept Rep 227 (2003); *Appeal of Santicola*, 42 Ed Dept Rep 356 (2003)).

   b. Generally, a board member who acts in good faith on the advice of counsel will not be found to have acted with the requisite willfulness to warrant removal (*Appeal of Nett and Raby*, 45 Ed Dept Rep 167 (2005); *Application of Kavitsky*, 41 Ed Dept Rep 231 (2001)), unless the advice of counsel contradicts established law (*Appeal of Scarrone*, 35 Ed Dept Rep 443 (1996); see also *Matter of BOCES*, 32 Ed Dept Rep 519 (1993)).

2. Although the commissioner considers removal from office a drastic remedy that should be taken only in extreme circumstances, he has indicated that behavior that interferes with a board's ability

to function warrants removal (see *Application of Gabryel*, 44 Ed Dept Rep 235 (2005); *Application of Lilly*, 43 Ed Dept Rep 459 (2004)).

That was the case, for example, where a board member threatened and initiated a physical altercation during a board meeting because such conduct breached the board member's "duty to engage in constructive discussion" on matters affecting the governance of the district (*Appeal of Kozak*, 34 Ed Dept Rep 501 (1995)).

REMOVAL BY THE SCHOOL BOARD

1. A school board may remove any of its members for "official misconduct" – that is, misconduct relating to a board member's official duties (Educ. Law § 1709(18)). That would be the case when a board member:

   a. engages in an unauthorized exercise of power (*Application of Balen*, 40 Ed Dept Rep 479 (2002) (removal of board member who settled employee grievances and directed overtime work without board authorization upheld), or

   b. intentionally fails to exercise power to the detriment of the district (*Appeal of Nelson*, 49 Educ Dept Rep 82 (2009); see also *Appeals of Gill and Burnett*, 42 Ed Dept Rep 89 (2002); *Matter of Cox*, 27 Ed Dept Rep 353 (1988)).

2. According to the commissioner board members have an "affirmative duty" to complete their fiscal training within one year of taking office. The mandatory training is a "critical component of the fiscal accountability legislation…." (*Appeals of Stepien and Lilly*, 47 Ed Dept Rep 388 (2008)). In that case, procedural defects forced the commissioner to reinstate the board members who failed to take the required training in the proscribed time. However, this decision underscores the importance of school board members completing their required training in a timely fashion to avoid potential removal from office.

3. In *Appeal of Nelson*, 49 Ed Dept Rep 82 (2009), a board member disclosed confidential student identification numbers from individualized education plans (IEPs) to state education department representatives and the media. The board adopted a resolution directing her to disclose to whom she had revealed the information and return any documents containing personally identifiable student information to the board's attorney. She refused**,** claiming she was entitled to retain the information as her "research work." The board held a hearing and found her guilty of these and other charges. On appeal, the commissioner deemed her actions a violation of her duties of confidentiality and her duties to the board, and constituted sufficient basis for her removal.

V. Role of the School Attorney

THE SCHOOL ATTORNEY'S ROLES AND RESPONSIBILITIES

1. The specific responsibilities school attorneys will be asked to fill vary from district to district, depending on the preferences and needs of the school board.

   a. The board may choose to appoint one firm to do all work for the district.

b. Other boards opt to retain a firm or individual attorney as general counsel and contract with other specialists to perform work such as special education, labor negotiations, or tax certiorari proceedings.

2. School attorneys may be asked to perform such duties as:

a. Serving on the district's negotiating team, or leading negotiations on behalf of the superintendent and school board during collective bargaining conducted pursuant to the Taylor Law;

b. Negotiating and drafting employment contracts, including those between the board and the superintendent of schools;

c. Advising the district regarding its responsibilities to students with disabilities, and representing the district during special education due process hearings and appeals;

d. Attending board meetings and executive sessions of the board to address legal questions that may arise;

e. Providing staff development and/or training on legal issues such as child abuse reporting requirements, student discipline, and the like;

f. Representing the district in tax certiorari proceedings;

g. Directing and conducting staff and student disciplinary investigations, hearings, and appeals; and

h. Providing day to day guidance on questions from the school board, superintendent and other members of the administration.

SELECTING A SCHOOL ATTORNEY

1. There is no legal requirement that school boards retain legal counsel to represent the board and the district. Further, the school attorney is not a district officer (*Matter of McGinley*, 23 Ed Dept Rep 350 (1984), citing *Matter of Harrison CSD v. Nyquist*, 59 A.D.2d 434 (3d Dep't 1977), *appeal denied*, 44 N.Y.2d 645 (1978)).

2. Depending on the employment relationship between the board and attorney, the attorney might be considered an independent contractor or an employee of the district.

a. For this purpose, an employee means "an individual performing services for the employer for which the employer has the right to control the means and methods of what work will be done and how the work will be done" (2 NYCRR § 315.2(b)). An independent contractor "shall mean a consultant or other individual engaged to achieve a certain result who is not subject to the direction of the employer as to the means and methods of accomplishing the result" (2 NYCRR § 315.2(c)).

b. To determine if a school attorney is an independent contractor or employee, the factors used in the regulations of the New York State and Local Employees' Retirement System must be employed. They include, for example, whether:

(1) the district controls, supervises or directs the individual performing the services, as to result and as to how assigned tasks are to be performed;

(2) the attorney reports to a certain person or department in the district at the beginning or during each work day;

(3) the district sets hours to be worked; and

(4) the district provides permanent workspace and facilities (such as an office, furniture, and/or utilities) (2 NYCRR § 315.3(c)).[1]

APPOINTING AND RETAINING A SCHOOL ATTORNEY

1. Engaging a school attorney falls within the professional services exception to the General Municipal Law's competitive bidding requirements. Thus, school boards may utilize a request for proposals (RFP) process to select a school attorney, in accordance with the procedures set forth in the district's RFP policy.

2. The board must negotiate whether the attorney will perform work pursuant to a retainer agreement, whether the attorney will bill the district by the hour for services performed, or a combination of both.

3. The school attorney is typically appointed at the board's annual reorganizational meeting.

   It is improper for an outgoing school board to bind its successor to a contract with a school attorney (*Harrison CSD v. Nyquist*, 59 A.D.2d 434 (3d Dep't 1977); see also *Karedes v. Colella*, 292 A.D.2d 138 (3d Dep't 2002), *rev'd on other grounds*, 100 N.Y.2d 45 (2003)).

REPORTING REQUIREMENTS

1. School attorneys may not simultaneously be employed as independent contractors and employees (Educ. Law § 2051(1)).

2. State Education Law requires that school districts and boards of cooperative educational services (BOCES) annually file with the state education department, the state comptroller, and the state attorney general a report specifying all lawyers who provide legal services to the district or board, whether the lawyers were hired as employees, and all remuneration and compensation paid for legal services (Educ. Law § 2053).

3. For additional information, see the state education department's "*Frequently Asked Questions" on Education Law Section 2053 Reporting Requirements*, available on the department's website at http://www.p12.nysed.gov/mgtserv/2053/FAQ_-_Updated_January_2012.pdf.

[1] Consult the regulations for a full list of the factors that districts are expected to consider in making this determination.

VI. SCHOOL BOARD MEETINGS

BOARD MEETINGS IN GENERAL

Types and Frequency of School Board Meetings

School board meetings fall into three categories:

1. The annual organizational/reorganizational meeting.

   a. This is the meeting where the board elects and appoints its officers (Educ. Law §§ 1701, 2502(9)(o)) and committees for the coming year, and board members take or renew their oaths of office.

      (1) They also often appoint other personnel, such as the internal auditor, school attorney, records access officer, and records management officer, and designate depositories for district funds and newspapers for required notices.

      (2) In small city school districts, the board also must set the dates and times for its regular school board meetings and prescribe a method for calling special meetings of the board (Educ. Law § 2504(2)).

   b. The date when the annual organizational/reorganizational meeting is held depends on the type of district.

      (1) In union free and central school districts, the reorganizational meeting must be held on the first Tuesday in July. If that day is a legal holiday, then the meeting must be held on the first Wednesday in July (§ 1707(1)). Alternatively, a school board in these districts may, by resolution, decide to hold the annual reorganizational meeting at any time during the first 15 days in July (§ 1707(2)).

      (2) In city school districts with less than 125,000 inhabitants, the reorganizational meeting must be held during the first week in July, unless otherwise specified by law (§§ 2504(1), 2502(9)(o), 2502(9-a)(o)).

      (3) In large city school districts, the reorganizational meeting occurs on the second Tuesday in May, except as otherwise specified by law (§§ 2563(1), 2553(9)(f), 2553(10)(o)).

      (4) Central high school districts in Nassau County must hold it on the second Tuesday in July (Educ. Law § 1904).

2. Regular meetings.

   a. These are the regularly scheduled business meetings held throughout the year.

   b. The Education Law requires that school boards meet at least once each quarter (Educ. Law § 1708(1)), although most meet at least once a month. However, school boards in city districts are required to meet at least once a month (Educ. Law §§ 2504(2), 2563(2)).

In New York City, the city board must hold at least one meeting in each borough per year. Special rules apply to community district educational councils (§§ 2590-b(1)(b); 2590-e(14)).

3. Special or emergency meetings.

   a. These meetings are not regularly scheduled. They usually are held to conduct business that cannot wait until the next regularly scheduled meeting.

   b. They may be called by any school board member (see *Matter of Felicio*, 19 Ed Dept Rep 414 (1980), as long as at least 24 hour advance notice is given to the other board members (Educ. Law § 1606(3); see also *Application of Bean*, 42 Ed Dept Rep 171 (2002)).

   c. Although it normally does, there is no requirement that the notice of a special meeting state a proposed agenda (*Matter of Neversink*, 10 Ed Dept Rep 203 (1971)).

   d. Care must be taken that special board meetings do not usurp the place of regularly scheduled board meetings for the consideration of regular district business, in order to avoid a possible violation of the Open Meetings Law.

   e. The notice provisions of the Open Meetings Law must be complied with when calling a special meeting.

Quorum Requirement

1. A quorum of the board is required to conduct a school board meeting and take official action (Gen. Constr. Law § 41); NYS Department of State, Committee on Open Government OML-AO-4744 (Mar. 30, 2009)).

2. A majority of the entire board, not simply of those present is required for the board to take official action (*Id*.; *Matter of Coughlan v. Cowan*, 21 Misc.2d 667 (Sup. Ct. Suffolk Cty. 1959); *Appeal of Instone-Noonan*, 39 Ed Dept Rep 413 (1999); *Matter of Ascher*, 12 Ed Dept Rep 97 (1972); Opn. of Counsel #70, 1 Ed Dept Rep 770 (1952); see also *Appeal of Greenwald*, 31 Ed Dept Rep 12 (1991)). Note: instances where a super majority vote of the board is required is discussed section I of these materials.

3. A board member's physical presence is required (NYS Department of State, Committee on Open Government, OML-AO-3025, May 1, 1999; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2d Dep't 2005)), except that board members may participate in such a meeting via videoconference (i.e. Skype) and are considered in attendance for quorum and voting purposes (Pub. Off. Law §§ 102-104).

   a. School board members may not vote by phone or mail (NYS Department of State, Committee on Open Government, OML-AO-4306, Dec. 18, 2006; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2d Dep't 2005)).

b. School board members may not vote by e-mail because this method does not permit the public to "observe" the performance of board members' public duties (NYS Department of State, Committee on Open Government OML-AO-4306, Dec. 18, 2006; see also *Town of Eastchester*, *supra*.)

c. Videoconferencing is permitted if the public notice of the meeting indicates that videoconferencing will be used, specifies the location(s) for the meeting, and states that the public may attend at any of the locations (Gen Const. Law § 41; Pub. Off. Law §§ 102, 103, 104).

4. A series of phone calls or other communications between individual board members that result in a collective decision is not permissible (NYS Department of State, Committee on Open Government, OML-AO-3025, May 1, 1999; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2d Dep't 2005)).

Neither is a series of e-mail communications that effectively results in the taking of official action.

Meeting Agendas

1. Although it is good business practice to have an agenda for school board meetings, an agenda is not specifically required (*Matter of Kramer*, 72 St. Dep't Rep. 114 (1951); NYS Department of State, Committee on Open Government, OML-AO-2750, April 30, 1997).

2. The procedures to be followed at school board meetings are left to the policies adopted by the board (*Id.*).

Meeting Minutes

1. Formal minutes shall be taken at all school board meetings (Pub. Off. Law § 106(1)). The minutes must consist of a record or summary of:

a. all motions, proposals, resolutions, and other matters formally voted upon, and

b. the result of any vote (*Id.*).

2. Bare bones resolutions do not satisfy the above requirement (*Mitzner v. Goshen Central School Dist. Bd. of Educ.*, (Sup. Ct. Orange Cty. 1993), cited in NYS Department of State, Committee on Open Government OML-AO-3472, June 18, 2002).

a. Minutes indicating that a recommendation was adopted or a contract amended would be inadequate without any information about the content or substance of such recommendation or contract (see NYS Department of State, Committee on Open Government OML-AO-5093, May 1, 2011).

b. When extending a superintendent's contract including in the minutes a description of the specific contract amendments in the minutes will provide an adequate description of the action taken (NYS Department of State, Committee on Open Government OML-AO-

5153, August 18, 2011). It is also recommended to attach a copy of the contract to the minutes to prevent any misunderstanding (*Id.*).

3. Records of votes must include the final vote of each board member on every matter voted on (Pub. Off. Law § 87(3)(a)).

   a. Secret ballots are not allowed for any purpose (*Smithson v. Illion Housing Auth.*, 130 A.D.2d 965 (4th Dep't 1988), *aff'd* 72 N.Y.2d 1034 (1988)); see also, *Perez v. City University of New York*, 5 N.Y.3d 522 (2005)), not even at a board's organizational/re-organizational meeting regarding the election of board President and Vice-President and other officers.

   b. Records of the final votes of each member of the board may not be destroyed (Pub. Off. Law §§ 87(3)(a), 106(1); 8 NYCRR § 185.12 (Appendix I)).

4. Minutes need not constitute a verbatim transcript of everything said at a meeting, but they must meet the requirements of the Open Meetings Law outlined above. (NYS Department of State, Committee on Open Government, OML-AO-4801, Aug. 25, 2009; OML-AO-3369, Sept. 25, 2001).

5. School boards have limited authority to take action in executive session. Where they do have such authority, the minutes of the executive session only need to contain a record of any final determination, the date, and the vote.

   Minutes of executive sessions do not need to contain any matter that would not be available to the public under the Freedom of Information Law (Pub. Off. Law § 106(2); *Plattsburgh Pub. Co., Div. of Ottoway Newspapers, Inc. v. City of Plattsburgh*, 185 A.D.2d 518 (3d Dep't 1992)). Accordingly, minutes reflective of a vote to initiate disciplinary proceedings against a tenured teacher do not have to reference or identify the teacher (NYS Department of State, Committee on Open Government OML-AO- 5174, Sept. 7, 2011).

Public Access to Meeting Minutes

1. Minutes of school board meetings must be made available to the public within two weeks of the date of the meeting. Minutes recording action taken by formal vote at an executive session must be made available within one week (Pub. Off. Law § 106(3)).

2. Minutes must be made available to the public even if they have not been approved by the board (NYS Department of State, Committee on Open Government FOIL-AO-8543, Nov. 17, 1994)).

3. Minutes can be marked "Draft" if necessary to allow the board to meet the two week publication deadline (NYS Department of State, Committee on Open Government OML-AO-3799, May 19, 2004). It should be noted that nothing in either the Education Law or the Open Meetings Law requires a school board to approve meeting minutes. However, such an obligation may be imposed by policy.

4. Minutes taken at an executive session where no action was taken by formal vote are not available to the public (*Kline and Sons, Inc. v. County of Hamilton*, 235 A.D.2d 44 (3d Dep't 1997)).

Public Participation at Board Meetings

1. School boards have authority to adopt rules and regulations for the maintenance of public order on school property. However, they may not automatically exclude members of the public from attending school board meetings (*Matter of Goetschius v. Board of Educ. of Greenburg 11 UFSD*, 244 A.D.2d 552 (2d Dep't 1997)).

2. The Open Meetings Law requires that public bodies such as school boards make reasonable efforts to hold meetings in rooms that can "adequately" accommodate members of the public who wish to attend (Pub. Off. Law § 103(d)). For example, if the school board anticipates that a particular item on the agenda will prompt greater public attendance at a board meeting than is typical, the board should consider whether the current meeting place can accommodate the anticipated extra attendees. If not, the board should choose another location where the attendance of extra members of the public may be accommodated (NYS Department of State, Committee on Open Government, OML-AO-5118, June 23, 2011; OML-AO-5210, Dec. 2, 2011).

3. There is no statutory or regulatory requirement that school boards allow members of the public to speak at school board meetings (*Appeal of Wittenben*, 31 Ed Dept Rep 375 (1992); *Appeal of Kushner*, 49 Ed Dept Rep 263 (2010)), even though school board meetings must be open to the public (Educ. Law § 1708(3); Pub. Off. Law § 103).

    a. The commissioner of education encourages school boards to allow citizens to speak on matters under consideration, whenever possible (*Appeal of Wittenben*, 31 Ed Dept Rep 375 (1992)). School boards may limit the time for a member of the public to speak (see *Matter of Kramer*, 27 St. Dep't Rep. 114 (1951)).

    b. The commissioner also has indicated school boards do not have to allow non-residents to speak at board meetings, even when there is a board policy allowing district residents to speak (*Appeal of Martin*, 32 Ed Dept Rep 381 (1992)).

        The Committee on Open Government concurs that school boards are not required to allow members of the public to speak at board meetings, but cautions that if a school board permits public participation, it may not discriminate between residents and non residents (NYS Department of State, Committee on Open Government, OML-AO-4141, Feb. 24, 2006).

    c. One court has ruled that a board of education properly limited public discussion at a board meeting about a particular topic when the board made multiple other avenues of communication on the topic available, such as public comment at previous meetings, the opportunity to speak with district officials and sending the board letters and e-mails, and the board felt it had been made fully aware of the public's concerns about the topic (*Curley v. Philo*, 2009 WL 2152323 (N.D.N.Y. 2009)).

    d. The presiding officer of a public body also has the ability to limit remarks from the public which are "repetitive" and "offensive". However, a public body cannot limit comments simply because they are negative or critical (NYS Department of State, Committee on Open Government, OML-AO-5296, June 12, 2012).

4. School boards may justifiably restrict the ability of members of the public speaking at their meetings from offering public commentary on matters involving privacy issues otherwise

protected by law. That would be the case, for example, when a member of the public wants to engage in a discussion that potentially may disclose information about particular students, even when the disclosure would be made by someone other than a school official (NYS State Department of State, Committee on Open Government, OML-AO-3405, Feb. 8, 2002). Instead, the member of the public wishing to discuss such a matter may meet with the board in private under the exemption to the Open Meetings Law that applies to matters made confidential by law (*Id.*)

5. School boards may also restrict the use of signs, banners and visual displays brought into a meeting by the public if such material obstructs the view of other attendees, violates the fire code or contains obscene language (NYS Department, State Committee on Open Government, OML-AO-5296, June 12, 2012).

Disclosure of Records to be Discussed at Board Meetings

1. The Open Meetings Law requires that school boards make the documents scheduled to be discussed at a board meeting available upon request, to the extent practicable as determined by the school board, both prior to and at the meeting during which the records will be discussed (Pub. Off. Law § 103(e)). Additional information on this requirement is available from the Committee on Open Government in its guidance document entitled *Q&A on Disclosure of Records Scheduled to be Discussed During Open Meetings*, available at http://www.dos.ny.gov/coog/QA-2-12.html.

    a. According to the Committee on Open Government, "to the extent practicable" pertains to the ability to take reasonable steps through reasonable efforts to achieve the goals of the legislation. Thus, if a record scheduled to be discussed is not delivered to the district clerk until shortly before the meeting it may not be "practicable" to honor a request for copies of the record in such a short period of time (see *Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings).*

    b. The Committee on Open Government has also stated that there is no obligation to prepare copies for distribution unless a request has been made. However, if a request is made at a meeting and the public body has the ability and it is practicable to do so it should provide copies to the requesters (*Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings*).

    c. The school district may charge a fee for the copies consistent with the rules under Freedom of Information Law (FOIL) (see Section VII herein for a discussion of FOIL).

2. If a school district maintains a website which is regularly and routinely updated and utilizes a high speed connection, the records to be discussed at a board meeting must also be posted to the website prior to the meeting, to the extent practicable (Pub. Off. Law § 103(e); see also NYS Department of State, Committee on Open Government, OML-AO-5282, May 4, 2012).

3. Records which must be made available include:

    a. Records available pursuant to a Freedom of Information Law (FOIL) request,

    b. Any proposed resolution, law, rule, regulation, policy or any amendment thereto.

4. FOIL specifically exempts certain records from mandatory disclosure. As such, any documents falling under one of those categories that the board is scheduled to discuss would not be disclosed pursuant to Public Officers Law §§87(2); 103(e). Note that some documents may only be partially exempt such that the portion of the document would be redacted but the rest of the document must be available. If there is any question as to whether a document should be disclosed the district should consult with its legal counsel. For a listing of records exempt from disclosure under FOIL see Section VII.

5. Records which will be discussed as part of an executive session and items on a consent agenda need not be posted or shared. (*Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings*).

6. A draft policy which is scheduled to be discussed by the board must be disclosed.

   To the extent that a draft document is not a proposed policy, resolution, law or rule but is scheduled to be discussed during an open meeting, portions of the material may be subject to disclosure. Draft documents would generally fall under the category of "intra-agency material" which are largely exempt from disclosure. Portions of such documents that include statistical or factual tabulations or data; instructions to staff that affect the public; or final agency policy or determinations would need to be disclosed and posted online pursuant to Public Officers Law §103(e)).

7. Memoranda, research materials and similar documentation that may have been prepared in support of or opposition to a proposed resolution, law, rule, or policy need not be disclosed or posted to the school district website (*Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings*).

Public's Right to Record School Board Meetings

1. The Open Meetings Law requires that public bodies, including school boards, allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means (Pub. Off. Law § 103(d)).

   a. School boards may adopt reasonable rules governing the use of cameras and recording devices, but such rules must be written, conspicuously posted during meetings and provided to the public upon request (*id.*). The Committee on Open Government adopted model rules regarding this new provision of law which are available on the committee's website at: http://www.dos.ny.gov/coog/modelregs_photo_record_broadcast.html.

   b. Prior to the law including requirements for broadcasting, recording and photographing, the general rule was that people attending board meetings had the right to videotape or audiotape the meeting and school boards could not prohibit outright the use of cameras (see *Csorny v. Shoreham Wading River CSD*, 305 A.D.2d 83 (2d Dep't 2003); *Mitchell v. Bd. of Educ. of Garden City UFSD*, 113 A.D.2d 924 (2d Dep't 1985)). School boards were permitted to regulate the use of cameras to avoid interference with the meeting, but the interference must have been genuine, not based simply on board members' objections to appearing on television to fears of publicly airing comments at a public meeting (*id.*). In light of the amendment to the Open Meetings Law, this guidance is likely still relevant.

ISSUES CONCERNING THE OPEN MEETINGS LAW

Basic Legal Requirements

1. Under the Open Meetings Law school board meetings of at least a quorum of the board that are conducted to discuss school district business must be open to the public (Pub. Off. Law §§ 103 *et seq*.) The Education Law contains a similar requirement (Educ. Law § 1708(3)).

2. For purposes of the Open Meetings Law, school district business includes not only binding votes by a school board, but also informal discussions and any activity preliminary to a vote or involving consideration of a matter that could be the subject of board action (Pub. Off. Law § 102; *Goodson Todman Enterprises, Ltd. v. Kingston Common Council*, 153 A.D.2d 103 (3d Dep't 1990); but see *Hill v. Planning Bd. of Amherst*, 140 A.D.2d 967 (4th Dep't 1988)). This includes work sessions and planning meetings (*Orange Co. Publications, Div. of Ottoway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409 (2d Dep't 1978); NYS Department of State, Committee on Open Government OML-AO-4506, Oct. 30, 2007; OML-AO-3709, Nov. 20, 2003; OML-AO-2683, Dec. 11, 1996).

3. The public may be excluded only from properly convened executive sessions (Pub. Off. Law § 105(2); see also Educ. Law § 1708(3)), and other meetings expressly exempted under the law (Pub. Off. Law §§ 105(2), 108).

4. By definition, the Open Meetings Law does not apply to casual or chance encounters by school board members that are not intended to conduct business, but only so as long as the encounter does not become an informal conference or agenda session (*Orange County Publications, Div. of Ottoway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409 (2d Dep't 1978)).

   Neither does it apply to board developmental retreats, where no school district business is discussed (NYS Department of State, Committee on Open Government, OML-AO-1973, Sept. 13, 1991). For purposes of this exception, a retreat is when a public body "gathers for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations" (NYS Department of State, Committee on Open Government, OML-AO-4762, May 27, 2009 and OML-AO-3709, November 20, 2003). A retreat does not include a long range planning or goal setting sessions as those are matters of public business. (*Id.*)

Applicability of the Law to Board Committees

1. Meetings of a committee or subcommittee consisting solely of school board members that discuss or conduct public business are subject to the Open Meetings Law (Pub. Off. Law § 102; NYS Department of State, Committee on Open Government, OML-AO-2588, Mar. 28, 1996; OML-AO-2472, Feb. 23, 1995; see *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984 (4th Dep't 1981)).

   In addition, according to the Committee on Open Government, if a majority of a committee consisting solely of board members meets and is joined at the same table by board members who are not on the committee, to discuss school district business, the committee meeting then becomes a meeting of the board if those present constitute a quorum of the board (NYS Department of State, Committee on Open Government OML-AO-4057, Oct. 19, 2005). That would not be the

case if the additional board members attended the committee meeting only as observers (*Id*.; see also NYS Department of State, Committee on Open Government OML-AO-3329 June 26, 2001).

2. Meetings of advisory committees that do not consist exclusively of school board members, and are created solely to advise and make recommendations to the board are not subject to the Open Meetings Law because they have no authority to take final action (NYS Department of State, Committee on Open Government, OML-AO-4232, July 21, 2006; see *Jae v. Board of Educ. of Pelham UFSD*, 22 A.D.3d 581 (2d Dep't 2005); *Goodson-Todman Enters., Ltd. v. Town of Milan*, 151 A.D.2d 642 (2d Dep't 1989); *Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force*, 145 A.D.2d 65 (2d Dep't 1989)).

   An exception would exist if the core membership of the advisory group consists of board members. In such a case, the additional non board members who sit on the committee do not change the essential character of the entity- which is that of a public body subject to the Open Meetings Law. (NYS Department of State, Committee on Open Government, OML-AO- 4158, Mar. 15, 2006). Additionally, when the core of a committee consists of members of a school board and there is an equal or lesser number of other members, all of whom are district employees, the Committee on Open Government has opined that the Open Meetings Law would apply to such a committee (NYS Department of State, Committee on Open Government, OML-AO-5068, March 18, 2011).

3. District-wide shared-decision-making committees are subject to the Open Meetings Law because they perform a governmental function to the extent that school boards may not adopt a shared-decision-making plan without the committee's collaboration and participation (NYS Department of State, Committee on Open Government, OML-AO-3329, June 26, 2001; OML-AO-2456, Jan. 31, 1995).

4. School-based shared-decision-making committees are subject to the Open Meetings Law depending on their responsibilities, such as:

   a. a district's shared decision making plan provides them with decision making authority (NYS Department of State, Committee on Open Government, OML-AO-3329, June 26, 2001; OML-AO-3625, Jan. 17, 2001).

   b. a school-based shared decision making committee has authority to make recommendations the school board must consider before taking action, even when the board does not have to follow its recommendations (NYS Department of State, Committee on Open Government OML-AO-3329, June 26, 2001).

   (For additional guidance on whether a particular committee or group is subject to the Open Meetings Law, see *Perez v. City University of New York*, 5 N.Y.3d 522 (2005)).

Meeting Notice Requirements

1. Pursuant to the Open Meetings Law, school boards must give public notice of their meetings (Pub. Off. Law § 104(1)). By comparison, the Education Law does not include a similar requirement (*Matter of Thomas*, 10 Ed Dept Rep 108 (1971)).

   The notice requirements are intended to ensure that all efforts are made to notify the public of the meeting. Failure to do so does not give effect to the Open Meetings Law's goal of ensuring

public deliberation and vote (*Phillips v. County of Monroe*, 18 Misc.3d 1127(A) (Sup. Ct. Monroe Cty. 2007)).

2. For board meetings scheduled at least one week in advance, school boards must give notice of the time and place of any board meeting to the news media, and conspicuously post such notice in one or more designated public locations at least 72 hours before the meeting (Pub. Off. Law § 104(1)). Notice to the news media may be sent electronically (*Id.*).

   If the district has the ability to do so, it must conspicuously post notice of the time and place of board meetings on the district's website (Pub. Off. Law § 104(5); *Rivers v. Young*, 26 Misc. 3d 946 (Westchester Co. 2009)).

3. For meetings scheduled less than a week in advance, notice of the time and place of the meeting must be given to the news media "to the extent practicable" and posted conspicuously a reasonable time before the meeting (Pub. Off. Law § 104(2); *Previdi v. Hirsch*, 138 Misc.2d 436 (Sup. Ct. Westchester Co. 1988)).

   Using the internet to post meeting notices and contacting various news media to alert the public of a meeting called with less than two days notice, were found to satisfy the notice requirement in a case where the record showed members of the public were present at the meeting and were permitted to comment on the subject of the meeting (*Phillips v. County of Monroe*, *supra*).

4. Under the Education Law, school board members must receive at least 24 hours notice of any board meeting (Educ. Law § 1606(3); see also *Application of Bean*, 42 Ed Dept Rep 171 (2000)).

   a. A majority of the board cannot dispense with notice of a board meeting to other members. Furthermore, a good faith effort must be made to give actual notice of the meeting to each board member. Failure to do so may invalidate any action taken at the meeting (see *Matter of Colasuonno*, 22 Ed Dept Rep 215 (1982)).

   b. Individual board members may waive the 24 hour notice requirement in case of an emergency (*Id.*; *Matter of Carlson*, 11 Ed Dept Rep 284 (1972)). Action taken at a board meeting for which a board member did not receive the required notice may be sustained if the board member signs an affidavit waiving the notice requirement (*Matter of Board of Educ. of UFSD No. 1 of the Town of Hume*, 29 St. Dep't Rep. 624 (1923)).

   c. It is advisable that in situations where 24 hours notice cannot be given, each board member sign a waiver of notice to be entered in the minutes.

5. Boards of Education should be careful to schedule meetings at a time when the public can attend. The scheduling of a meeting at 7:30 am was determined by a court to be inappropriate because it does not facilitate attendance by the public (*Matter of Goetchius v. Board of Education*, Supreme Court, Westchester Co., New York Law Journal, August 8, 1996; see also NYS Department of State, Committee on Open Government, OML-AO-5280, May 4, 2012).

Exempt Meetings

1. The Open Meetings Law exempts from coverage certain types of meetings. In the case of school boards, these include:

a. judicial or quasi-judicial proceedings

(1) The Committee on Open Government has opined that a "condition precedent" to applying the law's exemption regarding judicial or quasi-judicial proceedings is a final determination of a controversy being considered by the public body in such meeting (NYS Department of State, Committee on Open Government, OML-AO-4924, June 10, 2010).

(2) When a school board reviews the transcript and evidence presented at a student disciplinary meeting (when parents appeal their child's suspension to the board) but, a board vote to uphold or modify the suspension must take place in open session at a meeting conducted under the Open Meetings Law (see *Cheevers v. Town of Union, unreported,* (Sup. Ct. Broome Co., Sept. 3, 1998)).

b. matters made confidential by federal or state law (Pub. Off. Law § 108(3)).

(1) An exempt meeting involving a matter made confidential by federal law is a meeting to discuss a student's education records. Since the federal Family Educational Rights and Privacy Act (FERPA) prohibits school officials from divulging, without parental consent, education records that are specifically identifiable to a particular student or students (20 U.S.C. § 1232(g)) a board may meet in private with parents who wish to discuss concerns that require presentation of private student records (NYS Department of State, Committee on Open Government OML-AO-3863, Sept. 3, 2004).

(2) An exempt meeting involving a matter made confidential by state law is a meeting between a board of education and the board's attorney, which is protected by attorney-client privilege under New York's Civil Practice Law and Rules (CPLR § 4503; NYS Department of State, Committee on Open Government, OML-AO-4690, Sept. 23, 2008); for a review of the nature and scope of the privilege itself, see *Appeal of Goldin*, 40 Ed Dept Rep 628 (2001)).

Consequences for Violations of the Open Meetings Law

1. If a court determines that a school board has failed to comply with the Open Meetings Law, the court has the discretion to declare that the board violated the law, and/or may declare void any action taken in violation of the Open Meetings Law (Pub. Off. Law § 107(1); *Genatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Matter of MCI Telecomm. Corp. v. Public Serv. Comm'n of the State of New York*, 231 A.D.2d 284 (3d Dep't 1997); *Zehner v. Board of Educ. of the Jordan-Elbridge CSD*, 29 Misc.3d 1206(A) (Sup. Ct. Onondaga Cty. 2010) *aff'd*, 91 A.D.3d 1349 (4th Dep't 2012)). If the court finds the school board did violate the law, it may require members of the board to participate in a training session concerning Open Meetings Law requirements, conducted by the staff of the Committee on Open Government (Pub. Off. Law § 107(1); see *Zehner v. Board of Educ. of the Jordan-Elbridge CSD*).

   To invalidate an action already taken by a school board, complainants alleging a violation of the Open Meetings Law must show they were prejudiced by the board's failure to comply with the law (*Smithson v. Illion Housing Auth.*, 130 A.D.2d 965 (4th Dep't 1988), *aff'd* 72 N.Y.2d 1034 (1988); *Matter of Inner-City Press/Community on the Move v. New York State Banking Board*, 170 Misc.2d 684 (Sup. Ct. New York Cty. 1996)).

2. Courts have discretion to award costs and reasonable attorney fees to a complainant who commences litigation alleging a violation of the law and prevails (Pub. Off. Law § 107(2); see also *Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124 (1995); *Matter of Orange County Pubs. Div. of Ottaway Newspapers Inc. v. County of Orange*, 120 A.D.2d 596 (2d Dep't 1986); *Cunney v. Bd. of Trustees of Vil. of Grandview*, 72 A.D.3d 960 (2d Dep't 2010); *Stephenson v. Bd. of Educ. of Hamburg CSD*, 31 Misc. 3d 1227 (Sup. Ct. Erie Cty. 2011). However, a court must award costs and attorney's fees to a successful complainant if the court determines a vote was taken in material violation of the law or that substantial deliberations relating thereto occurred in private prior to such vote, unless there was a reasonable basis for a public body to believe a closed session could properly have been held (Pub. Off Law §107(2)).

EXECUTIVE SESSIONS

Basic Rules

1. An *executive session* is a portion of a school board meeting that is not open to the public. It is permitted only for a limited number of specific purposes that include the following subjects:

   a. Matters which will imperil the public safety if disclosed.

   b. Any matter that may disclose the identity of a law enforcement agent or informer.

   c. Information relating to current or future investigation or prosecution of a criminal offense that would imperil effective law enforcement if disclosed.

   d. Discussions involving proposed, pending, or current litigation.

   e. Collective negotiations pursuant to Article 14 of the Civil Service Law.

   f. The medical, financial, credit, or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal, or removal of a particular person or corporation.

   g. The preparation, grading, or administration of exams.

   h. The proposed acquisition, sale or lease of real property or the proposed acquisition, sale, or exchange of securities, but only when publicity would substantially affect the value of these things (Pub. Off. Law § 105(a-h)).

2. An executive session can take place only upon a majority vote of the total membership of the board taken at an open meeting (Pub. Off. Law § 105(1)).

   a. Because it can be convened only upon a majority vote of the board in an open public meeting, a school board cannot schedule an executive session in advance (e.g. Executive Session at 6:30 p.m. and Public Meeting at 7:00 p.m.) (NYS Department of State, Committee on Open Government OML-AO-3339, July 23, 2001 and OML-AO-4889, April 9, 2010).

      However, the meeting's agenda can indicate that there is a "Proposed executive session, subject to Board approval" or that "It is anticipated that the Board will act upon a

resolution to convene an executive session" (NYS Department of State, Committee on Open Government OML-AO-2426, Nov. 23, 1994).

b. The motion to go into executive session must identify the subject matter of the executive session with particularity (*Gordon v. Village of Monticello*, 207 A.D.2d 55 (3d Dep't 1994), *rev'd on other grounds*, 87 N.Y.2d 124 (1995); NYS Department of State, Committee on Open Government OML-AO-3478, June 26, 2002).

(1) It is insufficient to merely regurgitate the statutory language such as "discussions regarding proposed or pending litigation, without identifying the particular litigation" (*Daily Gazette v. Cobleskill*, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. 1981); *Zehner v. Board of Educ. of the Jordan-Elbridge CSD*, 29 Misc. 3d 1206A (Sup. Ct. Onondaga Cty. 2010), *aff'd*, 91 A.D.3d 1349 (4th Dep't 2012); NYS Department of State, Committee on Open Government OML-AO-5259, March 8, 2012; OML-AO-3654, July 10, 2003).

(2) There is no authority to go into executive session for the purpose of discussing "personnel matters". A school board does not need to identify who it is going to talk about, but it must disclose what it is going to talk about (e.g. "to discuss the discipline of a particular employee") (see NYS Department of State, Committee on Open Government OML-AO-3478, June 26, 2002).

(3) There is no authority to go into executive session to discuss the qualities and qualifications that the board is seeking in a superintendent, as well as the process which the board intends to utilize to conduct a superintendent search (*Zehner v. Board of Educ. of the Jordan-Elbridge CSD*).

c. There is no time limit on the length of an executive session other than that imposed by good judgment and the reasonable exercise of discretion (*Matter of Thomas*, 10 Ed Dept Rep 108 (1971)).

However, school boards do not want to waste the public's time by making them wait, because doing so fosters bad public relations. Therefore, a school board may wish to schedule proposed executive sessions later in the meeting, make a motion for same during the meeting, or state the estimated time when it expects to return to the open session of the meeting (see NYS Department of State, Committee on Open Government OML-AO-2426, Nov. 23, 1994).

3. Pursuant to the General Municipal Law, school board members, district officers and employees may not disclose confidential information acquired by them in the course of their official duties (Gen. Mun. Law § 805-a(1)(b)).

a. The General Municipal Law does not define the term "confidential information". According to one state court, interpretation of what is confidential in the school context is best left to the commissioner of education (*Komyathy v. Board of Educ. Wappinger CSD No. 1*, 75 Misc.2d 859 (Sup. Ct. Dutchess Cty. 1973)).

(1) According to the commissioner of education, matters discussed in a lawfully convened executive session are confidential and their disclosure constitutes a violation of the General Municipal Law's prohibition as well as a violation of a

school board member's oath of office, which subject a school board member to removal from the board (*Application of Nett and Raby*, 45 Ed Dept Rep 259 (2005)). There would be no such violation where a board collectively decides to release such information, or where an individual board member is compelled to disclose such information pursuant to law in the context of a judicial proceeding (*Id*.).

(2) According to one state supreme court, taping an executive session is improper and violates the confidentiality of the executive session (*Stephenson v. Bd. of Educ. of Hamburg Cent. School Dist.*, 31 Misc. 3d 1227 (Sup. Ct. Erie Cty. 2011).

b. The Family Educational Rights and Privacy Act ("FERPA") prohibits the disclosure of personally identifiable information about a student without prior consent of the student's parent, or student if over the age of 18, unless an exception applies (20 U.S.C. § 1232g *et seq*.; 34 CFR Part 99).

Participation in an Executive Session

1. All members of the school board and "any other persons authorized by" the board may attend an executive session (Pub. Off. Law § 105(2)). The Education Law contains a similar provision (Educ. Law § 1708(3)).

   a. A school board does not have to formally vote to approve the attendance of executive session invitees (NYS Department of State, Committee on Open Government, OML-AO-3864, Sept. 7, 2004).

   b. Neither does a board have to identify in its motion to enter into executive session the individuals whom the board has invited to attend (*Matter of Jae v. Board of Educ. of Pelham UFSD*, 22 A.D.3d 581 (2d Dep't 2005)).

2. It is important that a school board exercise discretion in deciding whom to invite into executive session because of confidentiality issues.

   a. The attendance at executive session of a former school board member who was awaiting the results of an appeal to the commissioner regarding his lost reelection was in conflict with laws providing for the confidentiality of personnel and student records (*Appeal of Whalen*, 34 Ed Dept Rep 282 (1994)).

   b. It would permissible to invite the district clerk, board attorney, superintendent or a person having some special knowledge, expertise or function that relates to the subject of the executive session (NYS Department of State, Committee on Open Government OML-AO-4344, March 7, 2007).

   If there is a dispute concerning the attendance of a person other than a member of the board at executive session, the committee on open government has advised that the board could resolve that matter by adopting or rejecting a motion by a board member to permit or reject the attendance by a non-board member (NYS Department of State, Committee on Open Government, OML-AO-4854, Jan. 25, 2010).

Taking Action in Executive Session

1. With certain limited exceptions, no official action can be taken on issues discussed in executive session without first returning to open session (see *Matter of Crapster*, 22 Ed Dept Rep 29 (1982)).

    a. One exception includes voting on charges against a tenured teacher (Educ. Law § 3020-a(2); *Sanna v. Lindenhurst Board of Educ.*, 85 A.D.2d 157 (2d Dep't 1982), *aff'd*, 58 N.Y.2d 626 (1987); *United Teachers of Northport v. Northport* UFSD, 50 A.D.2d 897 (2d Dep't 1975); *Matter of Cappa*, 14 Ed Dept Rep 80 (1974); Formal Opn. of Counsel No. 239, 16 Ed Dept Rep 457 (1976)). Section 3020-a requires that school boards meet in executive session to both discuss disciplinary charges against a tenured teacher and to vote on whether probable cause exists to commence disciplinary proceedings against the employee**.**

    b. No court has ruled yet whether a school board may take action in executive session on matters made confidential by other laws such as the federal Family Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, but see *Cheevers v. Town of Union, unreported*, (Sup. Ct. Broome Co., Sept. 3, 1998), indicating that a school board must vote to uphold or modify a student's suspension in an open session.

2. No public body, including a school board, may vote to appropriate money during an executive session (Pub. Off. Law § 105(1)).

Special Rule for Audit Committees

1. Notwithstanding any provisions of the Open Meetings Law and other laws to the contrary, a school district's audit committee may conduct an executive session pursuant to the Open Meetings Law in order to:

    a. meet with the external auditor prior to commencement of the audit

    b. review and discuss with the auditor any risk assessment of the district's fiscal operations developed as part of the auditor's responsibilities under governmental auditing standards for financial statement audit and federal single audit standards if applicable, and

    c. receive and review the draft annual audit report and accompanying draft management letter and, working directly with the auditor, assist the trustees or board of education in interpreting such documents (Educ. Law § 2116-c(7)).

2. A school board member who is not a member of the audit committee may be allowed to attend an executive session of the audit committee if authorized by a board resolution (*Id.*).

    2. According to the Committee on Open Government, the audit committee performs a government function pursuant to Education Law § 2116-c and is therefore a public body subject to all aspects of the Open Meetings Law, not just the rules for conducting an executive session (NYS Department of State, Committee on Open Government, OML-AO-4093, Dec. 14, 2005; OML-AO-4257, Sept. 11, 2006).

    3.

VII. SCHOOL DISTRICT RECORDS

BASIC LEGAL REQUIREMENTS

1. Pursuant to the Freedom of Information Law (FOIL), school districts must allow the public access to official documents and records (Pub. Off. Law §§ 84-90). The Education Law contains a similar requirement (Educ. Law § 2116). However, there is no broader scope of disclosure under the Education Law than under FOIL (*Appeal of Martinez*, 37 Ed Dept Rep 435 (1998)).

2. Any member of the public, including someone living outside the school district, has the right to examine and/or copy school district records according to procedures adopted by the district in accordance with the law (Pub. Off. Law § 87(1)(b); *Duncan v. Savino*, 90 Misc.2d 282 (Sup. Ct. Steuben Cty. 1977)).

    a. Those procedures must specify the times when and places where records are available, the names, titles, address and phone number of persons responsible for providing records, and any fees for copying records. The district must accept requests for public access to records and produce and permit inspection of records during all hours they are regularly open for business (Pub. Off. Law § 87(1)(b); 21 NYCRR § 1401.4).

    b. Copying fees up to 25 cents per page, or other amount prescribed by law (such as fees for an hourly employee who is needed to prepare the requested record), may be charged for the actual of reproduction, excluding fixed overheads (Pub. Off. Law § 87(1)(b)(iii), (c)).

    c. School districts may develop a standard FOIL request form and encourage its use. A person making a FOIL request must identify the desired records in sufficient detail for the request to be honored.

    d. School districts are required to maintain a list of district records that reasonably identify the records by subject matter and update that list regularly (Pub. Off. Law § 87(3)(c)).

3. School districts must accept electronic requests for records and transmit the records electronically by e-mail, if they reasonably have the ability to do so, and doing so will not involve any effort additional to responding to a request in a different manner (Pub. Off. Law § 89(3)(b); NYS Department of State, Committee on Open Government FOIL-AO-16279, Oct. 26, 2006).

    a. School districts that have the ability to retrieve or extract data or a record maintained in a computer storage system with reasonable effort must do so (Pub. Off. Law § 89(3)(a)).

4. School districts must respond within five business days of the receipt of a written request by:

    a. making the requested record(s) available, or

    b. issuing a written denial of the request, or

    c. acknowledging the request and stating the approximate time the request will be granted or denied based upon the reasonable circumstances of the request (Pub. Off. Law § 89(3)).

If a district cannot grant the request within 20 business days from the date it acknowledges the request, it must state in writing the reasons why not and the date certain within a reasonable time when it will be granted (*Id*.).

Failure to respond to a FOIL request within the law's timelines will be deemed a denial of the request (Pub. Off. Law § 89(4)(a), (b)).

5. Anyone who is dissatisfied with a school district's final decision on a request for access to records may appeal the decision in state supreme court (Pub. Off. Law § 89(4)(b)).

   A district determined to have violated the law may be assessed reasonable attorney fees and other costs incurred by the complainant who commenced litigation based on the district's violation(s) (Pub. Off. Law § 89(4)(c); see also *The Exoneration Initiative v. The New York City Police Dep't,* 39 Misc.3d 962 (New York Cnty. 2013), *aff'd as modified*, 114 A.D.3d 436 (1st Dep't 2014); *Gordon v. Village of Monticello*, 87 N.Y.2d 124 (1995)). Such fees will be assessed if the district either had no reasonable basis for denying access or failed to respond or appeal within the applicable statutory timelines (*Id*.)

   A school district that denies access to requested records must justify denial by showing the information requested "falls squarely within a FOIL exemption" and the justification for denying access under the claimed exemption must be "particularized and specific" (*In the Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454 (2007)).

6. The willful concealment or destruction of school district records with the intent to prevent their inspection is also a violation of the Penal Law punishable by a fine of up to $250 and/or a jail term of up to 15 days (Penal Law §§ 70.15(4), 80.05(4); Pub. Off. Law § 89(8)).

RECORDS AVAILABLE TO THE PUBLIC

1. Under FOIL, school district records include "any information kept, held, filed, produced or reproduced by, with or for" the district "in any physical form whatsoever, including but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes" (Pub. Off. Law § 86(4)).

   Examples include school contracts, statements of expenditures, and minutes of school board meetings. The Committee on Open Government has said that information sent via email and text message meets this definition and should be retained in accordance with the law and district policy, even if transmitted through private accounts (NYS Department of State, Committee on Open Government, FOIL-AO-18052, Mar. 24, 2010); see also *Retention and Disposal of Electronic Communications*, (December 2013), at http://www.dos.ny.gov/coog/news/dec13.html). The government's responsibility to recognize and retain records of business value and provide access in accordance with law requires government to be cognizant of and keep pace with technological advances (*Retention and Disposal of Electronic Communications*).

2. Only existing records are subject to disclosure. A school district does not have to prepare a record that does not already exist solely for the purpose of responding to a request for information (Pub. Off. Law § 89(3); *Curro v. Capasso*, 209 A.D.2d 346 (1st Dep't 1994)).

However, when records are maintained electronically and retrievable with reasonable effort, the disclosure of information does not involve the creation of a new record, but merely the retrieval of electronic data "already compiled and copying it onto another electronic medium" (*In the Matter of Data Tree LLC, v. Romaine*, 9 N.Y.3d 454 (2007)). Only if it involves "significant expense" should the manipulation of computer data to transfer records be treated as creation of a new document (*Id*.). Similarly, according to the Committee on Open Government, a public agency that can scan records to transmit them via e-mail must do so with no charge involved if scanning does not require any effort additional to an alternative method of responding (NYS Department of State, Committee on Open Government, FOIL-AO-16572 (May 16, 2007)).

3. A school district may not withhold a record simply because some information in the record may be exempt from disclosure, but is not properly categorized such that the district may easily redact the protected information. The proper response is to redact the protected information (*Schenectady County Society for the Prevention of Cruelty to Animals v. Mills*, 18 N.Y.3d 42 (2011) (State Education Department improperly refused to disclose list of veterinarians and veterinary technicians claiming information in its files did not distinguish between home and business addresses and home addresses are protected from disclosure)).

4. Districts also must keep a record setting forth the name, public office address, title and salary of every school district officer and employee (Pub. Off. Law § 87(3)(b)).

RECORDS EXEMPT FROM DISCLOSURE

1. There is a presumption of disclosure under FOIL. However, the law specifically exempts the following records from mandatory disclosure:

   a. Those specifically exempted by a state or federal statute. One example involves federal Family Educational Rights and Privacy Act (FERPA) (20 U.S. C. § 1232g *et seq*.) and its implementing regulations (34 CFR Part 99), which requires prior written parental consent for the disclosure of student records unless one of certain enumerated exceptions apply;

   b. Certain law enforcement documents and records;

   c. Records which, if disclosed would constitute an "unwarranted invasion of personal privacy;"

   d. Records which, if disclosed, would impair current or imminent contract awards or collective bargaining negotiations;

   e. Inter-agency and intra-agency materials which are not statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations, or external audits;

   f. Information which, if disclosed, could endanger the life or safety of any person;

   g. Computer access codes;

   h. Records which, if disclosed, would jeopardize a school district's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures;

i. Examination questions or answers which are requested prior to the final administration of such questions; and

j. Names and addresses if such information would be used for solicitation or fund-raising purposes (Pub. Off. Law §§ 87(2); 89(2)).

2. Exceptions are treated very narrowly. For example, a budget examiner's worksheets were determined subject to disclosure as "statistical or factual tabulations" rather than internal documents (*Dunlea v. Goldmark*, 54 A.D.2d 446 (3d Dep't 1976), *aff'd* 43 N.Y.2d 754 (1977); see also *Verizon New York, Inc. v. Bradbury*, 40 A.D.3d 1113 (2d Dep't 2007)).

What constitutes an unwarranted invasion of privacy generally is examined in terms of what would be offensive and objectionable to a reasonable person of ordinary sensibilities (*In the Matter of Pennington v. Clark*, 16 A.D.3d 1049 (4th Dep't 2005)).

3. School districts may not immunize documents from disclosure under FOIL by designating them as confidential, even by agreement with a private party. Only documents that fall within one of the law's specified exemptions are protected from disclosure (*In re City of Newark v. Law Dep't of the City of New York*, 305 A.D.2d 28 (1st Dep't 2003); *Hamilton v. Board of Educ.*, 29 Misc.3d 1201(A) (Sup. Ct. Onondaga Cty. 2010)).

ACCESS TO STUDENT RECORDS

1. Student records are not accessible under FOIL because they are records specifically exempted by a federal statute (Pub. Off. Law § 87(2)(a)), namely the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g *et seq.*).

2. Under FERPA, only parents or eligible students (age 18 or attending an institution of higher education) have the right to see the educational records pertaining to the student. Disclosure to anyone else without the prior written consent of the parent or eligible student is limited except as provided by law (see 20 U.S.C. § 1232g *et seq.*; 34 CFR Part 99; *Owasso Independent School Dist. No. I-0111 v. Falvo*, 534 U.S. 426 (2002); *Taylor v. Vermont Dep't of Education*, 313 F.3d 768 (2d Cir. 2003)).

   a. Parents of eligible students may still access the student's education records under certain circumstances, such as when the student is a dependent under the Internal Revenue Code (34 CFR § 99.31(a)(8)).

   b. In New York, non-custodial parents may still request and receive information about the student and his/her education, even if by court order or other legal restriction the parent lacks decision-making authority for the child's education (*Fuentes v. Bd. of Educ.*, 12 N.Y.3d 309 (2009)).

3. Some FERPA exceptions allow the disclosure of student records without prior written consent from the parents or eligible student. They include disclosure:

   a. To school officials who have "legitimate educational interests" (20 U.S.C. § 1232g (b)). An official has a legitimate educational interest if review of the records is required to fulfill his or her professional responsibilities (20 USC §1232g(b)(1)(A); 34 CFR § 99.31(a)(1)(i)(A)).

(1) A contractor, consultant, volunteer or other party to whom a school has outsourced institutional services or function will be considered a school official if the outside party:

i. performs an institutional service or function for which the school would otherwise use employees,

ii. is under the direct control of the school with respect to the use and maintenance of education records, and

iii. is subject to the requirements of 34 CFR § 99.33(a) governing the use and re-disclosure of personally identifiable information from education records (34 CFR § 99.31(a)(1)(i)(B)).

(2) An educational agency must use reasonable methods to ensure that school officials obtain access only to those education records in which they have a legitimate educational interest. An educational agency may use physical or technological access controls. If it does not use such controls it must ensure that any policy for controlling access to education records is effective and remains in compliance with the legitimate educational interest requirement (34 CFR § 99.31(a)(1)(i), (ii), (c)).

b. By court order, or pursuant to a lawfully issued subpoena, provided parents and students are notified by the district in advance of compliance with the court order or subpoena (20 U.S.C. § 1232g (b)(2)(B); 34 CFR § 99.31(a)(9)).

c. Directory information about students, such as their names, addresses and e-mail addresses, provided a district notifies parents of the categories of information designated as directory information, and gives the parents or eligible students a reasonable period of time to inform the district that such information should not be released without their consent (20 U.S.C. § 1232g (a)(5)(A), (B); 34 CFR § 99.3).

d. To officials of another school where the student seeks or intends to enroll, or when the student has already enrolled, provided the records relate to the student's enrollment at the new school (34 CFR § 99.31(a)(2)).

e. In connection with an emergency, to those who need the information to protect the health and safety of the student or others. The regulation implementing the exception indicates there must be a significant and articulable safety threat present to use this exception. If, based on the information available at the time of the determination, there is a rational basis for the determination, the U.S. Department of Education will not substitute its judgment for that of the district (34 CFR § 99.31(a)(10); 99.36).

4. State law prohibits the use of student social security numbers for public listing of grades, class rosters, or similar listings, except as specifically authorized or required by law (Educ. Law § 2-b).

5. State law also prohibits the sale or release of a student's personally identifiable information for any commercial purposes (Educ. Law § 2-d(4)(f)). Additionally, the law limits the information school districts may disclose to the State Education Department (SED) to that which is required by law or otherwise permissible under FERPA and expressly prohibits reporting the following

data to SED: juvenile delinquent records, criminal records, medical and health records and student biometric information (Educ. Law § 2-d(4)(d), (e)).

School districts must also publish on their websites a parental bill of rights explaining in plain English the prohibitions regarding use of student data, safeguards to protect such data and parental right to inspect records and file complaints and other information required by law (Educ. Law § 2-d(3)).

SCHOOL BOARD ACCESS TO PERSONNEL RECORDS

1. School board members may examine personnel records, but only in executive session and in limited circumstances, in accordance with regulations of the commissioner of education (8 NYCRR Part 84; *Appeal of Meyer & Pavalow*, 46 Ed Dept Rep 43 (2006); *Application of Bean*, 42 Ed Dept Rep 171 (2002); *Matter of Krasinski*, 29 Ed Dept Rep 375 (1990)).

2. Information from employee records may be accessed and used by school board members on matters before the board to:

    a. help make decisions on personnel matters such as appointments, assignments, promotions, demotions, pay, discipline or dismissal;

    b. aid in the development and implementation of personnel policies (8 NYCRR § 84.3; *Matter of Meyer & Pavalow*; *Matter of Krasinski*; *Application of Bean*).

        For example, a school board may review personnel files to determine whether the superintendent and/or other administrative staff are fulfilling the district's legal obligation to perform employee evaluations (*Application of Bean*).

3. Any board member that wishes to examine files may request that the superintendent bring the personnel records of a designated employee or group of employees to a board meeting. The board must then determine whether there is a legitimate reason to examine the files, and decide to meet in executive session to examine the records (8 NYCRR § 84.2; *Matter of Meyer & Pavalow*).

    a. Even if a majority of the board does not wish to view the records, a single member or board minority can insist that a majority of the board meet in executive session so that the interested members may do so (*Gustin v. Joiner*, 95 Misc.2d 277 (Sup. Ct. Westchester Cty. 1978), *aff'd*, 68 A.D.2d 880 (2d Dep't 1979)).

    b. Records are brought by the superintendent to the executive session and returned to the superintendent at the end of the session (8 NYCRR § 84.2).

4. Regulations of the commissioner of education preclude school boards from allowing a non-board member in attendance at executive session to have access to personnel records (*Appeal of Whalen*, 34 Ed Dept Rep 282 (1994)).

VIII. EMPLOYMENT OF INSTRUCTIONAL STAFF

PROBATIONARY APPOINTMENTS

Appointment of Teachers to Probation

1. A probationary appointment must be made when filling any vacant, unencumbered, full-time teaching position (*Board of Educ. of Oneida CSD v. Nyquist*, 59 A.D.2d 76 (3d Dep't 1977), *rev'd*, 45 N.Y.2d 975 (1978)).

    a. When a teacher is out on a leave of absence, the position remains encumbered and may not be considered vacant (*Brewer v. Board of Educ.*, 51 N.Y.2d 855 (1980)).

    b. A school district may not assign substitute teachers to temporarily fill vacant positions, even while negotiations are pending over the possible transfer of the duties of the vacant positions (*DiPiazza v. Board of Educ.*, 214 A.D.2d 729 (2d Dep't 1995)).

2. Probationary appointments are made by majority vote of the school board upon recommendation of the superintendent of schools (Educ. Law §§ 2509(1)(a), 2573(1)(a), 3012(1)(a)), or in the case of a board of cooperative educational services (BOCES), by majority vote of the BOCES board upon recommendation of the district superintendent (Educ. Law § 3014(1)).

Length of Probationary Appointment

Probationary Appointments made prior to July 1, 2015

1. The length of the probationary period for teachers appointed prior to July 1, 2015 is usually three years (Educ. Law §§ 2509(1)(a)(i), 2573(1)(a)(i), 3012(1)(a)(i), 3014(1)(a)).

2. There are two exceptions which may entitle a teacher to a shorter probationary term**.**

    a. The first exception applies to teachers who have been "*previously tenured*" in another school district or BOCES, or in another tenure area within the same district or BOCES. Such teachers are entitled to a shortened two-year probationary period (Educ. Law §§ 2509(1)(a)(i), 2573(1)(a)(i), 3012(1)(a)(i), 3014(1)(a)).

    A teacher is not entitled to a shortened probationary period if the prior tenure was as a teaching assistant, instead of as a teacher (*Putnam-Northern-Westchester BOCES v. Mills*, Sup. Ct. Westchester Co. (2006), *aff'd*, 46 A.D. 3d 1062 (3d Dep't 2007)).

    b. The second exception, commonly called "*Jarema* credit," applies to teachers who have served as a regular substitute for one or more semesters immediately preceding an appointment to a probationary position in the same tenure area. They can apply up to two years of the prior substitute service toward completion of the probationary period (Educ. Law §§ 2509(1)(a), 2573(1)(a), 3012(1)(a); *Robins v. Blaney*, 59 N.Y.2d 393 (1983); *Appeal of Negri*, 19 Ed Dept Rep 35 (1979), *aff'd*, *Negri v. Ambach*, (Sup. Ct., Albany Co., Hughes J., unreported (1980)).

        (1) Where the period of service as a regular substitute is for less than a full semester, the teacher is not entitled to Jarema credit (*Lifson v. Board of Educ. of the Nanuet*

Public Schools, 109 A.D.2d 743 (2d Dep't 1985), *aff'd* 66 N.Y.2d 896 (1985); *Appeal of Czajkowski*, 34 Ed Dept Rep 589 (1995)).

(2) Depending on the circumstances, a teacher's occasional absences during an otherwise full semester of regular, full-time substitute service will not defeat a teacher's entitlement to Jarema credit (*Appeal of Goldman*, 43 Ed Dept Rep 338 (2004)).

(3) Summer months are included in the calculation of Jarema credit, such that a teacher who serves as a regular substitute for a school year is entitled to 12 months of Jarema credit (*Appeal of Creswell*, 41 Ed Dept Rep 235 (2001)).

A teacher who is entitled to a two-year shortened probationary appointment and who also has rendered substitute service qualifying for Jarema credit cannot aggregate the two reductions. The shorter of the two probationary periods governs where both exceptions are applicable (*Carpenter v. Board of Educ.*, 71 N.Y.2d 832 (1988); see also *Appeal of Balandis*, 27 Ed Dept Rep 359 (1988)).

3. A teacher's probationary period may be extended to a fourth year by means of what is referred to as a "*Juul agreement*" (*Juul v. Board of Educ. of Hempstead UFSD*, 76 A.D.2d 837 (2d Dep't 1980), *aff'd* 55 N.Y.2d 648 (1981)) whereby a district waives its right to dismiss the teacher at the end of the probationary period and the teacher waives any claim of tenure by estoppel (see *Appeal of Fink*, 33 Ed Dept Rep (1993) (tenure by estoppel is discussed in another section of this outline). Juul agreements must be entered into freely with knowledge of the consequences to be valid.

Probationary Appointments made on or after July 1, 2015

Length of probationary period

1. The length of the probationary period for teachers appointed on or after July 1, 2015 is four years except that teachers remain in probationary status until the end of the school year in which his or her probationary term is ending (Educ. Law §§ 2509(1)(a)(ii), 2573(1)(a)(ii), 3012(1)(a)(ii), 3014(1)(b)). A shortened probationary period is available in the following circumstances:

   a. if the teacher has rendered satisfactory service as a regular substitute for a period of two years and received composite annual professional performance review rating in each of those years the teacher will be appointed to a two year probationary period

   b. if the teacher was appointed to tenure previously in New York State and was not dismissed from such district as a result of disciplinary charges the teacher will be appointed to a three year probationary period provided the teacher demonstrates that he or she received an annual professional performance review rating in his or her final year of service in such other district (*Id*.).

Termination of a Probationary Appointment

1. A teacher's probationary appointment may be terminated at any time on the recommendation of the superintendent of schools, and approved by a majority vote of the school board (Educ. Law §§ 2509(1)(a)(i), (ii), 2573(1)(a)(i), (ii)**;** 3012(1)(a)(i), (ii); 3014(1)(a), (b); 3012-c(1); see also

Matter of Amnawah v. Bd. of Educ. of the City of New York, 266 A.D.2d 455 (2d Dep't 1999)), or in the case of a BOCES, upon the recommendation of the district superintendent by majority vote of the BOCES board (Educ. Law § 3014(1)).

2. A teacher's probationary term may not be terminated for an illegal or unconstitutional reason.

3. The superintendent of schools must give the probationary teacher notice of termination at least 30 days prior to the board meeting at which the recommendation for termination will be considered (Educ. Law § 3031)).

   a. If requested by the teacher, in writing, no later than 21 days before that board meeting, the superintendent must provide, in writing, the reasons for the proposed dismissal recommendation within seven days after the request.

   b. The teacher may file a written response with the clerk of the board seven days before the meeting (Educ. Law § 3031(a); *Appeal of Hinson*, 48 Educ Dept Rep 437 (2009)).

   Failure to provide the required notice does not entitle the teacher to automatic reinstatement, but rather to reconsideration of the termination recommendation with proper notice and opportunity to respond (*Appeal of Gold*, 34 Ed Dept Rep 372 (1995); *Appeal of Nadolecki*, 55 Ed Dept Rep, Dec. No. 16,894 (2016)).

4. If a board majority accepts the superintendent's recommendation to terminate a teacher's probationary appointment, the teacher is entitled to 30-day written notice of termination (Educ. Law § 3019-a). Failure to provide this notice entitles a dismissed teacher to back pay, but not to reinstatement (*Appeal of Madden-Lynch*, 31 Ed Dept Rep 411 (1992); see also *Matter of Mutschler v. Bd. of Educ. of the William Floyd UFSD*, 177 A.D.2d 629 (2d Dep't 1991).

TENURE

Authority to Grant Tenure

1. A school board has no authority to grant tenure without the recommendation of the superintendent (*Anderson v. Bd. of Educ.*, 46 A.D.2d 360 (2d Dep't 1974), *aff'd* 38 N.Y.2d 897 (1976); *Matter of Burke*, 11 Ed Dept Rep 231 (1972)).

2. School boards, other than those in New York City and Buffalo, can reject a superintendent's recommendation in favor of tenure and deny tenure despite the superintendent's recommendation (Educ. Law §§ 2573(5), (6), 3031; see *Caraballo v. Community Sch. Bd.*, 49 N.Y.2d 488 (1980)).

3. The power to grant or deny tenure cannot be impaired by a collective bargaining agreement because the Education Law vests authority to make tenure decisions in the school board (*Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774 (1976)).

4. A school board may not deny tenure based upon a philosophical objection to the tenure system (*Conetta v. Bd. of Educ.*, 165 Misc.2d 329 (Sup. Ct. Nassau Cty. 1995)).

   Neither may board members abstain from voting on tenure based upon a philosophical objection to the tenure system (*Appeal of Craft & Dworkin*, 36 Ed Dept Rep 314 (1997)).

Tenure Procedures

1. For probationary appointments made prior to July 1, 2015, the superintendent recommends for tenure those teachers found competent, efficient and satisfactory before the end of their probationary period.

    a. The recommendation must be in writing.

    b. The school board may appoint to tenure, by majority vote, any or all of the teachers recommended (Educ. Law §§ 2509(2)(a), 2573(5)(a), 3012(2)(a), 3014(2)(a)).

2. For probationary appointments made on or after July 1, 2015, at the expiration of the probationary term or within 6 months prior thereto the superintendent shall make a written recommendation to the board for tenure for those teachers found competent, efficient and satisfactory provided the teacher has received an annual professional performance rating of either effective or highly effective in at least 3 of the preceding 4 years (Educ. Law §§ 2509(2)(b); 2573(5)(b), (6)(b), 3012(2)(b); 3014(2)(b)).

    a. If a teacher receives an ineffective rating in his or her final probationary year such teacher will not be eligible for tenure but the board of education has discretion to extend the teacher's probationary period for an additional year (*Id*.)

        i. If the teacher successfully appeals the ineffective rating he or she becomes eligible for tenure if the rating resulting from the appeal is effective or highly effective (*Id*.)

    b. The board of education may grant tenure contingent upon a teacher receiving a minimum rating in the final year of the probationary period and if such contingency is not met after all appeals are exhausted the grant of tenure is void and unenforceable and the board has discretion to extend the probationary period at that time (*Id.*).

3. When a school board rejects a superintendent's recommendation for tenure, such vote is considered advisory in nature.

    a. The board must reconsider the issue at a second meeting.

    b. At least 30 days before final consideration, the board must notify the teacher of its intention to deny tenure and the date of the board meeting at which the board will take final action (Educ. Law § 3031(b)).

4. A grant of tenure becomes effective on the date specified in the resolution granting tenure (*Remus v. Bd. of Educ. of Tonawanda City Sch. Dist. and Shaffer v. Schenectady Sch. Dist.*, 96 N.Y.2d 271 (2001)). A teacher whose position is abolished and is placed on the preferred eligible list before the effective date of his or tenure award is not entitled to be called back from that list as a tenured teacher. In such an instance, tenure never took effect (*Appeal of Dickinson*, 49 Educ Dept Rep 463 (2010)).

    a. A teacher awarded tenure may still acquire tenure even if he or she resigns before the effective date of the tenure (see *Marcus v. Bd. of Educ. of the Cohoes City Sch. Dist.*, 64 A.D.2d 475 (3d Dep't 1978)).

b. A board can rescind a prior grant of tenure before the effective date specified in the board resolution granting tenure (*Remus v. Bd. of Educ. of Tonawanda City Sch. Dist. and Shaffer v. Schenectady Sch. Dist.*).

Tenure by Estoppel

1. Tenure by estoppel, also referred to as tenure by acquiescence, occurs when school boards have not acted to grant tenure but have continued a teacher's employment after expiration of the teacher's probationary period (*Matter of Gould v. Board of Educ.*, 81 N.Y.2d 446 (1993); *Lindsey v. Bd. of Educ.*, 72 A.D.2d 185 (4th Dep't 1980)).

2. Tenure by estoppel can occur only if a district allows a teacher to continue to teach after the probationary period has expired "with full knowledge and consent" (*Lindsey v. Board of Educ.*).

DISCIPLINE AND TERMINATION OF TENURED TEACHERS

Authority to Discipline or Terminate Tenured Teachers

1. Tenured teachers may not be disciplined or terminated unless the school district follows the rules and procedures set forth in section 3020-a and 3020-b of the Education Law, or at the written election of the teacher, rules specified in the collective bargaining agreement between the teachers' union and the district (Educ. Law §§ 3020, 3020-a; see also 8 NYCRR Part 82)).

2. Tenured teachers may be disciplined or terminated only for "just cause" (Educ. Law § 3020(1); see also §§ 3012-c(k)(6), 3020-a(3)(c)(i-a)(A)**;** 3020-b(3)(c)(v)).

   Teachers convicted of a sex offense for which registration as a sex offender is required may be terminated without a section 3020-a or other disciplinary hearing subject to reinstatement if termination was based solely on the conviction and other specified circumstances such as a reversal of the conviction apply (Educ. Law §§ 3020-a(2)(b); 305(7-a)(f),(g)).

3. Grounds for discipline include insubordination, immoral character, conduct unbecoming a teacher, inefficiency, incompetency, physical or mental disability, neglect of duty, and failure to maintain certification (Educ. Law § 3012(2)).

Overview of the 3020-a Process

1. Any person, but usually the superintendent, files written charges and the school board votes to prefer charges against the teacher (*Matter of Van Dame*, 15 Ed Dept Rep 63 (1975); *Matter of Arcuri*, 20 Ed Dept Rep 178 (1980)). Charges filed under § 3020-a may incorporate any of the grounds of discipline available pursuant to the education law (see Educ. Law § 3012(2); *compare* Educ. Law § 3020-b).

   a. Charges may not be brought more than three years after the occurrence of the alleged misconduct, unless it constitutes a crime when committed (Educ. Law §§ 3020-a(1), 2590-j(7); *DeMichele v. Greenburgh CSD 7 and Arnold B. Green*, 167 F.3d 784 (2d Cir. 1999)).

   b. In addition, charges must be brought during the school year during which the employee is normally required to serve (Educ. Law § 3020-a(1)).

2. The school board and employee must agree on the appointment of a hearing officer within 15 days of receipt of a list of hearing officers. Failure to do so means the commissioner of education will appoint a hearing officer (except in New York City, where different rules apply) (Educ. Law § 3020-a(3)(b); 8 NYCRR §§ 82-1.6(b), (c), 82-3.5(b)). The hearing officer's compensation, payable by the state education department, is limited to that set forth in guidelines established by the commissioner (Educ. Law § 3020-a(3)(b); 8 NYCRR §§ 82-1.12**,** 82-3.12).

3. All hearings must be completed within timelines established by law. The state education department will monitor hearings to ensure compliance (Educ. Law § 3020-a(3)(c); 8 NYCRR §§ 82-1.10, 82-1.11, 82-3.9(b), (c), 82-3.11).

4. The teacher must be notified of the charges and a copy of the charges must be forward to the commissioner of education (Educ. Law § 3020-a(2)(a); 8 NYCRR § 82-1.3(b), 82-3.3(d)).

   The notice of the charges must indicate the nature of the charges, the maximum penalty sought, and the teacher's rights under the law (*Id*.).

3020-a Hearing

1. Once notified of charges, a teacher is entitled to request a hearing (Educ. Law § 3020-a(2)(a), (c); 8 NYCRR § 82-1.3(b), 82-3.4(a)) or choose to proceed under alternative disciplinary procedure collectively negotiated (Educ. Law § 3020(1); *Kilduff v. Rochester City School Dist.*, 966 N.Y.S.2d 708 (4th Dep't 2013)), except in New York City where teachers are bound by negotiated alternatives (Educ. Law § 3020-a(4)).

2. 3020-a hearings are usually conducted before a single hearing officer who determines the guilt or innocence of the teacher and orders any penalty to be imposed. But if the charges concern pedagogical incompetence or issues of pedagogical judgment and were commenced prior to July 1, 2015, the teacher may choose to proceed, instead, with a three-member panel, often referred to as a 3020-a panel. (Educ. Law § 3020-a(2)(c); 8 NCYRR § 82-1.6(e); 82-1.7).

3. A teacher may knowingly and freely waive the right to a hearing as part of a stipulation of settlement (*Abramovich v. Bd. of Educ.*, 46 N.Y.2d 450 (1979) *reconsideration denied*, 46 N.Y.2d 1076 (1979), *cert. denied* 44 U.S. 845 (1979)).

Overview of the 3020-b Process

1. Education Law §3020-b is limited in scope. Charges brought under § 3020-b are solely concerned with discipline and removal of teachers with two or more annual ineffective ratings under the annual professional performance review process (Educ. Law § 3020-b, see also Educ. Law §§ 3012-c, 3012-d).

   Unlike charges commenced under § 3020-a, charges brought under § 3020-b may be initiated at any time.

2. A school board may vote to prefer charges of incompetence if a teacher receives two consecutive ineffective ratings. (Educ. Law § 3020-b(2)(a); 8 NYCRR § 82-3.9(d)(1)). A school board is required to bring charges of incompetence if a teacher receives three consecutive annual ineffective ratings pursuant to the annual professional performance review process (Educ. Law § 3020-b(2)(a); 8 NYCRR § 82-3.9(e)(1)).

In both instances such charges are required to allege the board developed and substantially implemented an improvement plan for the employee following the first evaluation where the teacher was rated ineffective and the immediately preceding evaluation if the employee was rated developing (Educ. Law § 3020-b(2)(d); 8 NYCRR § 82-3.9(d)(2), (e)(2)).

3. For charges filed under § 3020-b after a teacher has received 2 ineffective ratings the parties must agree upon the appointment of a hearing officer within 7 days after receiving the list of hearing officers (Educ. Law § 3020-b(3)(a); 8 NYCRR § 82-3.6(b)). The commissioner will appoint a hearing officer if the parties fail to notify the commissioner of a selection (*Id*.). In the case of a mandatory expedited hearing after a teacher receives 3 ineffective ratings the commissioner will appoint a hearing officer (8 NYCRR § 82-3.6(c)).

4. All hearings commenced under § 3020-b whether standard or expedited, must be completed within specified time frames (Educ. Law § 3020-b(3)(c)(i); 8 NYCRR § 82-3.9(d), (e)). The state education department will monitor hearings to ensure compliance (Educ. Law § 3020-b(3)(c)(ii); 8 NYCRR § 82-3.11).

   The hearing officer's compensation, payable by the state education department, is limited to that set forth in guidelines established by the commissioner (Educ. Law § 3020-b(3)(b); 8 NYCRR § 82-3.12).

5. The teacher must be notified of the charges and a copy of the charges must be forward to the commissioner of education (Educ. Law § 3020-b(2)(a); 8 NYCRR § 82-3.3(d)).

   The notice of the charges must indicate the nature of the charges, the maximum penalty sought, and the teacher's rights under the law (*Id*.).

3020-b Hearing

1. Once notified of charges, a teacher is entitled to request in writing a hearing and the unexcused failure to request such hearing within ten days of receiving notice of the charges will be deemed a waiver to the right to a hearing (Educ. Law § 3020-b(2)(c)).

2. All hearings under §3020-b will be conducted by a single hearing officer (§ 3020-b(3)(b)).

3. The statute provides that two consecutive ineffective ratings shall constitute prima facie evidence of incompetence and can only be overcome by clear and convincing evidence that the employee is not incompetent in light of all surrounding circumstances, and if not overcome the finding, absent extraordinary circumstances shall be just cause for removal (Educ. Law § 3020-b(3)(c)(v)(A)).

   Three consecutive ratings of ineffective shall also constitute prima facie evidence of incompetence and may only be overcome by clear and convincing evidence that the calculation of one of more of the underlying components of the review was fraudulent (including a case of mistaken identity) (Educ. Law § 3020-b(3)(c)(v)(B)). Similarly, if the evidence is not successfully overcome, the finding absent extraordinary circumstances shall be just cause for removal (*Id*.).

Suspension While Charges are Pending

1. Teachers with 3020-a and 3020-b charges pending against them may be suspended until the case is resolved. However, the suspension is generally with full pay and benefits (Educ. Law § 3020-a(2)(b); *Matter of Jerry v. Bd of Educ.*, 35 N.Y.2d 534 (1974).

2. Suspension without pay while charges are pending is permissible only when:

   a. A collective bargaining agreement provides for it (*Romano v. Canuteson*, 11 F.3d 1140 (2d Cir. 1993); *Bd. of Educ. v. Nyquist*, 48 N.Y.2d 97 (1979); *Elmore v. Plainview-Old Bethpage CSD*, 299 A.D.2d 545 (2d Dep't 2012), *appeal denied*, 99 N.Y.2d 509 (2003)).

   b. A teacher faces charges for lack of certification for the course he or she has been hired to teach (*Meliti v. Nyquist*, 41 N.Y.2d 183 (1976); *Matter of Cutler v. Bd. of Ed. of Poughkeepsie City Sch. Dist.*, 104 A.D.2d 988 (2d Dep't 1984), *aff'd* 65 N.Y.2d 797 (1985); see also *Smith v. Andrews*, 122 A.D.2d 310 (3d Dep't 1986).

   c. The teacher has pleaded guilty or been found guilty of a felony drug crime or a felony crime involving the physical abuse of a minor or student (Educ. Law § 3020-a(2)(b)).

   d. Where charges of misconduct constituting physical or sexual abuse of a student are brought on or after July 1, 2015 (Educ. Law § 3020-a(2)(c); 8 NYCRR § 82-3.10). If, after a hearing, an impartial hearing officer finds probable cause exists to support the charges such suspension without pay may continue for the duration of the expedited hearing on the charges but may not exceed 120 days from date the board decided to suspend without pay (Educ. Law § 3020-a(2)(c), (3)(c)(i-a); 8 NYCRR § 82-3.10(a)).

ABOLITION OF POSITIONS[2]

School Board Authority to Abolish Positions

1. School boards may abolish a teaching position if it is no longer necessary to the school system (*Zarlo v. Ambach*, 53 N.Y.2d 1035 (1981); *Cohen v. Crown Point CSD*, 306 A.D.2d 732 (3d Dep't 2003); *Young v. Seneca Bd. of Ed.*, 35 N.Y.2d 31 (1974); *Currier v. Tompkins-Seneca-Tioga BOCES*, 80 A.D.2d 979 (3d Dep't 1981)). The prior recommendation of the superintendent is not required as this authority is vested in the school board under the Education Law. A policy giving the superintendent such authority would violate public policy and be declared unenforceable (*Appeal of Roberts, et al*, 49 Ed Dept Rep 354 (2010)).

   However, they may not abolish a position as a way to fire a teacher (*Young v. Bd. of Educ.*, 35 N.Y.2d 31 (1974); *Weimer v. Bd. of Educ.*, 76 A.D.2d 1046 (2d Dep't 1980); *Bd. of Educ. v. Niagara-Wheatfield Teachers' Ass'n*, 54 A.D.2d 281 (4th Dep't 1976) *appeal denied* 41 N.Y.2d 801 (1977); *Appeal of Stratton*, 33 Ed Dept Rep 373 (1993)).

[2] When a school district is under receivership, the abolition of positions, bumping and reappointment rights for teachers and administrators at the struggling or persistently struggling school are not governed by the traditional statutory framework outlined here but by special rules set out in the receivership statute and regulations (see Educ. Law § 211-f(7)(a)(viii); 8 NYCRR § 100.19(g)(4)).

2. A school board must adopt a formal resolution abolishing a particular position and provide notice to the teacher that his or her position is being abolished.

   a. The resolution must identify the tenure area in which the position is being abolished.

   b. The applicable collective bargaining agreement should be reviewed to determine if it requires a particular method or manner of giving notice to teachers whose positions are being abolished (*Appeal of Lessing*, 34 Ed Dept Rep 451 (1995)).

3. If a new position is created at the same time that an existing position is abolished, the teacher who would be "excessed" must be hired at his or her existing salary for the new position if the duties performed under both positions are similar and the teacher's record in the prior position has been one of faithful, competent service (Educ. Law §§ 2510(1), 2585(2), 3013(1)).

   a. Two positions are considered similar if more than 50 percent of the functions to be performed are the same (*Appeal of Klein*, 43 Ed Dept Rep 305 (2003), *petition dismissed*, Sup. Ct. Albany Co., Special Term, Ceresia, J., (Dec. 6, 2004); *Coates v. Ambach*, 52 A.D.2d 261 (3d Dep't 1976), *aff'd* 42 N.Y.2d 846 (1977)).

      The 50 percent rule should not be applied rigidly, and the emphasis should be on the type of duties the employee could have been expected to perform in the old position (*Matter of Cowan v. Bd. of Educ. of Brentwood UFSD*, 99 A.D.2d 831 (2d Dep't 1984), *appeal withdrawn*, 63 N.Y.2d 702 (1984); *Appeal of Elmendorf*, 36 Ed Dept Rep 308 (1997); see also *Elmendorf v. Howell*, 962 F.Supp 326 (N.D.N.Y. 1997)).

   b. An employee who claims entitlement to a similar position has a right to a pre-termination hearing to offer proof of the similarity of the positions (*DeSimone v. Bd. of Educ.*, 604 F.Supp. 1180 (E.D.N.Y. 1985), and 612 F.Supp. 1568 (E.D.N.Y. 1995); *Appeal of Elmendorf*; see also *Elmendorf v. Howell*).

"Bumping" Rights

1. When a position is abolished, it is the teacher with the least seniority within the tenure area of that position in the school district who is dismissed (Educ. Law §§ 2510(2), 2585(3), 3013(2)).

2. A teacher appointed under Part 30 of the Rules of the Board of Regents who has accrued seniority based on prior service in a different tenure area may claim the position of another teacher serving in that second tenure area if the first teacher has more seniority in the second tenure area than other teachers, and thus avoid being excessed (8 NYCRR § 30.13).

   In comparison, all teaching assistants are deemed to serve in the same tenure area. Therefore, when a teaching assistant position is abolished, the least senior teaching assistant must be excessed (*Appeal of Kranson*, 41 Ed Dept Rep 305 (2002), *aff'd Madison-Oneida BOCES v. Mills*, 2 A.D.3d 1240 (3d Dep't 2003), *aff'd* 4 N.Y.3d 51 (2004); *Appeal of Denova*, 44 Ed Dept Rep 308 (2005); *Appeal of McCollum*, 44 Ed Dept Rep 306 (2005)).

Right to Reappointment

1. Teachers who are excessed because their positions are abolished must be placed on a preferred eligible list (PEL) of candidates for appointment to a similar position for seven years after their

position is abolished (Educ. Law §§ 2510(3), 3013(3)(a); *Brewer v. Board of Educ.*, 51 N.Y.2d 855 (1980); *Gervais v. Bd. of Educ. of East Aurora* UFSD, 120 A.D.3d 1556 (4thDep't 2014); Jester *v. Bd. of Educ.*, 109 A.D.2d 1004 (3d Dep't 1985); *Greenspan v. Dutchess Co. BOCES*, 96 A.D.2d 1028 (2d Dep't 1983); *Appeal of Tucholski*, 28 Ed Dept Rep 112 (1988); *Appeal of Kantrowitz*, 48 Ed Dept Rep 218 (2008).

2. When several different teachers have been excessed, they must be offered reappointment in order of seniority based on the length of service in the system, rather than within a particular tenure area (Educ. Law §§ 2510(3)(a), 2585(4), 3013(3)(a); *Mahony v. Bd. of Educ.*, 140 A.D.2d 33 (2d Dep't 1988), *appeal denied*, 73 N.Y.2d 703 (1988)). School districts are required to make a reasonable effort to notify eligible persons of vacancies so that such persons may be afforded the opportunity to accept or decline the position. It is not enough for a district to publicize a vacancy (*Appeal of Dickinson*, 49 Educ Dept Rep 463 (2010)).

3. Teachers on the PEL must be offered regular substitute positions of at least five months' duration. Declining such an offer does not extinguish the teacher's PEL rights (Educ. Law §§ 2510(3)(b), 3013(3)(b)).

   They also must be offered a part-time position of shorter duration if one becomes available (*Abrams v. Ambach*, 43 A.D.2d 883 (3d Dep't 1974).

   A teacher recalled from the PEL to a part-time position after being excessed from a full time position is entitled to a new seven-year period on the PEL from the date a school board abolishes his or her part-time position (*Avila v. Bd. of Educ. of the North Babylon UFSD*, 240 A.D.2d 661 (2d Dep't 1997), *appeal denied*, 91 N.Y.2d 801 (1997)).

4. A teacher does not waive any right to reappointment within his or her tenure area by:

   a. Accepting a position in another tenure area in the district (*Matter of Mead*, 23 Ed Dept Rep 101 (1983)), or

   b. Accepting other employment (*Donato v. Mills*, 6 A.D.3d 966 (3d Dep't 2004)), or

   c. Refusing an offer of reemployment because of a short-term commitment to another employer (*Lewis v. Cleveland Hill UFSD*, 119 A.D.2d (4th Dep't 1986)) or

   d. Resigning from a position in a different tenure area within the district (*Appeal of Petkovsek*, 48 Ed Dept Rep 513 (2009)).

5. A teacher's right to reappointment is extinguished when the teacher retires (*Appeal of Lamb*, 42 Ed Dept Rep 406 (2003)).

ANNUAL PROFESSIONAL PERFORMANCE REVIEW [3]

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)).

Evaluation Categories

Teacher and principal evaluations consist of multiple measures in two categories – student performance and teacher observations (§ 3012-d(4)).

1. The student performance category for teachers includes mandatory and optional subcomponents (§ 3012-d(4)(a)).

   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, the teacher receives a state-provided student growth score.

      - If no, the teacher receives a student growth score based on a student learning objective (SLO) developed in accordance with a goal-setting 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)).

   b. The optional subcomponent consists of a second measure selected at the local level from among the following:

      - A second state-provided growth score on a state assessment under the mandatory subcomponent, or

      - A growth score based on a state-designed supplemental assessment that is calculated using a state-provided or approved growth model (§ 3012-d(4)(a)(2)).

[3] In December 2015 the Board of Regents adopted regulations to implement the recommendation of the Governor's Common Core Task Force that results of the grades 3-8 ELA/math state assessments and the use of any State provide growth model based on these tests or other State assessments shall not have consequences for teachers and students as the State transitions to higher learning standards through new State assessments aligned to the higher learning stands and a revise State-provided growth model. The transition period encompasses the 2015-16 through 2018-19 school years. The regulations provide that a transition score and HEDI rating will be calculated for during the transition period for teacher and principals.

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)).

2. The teacher observations category must be based on a state-approved rubric and include mandatory and optional subcomponents.

   a. The mandatory subcomponent is based on observations by:

      - A principal or other trained administrator

      - An impartial independent trained evaluator (ITE) selected by the district[4].

      The ITE may be employed within the district but not in the same school building as the teacher being evaluated.

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

      - Rated effective or highly effective

      - From the same school or another school within the district (§ 3012-d(4)(b)).

   c. 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)).

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)).

IX. EMPLOYMENT OF NON-INSTRUCTIONAL STAFF

BASICS OF CIVIL SERVICE LAW

1. The civil service includes all offices and positions in the service of the state or any of its civil divisions including school districts (Civ. S. Law §17 (1)-(2)). The civil service is divided into two broad categories: the unclassified service (Civ. S. Law §35) and the classified service (Civ. S. Law §§40-44).

[4] School districts may apply for waivers from the independent evaluator requirement if use of an independent evaluator would create defined undue burdens on the district (8 NYCRR § 30-3.4(d)(2)(i)(b)(1), (2)).

2. The unclassified service is comprised of all positions in eleven categories listed in the Civil Service Law (Civ. S. Law §35)

3. The classified service is comprised of four jurisdictional categories as follows:

   a. Exempt class: all positions for which competitive or non competitive examinations to determine the merit and fitness of applicants is found to be not practicable (Civ. S. Law §41(1)(e); N.Y. Const. Art. 5, §6).

      For example, teachers, principals, superintendents, school psychologists, guidance counselors and other similar positions fall in this class.

   b. Labor class: unskilled positions, with no minimum classifications, although applicants may be required to demonstrate ability to do job (Civ. S. Law §43).

   c. Noncompetitive Class: all positions not in exempt or labor class for which it is not practicable to ascertain the merit and fitness of applicants by competitive examination (Civ. S. Law §42(1)).

   d. Competitive Class: all positions not in exempt, labor or noncompetitive classes (Civ. S. Law §44). Candidates must meet minimum qualifications established by the local civil service agency and are subject to competitive examination to show merit and fitness for the position (Civ. S. Law §50(1), (4)(a)).

4. The administration and enforcement of the civil service system for local governments in New York is decentralized and is primarily the responsibility of local civil service agencies (Civ. S. Law §§15, 17).

   a. The county civil service commissioner or personnel officer is responsible for civil service administration with respect to all positions in the classified service of the county and all the local governments within in the county, including school districts, except for cities that have elected to operate their own civil service agency (Civ. S. Law §17(1)).

   b. Each local civil service agency is responsible for adopting rules that govern administration of civil service (Civ. S. Law §20). The local rules cover matters such as how positions will be classified, examinations, appointments, promotions, transfers, resignations and reinstatements (Civ. S. Law §20(1)).

APPOINTMENTS TO THE COMPETITIVE CLASS

In General

1. The school board is legally responsible for making appointments to all school district positions, including positions in the classified service, except in New York City where the chancellor has the power to appoint and set salaries for staff in non-represented managerial titles (Educ. Law §§ 1604(8), 1709(15), (16), 1711(1), 1804(1), 1903, 1950(4)(e), 2503(5), 2554(2), 2573(3), 2590-g(2), 2590-h(17), (41), 3011, 3012(1)(b); *Appeal of Brown*, 32 Ed Dept Rep 212 (1992)).

   As the appointing authority, the board is required to notify the local civil service agency of all classified service appointments on a form prescribed by the local agency (Civ. S. Law § 97(1)).

2. The school board is required to comply with all provisions of the Civil Service Law when making appointments to classified service positions. If the board fails to select or appoint classified service employees in accordance with the law, the board members may be personally responsible for paying that employee's salary (Civ. S. Law § 95).

3. An appointment or promotion to a position in the competitive class of the classified civil service can be made only by selection of one of the three persons certified by the local civil service agency as standing highest on the appropriate eligible list who is willing to accept such an appointment or promotion (Civ. S. Law § 61(1)).

   a. An eligible list is a list prepared by the local civil service agency (or in some cases by the State Civil Service Department), which lists in rank order the names of all persons who have passed the required civil service examination for the position to which an appointment is to be made (see *Deas v. Levitt*, 73 N.Y.2d 525, *cert. denied*, 493 U.S. 933 (1989)).

   b. "Appointments and promotions [are] made from the eligible list most nearly appropriate for the position to be filled" (Civ. S. Law § 61(1)) based on the qualifications of the position (*Gramando v. Putnam Cnty. Personnel Dep't*, 58 A.D.3d 842 (2d Dep't 2009); *Samboy v. N.Y.S. Liquor Auth*., 52 A.D.2d 1016 (3d Dep't 1976)). That determination is made by the local civil service agency and will not be disturbed by the courts unless it is irrational and arbitrary (*Gramando v. Putnam Cnty. Personnel Dep't*).

4. If there are fewer than three candidates on an eligible list, a school board cannot be compelled by the Civil Service Law to make an appointment from that list. Instead, the board may make a provisional appointment from outside the list (see Civ. S. Law § 65(1); *Valentin v. N.Y. State Dep't of Tax. & Fin.*, 992 F.Supp. 536 (E.D.N.Y. 1997), *aff'd*, 175 F.3d 1009 (2d Cir. 1999); *Heslin v. City of Cohoes*, 74 A.D.2d 393 (3d Dep't 1980), *rev'd on other grounds*, 53 N.Y.2d 903 (1981)).

   However, a collective bargaining agreement may contain a provision that requires a school board to make an appointment from a list of fewer than three candidates (*Heslin*). Thus, such an agreement may provide that only the top ranking candidate is eligible for a promotion (*Professional, Clerical, Technical Employees Ass'n (Buffalo Bd. of Educ*.), 90 N.Y.2d 364 (1997)).

Provisional Appointments

1. A school district may make a provisional appointment to a competitive class position when there is no eligible list available (Civ. S. Law § 65(1)), either because an examination has not been given, the eligible list expired (*Davey v. Dep't of Civil Serv*., 60 A.D.2d 998 (4th Dep't 1978)) or the existing eligible list contains fewer than three names (*Valentin v. N.Y. State Dep't of Tax. & Fin.*, 992 F. Supp. 536 (E.D.N.Y. 1997), *aff'd*, 175 F.3d 1009 (2d Cir. 1999)).

   a. Provisional appointments do not ripen into permanent appointments, no matter how long they exist (*Snyder v. Civil Serv. Comm'n of State of N.Y.*, 72 N.Y.2d 981 (1988); *Becker v. N.Y. State Civil Serv. Comm'n*, 61 N.Y.2d 252 (1984); *Haynes v. Cnty. of Chautauqua*, 55 N.Y.2d 814 (1981)), and the appointee can be terminated at any time for any lawful reason (*Preddice v. Callanan*, 69 N.Y.2d 812 (1987); see also *City of Long Beach v.*

CSEA-Long Beach Unit, 8 N.Y.3d 465 (2007); *Matter of Lee v. Albany-Schoharie-Schenectady-Saratoga BOCES*, 69 A.D.3d 1289 (3d Dep't 2010)).

b. Provisional appointees must be terminated within two months after the establishment of an appropriate eligible list, unless there is a large number of people in a particular title serving on a provisional basis. In this case, the appointment can continue, with the approval of the local civil service agency, for a maximum of four months after the establishment of the eligible list to avoid programmatic disruption (Civ. S. Law § 65(3)).

2. Provisional appointments to a competitive class position**s** are based on a noncompetitive examination that may consist of a review and evaluation of the candidate's training, experience, and other qualifications, without written, oral, or other performance tests (Civ. S. Law § 65(1)).

3. The duration of a provisional appointment is limited to nine months (Civ. S. Law § 65(2)). Under extenuating circumstances it may be extended, if there is no valid eligible list available (Civ. S. Law § 65(4)).

Temporary Appointments

1. A temporary employee is essentially a substitute in a position that is encumbered (i.e., one to which someone else is returning or may have a superior claim).

2. A school district may make a temporary appointment to a competitive class position (1) on an emergency basis for a period not exceeding three months; (2) to replace a permanent appointee who is on leave of absence for the duration of the leave; or (3) for up to six months when a position is not expected to exist for a longer period. If a position that is not expected to last more than six months does indeed remain in existence beyond the six-month period, the local civil service agency may authorize an extension for a period not to exceed an additional six months (Civ. S. Law § 64(1)).

DISCIPLINE OF NON INSTRUCTIONAL EMPLOYEES

1. Certain non-instructional employees in the classified civil service are entitled to due process protection prior to being disciplined or terminated for incompetency or misconduct (Civ. S. Law §75(1)).

2. These employees include:

a. Persons holding a position by permanent appointment (as opposed to provisional or temporary appointment) in the competitive class (Civ. S. Law §75(1));

b. Honorably discharged or honorably released veterans and exempt volunteer firefighters (as defined in the General Municipal Law) employed permanently in the classified service, regardless of the employee's jurisdictional classification, except persons holding the positions of private secretary, cashier, or deputy of any official or department (Civ. S. Law § 75(1)(b); see *Wamsley v. E. Ramapo CSD Bd. of Educ.*, 281 A.D.2d 633 (2d Dep't 2001)); and

c. Employees holding positions in the noncompetitive class who have completed at least five years of continuous service in that class, provided that the local civil service agency has specifically named the position as being in the noncompetitive class (*Wheeler v. Parker*, 546 F.Supp.2d 7 (N.D.N.Y. 2008)), and further provided the employee's position has not been designated as confidential or policy-making by the local civil service agency (Civ. S. Law § 75(1)(c); *Wamsley*)

3. A collective bargaining agreement may afford employees alternative disciplinary protections and procedures (*Auburn Police Local 195 v. Helsby*, 62 A.D.2d 12 (3d Dep't 1978), *aff'd*, 46 N.Y.2d 1034 (1979)), but it may not extend such alternate protection to individuals not otherwise entitled to the protections of section 75 of the Civil Service Law (see *City of Long Beach v. CSEA-Long Beach Unit*, 8 N.Y.3d 465 (2007)).

PROTECTIONS PRIOR TO HEARING

1. No removal or disciplinary proceedings may be commenced more than 18 months after the occurrence of the misconduct or incompetency alleged in the charge. This limitation does not apply where the charges would, if proved in court, constitute a crime (Civ. S. Law § 75(4); see *McKinney v. Bennett*, 31 A.D.3d 860 (3d Dep't 2006); *Wojewodzic v. O'Neill*, 295 A.D.2d 670 (3d Dep't 2002)).

2. Employees with section 75 protections are entitled to union representation when questioned if it appears that the employee may be the potential subject of disciplinary action (Civ. S. Law § 75(2)). This right extends to probationary employees (*NYSCOPBA v. State of NY*, 43 PERB ¶ 3031 (2010)).

   a. Employees must be notified in advance, in writing, of this right.

   b. The employee is entitled to a reasonable period of time to obtain representation. If the employee is unable to do so within a reasonable time period, the district can question the employee without representation (Civ. S. § 75(2)).

3. Written notice of the proposed disciplinary action, the charges and the reasons therefor must be provided to the employee. He or she must be given at least eight days to respond to the charges in writing (Civ. S. Law §§ 75(2)). The law does not specify who may prefer charges but one state appellate court has said that the superintendent possesses that authority (*Matter of Stafford v. Bd. of Educ. of Mohonasen CSD*, 61 A.D.3d 1259 (3d Dep't 2009)).

4. Employees may be suspended without pay for up to 30 days pending a hearing and determination of the charges (Civ. S. Law § 75(3)). If the employee is acquitted or later reinstated after appeal, the employee is entitled to restoration to his or her position with full back pay and benefits, less unemployment benefits received during the period of suspension (Civ. S. Law §§ 75(3), 76(3), 77; see *Matter of CSEA, Local 1000 v. Brookhaven-Comsewogue UFSD*, 87 N.Y.2d 868 (1995)).

HEARING ON THE CHARGES

1. At the hearing the employee is entitled to counsel or to be represented by the employee's union. The employee may present witnesses (Civ. S. Law § 75(2)).

2. The hearing is conducted by a school board or a designated hearing officer who makes a recommendation to the school board as to guilt or innocence and penalty, if any (Civ. S. Law § 75(2)).

   a. The designation of a hearing officer by the school board must be in writing (Civ. S. Law § 75(2)). A superintendent's letter on district letterhead informing the hearing officer of his or her designation by the board to conduct the hearing satisfies this requirement (*Matter of Stafford v. Mohonasen CSD*, 61 A.D.3d 1259 (3d Dep't 2009)).

   b. Failure to officially designate a hearing officer may leave the board without jurisdiction to discipline the employee if someone other than the board conducts the hearing. If the board fails to officially designate a hearing officer who conducts the hearing, a court may annul the hearing officer's determination and direct the district to reinstate the employee with back pay (*Melendez v. Bd. of Educ. of Yonkers City Sch. Dist.*, 34 A.D.3d 814 (2d Dep't 2006)).

3. In general, board members whose testimony in a Civil Service Law §75 disciplinary hearing supports or negates the establishment of the charges preferred must disqualify themselves from subsequently acting upon any of the charges related to the hearing. However, disqualification in a §75 proceeding would be inappropriate if the person who provided testimony is necessary to effectuate a decision (*Baker v. Poughkeepsie City School Dist.*, 18 N.Y.3d 714 (2012)).

4. The penalty or punishment that may be imposed following a determination of guilt is limited to those set forth in the Civil Service Law:

   a. reprimand;

   b. a fine not to exceed $100 to be deducted from the employee's wages;

   c. suspension without pay for a period not exceeding two months;

   d. demotion in grade and title; or

   e. dismissal (Civ. S. Law § 75(3)).

5. Any time period during which the employee was suspended without pay prior to the outcome of the hearing may be become part of the penalty (i*d.*).

EMPLOYEES NOT COVERED BY SECTION 75

1. Employees not covered under section 75 may have job protections under a collective bargaining agreement. However, employees who have neither protection are considered "at will" and can be discharged without cause and without a hearing for any reason, except an illegal reason (i.e., because of race, religion, sex, disability) (see *Tyson v. Hess*, 109 A.D.2d 1068 (4th Dep't 1985), *aff'd*, 66 N.Y.2d 943 (1985)).

2. Unionized non-instructional employees who do not have section 75 or collective bargaining agreement protections are entitled to union representation during questioning by an employer under the conditions set forth in the civil service law (Civ. S. Law § 209-a(1)(g)).

X. OVERVIEW OF COLLECTIVE BARGAINING

THE TAYLOR LAW

1. The Taylor Law is the New York State statute that governs collective bargaining negotiations between school districts and their employees. It is part of the Civil Service Law and is officially known as the Public Employees' Fair Employment Act (Civ. Serv. Law Article 14)

    a. The law's purpose is to promote harmonious and cooperative labor relations in the public sector and to avoid strikes (Civ. Serv. Law § 200; *City of Newburgh v. Newman*, 69 N.Y.2d 166 (1987)).

    b. The law is administered by the Public Employment Relations Board, also referred to as PERB (Civ. Serv. Law § 205).

2. Under the Taylor Law, school districts have the right to:

    a. Recognize or withhold recognition of employee organizations (unions) for purposes of negotiating terms and conditions of employment, and the administration of grievances under a collective bargaining agreement.

    b. Negotiate with, and enter into agreements with, unions representing school district employees to determine terms and conditions of employment (Civ. Serv. Law §§ 204(1), 207(3)).

    c. Insist that a union participate in good faith bargaining with the district (Civ. Serv. Law §§ 204(2), (3), 209-a(2)(b)).

    d. Negotiate free from strike activities such as concerted work stoppage or slowdown, or threats of strikes, and the right and obligation to invoke the law's procedures concerning strikes if a strike or strike activity occurs (Civ. Serv. Law §§ 201(9), 210)).

3. Under the Taylor Law, school district employees have the right to:

    a. Self-organization and to join or refrain from joining an employee organization (Civ. Serv. Law § 202).

    b. Representation and to designate an employee organization as their representative in collective bargaining negotiations and the administration of grievances under a negotiated collective bargaining agreement (Civ. Serv. Law § 203).

    These employee rights to do not apply to:

    a. managerial and confidential employees (Civ. Serv. Law § 201(7)).

    b. "casual" employees (*BOCES III, Suffolk County*, 15 PERB ¶ 3015, *aff'd BOCES III Faculty Assn. v. PERB*, 92 A.D.2d 937 (2d Dep't 1983).

    c. Per diem substitute teachers who have not been given a reasonable assurance of continued employment by the district (Civ. Serv. Law § 201(7)(d), (f)).

Generally, former employees or retirees do not enjoy representation rights under the Taylor Law either, since the law affords representational rights only to public employees (Civ. Serv. Law § 209-a(2)(c)).

4. The Taylor Law requires that school districts and employee organizations negotiate in good faith (Civ. Serv. Law § 204(2), (3)). This requires that both sides:

   a. "approach the negotiating table with a sincere desire to reach agreement" (*Town of Southampton*, 2 PERB ¶ 3011 (1969)), and

   b. actively participate in negotiations indicating a "present intent to find a basis for agreement" (*Deposit CSD*, 27 PERB ¶ 3020 (1994), *aff'd* 24 A.D.2d 288 (3d Dep't 1995), *reconsideration denied*, 29 ¶ PERB 7001, *appeal denied*, 88 N.Y.2d 866 (1996)).

THE TRIBOROUGH RULE

1. If a current collective bargaining agreement expires before a successor agreement is negotiated, all the provisions of the expired contract continue in full force and effect until there is a new agreement.

   It is an improper practice for a public employer, including a school district, to refuse to continue the terms of an expired contract until a new one is negotiated (Civ. Serv. Law § 209-a(1)(e)).

2. There are some exceptions to the *Triborough* rule. The rule does not apply:

   a. If the employee organization either strikes or causes, instigates, encourages, or condones a strike (Civ. Serv. Law § 209-a(1)(e)).

   b. To provisions covered by a sunset provision also included in the agreement (see *Waterford-Halfmoon UFSD*, 27 PERB ¶ 3070 (1994)). A sunset clause attaches a final effective date to a specific provision in the contract (see *Schyulerville CSD*, 29 PERB ¶ 3029 (1996)).

THE PARTIES TO THE NEGOTIATION PROCESS

1. Under the Taylor Law, the school superintendent, as chief executive officer, has the authority to execute collectively negotiated agreements on behalf of a school district (Civ. Serv. Law § 201(10)); *Utica City Sch. Dist.*, 27 PERB ¶ 3023 (1994)).

   Technically, it is also the superintendent, as chief executive office**r**, who is responsible for negotiating a school district's collective bargaining agreement (Civ. Serv. Law § 201(12)), even though as a practical matter school boards frequently play an active role in the process.

2. Under the Taylor Law, a school board is the legislative body of a school district responsible for appropriating additional moneys necessary to fund the provisions of a successor collectively negotiated agreement and other negotiated expenditures such as in a supplemental memorandum of agreement (Civ. Serv. Law § 201(11), (12)). Board approval is not necessary if a change does not result in the expenditure of school district funds.

At the conclusion of the negotiating process, the school board may also play a role in ratifying a tentative agreement, if that right has been reserved to the board by the district's negotiator (*Town of Dresden*, 17 PERB ¶ 3096 (1984)).

3. The Taylor Law authorizes employee organizations to execute a collective bargaining agreement on behalf of school district employees in the bargaining unit that they represent (Civ. Serv. Law § 201(5)).

THE SCHOOL BOARD'S ROLE IN NEGOTIATIONS

Selection of the Negotiating Team and Spokesperson

1. Although in some small localities a school district's team may well be a single person, in most cases, school boards designate a team of individuals to function as its bargaining team.

2. Typically, a district's negotiating team includes a chief spokesperson (chief negotiator), a recorder who takes notes, an individual familiar with the district's educational program when negotiating with the teachers, and an individual familiar with the financial needs and resources of the district.

3. There is no prohibition precluding school board members and superintendents from serving on the negotiating team, but there may be some negative effects including, but not limited to, issues regarding the duty of a negotiator to support a tentative agreement, and the school board's right to ratify the contract.

Setting and Prioritizing Negotiation Goals

1. School boards play an important role in establishing the goals that the negotiation team will rely on to make specific proposals and implement negotiation strategies.

2. In this regard, school boards should:

    a. Work closely with the superintendent and negotiating team when developing the negotiation goals.

    b. Develop a contingency plan in case negotiations break down.

    c. Prioritize the goals to ensure that agreement is reached on the most important.

    d. Set parameters that identify the limits of an acceptable settlement on each of the negotiation goals.

Keeping Informed

1. Both a school board and the superintendent must be kept informed about the progress of negotiations.

2. A school board may meet in executive session to discuss certain aspects of collective bargaining (Pub. Off. Law § 105(1)(e)). Such discussions must be kept confidential (*Appeal of Nett and Raby*, 45 Ed Dept Rep 259 (2005)).

Contract Ratification

1. A school board may ratify a tentative agreement before the superintendent executes it, but only if the right to ratify was reserved to the board by the district's negotiator (*Town of Dresden*, 17 PERB ¶ 3096 (1984)).

2. The board must ratify or reject a tentative agreement as a whole and not on a piecemeal basis. In addition, the decision to ratify must be clear, unequivocal and communicated (*Jamesville-DeWitt CSD*, 22 PERB ¶ 3048 (1989); see *Copiague UFSD*, 23 PERB ¶ 3046 (1990)).

3. A school board may lose a reserved right to ratify a tentative agreement if:

    a. It does not conduct a ratification vote "with reasonable expedition", which also constitutes a violation of the duty to negotiate in good faith (*Utica City Sch. Dist.*, 27 PERB ¶ 3023 (1994); *Jamesville-DeWitt CSD*).

    b. Its negotiators fail to affirmatively support ratification, unless a team member has explicitly given advance notice of a contrary intent (*Jamesville-DeWitt CSD*, see *Copiague UFSD*).

    c. Its negotiators fail to provide the board with the agreement (*Town of Greece*, 32 PERB ¶ 3059 (1999)).

XI. STUDENT ATTENDANCE

COMPULSORY ATTENDANCE RULES

In General

1. Under New York's compulsory education law minors who turn 6 years old on or before December 1 in any school year must receive full-time instruction from the first day school is in session in September of such school year. Minors who turn 6 years old after December 1 of a school year must receive full-time instruction from the first day of school in the following September.

2. In general children must remain in attendance until the last day of the school year in which they reach the age of 16 (§ 3205(1); *In the Matter of Kiesha BB*, 30 A.D.3d 704 (3d Dep't 2006)).

    a. A student who has completed a four year high school course of study prior to attaining the age of 16 is not required to remain in attendance (§ 3205(2)).
    b. A school board may require minors from ages 16 through 17 who are not employed to attend school until the last day of the school year in which they become 17 years of age (§ 3205(3)).

3. Generally, persons over 5 and under 21 may attend the public schools of the school district in which they reside even if they are not of compulsory education age (§ 3202(1)).

    a. A child over 5 years of age is entitled to attend public school regardless of whether the district maintains a kindergarten program. Districts without a kindergarten program must

admit such a child to the first grade (*Appeal of Carney*, 15 Ed Dept Rep 325 (1976*); Formal Opinion of Counsel No. 75*, 1 Ed Dept Rep 775 (1952)).

b. When admitting a child who is under the compulsory education age, a school district can require that the child become five years of age on or before December 1 of the school year he or she begins school (§ 3202(1); *Appeal of S.H.*, 40 Ed Dept Rep 527 (2001); *Appeal of Tommasetti*, 39 Ed Dept Rep 513 (2000); *Appeal of Sollitto*, 31 Ed Dept Rep 138 (1991)).

Part time Attendance

1. Students can attend public school part time and receive instruction elsewhere for the balance of the day only as permitted by Education Law section 3602-c **(**known as the dual-enrollment law**)** whereby students attending nonpublic schools may receive instruction in the areas of career education, gifted and talented, and education for students with disabilities, and counseling, psychological and social work services related to such instruction.

2. Nonpublic school students do not have a right to participate in a public school's credit bearing programs other than those authorized by the dual-enrollment law (*Appeal of Pope*, 40 Ed Dept Rep 473 (2001); *Appeal of Sutton*, 39 Ed Dept Rep 625 (2000); *Matter of Mayshark*, 17 Ed Dept Rep 82 (1977)). Neither do they have a right to participate in the non-credit bearing extra-curricular activities of a public school (*Appeal of Ponte*, 41 Ed Dept Rep 186 (2001)).

3. The dual-enrollment law does not permit home-schooled students to be instructed at home for part of the day, and attend classes at a public school for part of the school day (*Id*.), or participate in BOCES programs (*Appeal of Ando*, 45 Ed Dept Rep 523 (2006)). The only exception applies to students with disabilities who are home-schooled (§ 3602-c(2-c)).

ATTENDANCE REQUIREMENTS

Basic Requirements

1. Students of compulsory education age must attend school regularly, as prescribed by the school board for the entire time the appropriate public schools or classes are in session. Absences are permitted only as allowed by the general rules and procedures of the public schools (Educ. Law § 3210(1)(a), (2)(b); see *In the Matter of Sheena S.S.*, 263 A.D.2d 809 (3d Dep't 1999)).

2. School attendance records must be kept for use in the enforcement of the Education Law (Educ. Law §§ 3024, 3211(1); (8 NYCRR § 104.1(c),(d)), and as the source for the average daily attendance used to help determine a district's state aid allocation (Educ. Law § 3025(1)).

   The commissioner's regulations prescribe the form and manner of keeping such records (Educ. Law §§ 3024, 3025(1), 3211(1); 8 NYCRR § 104.1(c)-(h)).

3. A teacher, supervisory staff or other suitable employee designated by the school board shall make entries into a register of attendance and verify the entries by oath or affirmation (Educ. Law § 3211(1); 8 NYCRR § 104.1(b)(4), (5), (e), (f), (g)). Entries will include all excused and unexcused absences, tardiness and early departures (8 NYCRR § 104.1(d)(7)).

4. In non-departmentalized K-8 schools, attendance shall be taken once per day and if students are dismissed for lunch, again upon their return (8 NYCRR § 104.1(d)(7)(i)). In grades 9-12 and departmentalized schools at any grade level, attendance shall be taken each period of instruction. However, if students do not change classrooms between periods, then attendance shall be taken the same as for non-departmentalized grades K-8 above (8 NYCRR § 104.1(d)(7)(ii)).

Attendance Policy

1. School boards must adopt a comprehensive attendance policy which provides for the maintenance of an adequate record verifying the attendance of all children upon instruction, and establish**es** a mechanism for examining patterns of pupil absence and developing effective intervention strategies to improve school attendance (8 NYCRR § 104.1(i)). It must include those required components set forth in the commissioner's regulations (see 8 NYCRR § 104.1(i)(2)).

2. A school board must review student attendance records annually and revise the policy as necessary to improve attendance if the attendance records show a decline in student attendance (8 NYCRR § 104.1(i)(3)).

3. The district must promote community awareness of the policy, including, for example, providing a plain language summary to parents before each school year and making copies available upon request to other community members (see 8 NYCRR § 104.1(i)(4)).

Truancy

1. Truancy is the unlawful absence or irregular attendance upon instruction by a student of compulsory education age (see Educ. Law § 3213(2)(a); see also *Matter of Blackman v. Brown*, 100 Misc.2d 566 (Sup. Ct. Ulster Cnty. 1978); *DeLease v. Nolan*, 185 A.D. 82 (3d Dep't 1918)).

2. Section 3213(2)(c) of the Education Law requires an attendance officer or other person authorized by the school district to notify the parent of an elementary-grade student of his or her child's absence from school, if the parent so requests. The obligation to notify a parent arises only after a parent has submitted a request to be notified.

3. Districts may not suspend or expel students from school for truancy (*King v. Farmer*, 102 Misc.2d 610 (Sup. Ct. Westchester Cnty. 1979); *Appeal of Ackert*). Neither may they be dropped from attendance, except as authorized by law.

4. Habitual truancy constitutes grounds for filing a person in need of supervision (PINS) petition in family court (Family Court Act §§ 712(a), 732; see also *Matter of Samantha K.*, 61 A.D.3d 1322 (3d Dep't 2009)).

Educational Neglect

1. Educational neglect consists of parental failure to ensure a child's prompt and regular attendance in school as required by the state's compulsory education laws, or parental actions that keep a child out of school for impermissible reasons resulting in an adverse effect on the child's educational progress or imminent danger of such an adverse effect (Family Court Act § 1012(f); Model Policy on Educational Neglect, NYS Office of Children and Family Services (Feb. 28, 2008)).

2. Section 34-a(8) of the Social Services Law requires that school districts work with local social services districts in the development of written policies for the reporting and investigation of educational neglect. Such policies and procedures, and any substantive changes to them, must be reviewed and approved by the Office of Children and Family Services (OCFS).

3. School districts must inform all school staff of the policy and procedure for reporting and investigating educational neglect. Mandated reporters must submit a report to the Statewide Central Register for Child Abuse and Maltreatment (SCR), whenever a student is excessively absent from school and they have reasonable cause to suspect the parent is or should have been aware of the absenteeism, has contributed to or is failing to effectively address the problem, and educational impairment or harm to the child or imminent danger of either (Social Services Law § 413(1), (2); Educ. Law § 3209-a; Model Policy on Educational Neglect, NYS Office of Children and Family Services (Feb. 28, 2008)).

   a. Mandated reporters include, but are not limited to, teachers, administrators, guidance counselors, school psychologists, school social workers, school nurses, and other school personnel required to hold a teaching or administrative license or certificate.

   b. Retaliatory action against mandated reporters who make a report to SCR is prohibited.

   c. School officials may not impose conditions, including prior approval or notification, on mandated reporters (Social Services Law § 413(1)(a), (c)).

XII. STUDENT RESIDENCY

RESIDENCY BASICS

In General

1. Residency in this context means domicile. It requires both one's physical presence as an inhabitant and the intention to reside within the district (*Longwood CSD v. Springs UFSD*, 1 N.Y.3d 385 (2004); *Appeal of Perry*, 49 Ed Dept Rep 190 (2009); *Appeal of Lin*, 48 Ed Dept Rep 166 (2009); *Appeal of Three Students*, 48 Ed Dept Rep 40 (2008)).

2. Physical presence alone is insufficient to establish residence for purposes of attending the school in that district on a tuition-free basis (*Appeal of Rieffler*, 31 Ed Dept Rep 235 (1992)).

   The following do not confer residency status:

   a. Mere ownership of property within a district (*Appeal of C.B-M.*, 55 Ed Dept Rep, Dec. No. 16,844 (2015)*; Appeal of D.D.*, 48 Ed Dept Rep 320 (2009); *Appeal of Seefried*, 46 Ed Dept Rep 311 (2007)).

   b. The mere renting of property or the actual payment of taxes (*Appeal of Alvarez*, 54 Ed Dept Rep, Dec. No. 16,661 (2014); *Appeal of D.D.*; *Appeal of T.B.*, 48 Ed Dept Rep 4 (2008); compare *Appeal of Three Students*).

   c. Pending home construction (*Appeal of Zhang*, 54 Ed Dept Rep, Dec. No. 16,733 (2015); *Appeal of Lin*; *Appeal of a Student with a Disability*, 46 Ed Dept Rep 18 (2006)).

Note: The amount of school taxes paid on property not constituting a person's legal residence must be deducted from the tuition charged to a nonresident student if the student attends school in that district instead of his legal district of residence (Educ. Law § 3202(3)).

3. Intent to reside within a district is determined based on factors such as continuing ties to the community and the nature of the efforts to return (*Appeal of Lin*; *Appeal of Smith*, 48 Ed Dept Rep 125 (2008); *Appeal of Three Students*), including a concrete and realistic plan to do so (*Appeal of Yuen*, 49 Ed Dept Rep 175 (2009); *Appeal of T.F.*, 49 Ed Dept Rep 70 (2009)).

4. A person can have only one legal residence (*Catlin v. Sobol*, 155 A.D.2d 24 (3d Dep't 1990), rev'd on other grounds, 77 N.Y.2d 552 (1991); *Appeal of Sigsby*, 44 Ed Dept Rep 97 (2004); *Appeal of W.D. & P. Z-D.*, 44 Ed Dept Rep 77 (2004)). Therefore, where someone owns or rents property both within and outside a school district, only one of the properties can be considered his or her legal residence for purposes of attending school within a particular district (*Appeal of W.D. & P. Z-D*; *Appeal of Elkareh*, 45 Ed Dept Rep 177 (2005)).

Residency Presumption and Rebuttal

1. Generally, a student's legal school district of residence is presumed to be the district in which the student's parents or legal guardians reside (*Longwood CSD v. Springs UFSD*, 1 N.Y.3d 385 (2004); *Catlin v. Sobol*, 155 A.D.2d 24 (3d Dep't 1990), rev'd on other grounds, 77 N.Y.2d 552 (1991); *Appeal of Smith*, 48 Ed Dept Rep 125 (2008); *Appeal of Crawford*, 47 Ed Dept Rep 148 (2007)).

2. The residency presumption can be rebutted, for example, by evidence of total and permanent transfer of custody and control to a resident of the district in which a student attends school (*Appeal of Murillo*, 55 Ed Dept Rep, Dec. No. 16,806 (2015); *Appeal of Capozzi*, 51 Ed Dept Rep, Dec. No. 16,305 (2011); *Appeal of Smith*), except when such a transfer is made solely to take advantage of the schools of a particular district (*Appeal of Begum*, 55 Ed Dept Rep, Dec. No. 16,799 (2015); *Appeal of L.B.*, 54 Ed Dept Rep, Dec. No. 16,672(2014);*Appeal of Cook*, 45 Ed Dept Rep 115 (2005)).

3. A formal guardianship proceeding is not required to establish a parental transfer of custody and control. However, there must be evidence that a particular location is a child's permanent residence and that the individual exercising control has full authority and responsibility with respect to the child's support and custody (*Appeal of Kendall*, 50 Ed Dept Rep, Dec. No. 16,149 (2010);*Appeal of Smith*, 48 Ed Dept Rep 125 (2008)).

    a. A transfer will not be deemed total and complete when:

        (1) A parent continues to provide financial support for room, board, clothing and other necessities, custody and control is not deemed relinquished (*Catlin v. Sobol*, 155 A.D.2d 24 (3d Dep't 1990), rev'd on other grounds, 77 N.Y.2d 552 (1991); *Appeal of Cook*, 45 Ed Dept Rep 115 (2005)).

        (2) Parents retain control over important issues such as medical and educational decisions (*Appeal of Cook*; *Appeal of Nelson*, 44 Ed Dept Rep 20 (2004)).

    b. A transfer will be deemed complete and total where a court of competent jurisdiction legally transfers custody of a child by court order or issuance of letters of guardianship,

provided the child actually resides with the court-appointed guardian (*Appeal of D.R.*, 45 Ed Dept Rep 550 (2006); *Appeal of Johnson*, 45 Ed Dept Rep 559 (2006)).

4. Students can rebut the presumption that their residence is with their parents if they can establish themselves as emancipated minors.

   A student is considered emancipated if he or she is beyond the compulsory school age, is living separate and apart from his or her parents in a manner inconsistent with parental custody and control, is not receiving financial support from his or her parents, and has no intent to return home (*Appeal of Kehoe*, 37 Ed Dept Rep 14 (1997); *Appeal of a Student with a Disability*, 50 Ed Dept Rep, Dec. No. 16,190 (2011)).

5. Students also can establish residence apart from their parents for other bona fide reasons such as family conflict (*Appeal of Palmieri*, 45 Ed Dept Rep 173 (2005); *Appeal of T.C.*, 43 Ed Dept Rep 44 (2003); *Appeal of Y.R.*, 42 Ed Dept Rep 376 (2003)), or the hardships of single parenting (*Appeal of I.M.*, 43 Ed Dept Rep 500 (2004); *Appeal of Taylor & Wilson*, 43 Ed Dept Rep 89 (2003)).

Children of Divorced Parents

1. Where a child's parents live apart, a child can have only one legal school district of residence (*Appeal of Students Suspected of having Disabilities*, 54 Ed Dept Rep, Dec. No. 16,725 (2015); *Appeal of R.G.*, 54 Ed Dept Rep 16,682 (2014); *Appeal of Dennis*, 51 Ed Dept Rep, Dec. No. 16,298 (2011)). Where a court awards custody to one parent, the child's residence is presumed to be that of the custodial parent (*Appeal of Plesko*, 37 Ed Dept Rep 238 (1997); *Appeal of Juracka*, 31 Ed Dept Rep 282 (1992); *Appeal of Forde*, 29 Ed Dept Rep 359 (1990)). However, this presumption is rebuttable (*Appeal of Plesko*).

2. A custodial parent may designate a child's residence to be that of the non-custodial parent. Although preferable, such designation does not require legal modification of the divorce decree. But there must be compelling evidence that the custodial parent consents to the child's legal residence being that of the non-custodial parent (*Appeal of Petrie*, 37 Ed Dept Rep 200 (1997); *Appeal of Barron*, 31 Ed Dept Rep 1 (1991); *Appeal of Forde*).

3. To determine the residency of a child not living with his or her custodial parent, a school district must consider several factors, including the extent of the time the child actually lives in the district.

   a. Where a child's time is essentially divided between the households of the divorced parents, with both parties assuming day-to-day responsibility for the child, the determination of the child's residence ultimately rests with the family (*Appeal of Franklin-Boyd*; *Appeal of T.K.*; *Appeal of Seger*, 42 Ed Dept Rep 266 (2003)).

   b. Absent proof that the child's time is essentially divided between both households, the residency of a child of divorced parents will be deemed to be that of the primary custodial parent, determined by the traditional test of physical presence and intent to remain (*Appeal of Franklin-Boyd*; *Appeal of Williams*, 42 Ed Dept Rep 8 (2002); *Appeal of T.K*).

4. Where a child's parents simply live apart but still claim joint custody, the child's residency is determined by the traditional test of physical presence and intent to remain there if the parents do

not produce proof of the child's time being divided between both households (*Appeal of W.B.*, 54 Ed Dept Rep, Dec. No. 16,662 (2014); *Appeal of Students Suspected of having Disabilities*; *Appeal of Rousseau*, 45 Ed Dept Rep 567 (2006)).

RESIDENCY DETERMINATIONS

Board of Education Responsibilities

1. The school board or its designee determines whether a child is a resident entitled to attend the schools of its district. Any determination made by a school official, other than the board or its designee, that a child is not entitled to attend the schools of the district must include notification of the procedures to obtain review of the decision within the district (8 NYCRR § 100.2(y)(6)).

2. Each district's enrollment forms, procedures, instructions and requirements for residency and age determinations must be posted on the school district website and must be provided to parents and persons in parental relation upon request. Such information must include a non-exhaustive list of the forms of documentation that may be submitted to establish residence in the district (8 NYCRR § 100.2(y)(2)).

Enrollment Procedures- Residency

1. When a parent, person in parental relation to the child or the child, as appropriate, requests enrollment such child must be enrolled and begin attendance on the next school day, or as soon as practicable thereafter. If at the time of the enrollment request the child is determined not to be a resident of the district the district need not enroll the child (8 NYCRR § 100.2(y)(3)).

2. Either at the time of enrollment or within three days thereafter, the parent or person in parental relation must submit documentation and/ or information in support of the child's residency by providing evidence of physical presence of the parent or person in parental in the district. The board or its designee must make a residency determination after reviewing the documentation submitted. The board or its designee must make its determination no later than the fourth business day after initial enrollment (*Id*.).

3. The school district may not request any enrollment/registration forms any of the following documentation:

    a. Social Security card or number or

    b. any information regarding or which would tend to reveal the immigrations status of the child, the child's parents or persons in parental relations, including but not limited to visas or other documentation indicating immigrant status (8 NYCRR § 100.2(y)(3)(i)(a)).

Procedures for Residency Determinations

1. Prior to making a residency determination, the board or its designee must allow the parent or guardian the opportunity to submit information concerning the child's right to attend school in the district (8 NYCRR § 100.2(y)(6); *Appeal of Cortez*, 54 Ed Dept Rep, Dec. No. 16,658 (2014)).

a. Such an opportunity does not require a formal hearing or representation by counsel (*Appeal of Rosen*, 43 Ed Dept Rep 87 (2003); *Appeal of Dashe*, 31 Ed Dept Rep 195 (1991)).

b. However, a school board may adopt a policy that grants the right to an evidentiary due process hearing. In such an instance, the district would be bound by the policy, and obligated to ensure that hearing procedures comport with due process, including that the hearing be conducted by a neutral fact finder (*Appeal of Dashe*).

2. If a board or its designee determines that the child is not entitled to attend its schools, the board or its designee must, within two business days, provide written notice of its decision to the child's parent, person in parental relation, or to the child as appropriate (8 NYCRR § 100.2(y)(6); *Appeal of Crowley*, 44 Ed Dept Rep 71 (2004); *Appeal of Gurka*, 43 Ed Dept Rep 521 (2004)). The written notice must conform to the requirements of the commissioner's regulations (8 NYCRR § 100.2(y)(6)).

3. A school board that delegates the authority to make residency determinations to a designee has no obligation to hear appeals regarding its designee's determinations. Any such appeals can be filed directly with the commissioner of education (8 NYCRR § 100.2(y)(6); *Appeal of Sobel*, 43 Ed Dept Rep 93 (2003)).

4. A determination that a child is a nonresident must be supported by sufficient evidence to establish non-residence.

   Surveillances conducted as part of an investigation must be of sufficient duration and include both residences involved (*Appeal of Cortez*, 54 Ed Dept Rep, Dec. No. 16,658 (2014); *Appeal of Salerno*, 45 Ed Dept Rep 106 (2005); *Appeal of a Student with a Disability*, 45 Ed Dept Rep 81 (2005)).

XIII. HOMELESS STUDENTS

DEFINITIONS

Homeless Child

1. Except as otherwise provided by law, a homeless child is a child or youth who does not have a fixed, regular, and adequate nighttime residence, or whose primary nighttime location is in a public or private shelter designed to provide temporary living accommodations, or a place not designed for, or ordinarily used as, regular sleeping accommodation for human beings. Consistent with the provisions of the McKinney-Vento Homeless Education Assistance Act, a child lacks a fixed, regular and adequate residence if he or she is:

   a. Sharing the housing of other persons due to a loss of housing, economic hardship or a similar reason.

   b. Living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations.

c. Living in a publicly or privately operated shelter designed for temporary accommodation, car, park, public space, abandoned building, substandard housing, bus or train station or similar setting.

d. Abandoned in a hospital.

e. A migratory child who qualifies as homeless. (42 USC § 11434a(2)(B)(iv); Educ. Law § 3209(1)(a); 8 NYCRR § 100.2(x)(1)(iii)).

2. The term homeless child does not include a child in foster care (Educ. Law § 3209(1)(a-1); 8 NYCRR § 100.2(x)(1)(iii)(c))..

3. School districts should review their policies on homeless children and unaccompanied youth periodically to ensure they incorporate current definitions and legal requirements (*Appeal of a Student with a Disability*, 49 Ed Dept Rep 77 (2009)).

Homeless Unaccompanied Youth

1. An unaccompanied youth is a homeless child or youth who is not in the physical custody of a parent or legal guardian. The term does not include those living with someone other than a parent or guardian solely to take advantage of a district's schools (8 NYCRR § 100.2(x)(1)(iii)(a)(6); see also *Appeal of D.R.*, 48 Ed Dept Rep 60 (2008)).

Confidentiality

1. Information about a homeless student's living situation shall be treated as a student educational record and not be deemed directory information accessible under the Family Educational Rights and Privacy Act (Educ. Law §3209(8); 8 NYCRR § 100.2(x)(7)(vi)).

School Choice by Homeless Students

1. A homeless student may attend school within the school district of his or her current location, the school district of origin, or a school district participating in a regional placement plan.

   a. The school district of origin is the district within New York State where the homeless student was attending a public school or preschool on a tuition-free basis or was entitled to attend when circumstances arose that caused the student to become homeless (Educ. Law § 3209(1)(c); 8 NYCRR § 100.2(x)(1)(viii)). The school district of origin also includes the school district in the state of New York in which child was residing prior to becoming homeless if such child was eligible to apply, register or enroll in public pre-school or kindergarten or has a sibling who attends a school in the school district in which the child was residing when circumstances arose that caused such child to become homeless.

   A school of origin is a public school that a child attended when permanently housed or the school in which the child was last enrolled, including a pre-school or charter school. It also includes the designated receiving school at the next grade level for all feeder schools (Educ. Law 3209(1)(i); 8 NYCRR § 100.2(x)(1)(ix)).

Homeless students may attend school in the district they were entitled to attend before becoming homeless for the duration of homelessness and until the end of the school year in which the child becomes permanently housed and one additional year if that would be the child's terminal year in such building subject to a best interest determination (42 USC § 11432(g)(3)(A); Educ. Law § 3209(2)(c); 8 NYCRR 100.2(x)(2)(iii)).

b. The school district of current location is the district within New York State where the temporary housing arrangement or the residential program for a homeless or runaway student is located, which is different from the school district of origin (Educ. Law § 3209(1)(d); 8 NYCRR § 100.2(x)(1)(vii)).

c. A regional placement plan is a comprehensive regional approach to the provision of educational placements for homeless students, which must be approved by the commissioner of education (Educ. Law § 3209(1)(e); 8 NYCRR § 100.2(x)(1)(vi)).

2. The designation as to where a homeless student will attend school is made by the student's parent or guardian, the homeless student together with the homeless liaison designated by the school district if no parent or guardian is available, or the director of a residential program for runaway and homeless youth, where applicable, in consultation with the homeless student (Educ. Law § 3209(1)(b); 8 NYCRR § 100.2(x)(1)(i), (2)).

3. If the person who made the designation for school of attendance finds that the original designation is educationally unsound it may be changed. The change must be made before the end of the first semester of attendance or within 60 days after commencing attendance at a school, whichever occurs later (8 NYCRR § 100.2(x)(2)(vi)).

Procedures for School Designation

1. Upon receipt of an attendance designation form from the homeless student or his/her parent or person in parental relation, a district designated as a homeless student's school district of attendance must immediately review the designation form to assure that it has been completed, admit the homeless student, and provide the student with access to all of its programs, activities, and services to the same extent available to resident students. (Educ. Law § 3209(2)(e), (f); 8 NYCRR § 100.2(x)(3), (4)).

2. Designated school districts must admit homeless students even if they are unable to produce records normally required for enrollment, such as academic records, medical records, proof of residency, or other documentation (Educ. Law § 3209(2)(f)(2); 8 NYCRR § 100.2(x)(4)(ii)). They must immediately contact the district where the students records are located to obtain a copy of such records (§ 3902(2)(e); 8 NYCRR § 100.2(x)(4)(v)), and the district where the student's records are located must forward a complete copy of the homeless student's records within five days of receiving a written request (§ 3209(2)(f)(5); 8 NYCRR § 100.2(x)(5)).

Best Interest Determination

1. Upon receipt of a designation form, the school district must also make a determination if the designation made is in the best interest of the child (Educ. Law § 3209(2)(f)(3); 8 NYCRR § 100.2(x)(4)(iii)).

2. The school district must presume keeping the child in the school of origin is in the child's best interest unless to do so is contrary to the request of a parent, or the student (if unaccompanied youth). The district must consider student related factors such as the impact of mobility on achievement, the health and safety of the student and more (*Id.*).

3. A school district that determines it is not in the best interest of a child to attend the designated school must provide a written explanation of its determination and the right to appeal. A child shall remain in the designated district during the pendency of all appeals (*Id.*).

Determining Validity of Claim of Homelessness

1. A district designated as the school district of attendance must immediately admit a homeless student (Educ. Law § 3209(f)(2); 8 NYCRR § 100.2(x)(4)(ii)). It then must follow the procedures it has established to resolve disputes, including providing the student's parent an opportunity to submit information before it makes a final determination regarding the student's homeless status (Educ. Law § 3209(5); 8 NYCRR § 100.2(x)(7)(ii)(a)).

2. If a district determines that a student is not homeless, it must provide the student's parent written notice stating that the student is not entitled to attend its schools, the basis for its determination, and the date as of which the student will be excluded from school. The notice must state also that the district's determination may be appealed to the commissioner of education and the name and other information pertaining the school district's homeless liaison responsible for assisting the parent in filing such an appeal, along with the form petition to be filled out by the parent with the liaison's help (Educ. Law § 3209(5); 8 NYCRR § 100.2(x)(7)(ii)(b); *Appeal of L.P.*, 50 Ed Dept Rep, Dec. No. 16,107 (2010)).

   The student remains enrolled pending resolution of the dispute of the school district's final determination including all available appeals (Educ. Law § 3209(5); 8 NYCRR § 100.2(x)(7)(ii)(c)).

Homeless Liaison

1. School districts must appoint a liaison for homeless children and youth to serve as a primary contact between homeless families and school staff, district personnel and local social services agencies and other programs providing services to homeless students (42 USC § 11432(g)(6); § 3209(2-a); 8 NYCRR § 100.2(x)(7)(iii)).

2. The homeless liaison's responsibilities include ensuring that homeless students enroll in and have a full and equal opportunity to succeed in school; receive educational services for which they are eligible; receive referrals for health care and housing services and are informed of their educational and related opportunities such as transportation and dispute resolution (*Id.*).

Tuition Costs

1. When the parents of a homeless student, or a homeless unaccompanied youth designates as the school district of attendance a district other than that of the student's last residence the district providing instruction will be eligible for reimbursement by the State Education Department (SED) as set forth in law (§ 3209(3)(a), (b)). The district where the student last attended school must, in turn, reimburse SED for its expenditure on behalf of that child.

Transportation for Homeless Students

1. A social services district must provide transportation for homeless students who are eligible for benefits under section 350-j of the Social Services Law and are placed by the social services district in temporary housing arrangements outside their designated school district of attendance. The social services district or the Office of Children and Family Services may contract with a school district or board of cooperative educational services (BOCES) to provide such transportation services. To the extent funds are available, the state Office of Children and Family Services must reimburse a designated district of attendance for transportation for homeless students in a residential program for runaway and homeless youth located outside the designated district. (§ 3209(4)(a), (b)).

2. The designated school district of attendance must provide transportation services to homeless students who are not eligible for transportation from the social services district (§ 3209(4)(c), (d), (e); 8 NYCRR § 100.2(x)(6)). The responsibility to provide transportation extends to summer school and extra-curricular activities under specified circumstances (Educ. Law § 3209(4)(f); 8 NYCRR 100.2(x)(6)(e), (f)).

   A district's duty to provide such transportation is triggered when it receives notice of their homeless status (§ 3209(2)(f); 8 NYCRR § 100.2(x)(6)(i); Appeal of D.U., 47 Ed Dept Rep 213 (2007)).

3. Homeless students who designate the district of current location to attend school are entitled to transportation services on the same basis as resident students (§ 3209(4)(d); 8 NYCRR § 100.2(x)(6)(iii)).

4. Disputes regarding transportation of homeless students are subject to the same dispute resolution process applicable to disputes concerning the homeless status of a child or youth (Educ. Law § 3209(5)(a); 8 NYCRR § 100.2(x)(7)(ii)).

5. Transportations must be furnished to a student for the duration of homelessness, as well as the remainder of the school year in which the child becomes permanently housed and one additional year is that year constitutes a child’s terminal year in the designated school (Educ. Law § 3209(4)(i); 8 NYCRR § 100.2(x)(6)(iv)).

   The designated school district of attendance is entitled to reimbursement from the current school district in which the child becomes permanently housed for any cost incurred for transportation for the remainder of the school year after the child becomes permanently house and one additional year if such year is the child’s terminal year in the designated school (Educ. Law § 3209(4)(i)).

6. A designated school district that must provide transportation to a homeless student may not provide transportation in excess of 50 miles one way, unless the commissioner of education determines that it is in the best interest of the student (§ 3209(4)(c); 8 NYCRR § 100.2(x)(6)(ii)).

XIV. HOMEBOUND INSTRUCTION

1. Homebound instruction is provided on a temporary basis by a public school district when a student is unable to attend school because of short-term disability or discipline (see *Appeal of a*

Student Suspected of Having a Disability (Fayetteville-Manlius CSD), 40 Ed Dept Rep 75 (2001); *Appeal of Douglas & Barbara K.*, 34 Ed Dept Rep 214 (1994); *Appeal of Anthony M.*, 30 Ed Dept Rep 269 (1991)).

2. If a prolonged absence due to a short-term physical, mental, or emotional illness is anticipated, the administrator of the student's school should talk with the student's parents about arranging for homebound instruction. According to the State Education Department, an absence of at least two weeks is considered a prolonged absence. The student's physician should verify any such absence due to illness (see Handbook on Services to Pupils Attending Nonpublic Schools, NYS Education Department (revised Feb. 2012), available electronically at http://www.p12.nysed.gov/nonpub/handbookonservices/home.html).

3. The district in which the student resides is responsible for providing an appropriately certified teacher to tutor the homebound student. However, the district of residence may contract with another district to provide this service (see Handbook on Services to Pupils Attending Nonpublic Schools, NYS Education Department (revised Feb. 2012)).

   A nonpublic school student requiring homebound instruction should enroll in the public school during the time he or she receives homebound instruction from the public school, so that the district may count the student in its attendance report for state aid purposes (see Handbook on Services to Pupils Attending Nonpublic Schools, NYS Education Department (revised Feb. 2012)).

4. Elementary school students on homebound instruction must receive at least five hours of instruction per week and secondary school students 10 hours per week. To the extent possible, homebound instruction should be staggered proportionately throughout the week (8 NYCRR § 175.21; see also Handbook on Services to Pupils Attending Nonpublic Schools, NYS Education Department (revised Feb. 2012)).

XV. STUDENT HEALTH AND WELFARE

EMPLOYMENT OF HEALTH PROFESSIONALS

1. School districts must employ either a qualified physician, or a nurse practitioner to the extent authorized by the nurse practice act, to perform the duties of the director of school health services (Educ. Law § 902(2)(a); 8 NYCRR § 136.2(c)).

   Such duties include any conferred on the school physician or school medical inspector under any provision of law, the provision and coordination of school health services, and health appraisals of students attending the public schools (Educ. Law § 902(2)(a); 8 NYCRR § 136.1(d)).

2. A school district may employ one or more school nurses who must be a registered professional nurse, and other health professionals as defined in law, as may be necessary. Such individuals must aid the director of school health services (Educ. Law §§ 902(1), (2)(b); 8 NYCRR § 136.1(b)).

SCHOOL HEALTH SERVICES

1. All school districts except the city school district of New York, must provide students attending their public schools with school health services.

    a. School health services include the services of a registered professional nurse, if one is employed (§§ Educ. Law 901(1), 1604(25), 1709(21); 8 NYCRR § 136.2(b)), and include medical examinations, dental inspection and/or screening, scoliosis screening, vision screening, audiometer tests, and other such services as may be rendered in examining students for the existence of disease or disability and in testing the eyes and ears of students (Educ. Law § 901(1), (2); 8 NYCRR § 136.2(b)).

    b. The procedures used in rendering such services must be designed to determine the health status of a child; inform parents, students and teachers of the individual child's health condition subject to federal and state confidentiality laws; guide parents, children and teachers in procedures for preventing and correcting defects and diseases; instruct school personnel in procedures to take in case of accident or illness; and to survey and make necessary recommendations concerning the health and safety aspects of school facilities and the provision of health information (Educ. Law § 901(2); 8 NYCRR § 136.1(e)).

2. School health services are not intended to supplant the affirmative duty of parents to provide adequate medical care for their children (see, *Matter of Hofbauer*, 47 N.Y.2d 648 (1979); *Matter of Christine M.*, 157 Misc.2d 4 (Fam. Ct. Kings Cnty. 1992); *Opinion of Counsel No. 98*, 1 Ed Dept Rep 824 (1961); *Opinion of Counsel No. 67*, 1 Ed Dept Rep 766 (1952)). Moreover, school districts need to obtain parental consent before providing health care services to determine the health status of a student (*D.F. v. Bd. of Educ. of Syosset CSD*, 386 F.Supp.2d 119 (E.D.N.Y. 2005), aff'd, 180 F.Appx. 232 (2d Cir. 2006), cert. denied, 549 U.S. 1179 (2007)).

SCHOOL HEALTH SERVICES FOR NONPUBLIC SCHOOL STUDENTS

1. At the request of a private school, a school district must provide to resident students attending a nonpublic school health and welfare services and facilities equivalent to those available to resident students attending the district's public schools (§ 912*; Cornelia v. Bd. of Educ. of CSD No. 1, Town of Greece*, 36 A.D.2d 576 (4th Dep't 1971), aff'd 29 N.Y.2d 586 (1971); *Appeal of W.T.B. and M.B.*, 44 Ed Dept Rep 152 (2004); *Appeal of Burke*, 34 Ed Dept Rep 3 (1994)). Such services may include those provided by, for example, a physician, nurse practitioner, or psychologist, taking medical histories and maintaining health records, and administration of emergency care (Educ. Law § 912).

    a. Such services must be provided in "essentially the same manner and to the same extent" they are offered to public school students. Thus, a school district would have to ensure that a resident student who attends private school and is diabetic receives needed daily insulin testing the same as if the student attended public school (*Richard K. v. Petrone*, 31 A.D.3d 181 (2d Dep't 2006)).

    b. When students attend private school outside their district of residence, the district of residence must contract with the district where the private school is located for the provision of such services. Such an expenditure must be included in the annual budget of the school district of residence (Educ. Law § 912).

2. The obligation to provide resident private school students with health services that are equivalent to those provided to resident public school students does not require that districts provide full-time nursing services to a private school (*Appeal of W.T.B. & M.B.*; *Appeal of Burke*).

MEDICAL EXAMS FOR SCHOOL ENROLLMENT

Medical Examination

1. Students enrolled in public **s**chool districts (except in the cities of New York, Buffalo and Rochester) must have a satisfactory health examination conducted by their family physician, physician assistant or nurse practitioner, upon first entering their school at any grade level, and upon entering prekindergarten, kindergarten, and the second, fourth, seventh, and 10th grades (8 NYCRR § 136.3(b)(1)). The examination must have been conducted no more than 12 months before the first day of the school year in question (8 NYCRR § 136.3(b); see 8 NYCRR § 136.1(g)).

    a. Every public school student must submit a health certificate that complies with the requirements set forth in the Education Law to the principal or the principal's designee within 30 days of entering school that indicates the student is in a fit condition to attend school (Educ. Law § 903(1); 8 NYCRR § 136.3(b)(3), (c)(1); see 8 NYCRR § 136.1(h)).
    b. A school district may require an examination and health history of any student at any time in its discretion to promote the educational interests of the student (Educ. Law § 903(1); 8 NYCRR § 136.3(b)(2)).

2. If a student does not present a required health certificate, and he or she is not exempt from such requirement on religious grounds, the school principal or his or her designee must notify the student's parents that if the certificate is not provided within 30 calendar days from the date of the notice, the director of school health services will conduct an examination by health appraisal of the student (Educ. Law § 903(3)(a); 8 NYCRR § 136.3(c)(1)(iii); see 8 NYCRR § 136.1(h); see also NYS Education Department, Office of School Innovation, *School Health Examination Guidelines* (Revised June 2015) at: http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/SchoolHealthExaminationGuidelines.pdf).

3. Students may be exempt from these requirements if they or their parents object claim a conflict with their genuine and sincere religious beliefs (Educ. Law §§ 903(4), 904(2); 8 NYCRR § 136.3(c)(1)(iii), (f)). The exemption must be requested in writing to the school principal or his or her designee**,** who may require documents supporting the request (8 NYCRR § 136.3(f); see also *School Health Examination Guidelines*).

REQUIRED HEALTH SCREENINGS

1. A school district's director of school health services must ensure that all students undergo certain screening examinations at those times set forth in the law and commissioner's regulations (Educ. Law § 905; 8 NYCRR § 136.3(e), (f)), including scoliosis screening, vision screening, and hearing screening.

2. Students may be exempt from such health screenings if they or their parents object on the grounds that they conflict with their genuine and sincere religious beliefs (Educ. Law § 905(5); 8 NYCRR § 136.3(f)). Students or their parents must request such an exemption in writing to the school

principal or his or her designee who may require documents supporting the request (8 NYCRR § 136.3(f); see also *School Health Examination Guidelines*).

3. Parents must receive written notice of the results of vision and hearing examinations and the positive results of scoliosis screenings (Educ. Law § 905; 8 NYCRR § 136.3(e)(1)).

IMMUNIZATIONS

1. Every student entering or attending public school must be immunized, as required by section 2164 of the Public Health Law (see Educ. Law § 914). Public school students must be immunized against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B and any boosters as required by law (Pub. Health Law § 2164(2)(a); 10 NYCRR §§ 66-1.1, 66-1.3; 8 NYCRR § 136.3(c)(2)).

   Beginning September 1, 2016, children entering seventh and twelfth grades must be administered vaccines against meningococcal disease (Pub. Health Law § 2164(2)(c); see also NYS Department of Health, Frequently Asked Questions for Public Health Law §§ 2164 and 2168, (April 2016) at:
   http://www.health.ny.gov/prevention/immunization/schools/docs/faq_immunization_regulations).

2. No child may be admitted to, or allowed to attend, school for more than 14 days without an appropriate immunization certificate or other acceptable evidence of immunization. A school principal may extend this period to 30 days on a case-by-case basis when a student has transferred from another state or country and can show a good faith effort to get the necessary certificate or other evidence of immunization (Pub. Health Law § 2164(7)(a)).

3. If a student fails to submit proof of immunization, the school principal must inform the student's parents of the necessity to have the student immunized, that the required immunizations may be administered by any health practitioner, or at no cost by the county health officer upon parental consent. The student's parents also must be informed that, as a pre-requisite for their child's admission to, or continued attendance at, school, they must either choose a health practitioner to administer the immunization, or provide consent for the county health officer, or a school physician or nurse to administer the immunization, unless they state a valid reason for withholding such consent (Pub. Health Law § 2164(6)).

4. In addition, a school principal must report to the local health authority the name and address of any student refused admission or continued attendance for lack of proof of immunizations. The principal also must notify the student's parents of any such exclusion, provide them with an immunization consent form, and cooperate with the local health authority in scheduling a time and place for immunizing a child for whom consent has been obtained (Pub. Health Law § 2164(8-a)(a)). A student may appeal a denial of admission to, or continued attendance at, school to the commissioner of education (Pub. Health Law § 2164(7)(b)).

Medical Exemption to Immunization

1. Students may be admitted to school or continue attendance without a certificate or proof of immunization if a physician will testify or certify that administering a vaccine to a specific student will be detrimental to that student's health (Pub. Health Law § 2164(8)).

2. A student may seek a medical exemption from any or all of the required vaccinations (*Appeal of L.W.*, 52 Ed Dept Rep, Dec. No. 16,416 (2012); *Appeal of N.C.*, 50 Ed Dept Rep, Dec. No. 16,172 (2010)*; Appeal of M.E.F.*, 43 Ed Dept Rep 248 (2003); *Appeal of McGann*, 32 Ed Dept Rep 187 (1992)).

3. A medical exemption certificate must indicate why immunization would be detrimental to the student seeking the exemption (*Appeal of J.S. and D.S.*, 55 Ed Dept Rep, Dec. No. 16,821 (2015); *Appeal of N.C.*, 50 Ed Dept Rep, Dec. No. 16,172 (2010). It must also indicate a time at which a vaccine may no longer be detrimental (*Appeal of D.F.*, 50 Ed Dept Rep, Dec. No. 16,132 (2010)).

   School officials may engage in further investigation of a doctor's note excusing a student from immunization (*Lynch v. Clarkstown CSD*, 155 Misc.2d 846 (Rockland Cnty. 1992); *Appeal of J.S. and D.S.; Appeal of a Student with a Disability*, 54 Ed Dept Rep, Dec. No. 16,667 (2014)).

Religious Exemption to Immunization

1. Students may be admitted to school or continue attendance without certificate or proof of immunization if the student's parents claim an exemption based on genuine and sincerely held religious beliefs that are contrary to the practice of immunization and such waiver is granted (Pub. Health Law § 2164(9); see *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 104 (2015)

   a. Parents may claim a religious exemption even if they are not members of a recognized religious organization whose doctrines oppose vaccination (*Farina v. Bd. of Educ. of the City of N.Y.*, 116 F.Supp.2d 503 (S.D.N.Y. 2000); *Lewis v. Sobol*, 710 F.Sup.. 506 (S.D.N.Y. 1989); *Sherr v. Northport-East Northport UFSD*, 672 F.Supp. 81 (E.D.N.Y 1987); *Matter of Christine M.*, 157 Misc.2d 4 (Fam. Ct. Kings Cnty. 1992); *Appeal of C.S.*, 49 Ed Dept Rep 106 (2009); *Appeal of H.K. and T.K.*, 49 Ed Dept Rep 56 (2009); *Appeal of L.S.*, 48 Ed Dept Rep 227 (2008)).

   b. Nonetheless, a religiously based opposition to immunizations must be founded on sincerely held religious beliefs rather than medical or purely moral considerations, scientific and secular theories, or philosophical and personal beliefs (*Caviezel v. Great Neck Public Schools* 500 Fed. Appx. 16 (2d Cir. 2012); *Mason v. General Brown CSD*, 851 F.2d 47 (2d Cir. 1988); *N.M. v. Hebrew Academy Long Beach*, 2016 WL 105950 (E.D.N.Y. 2015)*; Farina v. Bd. of Educ. of the City of N.Y.*; *Sherr v. Northport-East Northport UFSD*; *Matter of Christine M.*; *Check v. New York City Department of Education* 2013 U.S. Dist LEXIS 186100 (E.D.N.Y. May 20, 2013); *Appeal of D.M. and K.M.*, 55 Ed Dept Rep, Dec. No. 16,863 (2016), *Appeal of L.L.*¸ 54 Ed Dept Rep, Dec. No. 16,670 (2014); *Appeal of B.R. and M.R.*). This includes personalized interpretations of concepts and practices found in various religions (*Appeal of J.W.R. and E.R.*, 55 Ed Dept Rep, Dec. No. 16,899 (2016); *Appeal of N.C.*; *Appeal of B.O-G.*, 51 Ed Dept Rep, Dec. No. 16,294 (2011)).

2. Parents seeking a religious exemption from immunizations must submit to their school district a written and signed statement declaring their objection to immunizations due to sincere and genuine religious beliefs that prohibit the immunization of their child (10 NYCRR § 66-1.3(d); *Appeal of C.S.*, 49 Ed Dept Rep 106 (2009); *Appeal of H.K. and T.K.*, 49 Ed Dept Rep 56 (2009); *Appeal of S.B.*, 48 Ed Dept Rep 332 (2009)).

A school principal may request supporting documentation if, following review of the parental statement, questions remain about the existence of a sincerely held religious belief (10 NYCRR § 66-1.3(d); *Appeal of C.S.*; *Appeal of H.K. and T.K.*; *Appeal of S.B.*). The burden is on the parents to establish their right to the exemption (see *Appeal of C.S.*; *Appeal of H.K. and T.K.*).

3. Whether a student is exempt from immunization because of religious reasons is determined, in the first instance, by school district officials (*Appeal of C.S.*, 49 Ed Dept Rep 106 (2009); *Appeal of H.K. and T.K.*, 49 Ed Dept Rep 56 (2009); *Appeal of S.B.*, 48 Ed Dept Rep 332 (2009)). Specifically, school officials must determine whether the purported beliefs that support the opposition to immunizations are religious in nature and, only if they are, whether they are genuine and sincerely held (*Farina v. Bd. of Educ. of the City of N.Y.*, 116 F.Supp.2d 503 (S.D.N.Y. 2000); *Sherr v. Northport-East Northport*, 672 F.Supp. 81 (E.D.N.Y. 1987)).

   When determining whether a parent's religious beliefs are genuine, school district officials do not have to simply accept a statement of religious belief without some examination. Similarly, they should not simply reject a statement either without further examination (*Appeal of C.S.*, *Appeal of H.K. and T.K.*; *Appeal of S.B.*). The school district should evidence that the application was fully examined (*Appeal of L.S.*, 48 Ed Dept Rep 227 (2008)). Such explanation must articulate the specific reasons for a denial (*Appeal of N.C.*, 55 Ed Dept Rep, Dec. No. 16,805 (2015)).

4. A school district is not bound by previous grants of a religious exemption from immunization. It can deny a religious exemption from immunization to a student previously granted such an exemption after a separate inquiry to ensure compliance with statutory immunization requirements (*Appeal of K.E.*, 48 Ed Dept Rep 54 (2008)).

   Similarly, a religious exemption granted by school officials in another school district previously attended by a student is not binding on school officials of the district of current attendance. Actually, district officials of the new district are obligated to make their own determination whether any one of their students qualifies for a religious exemption (*Appeal of S.B.*, 48 Ed Dept Rep 332 (2009)).

Determination of Entitlement to Exemptions

1. A parent's religious beliefs do not have to be consistent with the dogma of any organized religion (*Farina v. Bd. of Educ. of the City of N.Y.*; *Appeal of L.P.*, 46 Ed Dept Rep 341 (2007)), or founded upon a belief in the fundamental premise of a God as commonly understood in western philosophy (*U.S. v. Seeger*, 380 U.S. 163 (1965); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barker*, 650 F.2d 430 (2d Cir. 1981); *Mason v. General Brown CSD*, 851 F.2d 47 (2d Cir. 1988); *Sherr v. Northport-East Northport*, 672 F.Supp.2d 81 (E.D.N.Y. 1989); *Matter of Christine M.*, 157 Misc.2d 4 (Fam. Ct. Kings Cnty. 1992); *Appeal of L.P.*). Therefore, parents may not be asked about their religious affiliation, or that they provide a letter from their church regarding their religious beliefs, just the nature of their beliefs (*Farina v. Bd. of Educ. of the City of N.Y.*).

   What is required is that:

   a. a parent's personal religious belief occupies a place in the parent's life that is parallel to that filled by the orthodox belief in God (*U.S. v. Seeger*; *Int'l Soc'y for Krishna Consciousness, Inc. v. Barker*; *Mason v. General Brown CSD*; *Sherr v. Northport-East Northport*; *Matter of Christine M.*), and

b. the parent will categorically disregard elementary self-interest rather than transgressing religious tenets (*U.S. v. Allen*, 760 F.2d 447 (2d Cir. 1985); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barker*; *Lewis v. Sobol*, 710 F.Supp. 506 (S.D.N.Y. 1989); *Matter of Christine M*.).

2. When determining whether a parent's religious beliefs are sincerely held, school district officials must make a good faith effort to assess the credibility of the parent's sentiments and sincerity (*Matter of Christine M*. 157 Misc.2d 4 (Fam. Ct. Kings Cnty. 1992); *Appeal of D.W. and N.W.*, 50 Ed Dept Rep, Dec. No. 16, 144 (2010); A*ppeal of C.S.*, 49 Ed Dept Rep 106 (2009); *Appeal of J.F.*, 45 Ed Dept Rep 241 (2005)).

a. They may draw inferences from the parent's words and actions (*Farina v. Bd. of Educ. of the City of N.Y.*, 116 F.Supp.2d 503 (S.D.N.Y. 2000)), including a parent's attitudes toward sickness and health, and whether the parent joined a particular organized group in order to gain an exemption from immunization (*Sherr v. Northport-East Northport*, 672 F.Supp.2d 81 (E.D.N.Y. 1989)).

b. School district officials can also rely on their observation of the parents' demeanor and forthrightness (*Matter of Christine M*.; *Appeal of J.W.R. and E.R.*, 55 Ed Dept Rep, Dec. No. 16,899 (2016); *Appeal of H.K. and T.K.*, 49 Ed Dept Rep 56 (2009); Appeal of J. F.).

COMMUNICABLE AND INFECTIOUS DISEASE

1. A school district must exclude from school and send home immediately, any student who shows symptoms of any communicable or infectious disease that is reportable under the Public Health Law and imposes a significant risk of infection of others in the school. The director of school health services must immediately notify a local public health agency of the disease (§ 906(1); 8 NYCRR § 136.3(h)).

2. A student returning to school after an absence on account of illness or from unknown cause may be examined by the director of school health services if the student returns to school without a certificate from a local public health officer, a duly licensed physician, physician assistant, or nurse practitioner (§ 906(2); 8 NYCRR § 136.3(h)).

3. In addition, the director of school health services, or other health professionals under his direction or upon his referral, may conduct evaluations of teachers and any other school employees, and school buildings and premises, as they deem necessary to protect students and staff from communicable diseases (§ 906(3); 8 NYCRR § 136.3(i)).

4. The automatic exclusion from school or school-related activities of students solely because they have been diagnosed with AIDS or become infected with HIV would violate those students' rights under section 504 of the Federal Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability (*District 27 Cmty. Sch. Bd. v. Bd. of Educ*., 130 Misc.2d 398 (Sup. Ct. Queens Cnty. 1986); see 29 USC § 794; see also, *Martinez v. Sch. Bd. of Hillsborough Cnty*., 861 F.2d 1502 (11th Cir. 1988); *Thomas v. Atascadero Unified Sch. Dist*., 662 F.Supp. 376 (C.D. Cal. 1987)).

5. A district may be obligated to provide temporary home instruction for a student suffering from a short-term physical disability (*Appeal of a Student Suspected of Having a Disability*; 40 Ed Dept

Rep 75 (2000); *Appeal of Douglas & Barbara K.*, 34 Ed Dept Rep 214 (1994); *Appeal of Anthony M. & D. M.*, 30 Ed Dept Rep 269 (1991)).

ADMINISTRATION OF MEDICATION

1. Generally, only health care practitioners licensed or certified in New York State, including, for example, physicians, nurse practitioners, physicians assistants, registered professional nurses and licensed practical nurses may administer medication to students in a school setting (§§ 902-a, 902-b, Education Law Title VIII; 8 NYCRR § 136.7(e); see also NYS Education Department, Office of Student Support Services, *Guidelines for Medication Management in Schools*, (Sept. 2015) at: http://www.p12.nysed.gov/sss/documents/MedicationManagement-final2015.pdf).

2. A physician or other duly authorized licensed health care practitioners may train unlicensed school staff to administer glucagon or epinephrine auto injectors in emergency situations when a licensed health care practitioner is not available (§ 921; 8 NYCRR § 136.7(f)). Under provisions of the public health law, trained unlicensed individuals may administer epinephrine both to students with specific provider orders and to students and staff with symptoms of anaphylaxis regardless of previous history of severe allergic reaction (§921; Pub. Health Law § 3000-c). Unlicensed staff may also administer opioid antagonists if the school district participates in an opioid overdose prevention program and they have been trained to do so pursuant to provisions of the public health law (§ 922(2), Pub. Health Law § 3309).

   Additionally, trained unlicensed staff may assist supervised students with self-administering medication at the direction of the student. Such assistance may include for example opening a bottle, assembling nebulizer tubing, or verifying that a student entered the number he or she intended into an insulin pump. If at any time the student cannot direct the unlicensed trained staff then the unlicensed staff may not proceed but must request a licensed school health professional to assist the student and report such incident pursuant to school policy (*Guidelines for Medication Management in Schools*).

   However, only licensed health professionals can calculate insulin dosages, administer insulin, program an insulin pump, refill the reservoir, and change the infusion site for students with diabetes who use an insulin pump(§ 902-a; 8 NYCRR § 136.7(d)(6)); see also *Guidelines for Medication Management in Schools*; NYS Education Department, Office of Student Support Services, *Clarification on Insulin Pumps*, (Mar. 2012), at: http:www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/insulinpump.pdf).

3. If during a school sponsored event a school nurse or the student's parents are not available to do so, the parent may**,** in accordance with the requirements set forth in law, designate and authorize another adult such as a family member, household member, or friend to do so (§ 6908; see also *Administration of Medication to Students During School-Sponsored Events by Parent/Guardian Designee*, NYS Education Department (Sept. 2009*)*, available at http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/fieldtrips.pdf; see also NYS Education Department, Office of Student Support Services, *Guidelines for Medication Management in Schools*, (Sept. 2015) at: http://www.p12.nysed.gov/sss/documents/MedicationManagement-final2015.pdf)).

   The education law permits non licensed employees of a school district to be trained by licensed health professionals to administer prescribed glucagon and epinephrine in emergency situations (Educ. Law § 921).

4. School districts and boards of cooperative educational services (BOCES) must permit students who have been diagnosed with asthma or another respiratory disease, allergies and diabetes to carry and use a prescribed inhaler, epinephrine auto-injector and glucagon and/or insulin and appropriate medication delivery device on school property and at any school function during the school day, with the written permission of a physician or a duly authorized health care provider and written parental consent. Upon parental request, such children also must be allowed to maintain an extra inhaler, extra epinephrine auto-injectors and extra insulin, insulin delivery system, glucagon, blood glucose meters and related supplies in the care and custody of specified licensed health professionals employed by the district or BOCES. A record of this permission must be maintained in the student's cumulative health record (Educ. Law §§ 916, 916-a, 916-b; 8 NYCRR § 136.7).

PLANNING FOR HEALTH EMERGENCIES

Allergy and Anaphylaxis Management

School districts are required to consider and take action in response to the anaphylactic policy for school districts established by the Department of Public Health in consultation with the State Education Department concerning the prevention of, and medical emergencies resulting from, anaphylaxis, including but not limited to procedures and treatment plans, training for school personnel, and procedures for developing individual emergency health care plans for students with allergies (Pub. Health Law § 2500-h).

Exposure Control Plan

School districts must have a written "exposure control plan" to prevent the spread of HIV and other diseases communicable through contact with blood and other bodily fuels. The plan must be compliant with federal regulations and include, for example, employee training on how to deal with body fluids and other materials, and procedures for "universal precautions," which require, for instance, that all bodily fluids and material be treated as infectious (29 CFR § 1910.1030(c)(1)).

Automated External Defibrillator

1. There must be AED equipment on site at each instructional school facility to ensure ready and appropriate access for use during emergencies. In addition, school districts must post a sign or notice at the main entrance to each facility or building where AED equipment is stored indicating their regular location (Educ. Law § 917(1), (3); Pub. Health Law § 3000-b(3)(f)).

2. At least one staff member trained in the operation and use of an AED must be present whenever school facilities are used for school-sponsored or school-approved curricular or extracurricular events or activities and whenever a school-sponsored athletic contest is held at any location. School officials must ensure that AED equipment and a trained staff person are provided on-site whenever a school-sponsored competitive athletic event is held at a site other than a public school facility (§ 917(2); 8 NYCRR § 136.4(c), (d)).

Opioid Overdose Prevention Program

School districts may elect to become a registered opioid overdose prevention program with the New York State Department of Health (§ 922, Pub. Health Law § 3309; 8 NYCRR 136.8; 10 NYCRR § 80.138; Guidelines for Implementing Opioid Overdose Programs in Schools; see also Guidelines for

Medication Management in Schools). School districts choosing to participate in the opioid overdose prevention program must comply with the requirements of Public Health Law § 3309 including but not limited to appropriate clinical oversight, record keeping and reporting (8 NYCRR § 136.8(c)). For guidance on registering for the program, adopting appropriate policies and procedures, including amending district safety plans please refer to Guidelines for Implementing Opioid Overdose Programs in Schools and the Department of Health website at: http://www.health.ny.gov/diseases/aids/general/opioid_overdose_prevention/schools.htm.

DRUG AND ALCOHOL TESTING

1. A drug test may be performed only upon the written request or consent of the child's parent or person in parental relation (§ 912-a(2); *Appeal of Studley*, 38 Ed Dept Rep 258 (1998)). If parental authorization is obtained, the Education Law permits urine testing of students in grades 7-12 for detection of use of "dangerous drugs" as determined by reference to Public Health Law and Education Law § 912-a(1). These tests must be conducted without notice to the student (§ 912-a(2)). If the test result indicates that the student is using dangerous drugs, the district must report such information to the local social services department and to the parent or person in parental relation, including a statement as to available programs and facilities to combat dangerous drug usage (Id.).

   The test results may not be used for law enforcement purposes and must be kept confidential (§ 912-a(3)). The law also contains an exemption from testing based on religious considerations (§ 912-a(4))

2. Although the commissioner of education has not answered this question directly, he has upheld the discipline of a student who attended a school-sponsored Senior Ball, was suspected of having consumed alcohol and was tested with an "Alco-sensor" (breathalyzer). In that case, the commissioner noted that the device had been borrowed from the town police on the day of the dance. In addition, the school official who administered the test had been trained in the use of the device, and had consulted with police officers before administering the test to make sure it was performed properly. Upon its return, the police checked the calibration of the device and found it to be accurate (*Appeal of James L.*, 39 Ed Dept Rep 482 (2000)).

XVI. STUDENT SAFETY

RELEASE FROM SCHOOL

1. A school district may release a student from school to someone other than the student's parent if the identity of the person requesting the release is verified against a list of names provided by the student's parent or person in parental relation at the time of the child's enrollment in the school. (§ 3210(1)(c)).

2. A school can release a student to someone whose name is not on a list previously provided by the student's parent or person in parental relation only in case of an emergency.

3. A school district may presume that either parent of a student has authority to obtain the child's release. Unless the district has been provided with a certified copy of a legally binding

instrument, such as a court order or decree of divorce, separation, or custody, that indicates the non-custodial parent does not have the right to obtain such release (§ 3210(1)(c)).

MISSING CHILDREN

1. A school district with notice that the Division of Criminal Justice Services (CJS) has listed as missing in the statewide register for missing children a child currently or previously enrolled in one of its schools must for example:

   a. Flag the school records of that child and remove such flag upon notice from CJS that the child has been recovered.

   b. Immediately notify CJS if it discovers that the child is currently enrolled in one of its schools (§ 3222(5)).

2. All students in kindergarten through eighth grade must receive instruction designed to prevent the abduction of children. (§ 803-a). School districts must provide appropriate training and curriculum materials for those teachers who provide the instruction (§ 803-a(4)).

XVII. CHILD ABUSE REPORTING

REPORTING UNDER SOCIAL SERVICES LAW

Mandated Reporters

1. School officials including, but not limited to teachers, guidance counselors, school psychologists and social workers, school nurses, administrators, or other school personnel required to hold a teaching or administrative license or certificate, are required to make a report to child protective services when they have reasonable cause to suspect a student is abused or maltreated (Soc. Serv. Law § 413(1); *Matter of Kimberly S.M. v. Bradford Cent. Sch.*, 226 A.D.2d 85 (4th Dep't 1996); *People v. Heil*, 16 Misc.3d 1125(A) (Sup. Ct. Monroe Cnty. 2007)).

   a. Persons who are not mandated reporters also may make such a report if they have reasonable cause to suspect child abuse or maltreatment (Soc. Serv. Law § 414).

   b. The identity of persons making a report is confidential and may not be disclosed (*Deleon v. Putnam Valley Bd. of Educ*., 228 F.R.D. 213 (S.D.N.Y. 2005)).

2. The law provides immunity from liability for mandated reporters who make such a report in good faith (Soc. Serv. Law § 419; see also *Biondo v. Ossining UFSD*, 66 A.D.3d 725 (2d Dep't 2009)).

   It is a crime to knowingly report a false claim of child abuse or maltreatment to the State Central Register (Penal Law § 240.50(4)(a)) or to knowingly report a false claim of child abuse or maltreatment to a mandated reporter knowing that person is required to report such cases and intending that such a report be made (Penal Law § 240.50(4)(b)).

3. Mandated reporters must report immediately cases of suspected child abuse or maltreatment whenever a child, or the child's parent, guardian or other person responsible for the child appears before the mandated reporter in the reporter's professional or official capacity and provides the

reporter with information from personal knowledge that, if correct, would render the child an abused or maltreated child (Soc. Serv. Law § 413(1)).

A mandated reporter must make the required report even if the identity of the person legally responsible for the child's care or the identity of the abuser is unknown. The obligation to report is based upon facts and circumstances within the knowledge of the reporter at the time the abuse is suspected (*Matter of Kimberly S.M. v. Bradford Cent. Sch.*, 226 A.D.2d 85 (4th Dep't 1996)).

4. Mandated reporters must first make the report to the State Central Register (SCR) and then immediately notify the head of the school (Soc. Serv. Law § 413(1)). The report must include the name, title, and contact information for every staff member believed to have direct knowledge of the allegation (*Id*.).

   Upon receiving notice that a mandated report has been made, the head of the school, or a designated agent, will become responsible for all subsequent administration required by the report (*Id*.). The head of the school also shall take or cause to be taken, at public expense, color photographs of visible trauma and, if medically indicated, cause to be performed an X-ray examination of the child (Soc. Serv. Law § 416).

5. Reports of suspected child abuse or maltreatment must be made by telephone or fax on a form supplied by the commissioner of the Office of Children and Family Services. Oral reports must be made to the statewide central register of child abuse and maltreatment, unless an appropriate local plan provides these reports should be made to the local child protective service. The local child protective service would then make a report to the statewide central register. An oral report must be followed by a written report within 48 hours (Soc. Serv. Law § 415).

   The hotline telephone number to report a case of suspected abuse or maltreatment is 800-342-3720. An additional hotline telephone number for school administrators and teachers to report suspected abuse or maltreatment is 800-635-1522.

6. Schools and school officials may not impose any conditions, including prior approval or prior notification, upon a member of their staff specifically required to report suspected child abuse and maltreatment (Soc. Serv. Law § 413(1)(c)). Similarly, schools may not take any adverse employment action against employees who believe they have reasonable cause to suspect that a child is abused or maltreated and make a report in accordance with the child abuse or maltreatment reporting law (Id.).

7. School districts have a responsibility to provide assistance and data to enable local child protective service (CPS) employees to carry out their investigations (Soc. Serv. Law § 425(1)). This includes providing access to records relevant to the investigation and allowing CPS to conduct an interview of such child without parental consent or court order when CPS encounters circumstances that warrant interviewing the child apart from family or other household members or the home or household where child abuse or maltreatment allegedly occurred (18 NYCRR §432.3(i); see also 53:37). School personnel may observe the interview (*Id*.).

   School districts may require CPS workers and those who accompany them to comply with reasonable visitor policies and procedures of the school and to present appropriate identification (Id.).

8. The Social Services Law provides legal penalties for failure to report cases of suspected child abuse, including liability for damages proximately caused by such failure (Soc. Serv. Law § 420).

Required Policies and Training

1. School districts must develop, maintain, and disseminate written policies and procedures on mandatory reporting of child abuse or neglect; reporting procedures and obligations of persons required to report; provisions for taking a child into protective custody; mandatory reporting of deaths; immunity from liability; penalties for failure to report; and obligations for providing services and procedures necessary to safeguard the life or health of a child (§ 3209-a).

2. Every district must establish and maintain a training program for all current and new school employees regarding its policies and procedures on mandatory reporting of cases of suspected child abuse or maltreatment (§ 3209-a) including written information explaining reporting requirements (Soc. Serv. Law § 413(2)). Failure to provide adequate training would subject a school district to liability (see *Biondo v. Ossining UFSD*, 66 A.D.3d 725 (2d Dep't 2009)).

   Districts employing mandated reporters must provide all such current and new employees with written information explaining the reporting requirements (Soc. Serv. Law § 413(2)).

3. School districts that employ mandated reporters of suspected child abuse or maltreatment who, in the normal course of their employment, visit children's homes must provide all such current and new employees information on recognizing the signs of an unlawful methamphetamine laboratory (Soc. Serv. Law § 413(4)).

4. Every public school including charter schools must post in English and Spanish the toll-free number operated by the Office of Children and Family Services (OCFS) to receive reports of child abuse or neglect under the Social Services Law, as well as directions for accessing the OCFS website (Educ. Law § 409-l).

REPORTING CHILD ABUSE IN AN EDUCATIONAL SETTING

1. The Education Law requires that school districts report to law enforcement authorities allegations of child abuse in an educational setting by a district employee or volunteer.

   a. The term child abuse refers to the intentional or reckless infliction of physical injury, serious physical injury, or death, as well as conduct that creates a substantial risk of such injuries or death. It also includes any child sexual abuse as defined under articles 130 or 263 of the Penal Law, and the dissemination of or attempts to disseminate indecent materials to minors under article 235 of the Penal Law (§ 1125(1), (9)).

   b. The term educational setting means building and grounds of a public school district, vehicles used to transport students to and from school, and field trips, co-curricular and extracurricular activities, as well as sites where those activities take place. It also includes any other location where direct contact occurs between students and employees or volunteers (§ 1125(5)).

2. The law provides immunity from civil liability to school personnel who reasonably and in good faith comply with their responsibilities under the child abuse in an educational setting reporting requirements (§§ 1126(3), 1128(4), 1133(3)).

3. Teachers, school nurses, guidance counselors, school psychologists and social workers, administrators, school board members, or other school personnel required to hold a teaching or administrative license must file a written report with the school principal upon receipt of any oral or written allegation of child abuse in a educational setting (§ 1126(1)).

4. If it is determined that there is reasonable suspicion to believe that an act of child abuse has occurred, the school principal must take additional steps which differ depending on who has made the allegation, and who it was made to. For example, parents must be notified of the allegation if it comes from someone other than them. In all cases, parents must be provided a written statement that sets forth parental rights, responsibilities and procedures to be followed. Appropriate law enforcement officials must be notified without delay (§ 1128; 8 NYCRR § 100.2(hh)(1); *Appeal of S.S.*, 42 Ed Dept Rep 273 (2003)).

   If, following an investigation, it is determined that there is no reasonable suspicion to believe that an act of child abuse had occurred, there is no obligation to notify law enforcement authorities, or to provide parents with a written statement setting forth parental rights, responsibilities and procedures (§ 1128; *Appeal of S.S*).

5. Where the alleged child abuse occurred outside the district of attendance, the report must be submitted to the superintendent of both the district of attendance and the district where the abuse allegedly occurred. In this case, both superintendents are responsible for contacting law enforcement authorities without delay and for taking other actions required by law (§§ 1126(2), 1128).

6. A school superintendent must refer to the commissioner of education any report of child abuse in an educational setting forwarded to law enforcement authorities, when an employee or volunteer alleged to have committed such act holds a certification or license issued by the State Education Department (§ 1128-a(1)).

7. Willful failure to comply with the child abuse in an educational setting reporting requirements constitutes a class A misdemeanor. The failure to contact law enforcement authorities is also punishable by a civil penalty of up to $5,000 (§ 1129).

8. The law expressly prohibits school districts from agreeing to withhold from law enforcement authorities the fact that an allegation of child abuse in an educational setting has been made in exchange for the resignation or voluntary suspension of the employee or volunteer against whom the allegation is made (§ 1133(1)). Such an agreement constitutes a Class E felony that is also punishable by a civil penalty of up to $20,000 (§ 1131(2)).

Confidentiality of Records

1. Such reports and other written materials submitted, as well as any photos taken in connection with allegations of child abuse in an educational setting, that are held by a person authorized to receive such information is confidential. They can be re-disclosed only to law enforcement authorities investigating the allegations, or pursuant to a court-ordered subpoena, or as otherwise expressly authorized by law (§ 1127), as in the case of the employee or volunteer who is the subject of a child abuse in an educational setting report (§ 1131(4)).

2. Such reports must be expunged from district records five years after the date of its making if, after investigation, they do not result in a criminal conviction. They may be expunged earlier, in the district's discretion (§ 1128-a(2)).

3. The willful re-disclosure of such materials to persons not authorized to receive or review them constitutes a Class A misdemeanor (§ 1127).

Law Enforcement Action

1. The district attorney must notify school districts of any indictment or filing of an accusatory instrument against an employee or volunteer involved in a child abuse in an educational setting report. The district attorney also must inform school districts as to the disposition of a criminal case, or the suspension or termination of an investigation (§ 1130).

2. The district attorney must notify the commissioner of education of any criminal conviction. Upon receipt of such information, the commissioner must conduct an investigation into the good moral character of the individual (§ 1131).

Training Requirements

1. School districts must establish and implement on an ongoing basis a training program regarding the law on child abuse in an educational setting for all current and new teachers, school nurses, school counselors, school psychologists, school social workers, school administrators, other personnel required to hold a teaching or administrative certificate or license and school board members (§ 1132(2); 8 NYCRR § 100.2(hh)(2); see also *Application of the Bd. Of Educ. For the City School Dist. Of the City of Elmira,* 49 Ed Dept Rep 363 (2010)).

2. The program must include, at a minimum, training on the duties of all school personnel; confidentiality of records; penalties for failure to comply with the law; notification by the district attorney of the results of investigations; action taken upon conviction of a licensed or certified employee; and the prohibition against silent resignations (8 NYCRR § 100.2(hh)(2)).

3. School districts must provide, annually, to each teacher and all other school officials a written explanation of the reporting requirements including the immunity provisions (8 NYCRR § 100.2(hh)(3)).

XVIII. STUDENT CONSTITUTIONAL RIGHTS

FREE SPEECH

Basic Rights

1. According to the United States Supreme Court, student free speech rights "are not automatically coextensive with the rights of adults in other settings" (*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); see also *Morse v. Frederick*, 551 U.S. 393 (2007); *Peck v. Baldwinsville CSD*, 426 F.3d 617 (2d Cir. 2005), cert. denied, 547 U.S. 1097 (2006)). Instead, they must be "applied in light of the special characteristics of the school environment" (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); see also *Morse v. Frederick*; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Peck v. Baldwinsville CSD*).

2. Generally, school officials cannot punish students merely for expressing their personal political or religious views on school premises. But they can prohibit the expression of such views if they reasonably believe that it will "materially and substantially interfere with the appropriate discipline in the operation of the school or impinge upon the rights of other students" or it actually does (*Tinker v. Des Moines Indep. Cty. Sch. Dist*., 393 U.S. 503 (1969); *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006),).

Threatening Speech not Protected

1. The First Amendment does not protect true threats of violence (*Appeal of Ravick*, 40 Ed Dept Rep 262 (2000), citing *Watts v. United States*, 394 U.S. 705 (1969); *People v. Deitze*, 75 N.Y.2d 47 (1989)), even if the speaker of the threat does not intend to carry it out (*D.F. v. Bd. of Educ. of Syosset CSD*, 386 F.Supp.2d 119 (E.D.N.Y. 2005), citing *Virginia v. Black*, 538 U.S. 343 (2003)). It suffices that a reasonable person would foresee the statement would be interpreted by those receiving it as a serious expression of intent to harm or assault (*Lovell v. Poway Unified Sch. Dist*., 90 F.3d 367 (9th Cir. 1996); see, e.g., *Appeal of Ravick*).

2. However, "[s]chool officials have significantly broader authority to sanction student speech than the [true threat] standard allows" (*Wisniewski v. Bd. of Educ. of Weedsport CSD*, 494 F.3d 34 (2d Cir. 2007), cert. denied, 128 S.Ct. 1741 (2008)). The appropriate standard by which to assess a school district's ability to discipline students for statements "reasonably understood as urging violent conduct" is whether school officials reasonably conclude the statements will "materially and substantially disrupt the work and discipline of the school" (*Id.*; see also, *Cuff v. Valley Central School Dist.*, 677 F.3d 109 (2d Cir. 2012)).

Limitations on Controversial, Rude and Disparaging Speech

1. In general, to justify prohibiting a student's expression of a particular opinion, school districts must show that the expression would result in a material and substantial interference with the work of the school or impinge on the rights of other students. "[A] mere desire" to avoid controversy and the discomfort and unpleasantness that could result from the expression is insufficient ((*Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503 (1969)); see *M.B. v. Liverpool CSD*, 487 F.Supp.2d 117 (N.D.N.Y 2007); *K.D. v. Fillmore CSD*, 2005 U.S. Dist. LEXIS 33871 (W.D.N.Y. 2005)).

2. In the absence of any evidence of material or substantial disruption, districts do not have to tolerate student speech that is offensive because it is lewd, vulgar, and indecent or may reasonably be regarded as promoting illegal drugs (*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Guiles v. Marineau; Morse v. Frederick*, 551 U.S. 393 (2007); see also *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011)). The U.S. Court of Appeals for the Second Circuit, with jurisdiction over New York, has ruled that the term "offensive" in this context refers to speech that is lewd, vulgar, or indecent (*Guiles v. Marineau*, 461 F.3d 320 (2006)). However, the United States Supreme Court has refused to rule that districts may restrict all manner of offensive speech (*Morse v. Frederick*, 551 U.S. 393 (2007); see also *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533 (2d Cir. 2011)).

School Sponsored Publications

1. School districts can exercise editorial control over the style and content of student expression in "school-sponsored publications, theatrical productions and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *R.O. v. Ithaca City School Dist.*, 645 F.3d 533 (2d Cir. 2011); see also *Peck v. Baldwinsville CSD*, 426 F.3d 617 (2d Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006)).

   But a school's actions in editorializing school-sponsored student expressive activities must be "reasonably related to legitimate pedagogical concerns" (*Id*.), and may not amount to viewpoint discrimination (*Peck v. Baldwinsville CSD*). Actions taken to avoid the perception of endorsement of religion do not constitute evidence of intent to inhibit religion or view point discrimination (*Id*.).

2. School officials may also regulate the content of advertisements in school-sponsored student publications if they have reserved the publication for an intended purpose and have not otherwise opened it for indiscriminate use by the general public (*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

Distribution of Non School Sponsored Student Publications

1. School authorities may regulate the content and distribution of literature produced by students off campus to the extent necessary to avoid material and substantial interference with the requirements of order and discipline in the operation of schools (*R.O. v. Ithaca City School Dist.; Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Appeal of Doro*, 40 Ed Dept Rep 281 (2000); *Appeal of Rampello*, 37 Ed Dept Rep 153 (1997). The same constitutional standards would apply to student distribution of religious and nonreligious literature (see *M.B. v. Liverpool CSD*, 487 F.Supp.2d 117 (N.D.N.Y. 2007); see also *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993); *Hemry v. Sch. Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F.Supp. 856 (D. Colo. 1991)).

2. School authorities also may regulate time, manner, place and duration of the distribution to avoid interference with normal school operations (*Eisner v. Stamford Bd. of Educ.*; *Appeal of Doro*).

   a. Guidelines regarding the time, manner, place and duration of distribution should be specific including, for example, the areas of school property where it would be appropriate to distribute approved materials, and requirements that those distributing the literature not block pedestrian traffic or school building entrances, and remove any litter they create.

   b. Guidelines for pre-distribution review and approval must identify to whom the literature must be submitted for clearance, and objective criteria by which distribution may be approved or prevented. They also must set an expedited time period for school officials to decide whether or not to permit distribution (*Eisner v. Stamford Bd. of Educ*.; *M.B. v. Liverpool CSD*). Such guidelines may not afford school officials unfettered discretion to suppress disfavored speech or disliked speakers (*M.B. v. Liverpool CSD*).

Disciplinary Action for Distribution of Student Produced Publications

1. Generally, school officials have no authority to punish students for the publication and distribution of student magazines or papers produced and distributed off school property (*Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980)).

    a. However, school officials might be able to take disciplinary action in cases where the publication produced and distributed off-campus threatens violence or harm, or incites substantial disruption, within the school (Id.**;** see also *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821 (7th Cir. 1998) (court refused to award injunction halting suspension of student who wrote article in off campus underground newspaper about who to hack into school's computer); *Bd. of Educ. of Monticello CSD v. Commissioner of Educ.*, 91 N.Y.2d 133 (1997)).

    b. Similarly, school officials might be able to discipline students where there is evidence that their authorship of an off-campus publication endangered the safety, morals, health or welfare of others (see *Appeal of Roemer*, 38 Ed Dept Rep 294 (1998)).

2. School authorities may punish both on-campus and off-campus student speech and conduct that threaten to substantially interfere with the work of the school or the rights of other students (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ*., 91 N.Y.2d 133 (1997) (district could punish student who produced material at home calling for destruction of school property which he distributed at school); see also *Wisniewski v. Bd. of Educ. of Weedsport CSD*, 494 F.3d 34 (2d Cir. 2007), cert. denied, 552 U.S. 1296 (2008)).

Disciplinary Action for speech communicated through computer technology

1. School authorities have been allowed to regulate and punish student communications through the use of computer technology that have threatened harm or been disruptive to the work of the school and impinged on the rights of other students. For example, courts and the commissioner of education have upheld disciplinary action taken by school officials against:

    a. A student who called the administration "douchebags" on her publicly accessible blog, inaccurately stated the administration had canceled a school event, and urged others to call and email the administration to protest this action and to "piss [them] off" (*Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008)).

    b. A student who "instant messaged" friends a drawing, created on his home computer, threatening the life of a teacher that caused the district to transfer the teacher out of the student's class (*Wisniewski v. Bd. of Educ. of Weedsport CSD*, 494 F.3d 34 (2d Cir. 2007), cert. denied, 522 U.S. 1296 (2008); see 22:7).

    c. Students issuing or posting emails or messages containing threats of violence either from their home computers (*Appeal of T.N.*, 42 Ed Dept Rep 235 (2003); *Appeal of B.B.*, 38 Ed Dept Rep 666 (1999); *Appeal of Ravick*, 40 Ed Dept Rep 262 (2000)), or from a school computer terminal (*Appeal of David and Cynthia L.*, 40 Ed Dept Rep 297 (2000)), causing student absences and cancellation of classes.

    d. A student who used a school-issued laptop computer to try and gain unauthorized access to various servers across the country, including the server of his school district, and to

load programs capable of sabotaging a server (*Appeal of J.C.*, 41 Ed Dept Rep 395 (2002)), or altering a teacher's website using his home computer by adding sexually explicit comments (*Appeal of D.V.*, 44 Ed Dept Rep 263 (2005)).

First Amendment and Student Dress in General

First Amendment protections may extend to clothing**,** if the clothing constitutes symbolic speech representing a student's statement of either political or religious expression (*Tinker v. Des Moines Indep. Sch. Dist*., 393 U.S. 503 (1969); see also *Appeal of Conley*, 34 Ed Dept Rep 376 (1995); *Appeal of Mangaroo*, 33 Ed Dept Rep 286 (1993); *Appeal of Pintka*, 33 Ed Dept Rep 228 (1993)). It also must be neither disruptive of the educational process or in conflict with the rights of others (*Tinker v. Des Moines Indep. Sch. Dist.;* see also *Appeal of Pintka*) nor lewd, vulgar, or offensive (*Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); see also *Appeal of Pintka*).

Dress Codes

1. Student dress codes may not suppress expressions that are entitled to free speech protections.

   However, a student dress code that banned all shirts with printed messages except those related to district-sponsored curricular clubs, organizations, athletic teams or school spirit approved by a school principal was found to be content neutral and, therefore, constitutionally permissible (*Palmer v. Waxahachie Indep. Sch. Dist*., 579 F.3d 502 (5th Cir. 2009)).

2. Student dress codes may not be vague, subjective, or overly broad (*Appeal of Parsons*, 32 Ed Dept Rep 672 (1993); see also *Newsom v. Albemarle Cnty. Sch. Bd*., 354 F.3d 249 (4th Cir. 2003); *Sypniewski v. Warren Hills Reg'l Bd. of Educ*., 307 F.3d 243 (3d Cir. 2003)).

   A student dress code might be overly broad and therefore unconstitutional if, for example, it simply bans all clothing with weapons-related messages. Such a ban also would prohibit lawful non-violent and non-threatening symbols such as the fighting insignia of military units in overseas operations in which student family members might serve (*Newsom v. Albemarle Cnty. Sch. Bd*.; see also *Sypniewski v. Warren Hills Regional Bd. of Educ.*).

3. Student dress codes must address legitimate educational concerns, such as teaching socially appropriate behavior, eliminating potential health or safety hazards, ensuring the integrity of the educational process, or avoiding school violence (*Appeal of Pintka*, 33 Ed Dept Rep 228 (1993) see also *Appeal of Bartlett*, 33 Ed Dept Rep 234 (1993) (students required to wear long pants in lab area); *Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 Fed. Appx. 273 (11th Cir. 2008) (wearing pierced jewelry other than in ear prohibited as safety concern).

4. School districts must develop their student dress code in consultation with teachers, administrators, other school services professionals, students, and parents (8 NYCRR § 100.2(l)(2)(i), (ii)(a)) to ensure it reflects "current community standards" on "proper decorum and deportment" (*Appeal of Pintka*; see also *Appeal of Phillips*, 38 Ed Dept Rep 297 (1998)). See Student Discipline section for more on Codes of Conduct.

Wearing of accessories

Students have a right to wear or display buttons, armbands, flags, decals, or other badges that are symbolic of personal expression. However, the wearing of such symbols may not materially and

substantially interfere with the orderly process of the school or the rights of others or contain rude, vulgar or indecent material (see *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503 (1969)) *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *A.M. v. Cash*, 585 F.3d 214 (5th Cir. 2009); *B.W.A. v. Farmington R-7 Sch. Dist*., 554 F.3d 734 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008) (ban of confederate flag upheld based upon documented hostile race relations among students).

Gang related clothing

1. School districts may ban such items if there is evidence of gang presence, activity, and violence in the schools that might reasonably lead school authorities to forecast substantial disruption of school activities. A broad ban on "gang-related" apparel such as rosaries or sports team logos, or the wearing of earrings by male students would violate student First Amendment rights absent connection of such items or the student wearing them to any gang (*Grzywna v. Schenectady City Sch. Dist*., 489 F.Supp.2d 139 (N.D.N.Y. 2006); see *Chalifoux v. New Caney Indep. Sch. Dist*., 976 F.Supp. 659 (S.D. Tex. 1997); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F.Supp. 1459 (C.D. Cal. 1993); *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F.Supp 820 (N.D. Ill. 1987)).

2. School rules banning gang-related clothing and accessories from school can violate student First Amendment rights if they are vague. For example, it is not sufficient to merely state that "[g]ang related activities such as display of colors, symbols, signals, signs, etc., will not be tolerated on school grounds." Such a bare statement fails to provide adequate notice regarding unacceptable conduct, or offer clear guidance of its application (*Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997); see also *Lopez v. Bay Shore UFSD*, 668 F.Supp.2d 406 (E.D.N.Y. 2009)).

   A school rule prohibiting specific activities, such as membership recruitment, and threatening or intimidating students to commit acts in furtherance of gang purposes would be sufficiently clear as to what activities are prohibited (*Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. No. 61*, 251 F.3d 662 (7th Cir. 2001)).

Uniforms

1. The commissioner of education has ruled that under New York law, a school district lacks authority to compel students to wear a uniform or particular kind of clothing or force exclusion from school (*Appeal of Dalrymple*, 5 Ed Dept Rep 113 (1966)).

2. However a federal district court upheld a New York City School District policy mandating that students in prekindergarten through grade 8 wear a uniform, but which also allowed parents to secure an exception from that mandate**,** and the policy provided that discipline for noncompliance could not include suspension from class or school, or affect an academic grade or participation in an extracurricular activity. Instead, the policy limited corrective measures to parent or student-teacher conferences and reprimands (*Lipsman v. New York City Bd. of Educ*., 1999 U.S. Dist. LEXIS 3574 (S.D.N.Y. 1999)).

FREEDOM OF RELIGION

Establishment Clause

1. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion." It has been interpreted to require the separation of church and state and is applicable to

the states and their subdivisions, including school districts. It requires that government pursue a course of "complete neutrality toward religion," and not promote religion or entangle itself in religious matters (see *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Bd. of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Larson v. Valente*, 456 U.S. 228 (1982), *reh'g denied*, 457 U.S. 1111 (1982)).

However, not all governmental conduct that confers a benefit on or gives special recognition to religion is automatically prohibited. It depends on all the circumstances surrounding the particular church-state relationship (*Lynch v. Donnelly*, 465 U.S. 668 (1984), *re'hg denied* 466 U.S. 994 (1984)).

Free Exercise Clause

1. The Free Exercise Clause addresses the freedom of individual belief and religious expression. It states: "Congress shall make no law prohibiting the free exercise" of religion. This clause is also applicable to the states and their political subdivisions, and prohibits government from restricting the right of an individual to believe in whatever he or she may choose. This right, however, may not be read "to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens" (*Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)).

2. Although "government may accommodate the free exercise of religion," it may not "supersede the fundamental limitations imposed by the Establishment Clause" (*Lee v. Weisman*, 505 U.S. 577 (1992); see also *Bd. of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994)).

3. The right to exercise one's religion freely is not burdened simply by mandating one to be exposed to ideas with which that person disagrees *(Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Brown v. Hot, Sexy & Safer Prods*., 68 F.3d 525 (1st Cir. 1995); *Mozert v. Hawkins Cnty. Bd. of Educ*., 827 F,2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988); *Parker v. Hurley*, 474 F.Supp.2d 261 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008), *cert denied*¸555 U.S. 815 (2005)).

Blaine Amendment

1. Article 11, section 3 of the New York State Constitution, also known as the Blaine Amendment, provides that neither the state nor any state subdivision, which includes school districts, may authorize the use of its property, credit or public funds, directly or indirectly, to assist any school under the control of any religious denomination or which teaches any denominational tenet or doctrine.

2. The purpose of the Blaine Amendment is to prevent state aid to religion, but the article has been interpreted as not prohibiting every state action that may provide some benefit to religious schools (*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)). For example, this article specifically exempts the transportation of students to and from nonpublic schools, and the district's examination or inspection of such schools.

Prayer at School Board Meetings

1. There are no cases from the U.S. Supreme Court or the Court of Appeals for the Second Circuit governing whether a school board may conduct prayers at public board meetings. However, the U.S. Supreme Court recently upheld the practice of a town which opened each meeting with a prayer offered by a "chaplain of the month" chosen from a list of individuals who volunteered to offer the prayer (*Town of Greece, NY. v. Galloway*, 134 S.Ct. 1811 (2014)). The court relied on its prior decisions that recognized the authority of Congress and state legislatures to open meetings with overtly religious invocations in order lend gravity to the occasion and unite lawmakers in a common effort.

2. At least two federal appellate courts outside New York have ruled such a practice at school board meetings unconstitutional based, in part, on the high degree of student participation at such meetings (see *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), *reh'g denied*, 183 F.3d 538 (6th Cir. 1999); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2011); but compare *Lund v. Rowan Couty, N.C.*, 103 F.Supp.3d 712 (M.D.N.C. 2015) (prayer led by member of county board of commissioners directed at board and public violates Establishment Clause)).

School Sponsored Prayer

Policies promoting school-sponsored prayer in public schools consistently have been struck down as unconstitutional acts of government. The United States Supreme Court has ruled repeatedly that the separation of church and state principles embodied in the Establishment Clause of the First Amendment prohibit school-sponsored prayers and religious exercises, even when the prayer is nondenominational and participation is voluntary.

For example, the high court ruled unconstitutional a prayer endorsed by the New York State Board of Regents for use in public schools (*Engle v. Vitale*, 370 U.S. 421 (1962)). It also struck down a state statute requiring readings from the Bible, even if students were not required to engage in such prayers (*School Dist. v. Schempp*, 374 U.S. 203 (1963)).

Moments of Silence

1. In 1985, the United States Supreme Court struck down a state statute requiring a one-minute period of silence for "meditation or voluntary prayer during the school day" (*Wallace v. Jaffree*, 472 U.S. 38 (1985)). In *Jaffree*, the legislative history of the statute reviewed by the court made it clear that the purpose was to permit prayer. Therefore, the statute was found to be unconstitutional.

   Since *Jaffree* federal appellate courts have examined statutes enacting moments of silence for quiet contemplation or reflection or to calm students and prepare them for the start of the school day (*Croft v. Governor of Texas*, 562 F.3d 755 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Bown v. Gwinnet Cnty. Sch. Dist*., 112 F.3d 1464 (11th Cir. 1997); see also *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed for lack of jurisdiction*, 484 U.S. 72 (1987)**;** *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010), *cert. denied*, 132 S.Ct. 92 (2011)), and upheld several where there was no evidence showing intent to promote prayer (*Brown v. Gilmore, Bown v. Gwinnett Sch. Dist., Croft v. Governor of Texas*; *Sherman v. Koch*).

2. New York's Education Law allows for a moment of silence in the public schools at the opening of school every school day (§ 3029-a). It specifically provides: "The silent meditation authorized . . . is not intended to be, and shall not be conducted as, a religious service or exercise, but may be considered an opportunity for silent meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day." Students may remain seated and may not be required to stand.

   New York's statute has not been challenged in the courts. According to a 1964 Formal Opinion of Counsel from the State Education Department, the application of the statute would be impermissible if the statutory moment of silence were prefaced with the statement: "We will now have a moment of silence to acknowledge our Supreme Being" (Opn. Educ. Dep't, 3 Ed Dept Rep 255 (1964)). Since the legislative history of that statute does not indicate that it was enacted to foster organized religious prayer, it may pass constitutional scrutiny.

Organized student prayer during school hours

1. Although the United States Supreme Court has not ruled on this question, other courts have found this to violate the separation of church and state requirements of the Establishment Clause **(**see *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 887 F.Supp. 902 (N.D. Miss. 1995); see also *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274 (5th Cir. 1996), cert. denied, 117 S.Ct. 388 (1996)).

2. A federal district court in New York ruled that a school district properly halted broadcasting a Mohawk Indian "Thanksgiving Address" over the school intercom, at pep rallies and before lacrosse games. While not considered a prayer by Mohawks, the address contained speech reasonably interpreted as religious in nature. The district avoided an endorsement problem by halting the practice (*Jock v. Ransom*, 2007 U.S. Dist. LEXIS 47027 (N.D.N.Y June 28, 2007)).

Organized prayer and extracurricular activities

1. The United States Supreme Court, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), ruled that a school policy that allowed student-initiated, student-delivered, nonsectarian, non proselytizing prayer at high school football games violates the separation of church and state.

2. The federal Equal Access Act (20 USC §§ 4071-74) requires that public schools allow use of its facilities by student groups to pray or conduct bible study, but only during non instructional time, if the students are high school students, if the meeting or activity is not school-sponsored, and if the school district already allows other student-run, non curriculum-related student groups to meet on school premises during "non instructional time."

   a. Non instructional time generally means before or after school (but see *Ceniceros v. Bd. of Trustees of San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (lunch break was considered non instructional time) and (*Donovan v. Punxsutawney Area Sch. Bd*., 336 F.3d 211 (3d Cir. 2003) (activity period between homeroom and the first period of instruction is non instructional time)).

   b. A student group is non curriculum-related unless the subject matter of that group is actually taught or concerns the body of courses as a whole, or participation in such a group is a course requirement or provides the participants with academic credit (*Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990)).

3. The United States Court of Appeals for the Second Circuit, with jurisdiction over New York, has ruled that the Equal Access Act precludes a school district from enforcing nondiscrimination policies that would prohibit a student Bible club from meeting on school property solely because the group allowed only Christians to serve as officers of the club (see *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), cert. denied, 519 U.S. 1040 (1996)).

4. Under the federal Equal Access Act (20 USC §§ 4071-74), school personnel may attend such meetings of student prayer and bible study groups only as monitors, not as advisors or participants, and the meetings may not interfere materially or substantially with the orderly conduct of school activities. Furthermore, non-school persons or groups may not direct, control or regularly attend these student group meetings and activities.

Prayer at Graduation Ceremonies

The United States Supreme Court has not addressed the factual issue of whether student-initiated prayer at graduation ceremonies is constitutional. Some believe that the high court would invalidate a school district policy that allows student-initiated prayers at graduation ceremonies based on its decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), where the court ruled against a school district that allowed students to deliver prayer at a football game.

Absence for Religious Observance and Release Time for Religious Instruction

1. School absences for the observance of religious holidays outside of the official state holidays and for attendance at religious instruction are permitted by state law and regulation upon written request from a parent or guardian (§ 3210(1)(b); 8 NYCRR § 109.2(a)).

2. Students may be released to take such religious instruction in accordance with the commissioner's regulations (8 NYCRR § 109.2), as long as that instruction is not provided at the public school (*Zorach v. Clauson*, 343 U.S. 306 (1952); see also *Pierce v. Sullivan West CSD*, 379 F.3d 56 (2d Cir. 2004)), including a private trailer parked on school grounds for such purpose (see *H.S. v. Huntington Cnty. Cmty. Sch. Corp*., 616 F.Supp.2d 863 (N.D. Ind. 2009)).

Excusal from course based upon religious conflict

1. Parents do not have a right to tell a school what their children "will and will not be taught" (*Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003)), or to prevent their children's mere exposure to ideas or a point of view with which they disagree or find offensive (*Matter of Alfonso v. Fernandez*, 195 A.D.2d 46 (2d Dep't 1993), appeal dismissed, 83 N.Y.2d 906 (1994)). Indeed, mere exposure to courses and lessons with which someone disagrees does not burden a person's right to the free exercise of religion and, therefore, does not constitute a violation of the Free Exercise Clause of the First Amendment of the United States Constitution (*Mozert v. Hawkins County Bd. of Educ*., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988)).

2. Parents may seek an exemption to certain parts of the health and hygiene curriculum that conflict with their religion (§ 3204(5); 8 NYCRR §§ 16.2; 135.3(b)(2), (c)(2)).

3. School officials must allow students who express a religious or moral objection to the performance or witnessing of animal dissections to complete an alternative project approved by

their teacher, instead, without penalty upon written parental request and in compliance with school policy and law (§ 809(4)).

FOURTH AMENDMENT

Basic Right

1. The Fourth Amendment to the United States Constitution prohibits government officials from conducting unreasonable searches and seizures (U.S. Const. Amend. IV). The United States Supreme Court has determined that the prohibition extends to searches by public school officials, including teachers and administrators (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

2. However, the Fourth Amendment rights of students in a public school setting and related school-sponsored activities are not as extensive as elsewhere (*New Jersey v. T.L.O.*; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Rhodes v. Guarricino*, 54 F.Supp.2d 186 (S.D.N.Y. (1999)). Generally, a search will violate the Fourth Amendment unless it is based on probable cause to believe that a violation of law has occurred, and conducted pursuant to a warrant. But the legality of a search by school officials is determined by balancing a school's need to search against a student's legitimate expectation of privacy, and whether the search is reasonable under all circumstances (Id.).

3. Although individualized suspicion is not required, public school officials cannot conduct random causeless searches (*People v. Scott D.*, 34 N.Y.2d 483 (1974); see also *Doe v. Little Rock Sch. Dist*., 380 F.3d 349 (8th Cir. 2004)).

Reasonable Suspicion Standard

1. In most cases, a search by public school officials will be valid if it passes two questions, commonly referred to as the reasonable suspicion standard. First, was the search justified at its inception? Second, was the scope of the search, as actually conducted, reasonably related to the circumstances which justified it? (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985))

    a. A school search will be justified at its inception if the school officials had reasonable grounds to suspect it would turn up evidence that a student had violated or was violating law or school rules (Id.) Under New York cases, the suspicion must be unequivocal, and the information that supports the suspicion must be reliable and precise *(People v. Scott D.*, 34 N.Y.2d 483 (1974); *People v. Singletary*, 37 N.Y.2d 310 (1975)).

    b. The scope of a school search will be permissible if the measures used were related to the objectives of the search, and not excessively intrusive in light of the age and sex of the student, and the nature of the infraction (*New Jersey v. T.L.O.*).

2. In cases involving a high degree of intrusiveness, such as the strip search of students, the United States Supreme Court has stated school officials must have a reasonable suspicion of danger or a reasonable suspicion that the student has hidden evidence beneath his or her underwear. (*Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009)).

Searches Conducted with Police Assistance

1. There is no clear standard for assessing the validity of searches conducted by school officials in conjunction with or at the request of police authorities (see *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Doyle v. Roundout Valley CSD*, 3 A.D.3d 669 (3d Dep't 2004)). Courts throughout the country have reached different conclusions.

    a. One federal district court in New York ruled that the reasonable suspicion standard applied to a search conducted by school officials with police assistance in a case where:

        (1) School officials made the initial decision to conduct the search and call the police;

        (2) The police did not use the actions by school officials as a pretext for circumventing probable cause and warrant requirement; and

        (3) The police merely assisted school officials in conducting the search together with and at the direction of the school officials (*Vassallo v. Lando*, 591 F.Supp. 2d 172 (E.D.N.Y. 2008)).

    b. However, at least one court outside New York has determined that the probable cause instead of reasonable suspension standard would apply if the search is conducted solely at the behest of police, or police involvement is more than minimal (*M.S. v. Smith*, 504 F.Supp.2d 1238 (M.D. Ala. 2007)).

2. There is no clear standard for assessing the validity of a school search conducted by police authorities with minimal involvement by public school officials. One New York appellate court applied the reasonable suspicion standard in a case where the search was conducted by a school safety officer assigned exclusively to school security (*Matter of Stephen A.*, 308 A.D.2d 359 (1st Dep't 2003); see also *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002)). But other courts outside New York have determined that police officers involved in school searches with minimal school involvement require probable cause (*State v. Tywayne H.*, 933 P.2d 251 (N.M. 1997); *Picha v. Wielgos*, 410 F.Supp 1214 (N.D. Ill. 1976); see also *M.S. v. Smith*).

Student Drug Testing

1. Generally, the reasonable suspicion standard applied to school searches under the Fourth Amendment is also appropriate under the New York State Constitution (*In the Matter of Gregory M.*, 82 N.Y.2d 588 (1993)). However, New York's Education Law provides greater protection with respect to, for example, drug testing of students.

2. Although the United States Supreme Court has upheld school policies requiring mandatory drug testing of student athletes (*Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)) and middle and high school students participating in extracurricular activities (*Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002)), New York's Education Law prohibits such testing without parental consent (§ 912-a(2); *Appeal of Studley*, 38 Ed Dept Rep 258 (1998)). See also *Mac Ineirghe v. Bd. of Educ. of East Islip UFSD*, 2007 U.S. Dist. LEXIS 61841 (E.D.N.Y. Aug. 22, 2007) (where administration of a saliva test for drugs to a student reasonably suspected of being under the influence of drugs was upheld).

Pat Downs

School officials may pat down students and their belongings if a pat down is the least intrusive, most practical means of furthering a specific school objective and represents a reasonable balance between student privacy rights and school interests in maintaining order (see *Matter of Haseen N.,* 251 A.D.2d 505 (2d Dep't 1998) (pat downs of students on Halloween to prevent repeat of egg throwing incidents were permissible); see also *In the Matter of Gregory M*., 82 N.Y.2d 588 (1993) (search of student's bag which revealed gun was upheld based upon fact that bag had made metallic thud when student tossed it onto shelf causing school security officer to investigate sound by running his hands over bag where he felt outline of gun)).

Locker Searches

1. School officials may search lockers unless they have relinquished control over the lockers assigned to students (*People v. Overton*, 20 N.Y.2d 360 (1967), aff'd on reh'g, 24 N.Y.2d 522 (1969); see also *Appeal of Chipman*, 10 Ed Dept Rep 224 (1971)). Otherwise, students have exclusive possession of their school locker over other students, but not against school authorities (Id.). School officials have not only a right to inspect student lockers, but also a duty to do so upon suspicion that illegal items are stored there (*People v. Overton*).

2. Schools should include in their policies and student handbooks a provision that states that lockers, desks, and other such storage spaces remain the exclusive property of the school, and that students have no expectation of privacy with respect to these areas.

Use of Metal Detectors

Metal detectors may be used if students are given notice that scanning devices will be used and procedures are established to control the process**,** such as when a school posted signs outside the school building and informed students at the beginning of the school year such devices would be used, and particular students could not be searched unless there was reasonable suspicion the student was in possession of a weapon (*People v. Dukes*, 151 Misc.2d 295 (Crim. Ct. N.Y. Cnty. 1992); see also *Appeal of Coleman*, 35 Ed Dept Rep 529 (1996)).

Searches During Off Campus Activities

School officials may conduct searches related to a possible violation of law and/or school rules both on-campus and during off-campus school activities that are organized at school, and administered completely by school employees, including excursions or trips. The setting of the search is just a factor to consider in assessing the overall reasonableness of the search (*Rhodes v. Guarricino*, 54 F.Supp.2d 186 (S.D.N.Y. 1999)).

Thus, it was permissible for a school official who chaperoned a school-sponsored trip to Disney World to search student hotel rooms when prior to the search, the school official had smelled a strong odor of marijuana outside one of the student's room. In addition, the students and their parents had been made aware prior to the trip that room checks would be conducted and that alcohol and drug use was absolutely forbidden during the trip (Id.).

Removal of Students by Child Welfare Workers

1. Children may not be removed without a court order, or parental notice or consent (*Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), cert. denied, 529 U.S. 1089 (2000)). The removal of a child from school in a case of suspected child abuse constitutes a "seizure" that generally is subject to the warrant and probable cause requirements of the Fourth Amendment.

2. An exception to the court order or parental consent requirement would exist if the information available warrants belief that a child is subject to the danger of abuse if not removed from school before court authorization can reasonably be obtained (Id.)

Police Access to Students

1. According to a 1959 Opinion of Counsel for the State Education Department, police officers may enter a school to remove a student only if they have a warrant for the arrest of the student, or other court order authorizing the student's removal**, or** if a crime has been committed on school premises (Opinion of Counsel, 1 Ed Dept Rep 800 (1959)).

2. Police may not remove students from school for questioning without parental consent. Neither may police interrogate students on school premises without parental permission, unless a crime has been committed on school premises. School officials are not authorized to provide the required consent. In every instance, they should immediately contact the student's parents or guardian and try to arrange for their presence if at all possible, or obtain their consent (Id). See also *Matter of Christopher QQ,* 40 A.D.3d 1183 (3d Dep't 2007), where a state appellate court upheld the refusal of a lower court to suppress statements made by a student charged with criminal sexual conduct when questioned by State Police on school grounds).

FIFTH AMENDMENT

Miranda Warnings not required for School Investigations

1. Generally, public school officials have no obligation to give students *Miranda*-type warnings prior to questioning them while investigating school-related misconduct or a breach of school security (*Pollnow v. Glennon*, 594 F.Supp. 220 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985*); In re Daquan M*., 64 A.D.3d 713 (2d Dep't 2009); *People v. Butler,* 188 Misc.2d 48 (Sup. Ct. Kings Cnty. 2001); *In the Matter of Brendan H.,* 82 Misc.2d 1077 (N.Y. Fam. Ct. 1975)).

    a. There may be such an obligation if school officials act in concert with or as agents of the police when questioning one of their students (*In the Matter of Brendan H.*; *People v. Manley*, 26 A.D.3d 755 (4th Dep't 2006); *In re Angel S*., 302 A.D.2d 303 (1st Dep't 2003); see also *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2075 (2009)). That would be the case if police instigate or direct the interrogation, or give input or instructions to school officials questioning a student (*In re Angel S.*; *People v. Butler*).

    b. However, the mere presence of police officers during the questioning does not require *Miranda* warnings (*In re Angel S.*). That the school discipline matter school officials questioned a student on would carry criminal sanctions does not require *Miranda* warnings either (*People v. Butler),* unless police instigate the questioning or school officials interview the student in furtherance of a police objective (*In re Tateana R.*, 64 A.D.3d 459 (1st Dep't 2009)).

c. School officials should take note of the U.S. Supreme Court's recent decision in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), where police investigators questioned a 13 year old student at school regarding his potential involvement in a crime committed off school grounds, in the presence and with the assistance of school officials, without notifying the student's guardian or providing a Miranda warning. The Court ruled the police must take into account a child's age prior to questioning without a Miranda warning. While not specifically basing its decision on the fact that the interrogation occurred at school, the Court noted that such a setting could lead to the impression that a student is not free to leave and thus constitutes a custodial interrogation for which a Miranda warning would be required.

2. Statements obtained from a student during the course of a school-related misconduct investigation may be used as evidence for disciplinary purposes (*Appeal of M.F. & P.F.*, 43 Ed Dept Rep 174 (2003)).

3. Neither the Education Law nor the federal constitution require school officials to contact the parents of a student before questioning that student concerning an alleged infraction of a school rule (*Appeal of D.H.*, 47 Ed Dept Rep 77 (2007); *Appeal of M.F. & P.F.*, 43 Ed Dept Rep 174 (2003); *Appeal of Lago*, 38 Ed Dept Rep 723 (1999); *Appeal of Pronti*, 31 Ed Dept Rep 259 (1992)).

XIX. STUDENT DISCIPLINE

CODES OF CONDUCT

Codes of Conduct Basics

1. All school districts, boards of cooperative educational services (BOCES), and county vocational extension boards must adopt and enforce a code of conduct for the maintenance of order on school property**,** as that term is defined in the law, and at school functions. The code must govern the conduct of students, teachers, other school personnel, and visitors (§§ 2801(1), (2); 8 NYCRR § 100.2(l)(2)(i)).

2. The code must be reviewed annually and updated if necessary, taking into consideration the effectiveness of the code, and the fairness and consistency of its administration and filed with the commissioner no later than 30 days after its adoption or revision (§ 2801(5); 8 NYCRR § 100.2(l)(2)(i), (iii)(a)).

Required Content of Codes of Conduct

At a minimum, a code of conduct must adhere to the provisions, standards and procedures set forth in the Education Law, including but not limited to:

1. Provisions regarding conduct, dress and language that is deemed both appropriate and acceptable, and inappropriate and unacceptable, on school property and at school functions; and acceptable civil and respectful treatment of teachers, school administrators, other school personnel, students and visitors on school property and at school functions; as well as the appropriate range of disciplinary measures which may be imposed for code violations, and the roles of teachers, administrators, other school personnel, the school board and parents.

2. Provisions for the detention, suspension, and removal of students from the classroom, and the establishment of policies and procedures to ensure the provision of continued educational programming and activities for such students including alternative educational programs appropriate to individual student needs.

3. Provisions for ensuring the code and enforcement of the code comply with state and federal laws relating to students with disabilities.

4. A student bill of rights and responsibilities that focuses on positive student behavior that must be publicized and explained to all students annually.

5. Provisions prohibiting discrimination, harassment, and bullying (including cyberbullying) based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex. It must also include provisions for responding to such acts of discrimination, harassment and bullying, including a progressive model of student discipline that takes into account a variety of factors. The name and contact information for the district's Dignity Act Coordinator must also be included. For more detailed information on this topic see Education Law §§ 11(1),(2), 2801(2) 8 NYCRR §100.2(l)(2)(ii) and NYSED's Amended Dignity for All Students Act Student Discrimination, Harassment and Bullying Prevention and Intervention – Guidance for Updating Codes of Conduct, June 2013, http://www.p12.nysed.gov/dignityact/documents/DASACodeofConductGuidance.pdf).

Code Development and Dissemination

1. School boards and boards of cooperative educational services (BOCES) may adopt the code or revisions to the code of conduct only after at least one public hearing that provides for the participation of school personnel, parents, students, and other interested parties (§ 2801(2), (5)(a); 8 NYCRR § 100.2(l)(2)(i), (iii)(a)). Districts may establish a committee comprised of similar individuals to facilitate review of the code (§ 2801(5)(a); 8 NYCRR § 100.2(l)(2)(iii)(a)).

2. School districts must ensure community awareness of their code of conduct by:

    a. providing copies of a plain language summary of the code to all students at a general assembly held at the beginning of each school year and posting the code and any amendments on the district's website;

    b. mailing a plain language summary of the code to students' parents before the beginning of the school year, and making such summary available thereafter upon request;

    c. providing each teacher with a copy of the code and any amendments thereto; and

    d. making copies available for review by students, parents or other persons in parental relation to students, non-teaching staff, and other community members (§ 2801(4); 8 NYCRR § 100.2(l)(2)(iii)(b)).

Automatic Suspensions under a Code of Conduct

1. Generally, a school district's code of conduct may not provide for the automatic suspension of students who engage in certain types of behavior without regard to the circumstances giving rise

to the code violation (8 NYCRR § 100.2(l)(1)(i)(f); *Appeal of a Student with a Disability*, 33 Ed Dept Rep 101 (1993); *Appeal of Nuttall*, 30 Ed Dept Rep 351 (1991)).

2. However, a code of conduct must include a minimum period of suspension for violent students, and students who repeatedly are substantially disruptive of the educational process, or substantially interfere with a teacher's authority over the classroom as those terms are defined in the law (Id.; see also Educ. Law §§ 2801(2)(l)(m), 3214(2-a); 8 NYCRR § 100.2(l)(2)(ii)(0), (p)). That minimum period may be reduced on a case-by-case basis (§§ 2801(2)(l), (m); 3214(2-a)(a)); 8 NYCRR § 100.2(l)(2)(ii)(m), (n)).
3. Pursuant to federal and state law, students deemed to have brought or possessed a firearm at school, must be suspended for a minimum period of one calendar year, subject to modification on a case-by-case basis by the school superintendent (20 USC § 7961(b)(1); § 3214(3)(d)).

Types of Discipline Permitted

1. The following are among the types of discipline school districts may impose for violations of their student disciplinary code:

    a. Verbal warnings and reprimands.

    b. Written warning, including written notification to parents/guardians.

    c. Probation.

    d. Detention.

    e. Suspension from transportation.

    f. Suspension from participation in athletic events, social or extracurricular activities and other privileges.

    g. Exclusion from a particular class.

    h. In-school suspension.

    i. Suspension from school not in excess of five days.

    j. Suspension from school in excess of five days.

2. School districts that allow the use of a time out room as part of their behavior management approach must make sure their policies and procedures on the use of a time out room comply with commissioner's regulations regarding physical and monitoring requirements, parental rights and individualized education program (IEP) requirements for students with disabilities (8 NYCRR § 200.22(c)).

3. A disciplinary penalty is appropriate as long as it is proportionate to the severity of the misconduct for which it is being imposed (*Appeal of M.W. and K.W.*, 55 Ed Dept Rep, Dec. No. 16,903 (2016); *Appeal of F.W.*, 48 Ed Dept Rep 399 (2009); *Appeal of L.O. & D.O.*, 47 Ed Dept Rep 194 (2007); *Appeal of L.L.*, 45 Ed Dept Rep 217 (2005)). It would not be appropriate if it is so excessive as to warrant substitution of the commissioner's judgment for that of school officials

(*Appeal of F.W.*; *Appeal of L.O. & D.O.*; *Appeal of N.V.*, 46 Ed Dept Rep 138 (2006); *Appeal of L.L.*).

4. Districts may impose a harsher penalty for certain types of misconduct than others, such as a greater penalty for drugs than for tobacco or alcohol misconduct (see *Appeal of J.P.*, 44 Ed Dept Rep 204 (2004)).

5. A school district has no authority to impose a community service requirement as a penalty under section 3214 of the Education Law (*Appeal of L.H.*, 43 Ed Dept Rep 315 (2003); *Appeal of R.M & L.M*, 43 Ed Dept Rep 155 (2003); *Appeal of Cynthia & Robert W.*, 37 Ed Dept Rep 437 (1998)).

6. A school district may not condition a student's school attendance on participation in counseling services (*Appeal of L.H.*, 43 Ed Dept Rep 315 (2003); *Appeal of R.M. & L.M.*, 43 Ed Dept Rep 155 (2003); *Appeal of Jayme K.*, 40 Ed Dept Rep 114 (2000)) or order a psychological or psychiatric exam as part of a penalty (*Appeal of Pinckney*, 37 Ed Dept Rep 234 (1998)).

7. However, a school district may recommend counseling in circumstances where a student may benefit from such services (Id.). In addition, it may condition a suspension revocation or a student's early return from suspension on the student's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable (§ 3214(3)(e); *Appeal of B.L.G.*, 50 Ed Dept Rep, Dec. No. 16,101 (2010)).

RULES RELATING TO DISCIPLINE OTHER THAN SUSPENSION FROM SCHOOL

Detention

1. A district may use detention as a penalty for misconduct for which suspension would be inappropriate. However, teachers and administrators may keep a student for after school detention only if there is no parental objection and the student has appropriate transportation home (After School Detention Memorandum to School Administrators and Pupil Service Personnel, NYS Education Department (Mar. 1996), available online at http://www.p12.nysed.gov/sss/lawsregs/afterschooldetention1996.html).

2. Students who fail to attend detention may be kept from participating in school activities such as field trips (*Matter of Kubinski*, 26 Ed Dept Rep 348 (1987)). Failure to attend detention also may result in the imposition of an in-school suspension (*Appeal of G.H.L.*, 46 Ed Dept Rep 571 (2007)).

Suspension from School Transportation

1. A suspension from transportation services does not require a full, formal hearing as required in school suspension cases because a suspension from transportation, in and of itself, does not affect a student's right to attend school. Instead, all that is required is an opportunity to informally discuss the facts underlying the suspension (*Appeal of R.D.*, 42 Ed Dept Rep 237 (2003); *Appeal of Hale*, 30 Ed Dept Rep 26 (1990)). Districts must be reasonably certain that the student being suspended from transportation services was involved in the misconduct supporting the suspension (*Appeal of Hale*).

2. However, where suspending a student from school transportation amounts to a suspension from school attendance because of the distance between home and school and the unavailability of an alternative public or private means of transportation, a district must make "appropriate arrangements" to provide for the student's education (*Matter of Stewart*, 21 Ed Dept Rep 654 (1982)).

3. Special rules that apply to the discipline of students with disabilities may impact a school's ability to suspend such students' transportation.

Suspension from Extracurricular Activities

1. School districts may suspend or exclude students from extracurricular activities pursuant to a school board's authority to establish both reasonable standards of conduct for participation in such activities (*Appeal of J.P.*, 44 Ed Dept Rep 204 (2004); *Appeal of G.M.D.*, 43 Ed Dept Rep 289 (2003)), and academic standards as prerequisites for eligibility for extracurricular activities (§§ 1709(2), (3); *Matter of Clark*, 21 Ed Dept Rep 542 (1982)). Moreover, a suspension from extracurricular activities does not require a full, formal hearing. All that is required is that the student and his or her parents be given an opportunity to discuss the factual situation informally with the district official authorized to impose the discipline (*Sala v. Warwick Valley CSD*, 2009 U.S. Dist. LEXIS 67353 (S.D.N.Y. July 29, 2009); *Mazevski v. Horseheads CSD*, 950 F.Supp. 69 (W.D.N.Y. 1997); *Appeal of M.W. and K.W.*, 55 Ed Dept Rep, Dec. No. 16,903 (2016); *Appeal of Miller*, 49 Ed Dept Rep 465 (2009); *Appeal of D.K.*, 48 Ed Dept Rep 276 (2008)).

2. A school district may reduce the period of duration of such a suspension conditioned on a student's agreement to adhere to the school district code of conduct for students (*Sala v. Warwick CSD*). Such an agreement would not insulate the student from future suspensions from extracurricular activities based on additional violations of the code of conduct (Id.).

Lowering a Student's Grade as Discipline

Unless the student's misconduct is related to his or her academic performance a student's grade may not be lowered. That would be the case where a student cheats on an examination or is illegally absent to avoid taking a test (*Appeal of Pappas*, 39 Ed Dept Rep 310 (1999); *Matter of Augustine*, 30 Ed Dept Rep 13 (1990); *Matter of Caskey*, 21 Ed Dept Rep 138 (1981); *Matter of MacWhinnie*, 20 Ed Dept Rep 145 (1980)).

Involuntary School Transfers

Involuntary transfers are not an authorized penalty for student misconduct (*Appeal of a Student with a Disability*, 48 Ed Dept Rep 79 (2008)).. Moreover, such a transfer requires a separate procedure the purpose of which is to determine whether the proposed transfer would be beneficial to the student (*Matter of Reeves*, 37 Ed Dept Rep 271 (1998); see also *Appeal of a Student Suspected of Having a Disability*, 40 Ed Dept Rep 212 (2000); *Appeal of Mangaroo*, 37 Ed Dept Rep 578 (1998); see § 3214(5)).

Corporal Punishment, Use of Restraints and Aversive Interventions

1. The Rules of the Board of Regents specify that no teacher, administrator, officer, employee, or agent of a school district or board of cooperative educational services (BOCES) may use corporal punishment against a student (8 NYCRR § 19.5(a); see *Appeal of City Sch. Dist. of the City of*

Elmira, 30 Ed Dept Rep 68 (1990)). Corporal punishment consists of any act of physical force upon a student for the purpose of punishing that student (8 NYCRR §§ 19.5(a)(2), 100.2(l)(3)(i)).

2. However, in situations where alternative procedures and methods not involving the use of physical force cannot reasonably be employed, the use of reasonable physical force is permissible to:

   a. Protect oneself, another student, teacher, or any person(s) from physical injury.

   b. Protect the property of the school or others.

   c. Restrain or remove a student whose behavior interferes with the orderly exercise and performance of school district functions, powers, and duties, if that student has refused to refrain from further disruptive acts (8 NYCRR §§ 19.5(a)(3), 100.2(l)(3)(i); see *Appeal of Taber*, 32 Ed Dept Rep 346 (1992)).

3. The use of physical restraints may be used only when no other methods of controlling a student's behavior would be effective. Staff implementing the use of physical restraints must be appropriately trained in the safe and effective use of such intervention (8 NYCRR § 200.22(d)).

4. The Rules of the Board of Regents and commissioner's regulations also prohibit the use of aversive interventions, defined as interventions intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behavior, excluding certain exceptions that include interventions medically necessary for the treatment or protection of the student (8 NYCRR §§ 19.5(b); 200.1(lll)).

   a. An exception to the prohibition against the use of aversive interventions applies to child-specific cases involving school-age students with disabilities, subject to compliance with the procedures established in section 200.22(e) of the commissioner's regulations (see also *Alleyne v. NYS Educ. Dep't*, 516 F.3d 96 (2d Cir. 2008)).

   b. The NY State Education Department's Memorandum on Requirements Relating to the Use of Behavioral Interventions and Supports (Sept. 2009), provides guidance on the use of aversive interventions and time out rooms. It is available at http://www.p12.nysed.gov/specialed/publications/policy/BI-909.pdf.

SUSPENSION FROM SCHOOL

In General

1. School districts may suspend from school students who are insubordinate, disorderly, violent, or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others (§ 3214(3)(a)).

2. A school district may carry over a suspension to the following school year when misconduct occurs at the end of the school year and the suspension can be meaningfully implemented only at the beginning of the following school year. That would be the case, for example, when the misconduct occurs on the last day of classes (*Appeal of R.D.*, 42 Ed Dept Rep 237 (2003)).

3. According to the commissioner of education, there is no authority that would allow a new school district to automatically enforce a suspension imposed on a transfer student by the student's prior district. In addition, student codes of conduct vary among districts and a determination of guilt

and appropriate penalty in one will not necessarily be identical in another (*Appeal of a Student with a Disability*, 49 Ed Dept Rep 204 (2009)).

The new district, however, may make its own determination that the behavior supporting the suspension in the prior district also violates its own code of conduct. Based on that determination, the new district would also be able to impose an appropriate penalty under its own code. The commissioner has not specified the extent to which the new district would be able to rely on conclusions of fact made by the prior district's superintendent (Id.).

Alternative Instruction

1. The Education Law provides that after suspending a student, school districts must take immediate steps to provide that student with alternative instruction if the student is of compulsory education age (§ 3214(3)(e)). Thus, districts must provide alternative instruction only to students of compulsory school age (*Turner v. Kowalski*, 49 A.D.2d 943 (2d Dep't 1975); *Appeal of McMahon*, 38 Ed Dept Rep 22 (1998)).

2. Regardless of age, a suspended student has a right to receive academic intervention services (AIS) during a period of suspension unless and until the students' performance indicates he or she is no longer eligible for such services which is of a comparable nature and extent to that which preceded the suspension (*Appeal of J.C.*, 46 Ed Dept Rep 562 (2007)).

3. Alternative instruction does not have to match every aspect of the instructional program the student received in school prior to the suspension. However, it must be substantially equivalent thereto (*Matter of W.H.*, 45 Ed Dept Rep 96 (2005)) so that the student can complete the required courses in all of his or her academic subjects (*Matter of Lee D.*, 38 Ed Dept Rep 262 (1998); *Appeal of Camille S.*, 39 Ed Dept Rep 574 (2000); *Matter of Malpica*, 20 Ed Dept Rep 365 (1981); *Matter of Gesner*, 20 Ed Dept Rep 326 (1980)).

4. School districts are required to take immediate steps to provide alternative instruction to suspended students (§ 3214(3)(e)).

Appeals of Suspension and Probation Agreements

1. Students may appeal long-term suspensions (those greater than five days) to their local school board, and thereafter to the commissioner of education (§ 3214(3)(c)); *Appeal of R.A.*, 48 Ed Dept Rep 426 (2009); *Appeal of K.M.*, 45 Ed Dept Rep 62 (2005); *Appeal of A.S. & S.K.*, 44 Ed Dept Rep 129 (2004)). A school board may not refuse to hear an appeal from a superintendent's decision imposing a long-term suspension (*Appeal of M.T.*, 48 Ed Dept Rep 263 (2008); *Appeal of J.A.*, 48 Ed Dept Rep 118 (2008)).

   Neither the Education Law nor commissioner regulations establish a time frame for appeals to the board, but school boards may adopt a process for the orderly and efficient review of suspension that sets such a time frame.

   a. "A rigid 10-day time frame," with "no discretion for excusing delays in an appropriate case" is unacceptable (*Appeal of M.T.*, 48 Ed Dept Rep 263 (2008); see also *Appeal of B.L.G.*, 50 Ed Dept Rep, Dec. No. 16,101 (2010)). While not specifying what might be an appropriate time frame, the commissioner has noted that his regulations allow 30 days

from the decision or action complained of for individuals to file an appeal to the commissioner (*Id.*).

b. The regulations also allow the commissioner to excuse a delay for good cause shown (*Id*.).

2. Students may appeal a short-term suspension (those five days or less) directly to the commissioner, unless a school district policy requires that students appeal a short-term suspension to the school board first (*Appeal of F.M.*, 48 Ed Dept Rep 244 (2008); *Appeal of S.C.*, 44 Ed Dept Rep 164 (2004); *Appeal of Amara S.*, 39 Ed Dept Rep 90 (1999)).
School districts should give notice of their requirement along with the notice of suspension (*Appeal of F.M.*). It would be insufficient to generally refer parents to the student code of conduct for information on rights and responsibilities regarding suspension (Id.).

Contracts of Conduct

1. A school district may offer a student facing a long-term suspension the option of signing a "contract of conduct" under which the district agrees to stay the suspension in return for the student's promise to strictly abide by all school disciplinary rules. If the student violates the contract of conduct, the district would reinstate the original suspension after a conference with the superintendent (*Appeal of Spensieri*, 40 Ed Dept Rep 51 (2000)). In addition, a school board may condition a student's early return from suspension on the student's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable (§ 3214(3)(e)).

2. A contract of conduct must serve to stay an original suspension and allow a student to return immediately.

   a. It may not extend an initial suspension period effectively resulting in a suspension of indefinite duration (*Appeal of R.M. & L.M.*, 43 Ed Dept Rep 155 (2003)).

   b. Neither may it extend an original suspension for new misbehavior without the benefit of a superintendent's hearing or require parents to waive their child's right to due process as a condition of attending public school (*Appeal of a Student with a Disability*, 42 Ed Dept Rep 192 (2002)).

3. Prior to executing a contract of conduct, a district must still conduct a student disciplinary hearing, which after a finding of guilt, authorizes a district to suspend a student long-term in the first place. Before revoking a contractual probation a district must provide a minimal amount of due process including written notice, the right to request a conference, and an opportunity to contest a determination that the student violated the conditions of probation (*Appeal of Spensieri*).

Short Term Suspension Procedures

1. A short-term suspension is the term often used to refer to the suspension of a student from school for five days or less in accordance with the provisions of section 3214 of the Education Law.

2. Prior to suspension, the suspending authority must give the student notice of the charged misconduct. If the student denies the misconduct, the student must be provided with an explanation of the basis for the suspension (§ 3214(3)(b)(1)).

3. Also prior to suspension, school officials must give parents:

   a. Immediate written notice of the proposed suspension in the parents' dominant language or mode of communication, a description of the incident underlying the proposed suspension, and their right to request an informal conference with the building principal (8 NYCRR § 100.2(1)(4)).

      (1) The notice to parents must expressly inform them of their right to question complaining witnesses at the informal conference (*Appeal of a Student with a Disabilty*, 55 Ed Dept Rep, Dec. No. 16,836 (2016); *Appeal of J.R-B*, 46 Ed Dept Rep 509 (2007); *Appeal of M.S.*, 44 Ed Dept Rep 478 (2005); *Appeal of R.M. & L.M.*, 44 Ed Dept Rep 218 (2004)). Failure to give such notice will result in the annulment and expungement of the suspension from the student's record (*Appeal of M.I.*, 55 Ed Dept Rep, Dec. No. 16,840 (2015); *Appeal of J.R-B*; *Appeal of L.F. & J.F.*, 46 Ed Dept Rep 417 (2007); *Appeal of M.S.*).

      (2) The written notice must be delivered by personal messenger, express mail, or an "equivalent means reasonably calculated to assure receipt" within 24 hours of the decision to propose suspension. Where possible, notification also must be provided by telephone (8 NYCRR § 100.2(1)(4)).

   b. The opportunity to participate in an informal conference with the building principal (§ 3214(3)(b)(1); 8 NYCRR § 100.2(1)(4)).

      At the informal conference, the student and/or the student's parent are entitled to present the student's version of the incident and question the complaining witnesses against the student unless the names of the complaining witnesses are withheld to protect them from retaliation (Id.; *Appeal of C.M.*, 53 Ed Dept Rep, Dec. No. 16,583 (2014); see also *Vestal Central School District v. King et al.*, Sup. Ct. Albany Cnty (2013); *D.F. v. Syosset Central School District et al.*, 386 F.Supp.2d 119 (E.D.N.Y. 2005), *aff'd*, 180 Fed Appx 232 (2d Cir 2006), *cert. den.*, 549 US 1179 (2007)). The principal may consider whether the original decision to suspend was correct or should be modified (*Appeal of F.M.*; *Appeal of a Student Suspected of Having a Disability*, 45 Ed Dept Rep 483 (2006)).

4. The written notice to parents of a proposed short-term suspension and their rights must be given prior to the actual suspension (§ 3214(3)(b)(1); 8 NYCRR § 100.2(l)(4); *Appeal of F.L. and D.L.*, 55 Ed Dept Rep, Dec. No. 16,888 (2016); *Appeal of F.W.*, 48 Ed Dept Rep 399 (2009); *Appeal of L.O. & D.O.*, 47 Ed Dept Rep 194 (2007)).

   The only exception applies when the student's presence in school is a continuing danger to persons or property or an ongoing threat of disruption to the academic process. In such an instance, the requisite notice and opportunity for an informal conference must take place, instead, as soon after the suspension as is reasonably practicable (*Appeal of F.L. and D.L.*, 55 Ed Dept Rep, Dec. No. 16,888 (2016); *Appeal of a Student with a Disability*, 50 Ed Dept Rep, Dec. No. 16,214 (2011); *Appeal of L.O. & D.O.*; *Appeal of a Student Suspected of Having a Disability*, 45 Ed Dept Rep 483 (2006); *Appeal of R.F.*, 43 Ed Dept Rep 206 (2003)).

Long Term Suspension Procedures

1. A long-term suspension is the term often used to refer to the suspension of a student from school in excess of five days in accordance with the provisions of section 3214 of the Education Law.

2. No student may be suspended in excess of five school days unless the student and the student's parents have had an opportunity for a hearing on reasonable notice (§ 3214(3)(c)). At such hearing, students may bring their parents, and also have the right to be represented by an attorney or other counsel, to testify on their own behalf and present witnesses and other evidence on their own behalf, and to cross-examine witnesses against them (§ 3214(3)(c); *Appeal of M.A.*, 47 Ed Dept Rep 188 (2007); *Appeal of K.D.*, 37 Ed Dept Rep 702 (1998); *Appeal of Johnson*, 34 Ed Dept Rep 62 (1994)).
   a. If a district is forced to postpone a hearing and the initial short-term suspension has expired, the student must be allowed to return to school in the interim, unless the student's parents have consented to the delay (*Appeal of R.T. and S.T.*, 53 Ed Dept Rep, Dec. No. 16,581 (2013); *Appeal of a Student Suspected of Having a Disability*, 46 Ed Dept Rep 453 (2007); *Appeal of N.S.*, 42 Ed Dept Rep 190 (2002)).

   b. If a hearing is timely scheduled but adjourned at the parent's request, a school district can require that the student remain out of school beyond five days (*Appeal of F.W.*, 48 Ed Dept Rep 399 (2009)).

3. The law itself does not define reasonable notice but, in essence, a student and the student's parents are entitled to fair notice of the charges against the student (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ.*, 91 N.Y.2d 133 (1997)), and of the date when the hearing will take place (*Matter of Carey v. Savino*, 91 Misc.2d 50 (Sup. Ct. Allegany Cnty. 1977)).

   a. What constitutes reasonable notice varies with the circumstances of each case regarding the ability of a student and the student's parents to prepare and present an adequate defense (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ.*).

   b. A single day's notice of a long-term suspension hearing is insufficient (*Matter of Carey v. Savino*, 91 Misc.2d 50 (Sup. Ct. Allegany Cnty. 1977); *Appeal of Eisenhauer*, 33 Ed Dept Rep 604 (1994)). But a three days' notice has been deemed sufficient (*Appeal of M.A.*; *Appeal of Lago*, 38 Ed Dept Rep 723 (1999); *Appeal of DeRosa*, 36 Ed Dept Rep 336 (1997)), even when the notice was given verbally (*Appeal of DeRosa*).

4. The notice must give a student and the student's parents sufficient information to advise the student and the student's counsel of the activities or proceedings giving rise to the proceeding and forming the basis for the hearing (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ.*; *Appeal of H.B.*; *Appeal of L.L.*; *Appeal of K.B.*, 41 Ed Dept Rep 431 (2002)).

   a. The notice of the charges does not need to particularize every single charge against a student (Id.; *Appeal of H.B.*, 46 Ed Dept Rep 369 (2007)).

   b. Neither does it need to cite the specific provisions of the code of conduct which a student allegedly violated (*Appeal of L.L.*, 45 Ed Dept Rep 217 (2004)).

Duration of Long Term Suspensions

1. There is no statutory limitation on the duration of a long term suspension. However, permanent suspensions/expulsions are an extreme penalty that, according to the commissioner of education, are generally educationally unsound.

2. Permanent suspension/expulsions should be reserved for extraordinary circumstances, such as where a student exhibits an alarming disregard to the safety of others, and where it is necessary to safeguard the well-being of other students (*Appeal of N.V.*, 46 Ed Dept Rep 138 (2006); *Appeal of L.T.*, 44 Ed Dept Rep 89 (2004); *Appeal of Y.M.*, 43 Ed Dept Rep 193 (2003); *Appeal of Coleman*, 41 Ed Dept Rep 101 (2001)).

Waiver of Student Disciplinary Hearing

1. Students, together with their parents, may elect to either proceed to a hearing, or waive their right to a hearing and accept a district's proposed long-term suspension. However, any waiver of the right to a hearing must be made knowingly and voluntarily and intelligently (*Appeal of McMahon*, 38 Ed Dept Rep 22 (1998)).

   For a waiver to be voluntary, knowing, and intelligent, the student and the student's parents must be fully, clearly, and concisely informed, in writing, of all the rights being waived, and the consequences of waiving those rights (*Appeal of C.L.*, 44 Ed Dept Rep 370 (2005); *Appeal of V.L.*, 44 Ed Dept Rep 160 (2004); Appeal of J.G., 39 Ed Dept Rep 393 (2000)).

2. Districts are limited in the penalty they may impose under such a waiver to those that would have been available if a hearing was actually held (*Appeal of McMahon*). Therefore, the range of possible penalties must be identified in any waiver letter provided to students and their parents (Id.; see also *Appeal of L.M.*, 43 Ed Dept Rep 315 (2003)).

3. Districts may not interpret a parent's failure to request a hearing as a waiver of the right to a hearing. Absent a binding and written waiver, districts must schedule a hearing and notify students and their parents of the hearing (Id.).

Student Disciplinary Hearings

1. A student disciplinary hearing, often also referred to as a 3214 hearing or a long-term suspension hearing, is an administrative proceeding conducted in accordance with section 3214 of the Education Law to determine whether a student is guilty of misconduct that warrants a long-term suspension from school in excess of five days and, if so, to impose such a penalty.

2. The superintendent of schools conducts a student disciplinary hearing. However, both the superintendent and the school board are authorized to appoint a hearing officer to conduct student disciplinary hearings. The hearing officer's report is advisory only, and the superintendent or board may accept or reject all or any part of it (§ 3214(3)(c)).

   A school district's attorney may also act as a student discipline hearing officer. There is a presumption of honesty and integrity and those challenging the appointment of the school's attorney as the hearing officer have the burden of rebutting that presumption (*Appeal of J.H. and T.H.*, 54 Ed Det Rep, Dec. No. 16,687 (2014); *Appeal of F.W.*, 48 Ed Dept Rep 399 (2009)).

3. As in a court of law, the burden of proof rests on the person making a charge of misconduct against the student, namely the school district. The student is entitled to a presumption of innocence of wrongdoing until proven otherwise (*Matter of Montero,* 10 Ed Dept Rep 49 (1970)).

4. The decision to impose a long-term suspension following a student disciplinary hearing must be based on competent and substantial evidence that the student participated in the misconduct charged (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ*., 91 N.Y.2d 133 (1997); *In the Matter of the Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Mills*, 293 A.D.2d 37 (3d Dep't 2002); *Appeal of J.H. and T.H.*, 54 Ed Det Rep, Dec. No. 16,687 (2014); *Appeal of C.S.*, 48 Ed Dept Rep 497 (2009); *Appeal of D.B.*, 45 Ed Dept Rep 197 (2005)).

    a. This standard is a lesser standard than that required in a formal trial (*Bd. of Educ. of Monticello CSD v. Commissioner of Educ.*) or criminal proceeding (*Appeal of D.B.*).

    b. Districts must prove a student's guilt by presenting persuasive evidence of such "quality and quantity" as to allow a "fair and detached fact finder" to "reasonably, probatively and logically" conclude the student engaged in the alleged misconduct (*In the Matter of the Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Mills*). The evidence must be unequivocal (*Appeal of J.J.*, 46 Ed Dept Rep 270 (2006); *Appeal of P.D.*, 46 Ed Dept Rep 50 (2006)).

XX. STUDENTS WITH DISABILITIES

APPLICABLE LAWS

1. Federal and state statutes and their accompanying regulations govern school districts' responsibilities for educating students with disabilities:

    a. The federal Individuals with Disabilities Education Act (IDEA), which affords all eligible children with disabilities the right to a free appropriate public education in the least restrictive environment (20 USC §§ 1400-1482; 34 CFR Part 300);

    b. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability (29 USC §§ 701, 794-794a; 34 CFR Part 104);

    c. Title II of the Americans with Disabilities Act of 1994, which prohibits discrimination on the basis of disability (42 USC §§ 12101-12213); and

    d. Article 89 of the New York State Education Law and part 200 of the commissioner's regulations, which serve as the primary vehicle for implementing IDEA in this state.[5]

2. Where there is a lag between changes to federal statutes and regulations and incorporation of those changes into New York State law, districts are bound by federal requirements, except where state law and regulations confer greater rights.

[5] These materials will only address a school district's responsibilities and obligations under the IDEA and New York State laws and regulations governing the education of students with disabilities.

BASIC DEFINITIONS

Child with a disability

1. A child who falls within one of the classifications of disability set forth in the IDEA and section 200.1(zz) of the commissioner's regulations and who, as a result, needs special education or related services (20 USC § 1401(3)(A); 34 CFR § 300.8; 8 NYCRR § 200.1(zz); see also Educ. Law § 4401).

2. The classifications include: intellectual disability, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disability (20 USC § 1401(3)(A)(i); 34 CFR § 300.8(a)(1); 8 NYCRR § 200.1(zz); see also Educ. Law § 4401(1)).

3. Children who do not fall under these classifications may be entitled to special education and related services pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) and the Americans with Disabilities Act (ADA), which contain broader definitions of who is an individual with a disability (29 USC § 705(20)(B); 42 USC § 12131(2); *Maus v. Wappingers CSD*, 688 F.Supp.2d 282 (S.D.N.Y. 2010)).

Free appropriate public education (FAPE)

A FAPE consists of special education and related services provided to an eligible child with a disability at public expense under public supervision or direction, and in conformity with an individualized education program that is tailored to meet the child's unique needs (20 USC § 1401(9); 34 CFR § 300.17).

Special education and related services

1. Special education is specially designed individualized or group instruction or special services or programs to meet the unique needs of an eligible student. It may include instruction in the classroom, home, hospital or other setting, special class and resource room, consultant teacher services, related services and special transportation (20 USC § 1401(29); 34 CFR § 300.39; Educ. Law § 4401(2); 8 NYCRR § 200.1(vv)).

2. Related services consist of transportation and developmental, corrective and other supportive services required to assist a child with a disability. They include, for example, speech-language services, psychological services, physical and occupational therapy, social work, and assistive technology (20 USC § 1401(26); 34 CFR § 300.34; Educ. Law § 4401(2)(k); 8 NYCRR § 200.1(qq), (ss)).

Individualized education program (IEP)

1. An IEP is a written statement outlining the plan for providing an educational program for a disabled student based on his/her unique needs. Its specific required contents are set forth in the law. It must be written on a form prescribed by the commissioner of education (20 USC §§ 1401(14), 1414(d)(1)(A); 34 CFR §§ 300.22, 8 NYCRR §§ 200.1(y), 200.4(d)(2)).

2. Each student with a disability must have an IEP in place at the start of the school year (34 CFR § 300.323(a); 8 NYCRR § 200.4(e); *T.C. and A.C. v. N.Y. City Dep't of Educ.,* 2016 WWL 1261137 (S.D.N.Y. 2016)*; Tarlowe v. N.Y. City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 52704 (S.D.N.Y. July 3, 2008)).

3. Personnel responsible for implementing or assisting in the implementation of an IEP must receive a paper or electronic copy of the IEP and any amendments thereto prior to implementation or shall be able to access such IEP electronically.

   If a district has a policy that IEPs are to be accessed electronically, then such policy shall ensure that such personnel are trained and notified on how to access IEPs electronically (34 CFR § 300.323(d); Educ. Law § 4402(7); 8 NYCRR §§ 200.2(b)(11), 200.4(e)(3), 200.16(f)(6)).

Least restrictive environment (LRE)

1. The LRE is the setting where students with disabilities are educated. To the maximum extent appropriate, students cannot be placed in special classes, separate schools, or removed from the regular educational environment unless the "nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" (20 USC §§ 1412(a)(5)(A); 34 CFR §§ 300.114-120; 8 NYCRR § 200.1(cc)).

2. LRE requirements must be balanced against the requirement that students with disabilities receive an appropriate education (*T.M. v. Cornwall CSD*, 752 F.3d 145 (2d Cir. 2014); *Briggs v. Bd. of Educ. of the State of Conn.*, 882 F.2d 688 (2d Cir. 1989); see also 34 CFR § 300.116(d)).

BASIC RESPONSIBILITIES

School District Requirements

1. School districts must provide eligible children with a FAPE in the LRE appropriate to meet their individual needs, in conformity with their IEP (20 USC §§ 1401(3), 1412(a)(1)(A), (3)-(5)(A); 34 CFR §§ 300.101-02; *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)), and regardless of severity of disability or ability to benefit from special education (*Timothy W. v. Rochester, N.H. Sch. Dist.*, 875 F.2d 954 (1st Cir. 1980), *cert. denied*, 493 U.S. 983 (1989)).

2. Districts must identify, locate, evaluate and maintain information about all children with disabilities who reside or attend private schools in the district (20 USC § 1412(a)(3)(A), 10(A)(ii); 34 CFR §§ 300.111, 300.131; Educ. Law § 3602-c(2-a), 4402(1)(a); 8 NYCRR § 200.2(a)(1)). This obligation is commonly referred to as "child find."

3. School districts must provide special education services to students with disabilities until they obtain a local high school or Regents diploma, or until the end of the school year in which the child turns 21, whichever is sooner (20 USC § 1412(a)(1)(A); 34 CFR §§ 300.101(a), 300.102(a)(3); Educ. Law § 4402(5); 8 NYCRR § 200.5(a)(5)(iii))

4. Additionally, districts must:

   a. Establish an IEP team known in New York as the committee on special education (CSE), CSE subcommittees as appropriate, and a committee on preschool education (CPSE) to assure timely identification, evaluation and placement of eligible students, including

district residents and children attending private schools located in the district (20 USC §§ 1412(a)(10), 1414(b)(4)(A), (d)(1)(B); 34 CFR §§ 300.131(c), (e), 300.321; Educ. Law §§ 4402(1)(b), 4410(3); 8 NYCRR § 200.3(a), (c));

b. Ensure testing and evaluation materials for identification and placement of children with disabilities meet federal and state requirements and are not racially or culturally discriminatory (20 USC §§ 1412(a)(7), 1414(a)-(c); 34 CFR §§ 300.304-305; 8 NYCRR § 200.4(b)(6));

c. Arrange for special education programs and services in accordance with the student's IEP (8 NYCRR §§ 200.2(d), 200.16(f));

d. Keep on file and make available for public inspection and review by the Commissioner an acceptable plan of service as required by Education Law § 3602(8)(b); (8 NYCRR § 200.2(c));

e. Provide procedural safeguards for children with disabilities and their parents and notice of those safeguards at various times as specified in the law and regulations (20 USC § 1415; 34 CFR §§ 300.504-05, 500-520; 8 NYCRR § 200.5);

f. Appoint impartial hearing officers to hear appeals over the district's actions concerning the identification, evaluation and/or placement of eligible students (20 USC §§ 1415(f)(1)(A), (3)(A); 34 CFR § 300.511; Educ. Law § 4404(1); 8 NYCRR §§ 200.2(b)(9), 200.2(e)(1), 200.5(j)(3)(i), (ii));

g. Adopt policies that establish administrative practices and procedures to ensure that each preschool child with a disability can participate in preschool programs approved by the commissioner of education and undertake other activities set forth in law designed to ensure that preschool children with disabilities are identified, evaluated, referred, and placed into appropriate programs that meet their needs (20 USC § 1400 *et seq*; Educ. Law § 4410; 8 NYCRR §§ 200.2(a)(1), (b)(2), 200.16); and

h. Establish certain additional policies and procedures as specified in the law and regulations.

i. Notify parents upon their child's enrollment or attendance in a public school, of their rights regarding referral and evaluation of their child for purposes of special education services and program under federal and state law (Educ. Law § 4402(8)).

Board of Education Responsibilities

1. The school board reviews the recommendations of the CSE with respect to placement of students with disabilities. The board must arrange for the programs and services in accordance with an IEP within the timelines prescribed in law (8 NYCRR § 200.4(e)(1)).

2. If the board disagrees with the CSE's recommendation, it may:

   a. Return the recommendation, explaining the board's objections or concerns. The CSE must consider the objections or concerns, revise the IEP where appropriate, and resubmit the recommendation to the board. If the board continues to disagree, it may continue to

return the recommendation to the CSE or establish a second CSE to develop a new recommendation.

b. Establish a second CSE to develop a new recommendation. If the board still disagrees, it may return the recommendation to the CSE with a statement of its objections or concerns. The second CSE then follows the same reconsideration and revision process detailed above. Once the board establishes a second CSE, it may not select the recommendation of the initial CSE (8 NYCRR § 200.4(e)(1)).

3. Only a CSE may determine the content of a student's IEP and a student's placement (*Application of the Bd. of Educ. of the Gowanda CSD*, SRO dec. no. 04-016 (2004)).

4. Under IDEA and the dual-enrollment provisions of the state Education Law, districts must provide special education and related services to parentally-placed private school students with disabilities (20 USC § 1412(a)(10)(A)(i); 34 CFR §§ 300.129-144; Educ. Law § 3602-c).

THE COMMITTEE ON SPECIAL EDUCATION

Constitution and Responsibilities

1. The committee on special education (CSE) is composed of individuals mandated by law, such as a school psychologist, the student's teachers, and the parent (20 USC § 1414(d)(1)(B); 34 CFR § 300.321; Educ. Law § 4402(1)(b)(1)(a); 8 NYCRR § 200.3(a)(1)). Except in certain limited instances set forth in the law, the presence of these individuals is necessary to hold a CSE meeting and make decisions concerning the child's special education (20 USC § 1414(d)(1)(C); 34 CFR § 300.321(e); Educ. Law §§ 4402(1)(b)(1)(b-1)-(b-3), 4402(1)(b)(1)(d); 8 NYCRR § 200.3(f)).

   a. The primary function of the CSE is to identify, evaluate, review the status of, and make recommendations concerning the appropriate educational placement of each school-age child with a disability or thought to have a disability who resides in the district (20 USC § 1414(b)(4)(A), (d)(3), (4); 34 CFR §§ 300.306(a), 300.324; Educ. Law § 4402(1)(b)(3), 4410(3); 8 NYCRR §§ 200.3, 200.4).

   b. The CSE must annually report to the school board on the status of services and facilities made available by the district for students with disabilities, and must maintain and annually revise the register of children with disabilities who are entitled to attend public school during the next school year or those referred to the CSE (Educ. Law § 4402(1)(b)(3)(f); 8 NYCRR § 200.2(a)(1)).

2. Actual referrals to the CSE for an initial evaluation to determine a student's eligibility, and written requests for referrals for an initial evaluation, may only be made by certain individuals as set forth in the law (20 USC § 1414(a)(1)(B); 34 CFR § 300.301(b); 8 NYCRR §§ 200.4(a)(1)(i)-(iv), (a)(2)(i)(a)-(e)).

3. The law and regulations impose strict timelines on the CSE for responding to referrals and requests for referrals, conducting initial evaluations and re-evaluations, developing the IEP, recommending an educational placement and implementing the IEP (20 USC § 1414(a); 34 CFR §§ 300.301(c), 300.323(c); 8 NYCRR §§ 200.4, 200.5(b)).

Individualized Education Program (IEP) Development

1. The IEP is a written statement outlining the plan for providing an educational program based on a disabled student's unique needs. By law, it must include certain information about the student, including but not limited to classification, present levels of academic achievement and functional performance, learning characteristics, social and physical development, management needs, measurable annual goals consistent with the student's needs, recommended special education programs and related services, and recommended placement (20 USC §§ 1401(14), 1414(d)(1)(A); 34 CFR §§ 300.22, 300.320-324; 8 NYCRR §§ 200.1(y), 200.4(d)(2)).

2. The CSE develops and reviews the IEP in accordance with procedures and timelines set forth in law and regulations.
   a. Each student's IEP must be reviewed at least annually. At that time, the CSE determines if the student's annual goals are being achieved, revises the IEP to address any lack of expected progress toward achieving goals as well as in the general curriculum. It also reviews reevaluations and information provided by the student's parent(s)/guardian(s) and addresses any new needs the student may have (20 USC § 1414(d)(4); 34 CFR § 300.324(b)(1); 8 NYCRR § 200.4(f)).

   b. At least every three years, if conditions warrant, or if requested by the child's parent or teacher, the CSE must arrange an appropriate reevaluation of each student with a disability. Unless the parent and district agree otherwise in writing, reevaluations may not occur more than once per year. The parent and CSE may agree, in writing, that the three-year reevaluation is not necessary (20 USC § 1414(a)(2)(A), (B); 34 CFR § 300.303; Educ. Law § 4402(1)(b)(3)(d); 8 NYCRR § 200.4(b)(4)).

3. Students with disabilities may be entitled to year-round services if the CSE determines the student is at risk for substantial regression. Substantial regression means the inability to maintain developmental levels due to a loss of skill or knowledge during July and August, severe enough to require an inordinate review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year (34 CFR § 300.106; 8 NYCRR §§ 200.1(aaa), (eee), 200.6(k)(1), 200.16(i)(3)(v)).

4. Written parental consent is required before the CSE conducts initial evaluations or reevaluations of a student with a disability (20 USC § 1414(a)(1)(D)(i)(I), (c)(3); 34 CFR § 300.300(a)(1)(i), (c)(1)(i); 8 NYCRR § 200.5(b)(1)(i)). Additionally, parental consent is required prior to the initial provision of special education and related services to a child not previously identified as having a disability (20 USC § 1414(a)(1)(D)(ii)(II); 34 CFR § 300.300(b)(1); 8 NYCRR § 200.5(b)(1)(ii)). Parental consent, including for the continued provision of services, is voluntary and revocable at any time by the parent upon written notice to the district (34 CFR §§ 300.9(c)(1), (2), 300.300(b)(4); 8 NYCRR §§ 200.1(l)(3), 200.5(b)).

PROCEDURAL SAFEGUARDS AND DUE PROCESS

Procedural Safeguards

1. Federal and state laws and regulations require that a school district afford a disabled student and his/her parent(s) certain procedural safeguards, including but not limited to the right to:

a. Prior written notice a reasonable time before the district proposes or refuses to initiate or change the identification, evaluation or educational placement of the student, or provision of a FAPE,

b. Participate in CSE meetings, and

c. Have an opportunity to present and resolve complaints, participate in mediation, and initiate due process hearings related to the identification, evaluation and placement of the student or provision of a FAPE (20 USC § 1415(b)(5), (6), (e), (f); 34 CFR §§ 300.500-520; 8 NYCRR § 200.5).

2. Written notice of procedural safeguards must be provided at least once a year, and upon other occasions as set forth in law (20 USC § 1415(d)(1); 34 CFR §§ 300.504(a), 300.530(h); 8 NYCRR § 200.5(f)(3)).

3. Procedural safeguards notices must be on a form prescribed by the commissioner of education and in the native language or other mode of communication used by the parent (20 USC § 1415(d)(2); 34 CFR §§ 300.503(c), 300.504(d); 8 NYCRR § 200.5(f)).

Parental Challenges

1. Parents who disagree with the classification, evaluation or placement of their child may submit a complaint and request, in writing, an impartial due process hearing (20 USC § 1415(b)(6)(A); 34 CFR §§ 300.507-514; Educ. Law § 4404(1); 8 NYCRR § 200.5(j)).

a. The complaint must be submitted within two years of the date the parents knew or should have known about the alleged action that forms the basis of the complaint.

b. The time limitation does not apply when the parents were prevented from requesting a hearing due to specific misrepresentations by the district that the problems complained of were resolved or the district withheld information it was required to give the parents (20 USC § 1415(b)(6)(B), (f)(3)(C), (D); 34 CFR § 300.507(a)(2), 300.511(e), (f); 8 NYCRR § 200.5(j)(1)(i)).

2. Prior to the commencement of a hearing and within 15 days after the district's receipt of the parents' complaint, the district must convene a meeting with the parents and relevant CSE members to discuss the complaint and afford the district an opportunity to resolve it (20 USC § 1415(f)(1)(A), (B)(i); 34 CFR § 300.510(a); 8 NYCRR § 200.5(j)(2)). The parties may jointly agree to waive this meeting. Failure to resolve the complaint at this point means the parties proceed to the next stage of the process: the due process hearing.

3. A due process hearing is conducted by an impartial hearing officer (IHO) appointed by the school board on a rotation basis in accordance with timelines set forth in the law, using a list provided by the state education department (20 USC § 1415(f)(1)(A), (f)(3); 34 CFR § 300.511(b), (c)(3); Educ. Law § 4404(1); 8 NYCRR § 200.2(b)(9), (e)(1), 200.5(j)(3)(i), (ii)).

4. During the pendency of the proceedings, the student remains in his or her current educational placement unless the school district and parent(s) agree otherwise (often called "stay put") (20 USC § 1415(j), (k)(4)(A); 34 CFR §§ 300.518, 300.533).

5. School districts may be liable for the cost of attorneys' fees incurred by parents who are the prevailing party on an action or proceeding challenging the district's determination regarding the classification, evaluation or placement of their child (20 USC § 1415(i)(3); 34 CFR § 300.517; *Durkee v. Livonia CSD*, 487 F.Supp.2d 318 (N.D.N.Y. 2007)).

DISCIPLINING STUDENTS WITH DISABILITIES

Special Protections

1. School districts may suspend or remove disabled students from school only in accordance with the procedures and safeguards set forth in federal and state law and regulations (20 USC § 1415(k); 34 CFR §§ 300.530-37; Educ. Law §§ 3214(3)(g), 4404(1); 8 NYCRR Part 201).

2. Generally, a student with a disability may be suspended or removed from school on the same bases as nondisabled students for periods of up to 5 days, or additional suspensions of not more than 10 consecutive school days for separate incidents that do not constitute a disciplinary change in placement (20 USC § 1415(k)(1)(B); 34 CFR § 300.530(b)(1); 8 NYCRR § 201.7(b), (c)). New York State's rules applying to disciplinary hearings for suspensions in excess of five days still apply (Educ. Law § 3214(3)(g)).

3. However, a student with a disability may not be suspended or removed from school if the suspension or removal would constitute a disciplinary change in placement (20 USC § 1415(k)(1)(B); 34 CFR § 300.530(b)(1); 8 NYCRR § 201.7(d)).

    a. A suspension or removal constitutes a disciplinary change in placement if it is for more than 10 consecutive school days, or 10 days or less if the student's prior suspensions constitute a pattern because they add up to more than 10 school days in a year, the behavior is substantially similar to prior incidents that resulted in suspension, and other factors set forth in federal and state regulations (34 CFR § 300.536(a); 8 NYCRR § 201.2(e)).

    b. This determination is made on a case-by-case basis (34 CFR § 300.536(b); 8 NYCRR § 201.2(e)).

4. Before the district may impose a suspension constituting a disciplinary change in placement, it must conduct a manifestation determination to review the relationship between a student's disability and the behavior subject to disciplinary action (8 NYCRR § 201.4(a)).

    a. The purpose is to determine whether the conduct was caused by, or had a direct and substantial relationship to, the student's disability, or was the direct result of the district's failure to implement the student's IEP (20 USC § 1415(k)(1)(E); 34 CFR § 300.530(e); 8 NYCRR § 201.4(a), (c)).

        (1) The determination is made by a manifestation team, composed of individuals mandated by law (20 USC § 1415(k)(1)(E)(ii); 34 CFR § 300.530(e)(1), (2); 8 NYCRR § 201.4(b)).

        (2) Before reaching a determination, the team reviews all relevant information in the student's file including the IEP, teacher observations and information provided by the student's parents (34 CFR § 300.530(e)(1); 8 NYCRR § 201.4(c)).

b. If the behavior is a manifestation, the CSE must conduct special assessments and implement an intervention plan to address the behavior. No further disciplinary action may be taken except placement in an interim alternative educational setting, unless the parent and the school district agree to a change in placement as part of the modification of an already existing behavioral intervention plan (20 USC § 1415(k)(1)(F); 34 CFR § 300.530(f); 8 NYCRR §§ 201.3, 201.4(d), 201.7(e)). If there is no manifestation, the student may be disciplined in the same way as nondisabled students (Educ. Law § 3214 (3)(g)(3)(vi)).

Interim Alternative Educational Settings (IAES)

1. An IAES is a temporary educational placement determined by the CSE, other than the student's current educational placement at the time the behavior precipitating the IAES occurred (20 USC § 1415(k)(2); 34 CFR § 300.531; 8 NYCRR § 201.2(k)).

2. Removal to IAES may occur when the student, while at school, on school premises, or at a school function under the district's jurisdiction, inflicts serious bodily injury upon another person; carries or possesses a weapon; or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance (20 USC § 1415(k)(1)(G); 34 CFR § 300.530(g); Educ. Law § 3214(3)(g)(3); 8 NYCRR § 201.7(e)).

   a. School superintendents may place a student with a disability in an IAES.

   b. Placement in IAES may occur on grounds of dangerousness and for misconduct relating to serious bodily injury, weapons or drugs even if the behavior triggering the placement was a manifestation of the student's disability (20 USC § 1415(k)(1)(G); 34 CFR § 300.530(g); 8 NYCRR § 201.9(c)(3)).

   c. The placement cannot last beyond 45 days for each separate instance.

3. An IHO may order a child into an IAES for up to 45 days at a time if the district shows, by substantial evidence, that maintaining the child in his or her current placement is substantially likely to result in injury to the child or others (20 USC § 1415(k)(3)(B); 34 CFR § 300.530(b)(2)(ii); Educ. Law § 3214(3)(g)(3), (vii); 8 NYCRR § 201.8(a)).

4. The CSE determines the IAES for students with disabilities. While in an IAES, such students must continue to receive educational services that enable the student to continue to participate in the general curriculum and to progress toward meeting IEP goals as well as special assessments and behavior intervention services designed to address and eliminate the behavior (20 USC §§ 1415(k)(1)(D), (2); 34 CFR §§ 300.530(d), 300.531; 8 NYCRR §§ 201.2(k), 201.7(e)(1), 201.10(a), (b)).