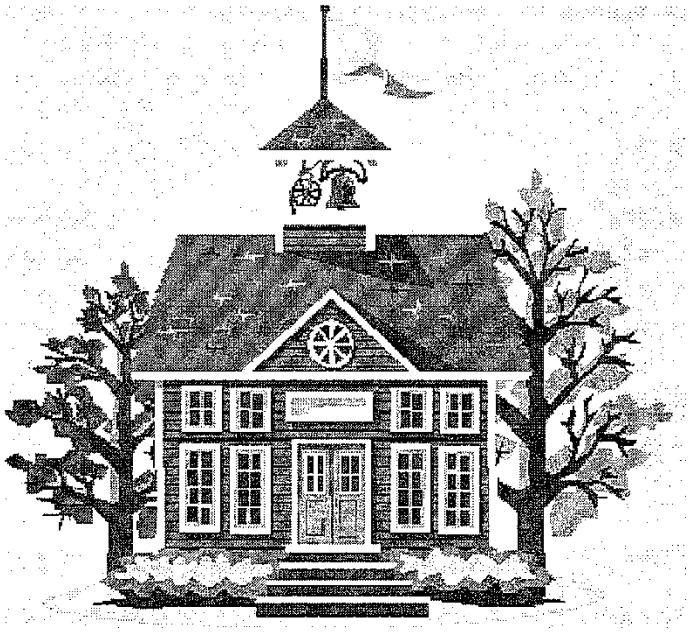
Westchester Putnam School Boards Association

NEW SCHOOL BOARD MEMBER GOVERNANCE SEMINAR

School Law: A to Z



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BOARD AUTHORITY AND THE LEGAL ASPECTS OF BOARD MEMBERSHIP

I. Board of Education is a body corporate (§1701 Education Law).

A. Board Powers (§§1709, 1804, 1950 and 2503 Education Law – See Appendix "A")

B. Limitation on delegation of Board Authority (See Appendix "B")

C. Superintendent's Powers (See Appendix "C")

II. Concept of Quorum (§41 General Construction Law) - A quorum is a majority (more than one-half) of the total number of members on the Board of Education (e.g., for a five-member board, three members would constitute a quorum; six or seven member board, four members). A quorum must be present in order to convene a Board meeting and a quorum vote is required in order to take action (e.g., by resolution).

A. **Exceptions**: Supermajority voting requirements:

1. Discontinuing a designated textbook within five years of adoption requires a three-quarters (3/4) vote of the Board of Education;
2. If a relative, by blood or marriage, of a Board member is employed in a teaching position or appointed to tenure, a two-thirds (2/3) vote of the Board of Education is required;
3. Standardization on a particular type of equipment or supplies must be determined to be in the best interests of the District by a two-thirds (2/3) vote of the Board of Education;
4. A vote to place a proposition before the voters for an object or purpose for which bonds may be issued requires a three-fifths (3/5) vote of the Board of Education.

III. Individual Board members have no inherent powers by reason of holding office - without power to individually authorize action or to direct personnel

EXAMPLE: *Matter of Balen*, 40 Ed. Dept. Rep. 479 (2001) - Board member removed for directing supervisor to give overtime work to employees.

Appeal of Wallace, 46 Ed. Dept. Rep. 347, Dec. No. 15,529 (Feb. 14, 2007) - Involved the right of board members to express an opinion on the school budget and other

propositions. In *Wallace,* the board president wrote a letter to the editor of a newspaper explaining a voter proposition seeking approval for a building project. The by-line of the letter identified the writer as a member of the board. According to the commissioner, that by-line gave the impression that the board president was speaking in his official capacity. The commissioner cautioned board members who wish to express their personal opinions about issues before the voters to ensure that they clearly distinguish their personal views from those of the board they represent. Therefore, when writing a letter in support of an issue before the voters, school board members must be sure to explicitly state that the letter expresses their personal views.

IV. Duty of Confidentiality regarding lawful presentation of confidential matters in executive session or Board packet materials (§805-a General Municipal Law, *Application of Nett & Raby*, 45 Ed. Dept. Rep. 259 [2005]).

A. The Commissioner placed all Board members on notice that breach of confidentiality regarding a matter that legitimately may be discussed in executive session could result in the Board member's removal from the Board. Unlike the definition of confidentiality previously announced by the Committee on Open Government in its advisory opinion letters, the Commissioner will hold Board members accountable for maintaining as confidential information intended to be kept secret that is a proper subject for executive session (see Appendix "B"), a broader definition than those matters made confidential by statute.

B. The Commissioner opined that only a quorum vote of the Board can act to relinquish the protection afforded to lawful speech exchanges in executive session:

> "In the course of their duties, school board members are required to discuss and debate difficult and sensitive issues, including matters involving employee discipline, collective bargaining tactics and litigation strategies. The law specifically recognizes the delicacy of these matters by permitting them to be discussed in private (see Public Officers Law §105). The purpose of this exception to the open meetings rule is to enable public officers to deliberate freely and speak frankly in ways they might not if these discussions were held in full public view."

C. Several months before issuing the *Nett & Raby* Decision, the Commissioner in *Appeal of Hoefer*, 45 Ed. Dept. Rep. 66 (2005) upheld the removal of a board member for violating that district's Ethics Policy and for disclosing the district's salary proposal for collective bargaining.

D. Many modern School District Codes of Ethics extend the confidentiality restriction to matters included in the Board packet that would qualify under the executive session confidentiality test. There is every reason to believe that the Commissioner would uphold

the removal of a board member who discloses opinions and recommendations from the Superintendent (who under law has the right to address all matters that come before the Board) that involve matters which may be confidentially discussed in executive session. Such Codes of Ethics cite such violations as actionable official misconduct.

E. A deliberative process privilege has been recognized under law applicable to New York school districts and may extend to certain confidential documents issued by the Superintendent to the Board in the meeting packet addressing executive session matters. This privilege extends to documents that are pre-decisional in nature and that are related to the decision making process of matters determined within the context of the executive session. The privilege does not, however, extend to previously found facts (*E.B. v. New York City Bd. of Educ.*, 2005 U.S. Dist. Lexis 35898 [EDNY. 2005]). The deliberative process privilege, also known as the executive privilege, "is premised upon the assumption that 'effective and efficient governmental decision making requires a free flow of ideas among governmental officials and that inhibitions will result if officials know that their communications may be revealed to outsiders'" (*New York City v. Dinkins*, 807 F. Supp. 955, 957 [SDNY 1992] citing *In Re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 580-581 [EDNY 1979]; see, also *Bobkoski v. Board of Educ. of Cary Consolidated School District*, 141 F.R.D. 88 [EDNY 1992]). Documents of this nature are exempt from disclosure under the Freedom of Information Law as intra-agency memoranda that precede final board determinative action.

F. As the Commissioner stated in *Nett & Raby*:

> "A Board member who chooses to divulge information that the board as a collective body properly decided to discuss in confidence...effectively thwarted the will of the majority and invalidated its action as a corporate body. Such conduct is contrary to the basic principles of school board governance."

V. Board as a policy making body

A. Statutory Sources

- §1709(1) Education Law - By-Laws and Rules
- §1709(2) Education Law - Order and Discipline
- §1709(13), (16) & (33) Education Law - Governance Provisions

B. Distinguishing By-Laws and Policies

- ***By-Laws*** - rules for the functioning of the Board, its committees and public meetings.
- ***Policies*** - same effect as local laws and ordinances, expressing how the District operates in relationship to its students, educational programs, personnel administration, business functions and facilities use.

- ***District-wide Code of Conduct*** (Section 2801, Education Law; 8 NYCRR §100.2[l][2]) - Students, Staff, Parents, Invitees, Public
- ***Code of Ethics for Board Members, Officers and Employees*** (Section 806[1][a], General Municipal Law) - Provides standards of conduct for officers and employees regarding:

    - conflicts of interest and incompatible offices
    - conduct expressly required or prohibited by statute
    - other conduct not expressly prohibited by statute that the Board of Education may seek to regulate

- ***Guidance Documents***

    - Family and Medical Leave Act

C. The Role of Policy

- Informs the public of District rules, philosophy and culture.
- Informs students, staff and community members of rights, privileges and restrictions
- Responds to legal mandates
- Establishes commitment and benchmarks for accountability
- May limit liability
- Assures consistency in governance

D. Implications of Poor Policies and Failure to Implement Policy

- Procedural and Substantive Due Process concerns

    - Equal Protection claims.
    - Challenges regarding the rational basis for policy or use of least restrictive means when fundamental constitutional rights are implicated.

- Elements of Good Policy

    - Legality
    - Clarity
    - Expresses your philosophy
    - Brevity, to the extent practicable
    - Coordinated with implementing regulations and exhibits, where applicable.

VI. Training available to new and veteran Board members

New York State School Boards Association, National School Boards Association, Westchester Putnam School Boards Association and Mid-Hudson School Study Council.

VII. Training required of new Board members

A. Fiscal Training (Section 170.12[1][A] and [B] of the Commissioner's Regulations):

- All Board members elected or appointed for a term beginning on or after July 1, 2005 must, within the first year of their term, complete six hours of training on financial oversight, accountability and fiduciary responsibilities of a board member. The training may be in one session or several sessions and must be given by SED, the Office of the State Comptroller or a provider approved by the Commissioner of Education. The curriculum must be approved by the Commissioner of Education in consultation with the State Comptroller.
- Upon completion of the training, a certificate will be issued to each board member, whose responsibility it will be to file the certificate with the school district clerk. Once trained, there is no requirement to be trained again. Separate training is not required for service on a BOCES Board or Central High School District Board.

B. **School Board Governance Training**

- All Board members elected or appointed to the Board and taking office for the first time on or after July 1, 2011 must complete within the first year of their term, training intended to acquaint new Board members with the powers, functions and duties of Boards of Education, as well as the powers and duties of other governing and administrative authorities affecting public education (e.g., SED, Board of Regents), with consideration to the Board's role in educating students, encouraging the attainment of higher student achievement and ensuring students have the opportunity to achieve an education that prepares them to succeed in college or a career. The curriculum must be approved by SED.
- Upon completion of the training, a certificate will be issued to the board member, who must file it with the school district clerk.

VIII. Implementing the Fiscal Accountability Laws and Regulations

A. The Audit Committee
B. The Internal Audit Function
C. Claims Auditor Accountability

IX. Procedure for Requesting Employee Personnel Records

Part 84 of the Commissioner's Regulations provides the procedure to be used when a Board member wishes to review employee personnel records, as follows:

- Any Board member may request that the Superintendent of Schools bring personnel records of a designated employee or employees to any open meeting of the Board.
- The Board may determine whether to convene an executive session for the purpose of conducting an examination of those records. The Board member must articulate a rationale consistent with the reasons specified in the Regulations (e.g., to assist them in fulfilling their legal responsibilities in making decisions in employee personnel matters such as appointments, assignments, promotions, demotions, remuneration, discipline or to aid in the development and implementation of personnel policies).
- After the review in executive session, the records are returned to the Superintendent.

In *Appeal of Meyer and Pavalow*, 46 Ed. Dept. Rep. 43 (2006) (Dec. No. 15,436), the Commissioner determined that an individual Board member does not have "unfettered access to personnel records" and a statement merely that the purpose for review is to enable the Board to carry out its legal responsibilities under the Education Law is insufficient to comply with the open meetings law.

X. Board responsibilities Under Taylor law

- The collectively negotiated agreement is between the Superintendent of Schools and the employee organization (union).
- The Board must appropriate the funds for the collectively negotiated agreement or for other expenditures negotiated (such as in a supplemental memorandum of agreement).
- Board approval is not required where there is a change that does not result in the expenditure of school district funds.

XI. Statutory Indemnification and Insurance for Leaders Liability and Employees (Errors and Omissions)

A. §3023 Education Law - negligence (applies to employees and volunteers - not Board members)
B. §3811 Education Law - volitional acts (applies to Board members)
C. §3028 Ed Law - criminal defense for excessive use of force (not usually a Board member issue)
D. §18 Public Officers Law - requires affirmative resolution adoption (covers current and former Board members) and is supplemental to the Education Law coverage.

XII. What to do when Board member is individually named as a defendant

Send letter immediately (e.g., within 5 days) to District Clerk, including name of litigation, asking for a defense and indemnification by the District pursuant to the statutory provisions and attach a copy of the litigation papers.

XIII. Board Member Immunity Status

A. ***State Law***

- Absolute Immunity - Board members may not be sued for defamation when acting within the scope of their offices (case will be dismissed upon filing a motion to dismiss).
- Qualified Immunity - Applies as long as remarks are not malicious or in reckless disregard of the truth. Here, the speech may not be directly necessary for carrying out official duties (case will be dismissed after depositions on motion for summary judgment).

B. ***Federal Law*** - usually §1983 Federal Civil Rights Litigation

Defenses:

- Absolute Immunity for legislative acts and quasi-judicial acts.
- Qualified Good Faith Immunity so long as action doesn't violate clearly established federal constitutional or statutory law.

  Example: Not giving a long-term suspension hearing to a student being disciplined 39 years after the U.S. Supreme Court decided the case of *Goss v. Lopez*, 419 U.S. 565 (1975).

CAVEAT: Punitive damages may be assessed for flagrant violations of clearly established federal constitutional or statutory law. New York State public policy does not allow public or insurance company indemnification of such assessments against individuals - not to be fearful - just be aware when taking action to do so on an informed basis with legal advice.

THE OPEN MEETINGS LAW

The Open Meetings Law (Section 100 *et seq*. of the New York State Public Officers Law ["POL"]) defines how school boards, their sub-committees and other legally mandated committees must notice their meetings. Failure to follow its requisites could result in the annulment of Board action, paying the legal fees of a petitioner who brings suit and the undermining of the public's confidence in the governance team. While there have been several authoritative court decisions interpreting the provisions of the Open Meetings Law, much of the legal analysis relied upon for determining compliance has come from the Committee on Open Government in the form of advisory opinion letters issued by its executive director.

I. MEETINGS

A. **Meetings of a "Public Body" are subject to the Open Meetings Law notice and conduct requirements.**

1. Board of Education Meetings
2. Board of Education Committees and Subcommittees
3. Shared Decision Making Committees
4. Audit Committee
5. AIDS Advisory Committee
6. Title I ESEA Committee
7. Any other committee required by law, but not advisory committees (e.g. facilities planning or educational planning committees) established at the discretion of the Board. (*See* POL §102[2]).

B. **When the Board conducts business.**

1. Defined as voting and/or deliberating about school district business (POL §102[1]):

   - A "Retreat" is not a meeting for the purposes of the law if it is limited to team building and communication skills (OML-AO-2733) or interpersonal relationships among Board Members (OML-AO-2764).

- Briefing on financial status is not an appropriate topic for a Retreat and must be done at an open meeting (OML-AO-3709).

- Action or voting via telephone conference call, emails or a series of telephone calls constitutes an unlawful meeting (OML-AO-3732, 3787).

- Holding an "e-Meeting" in a chat room with notice to the public constitutes an unlawful meeting (OML-AO-3928).

- While video-conferencing may be used for conducting an open meeting as per §102(1), emailing is not a lawful means to conduct business (OML-AO-3257); neither is telephone conferencing.

C. **How and When Notice of Meetings Must Be Given.**

1. Meetings Scheduled at least one week in advance must be noticed for at least 72 hours before the meeting (POL §104[1]).

2. Meetings called for less than a week in advance must be noticed as soon as is practicable (POL §104[2]).

3. Media Notice must be given as well as posting in one or more designated public locations, such as the public library, post office, town or village hall, school kiosk (POL §104 [1] & [2]).

4. If videoconferencing is to be used the meeting notice must identify all locations where participants will be located and the public must be given access to each location (POL §104[4]).

5. Notice must be placed on the School District website (POL § 104[5]).

Public Access to Information to be Discussed Publicly at Board Meetings - Chapter 603, Laws of 2011 (became effective February 2, 2012) – Added two new requirements to the Open Meetings Law for the stated purpose to enhance the public's ability to meaningfully observe the proceedings of public bodies.

1. Upon request, any document subject to disclosure under the Freedom of Information Law (FOIL), as well as any resolution, rule, regulation, policy or

policy amendment scheduled to be discussed at an open meeting, must be made available, to the extent practicable, prior to or at the meeting.

2. Documents scheduled to be discussed at an open meeting must be posted on the school district's website, to the extent practicable, prior to the meeting at which they will be discussed.

   - The new provision does not expand the scope of documents that are available to the public. Documents exempt from disclosure under FOIL, such as intra-agency or inter-agency materials that consist of advice, opinion, recommendation or suggestion, do not have to be released prior to meetings or at all.

   - Documents that may be properly discussed in executive session also need not be disclosed.

   - The phrase "to the extent practicable" was intended to give school districts flexibility. In its Guidance, the Committee on Open Government notes that the extent, manner and timing of disclosure must be based on a "reasonable and practicable" evaluation of the facts and circumstances.

Example: If a record scheduled to be discussed at a board meeting does not become available until an hour before the meeting, it is unlikely that it would be a violation of the new law if the district did not post the record on its website prior to the meeting.

D. **Individual Board member communications and briefings.**

1. Individual Board members may confer by telephone or electronic mail, but calls/ electronic communications among Board members that result in a decision would violate the law (OML-AO-2256). A series of phone calls would, likewise, be in violation (OML-AO-3732).

2. Board members, in less than quorum groups, may receive a briefing from administration regarding the tentative budget before its public presentation (OML-AO-3452).

E. **Public Presence and Participation.**

1. The Board must be seated where the audience can be fully aware of and listen to the deliberative process and voting (OML-AO-2575).

2. Public bodies, including school boards, must make reasonable efforts to ensure meetings are held in an appropriate facility that can adequately accommodate those who wish to attend the meeting.

3. The law does not require public speaking segments at Board meets but the same may be required by Board By-laws or Policies, as well as public hearings described in different statutory provisions (OML-AO-3845).

4. Unobtrusive video cameras may not be prohibited from use at meetings (*Csorny v. Shoreham Wading River Cent. Sch. Dist.*, 305 A.D.2d 83 [2d Dept. 2003]).

6. Meetings of a public body, including a school board, that are open to the public must also be open to being photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means. School boards can adopt reasonable rules governing the location of equipment and personnel used for such purposes to ensure that the meetings are conducted in an orderly manner. Any such rules must be consistent with recommendations from the Committee on Open Government and conspicuously posted during meetings with written copies available to those in attendance.

7. Meetings are not prohibited on holidays or weekends (OML-AO-2458).

8. Meetings held in the early morning hours (e.g. 7:20 AM) have been cited as being inconsistent with the law (OML-AO-3828).

9. Gathering behind closed doors before a meeting to discuss school business (e.g. contingency budget) is unlawful (OML-AO-3860; OML-AO-2754).

10. Meetings of advisory committees that are not required by statute or regulation, even when a Board member is on the committee, are not meetings subject to being conducted before the public (*Matter of Jae*, 22 A.D.3d 581 [2d Dept.2005], *appeal denied by*, 6 N.Y.3d 714 [2006]; OML-AO-2588).

11. Advisory building level committees need not meet in public because they are not "public bodies" under the law (OML-AO-3167).

F. **Confidentiality Requirements.**

1. Disclosing information shared in executive session, without the consent from a quorum of the Board, could invade personal privacy, impair collective bargaining or otherwise damage governmental functions even if the Open Meetings Law wouldn't preclude such disclosure (OML-AO-3562).

2. Under the decisional law of the Commissioner of Education, disclosure of information that was obtained in a lawful executive session discussion could give rise to removal from the Board of Education, notwithstanding how the disclosure would be viewed under the Open Meetings Law. (*Application of Nett & Raby* 45 Ed. Dept. Rep. 259 [2005]).

3. The law does not allow the disclosure of matters discussed in executive session that were made confidential by pre-existing statute or common law (e.g. by an Act of Congress – FERPA, or by the New York State Legislature – Public Health Law - AIDS identity protection or attorney-client privileged communications). (*See* POL § 108 [3]; OML-AO-3463).

4. A secret ballot may not be used in electing Board Officers (FOIL-AO-122126).

5. Quasi-judicial proceedings of a Board of Education are exempt from the Open Meetings Law requirements (e.g. Civil Service Law §75 record review and deliberations and Education Law § 3214 Appeals [*see* POL §108 (1)]).

II. EXECUTIVE SESSION (See Appendix "D")

1. An executive session may not be scheduled before a meeting but must occur during a duly convened open meeting (OML-AO-872; OML-AO-1189, OML-AO-1441).

2. A resolution adjourning into executive session must specify the purpose(s) and must not recite all of the reasons why a Board may conduct an executive session. (*Gernatt Asphalt Prods.*, 87 N.Y.2d 668 [1987]).

3. Only voting on Section 3020-a Education Law Charges and the arrangement of the placement of children with IEPs may take place in executive session (Formal Opinion of Counsel [SED] No. 239).

4. Any agenda of a Board meeting that refers to executive session must not state that there will be an executive session but, rather, may state "Proposed Executive Session" or "Executive Session-If Necessary" (OML-AO-1420; OML-AO-2416).

5. The members of the Board and those specifically invited may attend executive session (OML-AO-1052; OML-AO-2389). Typically the Board Clerk and Attorney are attendees (OML-AO-3864).

6. Where a member of the Board has sued or is likely to sue the District, s/he may be excluded from executive session during the discussion of such matter (OML-AO-3436).

7. A Board member-elect may be permitted to attend executive session but should be excluded when legal advice is given by an attorney to avoid breach of the attorney-client privilege (OML-AO-31577).

8. The Superintendent of Schools does not have the right to attend executive session by reason of the Open Meetings Law but, under the Education Law, has the right to be present based upon his or her right to speak to all matters that come before the Board (OML-AO-4027; OML-AO-3864; Education Law §§ 1711 & 2508).

9. There is no limit on the number of executive sessions that may be conducted during the course of an open meeting (OML-AO-1281).

10. Only litigation that is proposed, pending or current may be discussed in executive session, with the latter two requiring that the title of the case be included in the resolution (OML-AO-2250).

11. In the case of proposed litigation, the resolution should refer to discussing litigation strategy regarding the proposed litigation (OML-AO-3646).

12. To discuss labor negotiations in executive session, the bargaining unit must be cited in the resolution to adjourn into executive session (OML-AO-4091).

13. A resolution to adjourn to executive session may not refer to "personnel" because only individual employee matters may be the subject of executive session (OML-AO-1300; OML-AO-2276).

14. Budgetary considerations for the elimination of positions may not be discussed in executive session (OML-AO-2203).

15. The evaluation of the superintendent and his/her contract may take place in executive session, but discussing the criteria for hiring a new superintendent should take place at an open meeting (OML-AO-2459; OML-AO-2695).

16. Receiving legal advice from an attorney need not take place at an open meeting or even in an executive session. However, decision making about the litigation must occur at a meeting (e.g. executive session discussion and action by public vote) (OML-AO-1376).

17. A resolution to adjourn to executive session to discuss a potential sale or purchase of real property need not identify the parcel, but must recite that the purchase price, for example, would be discussed (OML-AO-2373).

18. Two governmental bodies may not hold a joint meeting in executive session (OML-AO-3646).

19. Setting the per diem substitute pay rate for non-unionized substitutes may not be discussed in executive session (OML-AO-831).

20. Scope of Construction Project work may not be discussed in executive session (OML-AO-3198).

III. ENFORCEMENT AND REMEDIES

1. Any person may bring a Civil Practice Law and Rules Article 78 Proceeding to challenge actions taken allegedly in violation of the Open Meetings Law.

2. Upon "good cause shown" a Board action may be annulled by the Court, except that an unintentional violation of the notice provisions, standing alone, shall not form the basis for annulling such action (POL §107[1]).

3. If a court determines that a public body, including a school board, has failed to comply with the requirements of the Open Meetings Law, the court may: (a) declare the action in violation of law void, in whole or in part, without prejudice to reconsideration; and (b) require the members of the public body to participate in training sessions conducted by staff of the Committee on Open Government.

4. Reasonable attorneys' fees may be recovered by a petitioner who proves a material violation of the Open Meetings Law (POL §107[2]).

5. The Statute of Limitations runs from the date when executive session minutes are made available to the public where the action challenged took place in executive session.

APPENDIX "A"

BOARD POWERS (most school districts):

The Board of Education of a school district is, by law, deemed to be a body corporate with the power of the Board in the body itself and not in the individual trustees. This expression of corporate entity is set forth at Section 1701 of the Education Law, applies specifically to union free school districts and is carried over through the "devolution provisions" elsewhere in the Education Law (such as those set forth at: Section 1804[1], which establishes Boards of Education in Central School Districts; Section 2503[1], which establishes Boards of Education in Small City School Districts; Section 2554, which establishes Boards in the Large City School Districts; Section 1604[30], which sets forth the general powers of a Board in a Common School District; and Section 1903, which establishes the powers of the Board in a Central High School District).

All property owned by the school district, by law, is held in the name of the Board of Education in its corporate capacity. (see Ed. Law §§1701, 1603, 2511, etc.)

Board powers, as expressed in Section 1709 of the Education Law, include the following:

1. To adopt by-laws and rules for the Board in discharging its duties.

2. To establish rules and regulations to govern student discipline (also, Part 100.2[l] of the Commissioner's Regulations).

3. Prescribe the course of studies for the grading and classification of students, regulate admission and transfer from one class or department to another, in accordance with their scholarship needs.

4. Prescribe the textbooks and compel uniformity in the use of the same, as well as furnishing the textbooks to students. (Also see §701, Education Law)

5. Provide for instruction in all required subjects (See §3204, Education Law and Part 100, Commissioner's Regulations).

6. Subject to voter approval:

    a. to purchase sites or additions to sites for schoolhouses, recreation grounds and agricultural purposes;
    b. to purchase furniture and apparatus for schoolhouses (keep and repair the same); and
    c. when authorized by the voters, to purchase implements, supplies and apparatus for agricultural, athletic, playground and social center purposes.

7. To temporarily lease necessary space not located on school property due to overcrowding, damage or destruction of schoolhouses. Furnish and equip the same (subject to annual approval by the Commissioner of Education).

8. To purchase insurance for school property; to insure students for athletic pursuits; insure against accidents to pupils occurring in-school, on school grounds or during transportation to and from school, as well as, upon school-sponsored trips. Establish a reserve, not to exceed 3% exclusive of any planned balance authorized by voters, to cover property loss and liability claims.

9. To take title to schoolhouses, sites, lots, furniture, books, apparatus and all school property within the district.

10. To alter and equip for use as a public library, any former schoolhouse or part thereof, when duly authorized by the qualified voters of the district.

11. Upon voter authorization, to *sell* any former school site, lot or real estate, with buildings and appurtenances thereon, if any, upon such terms as approved by the voters (deeds to be executed by a majority of board members). To *exchange* real property for the purpose of improving or changing schoolhouse sites without the requirement of voter approval.

12. To take grants and gifts of realty, money or other property and to apply trust proceeds/interest in accordance with instructions of the donor. To manage scholarship trusts according to the instructions of the donor (however, the trust decisions must be made by the board and scholarships must be only for the purpose of defraying the cost of higher education).

13. To have, in all respects, the superintendence, management and control of the district, in conformity with Regents Rules; discretion to receive into the schools any pupils living outside of the schools and to regulate the establishment of tuition fees for such non-residents (in accordance with Commissioner's Regulations set forth at Part 174).

14. To provide fuel, furniture, apparatus and other necessaries for the use of said schools.

15. To employ librarians.

16. To determine the number of teachers to be employed and the time of employment; to enter into contracts with teachers pursuant to Section 3011, except those subject to tenure track positions; to employ those necessary to supervise, organize, conduct and maintain athletic playground, social center activities and to adopt rules and regulations governing the excusing of absences of all teachers and

all employees and for the granting of leaves of absence to the same, with or without pay.

17. To fill any vacancy on the Board which results from death, resignation, removal from office or refusal to serve. The appointee will only serve until the next regular school district election of Board Members. Following such election, the vacancy is immediately filled.

18. To remove any member of the Board for official misconduct, based upon written charges served with at least ten days' notice and the conducting of a full and fair hearing (see, however, §306 of the Education Law, which, by case law, pre-empt the board's right to conduct such hearing pending the Commissioner's consideration of such matter).

19. To provide suitable lavatory and bathing systems.

20. To tax real property to pay the salary of teachers (See §3101[d] for definition of teachers).

20-a. To employ a claims auditor to serve at the pleasure of the Board, in lieu of the Board auditing claims. (Said auditor cannot serve at the same time as a Board Member, Clerk or Treasurer of the Board, school business administrator, purchasing agent or clerical personnel directly involved in accounting or purchasing functions.)

21. To provide for the medical inspection of all children in attendance.

22. To provide, purchase, lease, furnish and maintain buildings or other accommodations for the use of teachers or other employees of the district, when authorized by the voters of the district; also, when authorized by voters of the district, to maintain and operate a cafeteria or restaurant service for the use of pupils and teachers while at school. (No voter approval is required where the cafeteria or restaurant service is self-sustaining and does not require the levy of a tax.)

23. To provide milk for pupils within the limitations of an appropriation made therefor.

24. To provide transportation, home teaching or special classes to physically or mentally handicapped children, as well as delinquent children. This provision applies to both children enrolled in the public schools and other resident children of the district, as well; to purchase and maintain, when authorized by the voters of the district, motor vehicles for transportation of school children.

25. To purchase and maintain, when authorized by the voters, motor vehicles for transporting students.
(**Note**: The Board can replace a motor vehicle without voter approval when necessitated by damage or loss of the same by using any unencumbered funds in the general fund or by issuance of budget notes, under §29.00, Local Finance Law, in addition to any available insurance proceeds.)

The Board may lease motor vehicles to another district or a BOCES or a County Vocational Education and Extension Board or to an Indian tribe for educational purposes when not needed for transporting children of the district. Similarly, school buses may be leased for transporting children in connection with a recreation project or a youth service project operated by a school district or an Indian tribe, youth bureau or agency or activity or project of a county, town, city, village or an Indian tribe, devoted to the welfare of youth therein; or providing leisure time activities for youth or to one or more playgrounds and neighborhood recreation centers operated by cities, other than N.Y.C., Buffalo and Rochester. The Board may also lease motor vehicles from a BOCES or a County Vocational Education and Extension Board, another school district, a county, municipality or State Division for Youth. Under emergency circumstances, transportation vehicles may be leased from sources other than a school district, BOCES or County Vocational Education and Extension Board. The Board is also authorized to provide regional transportation services by rendering them jointly with other school districts or BOCES. [see also §1501-b, Education Law]).

26. The Board may pay any judgment levied against the district and levy a tax, if monies are not otherwise available.

27. To contract out for the conveyance of pupils residing within the school district, with voter approval. (Transportation contracts may not exceed five years - see also §305[14], Education Law.)

28. To illuminate, provide janitorial care and supervision for highway underpasses, when authorized to do so by voter approval.

29. To establish a petty cash fund for the use of school district officers and employees, for the payment in advance of authorization of properly itemized bills for materials, supplies or services furnished to the district, under conditions calling for immediate payment to the vendor upon delivery. (The Commissioner is charged with establishing regulations for the use of petty cash accounts - see Part 170.4, Commissioner's Regulations)

30. To compensate speakers; to reimburse candidates for teaching positions for actual travel and other expenses.

31. To explore, develop and produce natural gas, solely for school district purposes (§368, General Municipal Law).

32. To provide in-service training for teachers.

33. "To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes."

34. To provide workers' compensation insurance, other insurance, e.g., life, disability, health, for employees and liability/personal injuries for volunteers.

34-a. To enter into group insurance policies for employees (e.g., life insurance, disability insurance).

34-b. To provide insurance for injuries to volunteers.

35. Upon employee authorization, to deduct from salary for credit union participation.

36. [Repealed provision regarding vicarious liability of parents for damage or destruction of their child of real or personal property owned by the district. Replaced by broader provision of §3-112 of the General Obligations Law.]

37. To use excess proceeds from the sale of school district real property, after use of proceeds for any legally required purpose, to reduce property taxes, for a period not to exceed ten school years.

38. To offer monetary reward in a sum not to exceed $1,000, for information leading to the arrest and conviction of any person(s) for felonies or misdemeanors connected to vandalism of district property.

39. Section 1709(39) requires the board to fingerprint all prospective employees in accordance with §3035 of the Education Law who do not hold valid clearance pursuant to that section or §3004-d or §509-cc or §1209-d of the Vehicle and Traffic Law--fingerprinting to occur after furnishing the applicant with the form described in §305(c) of the Education Law for consent to the criminal history record search. The fingerprints must be submitted promptly to the Commissioner for purpose of clearance for employment by conducting a criminal history record check.

40. Section 1709(40) upon commencement and termination of employment of an employee by the school district, the board shall provide the Commissioner with the name of and position held by such employee.

41. Section 1709(41) provides transportation in a prescribed manner to and from athletic events, extra-curricular activities, field trips, etc.

42. Section 1709(42) authorizes leases, subleases or other agreements with the dormitory authority (DASNY) for the financing or refinancing of capital facilities or capital equipment with the approval of the Commissioner.

APPENDIX "B"

Delegable and Non-Delegable Board Duties:

1. In *Matter of Ploof*, 23 Ed. Dept. Rep. 59 (1983), the Commissioner upheld the authority of the Board of Education President to authorize the payment of district funds to cover travel and other expenses of two School Board Members to attend a national school boards association conference in San Francisco where the President's authority was delegated by Board resolution.

2. In *Matter of Serwentnyk*, 25 Ed. Dept. Rep. 210, citing *Matter of Anderson*, 17 Ed. Dept. Rep. 418 (1978) and other cases, the Commissioner noted that a decision to discontinue the use of a school building and transfer the pupils to another school building is a matter within the discretion of a Board of Education and will not be set aside, unless proven to be arbitrary or an abuse of discretion (See Court of Appeals cases, *Older*, 27 N.Y. 2d 333 [1971] and *DeVito*, 43 N.Y. 2d 618 [1977]).

3. In *Matter of Tobin*, 25 Ed. Dept. Rep. 301 (1986), the Commissioner ruled that the matter of a team name was within the discretion of the Board of Education.

4. In *Matter of Crapster*, 22 Ed. Dept. Rep. 29 (1982), the Commissioner noted that the power to appoint a person to a teaching position is vested solely with the Board of Education and that such power may not be delegated (citing *Matter of Eisenstadt v. Ambach,* 79 A.D. 2d 839 [1980], *Matter of Serritella v. Board of Education,* 58 A.D. 2d 645, Mot. for lv. to App. Den., 43 N.Y. 2d 642 [1977]). The Commissioner also noted that the appointments must be based upon the recommendation of the Superintendent of Schools.

5. *Matter of Flint*, 26 Ed. Dept. Rep. 84 (1986). The power to appoint a superintendent of schools is vested solely within the board of education and may not be delegated. Where the board was alleged to have hired a search consultant and established a citizen's advisory committee, the failure to follow the protocol established for the superintendent's search was held not to negate the board's appointment of the superintendent of schools.

6. Matters related to the curriculum are within the non-delegable discretion of the board of education. *Matter of Zaleski*, 36 Ed. Dept. Rep. 284 (1997).

7. The formulation of the school district's budget is non-delegable to shared decision making. *Matter of Kasperg*, 35 Ed. Dept. Rep. 208 (1995).

8. Under §1709(2) of the Education Law and Commissioner Regulation 100.2(l) the board of education has the non-delegable duty to establish a discipline code. These functions are not delegable to a shared decision making committee. *Moravia Teachers Association,* 36 Ed. Dept. Rep. 413 (1997).

9. The delegation of the decision to allow the custom of Halloween to be observed in a school is not of a non-delegable nature. Therefore, the board may delegate to local building decision making such matter. (*Matter of Webb*, 33 Ed. Dept. Rep. 493 [1994]).

APPENDIX "C"

The Powers of the Superintendent:

Pursuant to Section 1711(2) of the Education Law, the Board of Education may specify by its by-laws, the powers of the Superintendent. Absent such specifications, the statutory powers of the Superintendent are set forth as follows:

1. To be the chief executive officer of the district and the educational system, having the right to speak on all matters before the board, but not to vote.

2. To enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the Board of Education.

3. To provide the content of each course of studies authorized by the Board; to submit the same to the Board for its approval and cause the approved courses to be used in the grades, classes and schools for which authorized.

4. To recommend suitable lists of textbooks to be used in the schools.

5. To supervise and direct all school district employees, and under the direction and management of the Board of Education, to transfer teachers from one school to another or from one grade of the course of study to another grade in such course and report immediately such transfers to the Board for its consideration and action. To report violation of regulations in cases of insubordination, suspend any school employee under the next regular meeting of the Board when all facts relating to the case shall be submitted to the Board for its consideration and action.

6. To supervise and direct the enforcement observance of the course of study, the examination and promotion of pupils and overall other matters pertaining to playgrounds, medical inspection, recreation and social center work, libraries, lectures, and all other educational activities under the management, direction and control of the Board.

NOTE: Pursuant to §1711(4) of the Education Law, Chapter 843 of the Laws of 1986, allows for the Superintendent's powers regarding the transfer of teachers to be modified by a collectively negotiated agreement under the Taylor Law.

APPENDIX "D"
Conducting Executive Sessions

1. The Open Meetings Law requires that all Executive Sessions be conducted during the course of an Open Meeting. Thus, the Board must give appropriate notice of an Open Meeting and recess to Executive Session from the Open Meeting, as well as return to the Open Meeting prior to closing the business of the Board.

2. Agenda Notice - The Executive Director of the Committee on Open Government has given the opinion that it is inappropriate to have an item on the agenda which states "Executive Session." The rationale is that because the Board must vote to convene an executive session and the motion may or may not prevail, and the Board cannot predict when there will be an executive session. Therefore, the appropriate language to place on the agenda is:

   - "Proposed Executive Session, subject to Board approval" or
   - "It is intended that the Board will go into Executive Session" or
   - "A motion will be made to enter Executive Session for the following purpose(s):"

3. The Open Meetings Law requires that Executive Sessions be conducted only for legitimate purposes, as described in statute, pursuant to a resolution that describes the legitimate purpose(s), as follows:

   "BE IT RESOLVED, that the Board hereby recesses into Executive Session for the following purpose (or purposes):

   [State the legal purpose(s) from the list below, with those of greatest application to school districts highlighted]

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

      NOTE: This purpose could be used for discussing building level safety plans or a security audit that indicates the weaknesses in the District's building plans or the location of security cameras.

   b. Matters which may disclose the identity of a law enforcement agency or informer.

   c. Information relating to a current or future investigation or prosecution of a criminal offense.

   d. **Discussion regarding proposed, pending or current litigation.**

      NOTE: If a litigation has been filed, the name of the litigation must be stated. **It is not sufficient to state "possible" litigation.**

e. **Collective negotiations under the Taylor Law.**

NOTE: According to the Committee on Open Government and recent case law, you should identify the collective bargaining unit or units to be discussed.

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

NOTE: The most commonly criticized area is where a Board enters into Executive Session to discuss **"personnel"** which is not an acceptable purpose under the Open Meetings Law. Further, the Committee on Open Government has opined that the Board must state each specific purpose under this category separately. For example, the Board may discuss some or all of the following at the same Executive Session:

A. To review the employment history of a particular person.

B. To review the employment history of a particular corporation.

C. To discuss matters regarding the appointment of a particular corporation.

D. To review matters leading to the promotion of a particular person.

E. To review matters leading to the discipline of a particular person.

F. To review matters leading to the removal of a particular corporation.

g. The preparation, grading or administration of examinations.

h. **Proposed acquisition, sale or lease or real property, securities, only when publicity would substantially affect the value thereof.**

NOTE: To be legally appropriate, the resolution must state "and publicity would substantially affect the value thereof".

i. To discuss matters made exempt by federal or state law (e.g., FERPA - student matters; to seek legal advice from the School Attorney - attorney-client privilege).

NOTE: There is no category which would cover a "Board retreat" which is a gathering of Board members to discuss the internal workings of the Board (e.g., how do we function better as a Board; how do we get along better; interpersonal relations among Board members). The Committee on Open Government has opined that a Board retreat for the proper purposes is not a Board meeting for purposes of the Open Meetings Law

[OML-AO-3185] and, therefore, notice of the date, time and place of the retreat is not required to be given to the public, nor is the public allowed to attend.

Other exemptions from the Open Meetings Law include:

- judicial or quasi-judicial proceedings, such as due process hearings and appeals [e.g., §75 Civil Service Law; §3214 Education Law; Buckley Amendment (FERPA) Records Review Proceedings].

Recent Appellate Division (4th Dept) decision regarding specificity of motion for entry into executive session: *Zehner v. Board of Education of Jordan-Elbridge Central School District* – The Court determined that the school district violated the Open Meetings Law because it merely recited the statutory executive session categories.

> "Given the overriding purpose of the Open Meetings Law, section 105 is to be strictly construed, and the real purpose of an executive session will be carefully scrutinized 'lest the mandate [of the Open Meetings Law] be thwarted by thinly veiled references to the areas delineated thereunder'."

In that case the court found three factual scenarios where the Board's motion for executive session was not sufficiently descriptive.

1. Motion to convene executive session for "discussion regarding proposed, pending or current litigation" and "employment matter of a particular person or corporation or matters leading to the appointment, employment etc." The Board President stated that they discussed litigation matters with counsel and employee discipline issues pursuant to §3020-a Education Law, and employment issues regarding the Board's former attorney.

   The court held that there was no reason for lack of specificity and the violation of OML occurred due to the Board's failure to identify with particularity the topics to be discussed.

2. Executive session for two purposes: "collective negotiations pursuant to Article fourteen of the civil service law" and "the medical, financial, credit or employment history of a particular person." The Board President stated that the discussion was about the same matters as identified in #1 and the court found a violation of OML.

3. Executive session "for the purpose of discussing matters related to the appointment or employment of a particular person" where the discussion was the process of searching for a new superintendent which should have been a discussion in open meeting. The court stated that if the school district wished to discussed superintendent search firms, they would have had to state in the resolution "to discuss matters leading to the appointment of a particular corporation – superintendent search firms."

The Court awarded attorney's fees to the plaintiff and ordered that the Board of Education be trained by the Committee on Open Government.

Lessons:

- If you are discussing matters leading to the employment or appointment of a particular individual, you should indicate the position for which candidates are being considered (unless it is not appropriate to do so).
- Do not recite all of the verbiage from the OML – if discussion matters leading to potential discipline or suspension, don't state matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal etc.
- When discussing collective negotiations under the Taylor Law, indicate the union or unions being discussed.

4. Persons Who May Attend Executive Session

The Board of Education may invite non-members whose presence would be of relevance to the particular issue to be discussed into Executive Session.

5. Executive Session Minutes

There is no requirement of law or regulation and, indeed, it is not advisable to maintain minutes of discussions or deliberations had in executive session. Under Section 106 of the Public Officers Law, minutes must be taken at executive session only to record action taken by formal vote. In 1986, the Committee on Open Government issued an Advisory Opinion (#1336) which stated that if no action is taken in executive session, minutes need not be prepared. There are only two formal votes which the Commissioner of Education and the Committee on Open Government recognize as being legal in an Executive Session regarding school districts: voting upon (a) Section 3020-a Education Law charges and (b) the placement of children with disabilities [but not the contract for service] (see Opinions Counsel SED No. 239). Therefore, the Executive Session minutes of a school district should be few and far between since many districts vote upon the placement of students with disabilities in open meeting by assigning numbers in order to maintain privacy rights. All other action must occur in an Open Meeting with minutes reflecting such action accordingly. Executive session minutes must be available to the public within one week of the executive session.

Several Advisory Opinions (#2262, 2459, 2612) have clearly stated that where a public body reaches a consensus in executive session upon which it relies, a vote has been taken and minutes should be prepared and made available. Since there are very few votes which can be taken in executive session legally, this practice should be avoided. Advisory Opinion #2459 specifically states that a "'straw vote' or something like it, that is not binding and does not represent members' action that could be construed as final" may be taken in executive session when it "represents a means of ascertaining whether additional discussion is warranted or necessary."

6. **Action Taken after Executive Session**

The Committee on Open Government has opined that if action may be taken after an executive session, the resolution authorizing entering into executive session should include words to the effect "and the Board will (or may) come out of executive session and take action." Without this notice to the public that formal action may be taken after the executive session, it subverts the process because the public and press will, likely, leave and not return if they believe no further formal action will be taken. However, if the notice is given and the press and public choose not to wait for the open meeting to resume, that is their decision. The School District would then be considered as having complied with the provisions of the Open Meetings Law.

THE CODE OF ETHICS

A. ***Requirement for a Code of Ethics***

Section 806(1)(a) of the General Municipal Law (GML) states that the governing of each school district shall adopt a code of ethics setting forth, for the guidance of its officers and employees, the standards of conduct that are reasonably expected of them, specifically regarding:

1. Disclosure of interest in legislation before the local governing body
2. Holding of investments in conflict with official duties
3. Private employment in conflict with official duties
4. Future employment and such other standards related to conduct of officers and employees as may be deemed advisable
5. Other conduct not expressly prohibited by statute that the Board may seek to regulate
6. Prohibited conduct which may not be authorized by a code of ethics.

B. ***Distribution, Filing and Posting Requirement***

- The Superintendent of Schools is required to distribute a copy of the code of ethics to every officer and employee in the school district. If such distribution does not take place, the law specifies that the officers and employees are not relieved of compliance requirements or of the enforcement provisions of the provisions of the code. (§806[2], GML).

- The District's code of ethics must be filed in the State Comptroller's Office annually. The code, as a by-law or policy, is subject to public review and access in accordance with the Freedom of Information Law and §806(3), GML.

- In accordance with §807, GML, the Superintendent of Schools must ensure that a copy of Article 18 of the General Municipal Law is posted in each public building in a conspicuous place.

STATUTORY CONFLICTS OF INTEREST

The following provisions apply to all municipal officers and employees, including Board members. Generally, conflicts of interest exist where municipal officers are in a position to benefit personally from contracts made in their official capacity.

Personal interests which are **prohibited** by law include:

1. Interest in a contract with the School District where a Board member has the power or may appoint someone who has the power to negotiate, authorize or make payment or audit bills or claims under the contract, unless otherwise exempted by law (§§801[] and 802, GML); and

2. Interest by a Chief School Officer, Treasurer or his/her Deputy or employee in a bank or other financial institution that is used by the School District he or she serves (§801[2], GML).

- The term **"contract"** is defined broadly to include any claim or demand against the School District or account or agreement with the School District, whether expressed or implied (§800[2], GML).

- An **"interest"** is defined as a direct or indirect benefit that runs to the officers as a result of a contract with a School District (§800[3], GML).

Board members are deemed to have an "interest" in:

1. A firm, partnership or association in which the Board member is a member or employee;

2. a corporation in which the Board member is an officer, director or employee; or

3. a corporation in which the Board member directly or indirectly owns or controls stock (see exception in §802[2][a], GML).

Case Note: An example of where a Board member was held to have a conflict of interest was found in *Appeal of Golden,* 32 Ed. Dept. Rep. 202 (1992). In this case, the district purchased heating oil from the company of which the Board member was President and in which he owned more than 5% of the stock.

4. The member also is deemed to have an "interest" in a contract between the district and his and her spouse, minor child or dependents, except that the law specifically allows the spouse, minor child or dependent of a Board member to enter into an employment contract with the School District. (see §800[3] GML).

Case Note: The New York State Comptroller in Opinion 91-26 determined that it was not a prohibited conflict of interest for the President of a public library board to act upon a contract with an architectural firm that employed the President's daughter, since the daughter was an adult, and not a "minor child or dependent" that would have created a prohibited conflict of interest under §800(3), GML. The Comptroller further opined that the relationship does not require a public disclosure

under §803, GML. A code of ethics, according to the Comptroller, could require as a matter of policy, disclosure of the relationship.

Exceptions to the General Rule

Section 802 of the General Municipal Law lists several specific **exceptions** to the general conflict of interest rules set forth in §800:

1. Contracts with membership corporations or other voluntary not-for-profit corporations or associations - such as collective bargaining agreements - are exempt from the conflict of interest rules. (see §802[1][f], GML).

   Thus, a personal interest arising out of a collective bargaining agreement is not a prohibited interest under the law and all Board members may vote. (see *Stettine v. County of Suffolk*, 66 N.Y.S.2d 354 [1985]). In this regard, Board members are not prohibited from voting on collective bargaining agreements which are applicable to their spouse or children.

2. Education Law §3016 allows Boards to appoint a relative or spouse of a Board member as a teacher upon a two-thirds supermajority vote, without limiting any Board member's right to vote.

3. The conflict of interest provisions do not apply to the employment of a Board member as School Physician upon a two-thirds vote of the Board. (see §802[1][i], GML).

4. Contracts entered into by the district with a person who is subsequently elected or appointed to the Board remain valid, except the contract may not thereafter be renewed. (see §802[1][h], GML).

5. A contract with a corporation of which the Board member's interest by reason of stockholding is less than 5% of the outstanding shares (see §802[2][a], GML).

6. A Board member may enter into a contract with the school district if the total amount paid during the fiscal year pursuant to the contract is less than $750.00. (see §802[2][e], GML).

7. A conflict of interest does not exist if the Board member is merely an employee of the entity that has a contract with the school district, provided that the Board member's compensation is not contingent on the contract between the private employer and the school district and the Board member's duties for the private employer do not directly involve the "procurement, preparation or

performance of any part of the employer's contract with the municipality." (see *Appeal of Vivlemore,* 33 Ed. Dept. Rep. 174 [1993]).

8. The designation of a bank or trust company as a depository paying agent, registration agent for the investment of funds, except where the Board President, Treasurer or Deputy Treasurer has an interest in such bank or trust company (special exception where the conflict would require the engagement of a bank or trust company outside of the municipality or school district) (see §802[1][a], GML).

9. A contract with a person, firm, corporation or association in which a municipal offer or employee has an interest prohibited solely by reason of employment as an officer or employee of such other entity, if his/her compensation will not be directly affected as a result of the contract with the municipality or school district and duties do not directly involve the procurement, preparation or performance of any part of the contract. (see §802[1][b], GML).

10. The designation of a newspaper, including an official newspaper, for the publication of notices, resolutions or when publication is otherwise authorized by law (see §802[1][c], GML).

11. The purchase of real property or any interest therein when approved by an order of the State Supreme Court, upon petition of the governing body. (see §802[1][d], GML).

12. Acquisition of real property or an interest in real property through eminent domain proceedings. (see §802[1][f] GML).

13. Sale of bonds and notes pursuant to Section 60.10 of the Local Finance Law. (see §802[1][g], GML).

Disclosure Requirements

Board members and employees must publicly disclose the nature and extent of any interest they or their spouses have, will have or may later acquire in any actual or proposed contract, purchase agreement, lease agreement or other agreement involving the school district (including oral agreements), to the governing body and his/her immediate supervisor (where applicable) even if it is not a prohibited interest under applicable law. Such disclosure must be in writing and made part of the official record of the school district. Disclosure is not required

in the case of an interest that is exempt under §802(2), GML. (§803, GML, as amended by Chapter 499, Laws of 2005[1]).

Violations

The willful violation of Article 18 of the General Municipal Law is a misdemeanor and may also result in the Board member's removal from office (§805, GML). Contracts willfully entered into in violation of Article 18 are deemed void and are, thus, unenforceable (see §804, GML).

COMPATIBILITY OF OFFICES

Incompatible Offices

Section 2103 of the Education Law prohibits the following office holders to also hold the office of Board of Education member:

- District Superintendent
- Treasurer
- School Tax Collector
- Librarian
- Town Assessor *(Op. Atty. Gen. [Inf])*
- Town Supervisor (*Op. Atty. Gen. 96-29)*
- Trustee of School District Public Library with separate governance board *(Appeal of Powers,* 9 Ed. Dept. Rep. 179 [1970])
- Private School Board Member of a school located within the public school district *(Op. Atty. Gen. 87-58)*
- County Elections Commissioner *(Op. Atty. Gen. 87-50)*
- Claims Auditor(§1709[20-a] Education Law)
- City Commissioner of Human Rights *(1966, Op. Attny. Gen. [Inf]131)*

Compatible Offices

Offices held to be compatible with the office of member of the Board of Education include:

- Deputy Town Supervisor and Board Member *(Op. Atty. Gen. 87-58)*
- Town Assessor *(Op. Atty. Gen. [Inf] 2000-14)*
- County Clerk (*11 Op. St. Compt. 709 [1955)*

[1] *Restitution for Larceny* - Chapter 499, Laws of 2005 also lifts the lid off the Penal Law restitution limits for felonies and misdemeanors involving larceny crimes by an officer against his/her school district, providing that "the court may require an amount of restitution up to the full amount of the fruits of the offense ..."

- County Legislator *(Op. Atty. Gen. [Inf]. 82-1)*
- Town Councilman (*Op.St. Compt. 67-354)*
- Public Library Trustee *(Matter of School*, 21 Ed. Dept. Rep. 300 [1981])
- Village Trustee *(4 Op. St. Compt. 587 [1948])*
- Member of Town Board of Assessment Review *(Op. Atty. Gen [Inf.] 93-9)*
- Village Zoning Board of Appeals Member *(Appeal of Nolan*, 35 Ed. Dept. Rep. 139 [1995])
- County Director of Real Property Tax Service *(Op. Atty. Gen. [Inf.] 92-26)*
- Coach in another School District *(Op. St. Compt. 83-12)*
- Employee of a School District Public Library employed by separate governing body *(Op. St. Compt. 73-830)*

RIGHTS OF INDIVIDUAL BOARD MEMBERS TO ACCESS RECORDS OF THE SCHOOL DISTRICT

In *Matter of Bruno,* 4 Ed. Dept. Rep. 14 (1964), the Commissioner set forth several rules, based upon a review of then existing case law, regarding the records access rights of individual members of the Board of Education:

"1. An individual member of a Board of Education is entitled to examine and make copies of any of the unqualified public records of the School District dealing with the affairs of the School District.[2]

2. This right of inspection and copying must be strictly qualified by the rule of reasonableness and such inspection and copying must be made in accordance with the rules and reasonableness as outlined above by the Courts.[3]

3. An individual member of a Board of Education may not direct the administrative personnel of the District to do anything beyond those things necessary to such right of inspection and copying." (at pgs. 16-17).

The Commissioner, in *Bruno,* made a strong point that an individual member of the Board may not direct the Superintendent of Schools or any other administrative personnel to conduct research projects requiring the collating or extracting of various information that does not already exist in records. Work of that nature (e.g., reports and compilations) may be required by Board resolution at a regular or special meeting of the Board. In such instances, the provisions of Section 41 of the General Construction Law would apply. Thus, a quorum of the Board would have to vote its approval directing the report or compilation.

The Joiner Case

In the case of *Gustin v. Joiner,* 95 Misc. 2d 277, aff'd 68 A.D.2d 880 (2nd Dept. 1979), the Court addressed the issue of whether or not a quorum of the Board of Education could prohibit records access demanded by a single Board member. In that case, the Board

[2] In *King v. Ambellanh,* 12 Misc. 2d 333, the unqualified records of the district were described as all records except for those restricted by statute or Commissioner's rules.

[3] "Such rules and regulations would require that inspection shall be during regular business hours; that no records shall be removed from the custody of the officer involved; that the examination shall proceed in orderly and chronological fashion; that the records sought to be examined shall be specified with such a degree of clarity that they must be identified readily; that copies may be made at the expense of the examiner; and that the general business of the office shall not be unduly interfered with." (citing *Coughlin v. Cowan,* 21 Misc. 2d 667).

member made an application to the Superintendent of Schools to examine payroll records of the School District. The request was denied. The Court decided that individual Board members have the right to compel the production of documents for their review. The example of personnel records was highlighted with the Court citing a previous Court of Appeal case,[4] stating that "… its [the Board's] members have an inherent right to review the records and files of those of whom they employ. Indeed under Section 3010 of the Education Law, members of the Board might well subject themselves to criminal liability by failing to assure themselves of the qualification of teachers whose employment they approve." (at pg. 280). The Court concluded by ordering the other members of the School Board to make available all payroll records of the District that were under their control.

The Commissioner's Part 84 Regulations

Just prior to the Court's decision in *Joiner, supra,* the Commissioner provided by regulation at 8 NYCRR Part 84, that any Board member may request that the Superintendent of Schools bring personnel records of a designated employee or employees to any open meeting of the Board (§84.1). The Regulations then provides that the Board may determine whether to convene an executive session for the purpose of conducting an examination of those records (§84.2)[5] The criteria for the Board's determination may be informed by §84.3 of the Regulations and articulate one or more legitimate business purposes (see *Appeal of Meyer & Pavalow,* 46 Ed. Dept. Rep. 43, Dec. No. 15,436 [2006]). Then, following review in executive session, custody of the records shall remain with the Superintendent.

Access to Records under the Freedom of Information Law (FOIL)

If not directed by a Board resolution, an individual Board member may file a FOIL request to obtain access to records that are within the public domain.

[4] *Bd. of Educ. [Great Neck] v. Areman,* 41 N.Y. 2d 527 (1977).

[5] *Application of Bean*, 42 Ed. Dept. Rep. 171 (2002).

RECORDS MANAGEMENT AND THE FREEDOM OF INFORMATION LAW

Records Retention and Disposition Schedule

The State Education Department, State Archives and Records Administration (SARA) has adopted and periodically updates a Records Retention and Disposition Schedule (known as ED-1 for school districts) which sets forth the minimum length of time that school officials must retain their records before they may be legally disposed of. The Schedule covers the vast majority of documents in school districts. The Records Retention and Disposition Schedule need only be adopted once by the Board of Education although the most current schedule must be complied with (the latest Schedule ED-1 is from 2004). The Records Retention and Disposition Schedule can be accessed at: http:/www.archives.nysed.gov.

The purpose of the Records Retention and Disposition Schedule is to:

- Ensure that records are retained as long as needed for administrative, legal and fiscal purposes;
- Ensure that state and federal records retention requirements are met;
- Ensure that records with historical value are identified and retained permanently; and
- Encourage and facilitate the systematic disposal of unneeded records.

Section 57.19 of the Arts & Cultural Affairs Law requires each local government to designate a Records Management Officer to coordinate or directly carry out the disposition of records.

The following are special rules regarding records retention and disposal:

- Records created before 1910 may not be disposed of without written permission of SARA;
- Records used in legal actions must be retained for one year after the legal action ends, or until their schedule retention period has passed, whichever is longer;
- Retention periods in the Schedule refer to one "official copy" designated by the local government, unless otherwise stated;
- A "record" includes not only paper records but also microfilm, computer disk or tape or other medium.

Summary of Records Retention Schedule

Permanent Records

- any record with historical value;

- official minutes and hearing proceedings of governing body, including all records accepted as part of minutes;
- legal opinion or directive rendered by the governmental agency;
- local law, rule, regulation, ordinance, resolution, proclamation or court order;
- manual of procedures or policies and standards;
- correspondence and supporting documents maintained in a subject file documenting significant policy or decision making or significant events or dealing with legal precedents or significant legal issues;
- publications containing significant information or substantial evidence of plans and directions for government activities where critical information is not contained in other publications;
- report and recommendation resulting from internal investigation or non-fiscal audit (other than personnel investigations);
- annual, special or final report or summary which contains substantial evidence of governmental police, procedures, plans and directions;
- annual, special or long-range program plan;
- local governmental public access television records where the program constitutes an important public meeting, significant event, important subject or documents local government policy making;
- documentation of final disposition of records (including description of records disposed of and date of disposition);
- records transfer list, appraisal and accessioning documents and guide, listing or index or other location aid for archival records;
- legal case file (notice of claim, attorney and investigator and activity logs, complaints, court order, motions, notes, briefs, releases) for significant cases which have importance or which set legal precedents;
- legal case index;
- official copy of annual budget when not included in minutes;
- special budget filed with state or federal agency;
- disaster response files (response to a major disaster);
- district plan for conducting compensatory education program;
- report of audit of financial affairs filed pursuant to §35, General Municipal Law; conducted by NYS Comptroller, Division of Municipal Affairs or by auditing firm;
- sample ballot (for votes);
- final election results (including election inspectors return and statement of canvass and election result reports;
- official copy of election notice;
- summary records documenting request or need for referendum (including records of public hearing, justification accompanying petition, reports and correspondence dealing with pros and cons of issue at question);

- record of bonds, notes or securities purchased by the local government for investment, identifying the security, the fund for which held, the place where kept and listing the date of sale and the amount realized;
- annual or final fiscal reports when report is not included in the minutes;
- documentation of the process for selection and placement of students in gifted and talented programs (including criteria for acceptance into program and district program plan);
- curriculum catalog or bulletin;
- CAR report (if CAR is created instead of a district progress report);
- the district progress report;
- school progress report when all information cannot be readily extracted from district progress report;
- catalog of library holdings - manuscript or printed catalog;
- incorporation, chartering and registration records;
- for magnet schools, documentation of application, selection and placement process for students in the magnet program, including explanation and criteria;
- original application to NYSED for operating magnet schools;
- basic records documenting formation, alteration, consolidation, or dissolution of school districts, teacher hiring and salary records, school fund and other accounting ledgers, district tax rolls or lists, school library reports and book lists, certificates of apportionment and annual and special reports.

FREEDOM OF INFORMATION LAW (FOIL)

Section 87(2) of the Public Offers Law (POL) describes the process for accessing school district records and describes records or portions of records that are exempt from disclosure under FOIL.

General Provisions

The Board **must** annually designate the following who must be designed by job title and business address:

- A Records Access Officer who receives, reviews and responds to FOIL requests;
- A Records Management Officer who manages the school districts records and determines when they must be retained and when they may be disposed.

The Board may also designate a Records Appeal Officer if the Board does not wish to respond to FOIL appeals. These individuals must be designated by specific job title and business address.

- A FOIL request may be to inspect records, for electronic transmission of records (which does not result in a fee) or for copies of records (which does/may result in a fee) or a combination. If a record is available only in part, you may deny the request to inspect records and require the requester to accept a copy of the record which has had deniable information redacted.

- A record is broadly defined - any information kept, held, filed, produced or reproduced by, with or for the Board in any physical form whatsoever, including but not limited to reports, statements, examinations, memorandum, opinions, folders, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photographs, letters, microfilm, computer tapes or disks, rules, regulations or codes (includes electronic communications, i.e., e-mail).

- There is no obligation under FOIL to create a record which does not exist (although you can choose to do so). However, the Committee on Open Government (COG) has opined that any information on a computer database which can be extracted or retrieved from existing records with reasonable effort, must be provided. It is not considered the creation of a record. Likewise, any programming necessary to retrieve a record maintained in a computer storage system and to transfer it to the medium requested, is not considered the preparation or creation of a new record.

- Each District **must** maintain an up-to-date subject matter list by general classification, indicating where the records may be found. This must include all records, whether or not accessible to the public. The list must be updated at least twice a year.

- Time Limits: Upon receipt of a FOIL request, the Records Access Officer must respond within five business days (if school is closed it does not count towards the five days):

    - Grant the request in whole or in part
    - Deny the request in whole or in part
    - Acknowledge receipt of the request in writing and advise the requester of the date when the request will be granted or denied which date must be reasonable under the circumstances.
    - In most cases, the request must be responded to within 20 business days from the date of the acknowledgment. If more than 20 business days is needed, an explanation must be given to the requester and a date certain within which the request will be granted or denied which should be no more than an additional 20 business days. This date must also be reasonable under the circumstances (depending upon the volume or complexity of the request, the age of the records being requested, the extent of search required for the records, extent to which the records must be review and redacted).

- If access to records is neither granted nor denied within any of the above time periods, it will constitute a denial which may be appealed.

- The Records Appeal Officer has 10 business days after receipt of any appeal to grant access or fully explain in writing the reasons for further denial.

- If no response is given within that 10 business day period, the appeal is considered to be denied and the requester may commence a judicial proceeding to challenge the denial for access (which may include an award of attorney's fees).

- Attorney's Fees: When an individual initiates a judicial proceeding under FOIL (e.g., for a denial of records that is unreasonable or for inordinate delays in responding to FOIL requests), and substantially prevails, the court has discretionary authority to award costs and attorney's fees when the agency had NO REASONABLE BASIS for denying access to records or when the agency FAILED TO COMPLY WITH THE TIME LIMITS for responding to a request. In the past, attorney's fees and costs could not be awarded by a court where the court found that the records sought were of clearly significant interest to the general public.

- Most policies require that FOIL requests be submitted in writing (and FOIL requests are FOILable). The request does not have to be on the District's form (and you cannot require that it be on a District form). Requests received by facsimile and by e-mail should be accepted.

    - Each school district must develop a form that is made available on the District website that may be used by the public to request a record electronically.

- The District may not charge a fee for searching the files for records, for inspection of records or certification of records.

- The District may charge a fee of 25¢ per page, up to 9 x 14 inches, or the actual cost of reproduction for other documents, unless a different fee is set forth in statute.

    - Where an individual requests a copy of a record in a form other than paper, and a substantial time is needed to prepare the copy in the format requested (at least two hours of an employee's time), the individual may be charged a fee consisting of the cost of the storage medium and the hourly salary of the lowest paid employee who has the skill needed to prepare a copy of the records in the requested format. In extraordinary circumstances where the District's personnel do not have the information technology and skill to prepare a copy of the record in the medium requested, the District can charge for the cost of engaging an outside organization

to produce a copy of the record. The law also requires records to be provided to the requester in the form and format requested by the individual making the request. In this event, the requester must be notified in advance if more than two hours of an employee's time or an outside professional is needed to prepare a copy of the record.

  - The school district may not enter into or renew a contract for the creation or maintenance of records if it effectively impairs the right of the public to inspect or copy the records.

- If the school district has reasonable means to accept requests for records submitted in electronic form, it must accept requests by e-mail and respond by e-mail, unless the individual making the request seeks a response in another form. There is no fee charged for responses by e-mail. The school district must designate an e-mail address for purposes of receiving FOIL requests by e-mail.

- Where a request is denied, the Records Access Officer must indicate, in writing, the reasons for the denial, the right to appeal and the person to whom the appeal should be made.

- If a record cannot be found after diligent search, that fact must be certified to the applicant by the Records Access Officer, upon request.

- Any person denied access to records may appeal to the Records Appeal Officer (or Board of Education) within 30 days of the denial.

- A request may not be denied based upon the fact that the request is voluminous or that locating or reviewing the requested records is burdensome because the agency lacks sufficient staffing if an outside professional service can be engaged to do the copying, programming, etc. and the costs passed on to the requester.

- An appeal must be in writing and include the date and location of the records requested, the records denied and the name and return address of the person appealing. A copy of all appeals must be sent to the Committee on Open Government:

  Committee on Open Government
  41 State Street
  Albany, New York 12231

- The Records Appeal Officer must inform any person appealing the Records Access Officer's determination within 10 business days of receipt of an appeal, in writing,

including the reasons for denial or that the request will be granted. The determination shall also be sent to the Committee on Open Government.

- A final denial of access to records is subject to court review (Article 78 proceeding).

- The following records are **exempt** from public access:

  - those exempt from disclosure by state and/or federal statute (e.g., student records under the federal Family Educational Rights and Privacy Act [FERPA], attorney-client privileged under state law)

  - if disclosed, would constitute an unwarranted invasion of personal privacy

- In order to prevent an unwarranted invasion of personal privacy, identifying details may be deleted when making records available.

- An **unwarranted invasion of personal privacy** includes (but is not limited to):

  - disclosure of confidential personal matters reported to the Board which are not relevant to the ordinary work of the Board
  - disclosure of employment, medical or credit histories or personal references of applicants for employment, unless the applicant has provided a written release
  - sale or release of lists of names and addresses in the possession of the Board, if such lists would be used for solicitation or fund raising purposes
  - disclosure of items of a personal nature when disclosure would result in economic hardship for the subject party and such records are not relevant or essential to the ordinary work of the Board
  - disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility
  - if disclosed, would impair present or imminent contract awards or collective negotiations
  - those confidentially disclosed to the Board and compiled and maintained for the regulation of commercial enterprise, e.g., trade secrets, or for the grant or review of a license
  - are compiled for law enforcement purposes and which, if disclosed would:

    - interfere with law enforcement investigations or judicial proceedings
    - deprive a person of a right to a fair trial or impartial adjudication
    - identify a confidential source or disclose confidential techniques or procedures
    - reveal criminal investigative techniques or procedures

- endanger the life or safety or any person

- **inter-agency or intra-agency communications (generally opinion, suggestion, recommendation)**, except:

  - statistical or factual tabulations or data (e.g., budgets, draft budgets)
  - instructions to staff that affect the public
  - final Board policy determinations
  - External audits, including but not limited to audits performed by the Comptroller and the federal government.

- examination questions or answers that are requested prior to the final administration of such questions
- if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets (e.g., computer access codes).

- The following records **must** be made available to the public:

  - a list of all District employees, including the name, title, business address and gross salary (not home address)
  - personal records when the person consents in writing
  - records of final votes of each Board member in every Board action in which members vote
  - a reasonably detailed current list, by subject matter, of all records in possession of the school district, whether or not available under FOIL.

- A public employee's personnel file is available, in part, to the public. Information such as the individual's home address, telephone number, social security number, retirement system number, is not available and, therefore, would have to be redacted from the records. Information regarding public employment is available, but information regarding private employment and private references is not.

- An officer's (including Board member) or employee's home address and telephone number does not constitute public information and may be withheld. The school district address and telephone number are public.

Electronic Mail

Electronic mail is a convenient, efficient and effective way to transmit information. An e-mail communication is no different than an inter-office or intra-office memo or a letter written to an individual. Although it is not maintained in hard copy format, it is nonetheless a document.

Emails are:

- Subject to public access under FOIL, depending upon the nature of the content of the email. An email will be subject to FOIL to the same extent as any other document with similar content. To the extent that the email consists of opinion, recommendation or suggestion, it would constitute intra-agency or inter-agency materials and may not have to be provided. However, if it consists of statistical or factual tabulations or data, instruction to staff that affect the public, final agency policy or determinations, or external audits, it would be accessible.

- Subject to discovery and production in litigation; and

- Subject to retention and disposal in accordance with the Records Retention and Disposal Schedule ED-1. Retention periods for email records are based upon their administrative, legal, fiscal and research value.

Email is not a secure form of communication and privacy cannot be guaranteed. Therefore, it is good practice to use email for ministerial duties and communication of fact, but should not include the name of a student or employee or sensitive information.

An electronic communication that identifies a student by name or situation would constitute a student record. A parent/guardian would be entitled to inspect and/or receive a copy of all student records under the Family Educational Rights and Privacy Act (FERPA).

Relevant Court Cases

1. In *Xerox v. Town of Webster*, 65 NY2d 131 (1985) the Court of Appeals examined whether opinions and recommendations prepared by an outside consultant for a governmental agency are exempt from disclosure under FOIL. The court held that just as "pre-decisional" materials prepared by government actors to assist an agency in decision-making is exempt from disclosure, so too are reports prepared by outside consultants that are of a pre-decisional nature.

2. In *Matter of Gould v. NYC Police Department*, 89 NY2d 267, 276 (1996) the Court of Appeals referred to "factual data" that is subject to disclosure if contained within pre-decisional materials as being defined as "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision-making."

3. In *New York Times Co. v. New York State Department of Health*, 243 AD2d 157 (3rd Dept. 1997) the court noted that to protect the public interest in disclosure of records, the

law places the burden upon the agency to articulate a particularized and specific justification for denying access.

4. In *Matter of Sea Crest Const. Corp. v. Stubing*, 82 AD2d 546 (2nd Dept. 1981) the court noted that to protect the deliberative process of government, to insure that a person in an advisory role would freely express his/her opinion, pre-decisional opinions and recommendations remain subject to exemption from disclosure, even after the final decision on the matter is made by government.

5. Discussions with an agency's attorney that have been reduced to writing and are covered by attorney-client privilege may remain exempt from disclosure after the final decision has been made [*Kline and Sons v. County of Hamilton*, 235 AD2d 44 (3rd Dept. 1997)].

Advisory Opinion Letters

1. Documents need not be in the physical possession of an agency to constitute agency records, so long as they are produced, kept or filed by an agency they constitute "agency records" even if maintained apart from an agency's premises (FOIL-AO-1120).

2. Documents characterized as "draft" or "non-final" will not protect their contents based upon the labeling alone (FOIL-AO-10642).

3. Records prepared by a consultant for an agency are subject to disclosure based upon the same standards as in cases in which records are prepared by the staff of an agency. They are to be treated as "intra-agency materials" (FOIL-AO-10642).

4. The agency has responsibility to determine which portions of records might properly be withheld or deleted prior to disclosure (FOIL-AO-11477).

5. An agency is not required to respond to questions that require it to analyze information. It must only provide access to existing records (FOIL-AO-11543).

6. Emails between board members or district employees and members of the public are deemed to be public records and subject to FOIL, as well as to the records retention requirements (FOIL-AO-17045, 18052).

THE ROLE OF THE BOARD OF EDUCATION UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

Required Written Policies

Each Board of Education must adopt written policies that:

1. Establish administrative practices and procedures to ensure that students with disabilities residing in the district have the opportunity to participate in school district programs, to the maximum extent appropriate to the needs of the student, including extracurricular programs and activities, which are available to all other students enrolled in the public schools of the district;

2. Establish administrative practices and procedures to ensure that each preschool student with a disability residing in the district has the opportunity to participate in preschool programs;

3. Establish administrative practices and procedures for appointing and training appropriately qualified personnel, including the members and chairpersons of the committee on special education (CSE) and the committee on preschool special education (CPSE);

4. Establish policies, administrative practices and procedures to provide special services or programs, to the extent appropriate to the needs of the student, to enable the student to be involved in and progress in the general education curriculum;

5. Establish administrative practices and procedures for the purpose of ensuring that parents receive and understand the request for consent for evaluation of a preschool student;

6. Establish administrative practices and procedures for the purpose of ensuring the confidentiality of personally identifiable data, information or records pertaining to a student with a disability. Such personally identifiable information shall not be disclosed by any officer or employee of the State Education Department or any school district, or member of a CSE.

7. Establish a plan and policies for implementing school-wide approaches and pre-referral interventions in order to remediate a student's performance prior to referral for special education;

8. Establish plans and policies for the appropriate declassification of students with disabilities;

9. Establish administrative procedures for the selection, appointment and compensation of an impartial hearing officer;

10. Establish a plan to ensure that all instructional materials to be used in the schools are available in a usable alternative format for each student with a disability in accordance with the student's educational needs and course selections at the same time that such materials are available to nondisabled students. Conversion software program that is appropriate to meet the needs of the individual student.

11. Establish administrative practices and procedures to ensure that each staff member responsible for the implementation of a student's individualized education program (IEP):

    - is provided a paper or electronic copy of such student's IEP prior to its implementation;
    - that any copy of a student's IEP remains confidential;
    - that prior to the implementation of the IEP, the CSE Chair designates for each student one or more district employees with knowledge of the student's disability and educational program to inform each staff person of his/her responsibility to implement the recommendations on a student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP (includes behavior intervention plans);

12. Identify the measurable steps it shall take to recruit, hire, train and retain highly qualified personnel to provide special education programs and services;

13. Describe the guidelines for the provision of appropriate accommodations necessary to measure the academic and functional performance of the student in the administration of district-wide assessments; and

14. Identify how the district, to the extent feasible, will use universal design principles in developing and administering any district-wide assessment programs (8 NYCRR §200.2[b]).

IEP OVERSIGHT

Does the Board have to review the actual IEP to meet its legal obligations?

No. Both the Commissioner's Regulations and decisional law that preceded the change in the Regulations provide that the Board did not, and does not, have an obligation to review the actual IEP document. The Regulations state:

> "The board of education or board of trustees of each district shall, upon completion of its review of the recommendation of the committee on special education for special education programs and services, arrange for the appropriate special education programs and services to be provided to a student with a disability as recommended by the committee on special education (8 NYCRR §200.2[d][1]).

Before this regulation was promulgated, in *Application of the Board of Education of the Gowanda CSD,* SRO Decision No. 04-016 (April 28, 2004) the State Review Officer reversed an Impartial Hearing Officer's decision that ordered, in part, the Board of Education to review the student's actual IEP. The Decision sets forth in clear terms, obligations of the Board regarding IEP oversight:

- The CSEs and CPSEs are appointed by the Board (§4402[1][b][l-3] Education Law);
- The CSE or CPSE is responsible for developing the IEP and recommending to the Board the IEP's program and placement based upon the Committee's evaluation. (8 NYCRR §§200.3 and 200.4)

  > "It is well settled under federal and state law that only a team or committee composed of specific individuals [CSE or CPSE] can develop and recommend an IEP." (8 NYCRR §§200.3 and 200.4)

- The Board is required to furnish suitable educational opportunities for children with educational disabilities. (§4402[2], Ed Law)
  - By arranging within 60 school days from the receipt of a consent to evaluate or referral for review for appropriate programs and services; *except* if the placement is to be in a private school, the Board must make sure arrangements within 30 school days of receipt of a committee recommendation for such placement. (8 NYCRR §200.2[d][1] and §200.4[e][1]).
  - The Board's review of the IEP means acting favorably upon the committee's recommendation within the time frame or stating its objection and remanding.

The Board's Remand Authority

A. In New York State, and not by reason of a federal legal requirement, a board of education may disagree with the recommendation of the Committee on Special Education or a Subcommittee on Special Education, whereupon it may express its concerns and remand the matter for review by the CSE or CPSE as follows:

1. The committee or subcommittee that furnished the original recommendation for its determination to reissue the same recommendation or revise its recommendation regarding the IEP, or

2. A second committee or subcommittee for its review of the objections or concerns and its determination to confirm the initial IEP or to develop a new IEP recommendation.

B. The remand process, culminating in the Board of Education's vote to arrange for appropriate special education programs and services must be carried out within the original time frame of 60 school days or 30 school days, respectively, as set forth above.

C. Where the Board of Education decides to establish a second committee on special education or subcommittee on special education to develop a new recommendation, if the Board disagrees with such new recommendation, it may only remand the recommendation to the second committee or subcommittee, with a statement of the Board's objections or concerns and may not remand it back to the original committee.

D. The remanding process is described in the Regulations as permitting the Board to repeatedly send the recommendation back to the remand committee (original or second committee, where applicable). However, repeated remands are still subject to the same time lines as described above (§200.4[e][2][i] and [ii]).

E. The Board may not reject the recommendation of the second CSE and adopt the recommendation of the first CSE.

Board Action Recommendations

Prior to arranging for the placement of the students, the Board should be presented with the following information from the CSE/CPSE:

- The student's classification, placement, programs and services.
- A rationale for the program and placement regarding extent of services requirements and least restrictive environment analysis.
- Ask questions about special education services, placements and programs.
- Ask Special Education Director to ask apprise the Board of difficult or contentious IEP issues before the onset of litigation.
- Become familiar with IDEA requirements and state law.
- Be familiar with the District's biennial special education plan.

- Review all policies and procedures to make sure your district is not discriminating against students with disabilities and is providing appropriate services.
- Remember a Board member has the right to review individual IEPs, although it's not a specific obligation. But do not hesitate to ask questions.
- Don't veto an IEP solely for the reason of cost concerns.
- If reviewing IEPs, keep all personally identifiable student information confidential.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

Overview of Key Provisions and Definitions

The Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment, was enacted in 1974 to ensure the privacy of student records. The Act establishes the parameters under which student records and information contained in them could be disclosed to individuals other than parents/guardians (hereinafter "parents") or the students themselves. The Regulations implementing FERPA were recently amended to implement provisions of the USA Patriot Act and the Campus Sex Crimes Prevention Act which added new exceptions permitting disclosure of personally identifiable information, two recent U.S. Supreme Court decisions and other changes deemed by the Department of Education to be necessary.

General Provisions

1. Under FERPA, parents have the right to inspect and review the education records of their child(ren) maintained by the school district and to request amendments to the records. Any others who wish to have access to the education records of a child must have prior written consent, unless the situation falls under one of the exceptions.

2. A school district must comply with a parent's request within a reasonable time, but not later than 45 days after the request.

3. If a parent or eligible student is unable to inspect and review the records, the school district must make a copy of the requested records.

4. A school district may charge the parent or eligible student a fee for copies of education records, unless imposition of a fee would effectively prevent the parent or eligible student from exercising their rights. The fee, if any, would be established by Board policy.

5. Parents are only entitled to view the information regarding their own child. Therefore, if a record contains information on another student, the parent may inspect only the portion relevant to his/her child.

6. Parents have the right to file a complaint with the U.S. Department of Education's Family Policy Compliance Office regarding any alleged violation by the school district.

7. FERPA requires school districts to give annual notice to parents and eligible students of their rights under FERPA.

8. **Transfer of FERPA Rights.** Parents' rights under FERPA transfer to a student when the student turns 18 or enters a post-secondary institution. However, under §99.31(a)(8) of the Regulations, an educational agency or institution may disclose educational records to an eligible student's parents if the student is a dependent as

defined in §152 of the Internal Revenue Code of 1986. Thus, if a student is claimed as a dependent for federal income tax purposes by either parent, then under the Regulations, either parent may have access to the student's educational records without the student's consent.

Definitions

A. **Education Records:** Records, files, documents and other materials (e.g., films, tapes, photographs) that contain information directly related to the student that are maintained by a school district or by a person acting for a school district which are not specifically excluded under the five categories of exceptions.

- *U.S. v. Miami University,* 294 F 3d 797 (6th Cir. 2002). The Court found that student disciplinary records are "educational records" within the meaning of FERPA and cannot be released to a newspaper without consent of student or parents.

B. **Disclosure:** To permit access to or to release, transfer or otherwise communicate the contents of a student's education record or personally identifiable information contained in the records to any party, orally, in writing or by electronic means.

C. **Parent:** A natural parent (biological and adoptive), guardian or person acting as the parent in the absence of the parent or guardian. Does not include a step-parent unless the step-parent has day-to-day responsibility for the child.

C. **Personally Identifiable Information:** Information contained in student's record capable of identifying the student, including but not limited to name, address, social security number, student number or personal characteristics which would make the student identifiable. The 2009 amendments to the FERPA Regulations add "biometric records" to the definition of personally identifiable information (meaning "a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual" such as fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics and handwriting).

D. **Directory Information:** Information that generally would not be considered harmful if released from a student's record. The following may be classified by a school district as directory information:

- Name
- Address
- Telephone Number
- Email Address
- Photograph
- Date and place of birth

- Major field of student
- Dates of attendance (but not daily attendance records)
- Grade level
- Enrollment status
- Participation in officially recognized activities and sports
- Weight and height, if a member of an athletic team
- Degrees, honor and awards received
- Most receive educational agency or institution attended
- May include a student ID number ONLY if it cannot be used to gain access to educational records except when used with one or more other factors to authenticate the user's identity (e.g., PIN, password, access code).

Directory information should never include a social security number, in whole or in part.

There was a 2011 amendment to FERPA that allows school districts to adopt "limited directory information" to limit the disclosure of directory information to specific parties (e.g., PTA, Education Foundation), for specific purposes (yearbooks, school rings, school photographer), or both.

Exceptions to Education Records

A. Records of instructional, supervisory and administrative personnel and educational personnel who work with them that are in the **sole possession** of the maker of the records **as a memory aid and** are not accessible or revealed to any other person, except a temporary substitute for the maker of the record.

B. Records of a school district created solely for the purpose of law enforcement. A school district can designate a "law enforcement unit" such as a School Resource Officer. This does **not,** however, include records of a school's disciplinary actions or proceedings.

C. Records maintained in the normal course of business, relating exclusively to an individual's capacity as an employee of a district. They do not include the records of a student employed by an educational agency as a result of their status as a student.

D. Records of a student who is 18 years of age or older, or who is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional acting in his/her professional capacity, and which are made, maintained or used solely in connection with the provision of treatment to the student, and are not available to anyone other than the persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice (e.g., treatment records). An exception to the exception exists for students who receive treatment under IDEA or Section 504.

E. Records that contain information about an individual who is no longer a student at that agency or institution (e.g., alumni records). However, records created or received by an agency or institution on a former student that are directly related to the individual's attendance as a student are not excluded from the definition of educational records under FERPA. Moreover, the 2009 FERPA Regulations clarify that once a parent or eligible student opts out of directory information disclosures, the agency must continue to honor that election after the student is no longer in attendance.

LEGAL IMPLICATIONS OF BULLYING AND CYBERBULLYING FOR SCHOOL DISTRICTS

Introduction

In the 1990's school authorities were alarmed by studies that revealed the prevalence of sexual harassment in the nation's secondary schools, describing the corridors in our schools as "hallways of sexual taunts". The surveys described the effects on students as leading to non-attendance and poor academic performance. Today, the "virtual hallways" exist on the Internet, in-home computers, PDAs and cell phones. The technology enables the mass distribution of sexually explicit images and movies, threats of violence and words that harm. The virtual hallways harbor the anonymous bullies and harassers who cause great psychological harm and have, on occasion, resulted in tragic deaths by suicide of their victims who are brought into relationships with them because of the compulsory education laws.

School administrators lack the means to monitor the virtual hallways unless they have the cooperation of students and their parents to bring forward the evidence that may provide a basis for corrective action. While rules governing on-campus conduct have been finely honed since the advent of the Project SAVE legislation that took effect in the 2001-2002 school year, those dealing with off-campus misconduct involving student-to-student sexting and cyberbullying, are either newly developed or in the process of being developed.

The Legal Context

The issues involving bullying and cyberbullying often interface with the anti-discrimination laws (e.g. Title VI of the Civil Rights Act [prohibiting racial discrimination], Title IX of the Elementary and Secondary Education Act [prohibiting sexual harassment], Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA [prohibiting disability discrimination], 42 USC Section1983 [Equal Protection Clause of the 14th Amendment of the U.S. Constitution, the Substantive Due Process Clause of the 14th Amendment of the U.S. Constitution] and New York's recently enacted Anti-Bullying Law, including its 2013 amendments to cover cyberbullying, knows as the "Dignity for All Students Act" or "The Dignity Act" (Education Law §§10-18). Against this legal backdrop, the call for policy review and updating, as well as comprehensive training programs for administrators, staff members and students is manifest. Student discrimination claims that involve bullying with discriminatory components (e.g. race, disability, sex, etc.) have led to significant liability when pursued in federal court and the out-placement of victims where the intervention has been inadequate.

On October 26, 2010, the U.S. Department of Education, Office for Civil Rights (OCR) issued a "Dear Colleague" letter warning school districts that some student misconduct that falls under a

school's anti-bullying policy also may trigger responsibilities under one or more of the anti-discrimination laws enforced by OCR. School districts may violate these civil rights statutes when peer harassment based on race, color, natural origin, sex or disability creates a hostile environment and is either encouraged, tolerated, not adequately addressed or ignored by school employees.

Note: The letter references a "knew or should have known standard" for school district liability, but the Second Circuit Court of Appeals has required "actual knowledge".

THE DIGNITY FOR ALL STUDENTS ACT

On September 8, 2010, Governor Paterson signed the Dignity for All Students Act ("DASA" or "The Dignity Act") which prohibits harassment and/or discrimination of students by employees or other students on school property or at school functions based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. The law was amended in 2013 to add cyberbullying as a form of discrimination (whether initiated from an on-campus or off-campus computer).

The Dignity for All Students Act requires school districts to:

- Revise their codes of conduct and adopt policies intended to create a school environment free from harassment and discrimination.
- The Code of Conduct must include an age-appropriate, plain language version of the District's policy.
- Adopt guidelines to be used in school training programs to raise awareness and sensitivity of school employees to these issues and to enable them to prevent and respond appropriately.
- Designate at least one staff member in each school to handle human relations in the area of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.
- Develop guidelines related to the development of nondiscriminatory instructional and counseling methods.
    - In founded cases **remediation** must be reasonably calculated to end the harassment, bullying, cyberbullying or discrimination and eliminate any climate that is hostile, creating one that is more positive to insure the safety of the student(s) who were targeted.

Definitions

Harassment under the amended DASA is broadly defined as the creation of a hostile environment by conduct or by threats, intimidation or abuse (verbal and non-verbal), including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

- **Bullying** has the same meaning as harassment (see below).

- **Cyberbullying** is harassment or bullying through any form of electronic communication. In order to be actionable under this Policy, cyberbullying that occurs off campus must create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

- **Discrimination** is the act of denying rights, benefits, justice, equitable treatment or access to facilities available to all others, to an individual or group of people because of the group, class or category to which that person belongs.

School property means any building, structure, athletic playing field, playground, parking lot, school land or school bus.

School function means a school-sponsored extra-curricular event or activity.

Sexual orientation is actual or perceived heterosexuality, homosexuality or bisexuality.

Gender is actual or perceived sex and includes a person's gender identity or expression.

Immunity from Civil Liability

Any person with reasonable cause to suspect a student has been subjected to discrimination or harassment by an employee or student on school grounds or at a school function and who in good faith reports such incident or participates in any formal or informal proceedings shall have immunity from civil liability. Reporting may be to school officials, the Commissioner of Education or law enforcement.

Retaliatory Action

No school district or employee shall take, request or cause a retaliatory action against any such person who acting reasonably and in good faith, either makes a report or participates in any formal or informal proceedings.

Suggestion: Make sure harassed students and their families know how to report subsequent problems, conduct follow-up inquiries and respond promptly to address continuing or new problems.

Instruction in civility, citizenship and character education

The instruction currently required by Education Law §801-a will now need to include instruction on "tolerance", "respect for others" and "dignity", including awareness and sensitivity to discrimination and/or harassment and civility in relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, physical or mental abilities, sexual orientations, genders and sexes.

State Education Department Guidance on Bullying and Cyberbullying

In New York State, bullying incidents are documented and reported through the Violent and Disruptive Incidents Reports (VADIR). Within this system, there is the Intimidation, Harassment, Menacing and Bullying (IHMB) incident category, which is broad enough to include cyberbullying and sexting incidents. The VADIR allows the State Education Department to track the frequency, geographic area, and the specific school in which both the highest and lowest levels of bullying incidents occur. Incidents in the IHMB category that come to the attention of the principal or school administrator, but do not arise to the disciplinary threshold, must also be logged and reported by the school in the VADIR Summary.

Sexting incidents should be reported on the VADIR in the IHMB category or the Other Disruptive Incidents category for any incident that: (1) was violent/disruptive; (2) occurred on school property or at a school sponsored event; or (3) meets or exceeds the disciplinary actions. Incidents in the IHMB category that come to the attention of the principal or school administrator but do not rise to the disciplinary threshold, must also be logged and reported by the school in the VADIR Summary.

School Climate

An environment that values and teaches respect for all may be the single most important factor in preventing, limiting and/or dealing with bullying and cyberbullying incidents.

Code of Conduct

The District Code of Conduct should include statements that make it abundantly clear that bullying and harassment, including cyberbullying and sexting, are inappropriate and will not be tolerated on school grounds or at school-sponsored events or functions, and prohibits the use of either school or personal information technology devices to either bully or harass.

A summary of the Code of Conduct must be provided to students and all persons in parental relation to students at the beginning of each school year. The Code of Conduct must be reviewed annually and updated, if necessary. A school district may establish a committee to facilitate the review of the Code of Conduct. A district may recruit someone with a strong technology background to participate on the committee to assist in advising how new technologies are being used.

The greatest challenge for school officials and administrators relating to bullying or cyberbullying is addressing behavior and/or incidents that take place off-campus and endanger the health and safety of students within the educational system or adversely affect the educative process. This is a rapidly evolving area of constitutional law.

Constitutional Issues

FIRST AMENDMENT

Student speech in the nature of off-campus conduct through the Internet that may be subject to sanctions under the Student Code of Conduct will be limited to that which leads to actual disruption or foreseeable disruption to the school environment (as predicted by the school authorities) or that involves a targeted threat against another student or school staff member.

A. ***Sexting***

Free Speech Analysis: Recent case law from the U.S. Supreme Court and the Second Circuit Federal Court of Appeals supports the notion that a First Amendment free speech claim would not be a barrier to implementing code of conduct penalties for sexting violations. Not only would a prohibition against sexting be consistent with a school district's mission to avoid the distribution of pornographic or obscene materials among its students *(Morse v. Frederick*, 127 S.Ct. 2618 [2007]), but sexting would also be unprotected speech under the *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 [1986] "plainly offensive" standard and the "materially and substantially disruptive of the educational process" standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 [1969] (see also *Guiles v. Marineau*, 461 F.3d 320 [2d Cir. 2006]).

B. ***Direct Threats***

Direct threats delivered off-campus by cyber-bullies do not constitute protected speech. (*Wisniewski v. Bd. of Educ. of the Weedsport CSD,* 494 F 3d 34 [2d Cir. 2007]).

The Law Governing Off-Campus Misconduct

A school district's student code of conduct may provide for discipline for off-campus misconduct based upon a legal principle first announced by the Commissioner of Education in *Matter of Rodriguez,* 8 Ed. Dept. Rep. 214 (1969) wherein it is stated:

> "Whether discipline is to be meted out to such students and the measure thereof, is within the discretion of the school authorities. The mere fact that such conduct occurs or such conditions exist outside the school situation or the school official pupil relationship does not preclude the possibility that such conduct or condition may adversely affect the educative process or endanger the health, safety or morals of pupils within the education system for which the school authorities are responsible. The school authorities are in the best position to determine whether the education system for which they are responsible has been or could be so affected, and their determination will not be upset absent some showing that they have abused their discretion in making it." *Id.* at 216-17.

The Commissioner and the courts have consistently applied the rationale of *Rodriguez* to uphold discipline in matters involving off-campus criminal conduct that reasonably could have a spill-over effect on the campus that may adversely affect the educative process or would endanger the health, safety or morals of students in the schools. *(Pollnow v. Glennon, et al.,* 594 F. Supp. 220 [SDNY 1984], aff'd 757 F 2d 496 [2d Cir. 1985]). The *Rodriguez* standard may also be applied in cases that do not involve off-campus criminality but, nevertheless, may adversely affect the educative process or endanger the health, safety or morals of students within the schools. *(Matter of Coughlan v. Board of Education,* 262 AD 2d 949 [4th Dept. 1999]).

Where a threat originates off-campus and is delivered to a district website or answering machine *(Appeal of B.B.,* 38 Ed. Dept. Rep. 66, Decision No. 14,113 [1999] - email bomb threat; and *Appeal of J.F.,* 46 Ed. Dept. Rep. 205, Decision No. 15,483 [2006] - cell phone call to school answering machine threatening to bring a gun to school), the on-campus reach of the conduct makes it subject to sanctions under a student code of conduct.

FOURTH AMENDMENT

Absent a student's consent to a search, the school authorities must have reasonable suspicion that the intended search will yield illegal contraband or evidence that would support a violation of the code of conduct. By policy, searches of lockers, desks and school computers may be conducted in the absence of reasonable

suspicion where notice has been given to students that they are not private property and there should be no expectation of privacy regarding their contents. Strip searches require a heightened standard of reasonable suspicion (to be avoided if possible). A strip search is impermissible if its intrusive nature is not outweighed by the foreseeable danger inherent in not conducting the search. (*Stafford Unified School District v. Redding, 557 US 364 [2009] - where a strip search to look for prescription Tylenol did not justify such an intrusive search.*)

Search and Seizure Issues

The ability of school officials to search students' private cell phones, iPods, netbooks and other portable devices capable of displaying an image is constrained by the Fourth Amendment's *reasonable suspicion* standard for conducting a warrantless administrative search, as first announced in the U.S. Supreme Court decision, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Thus, before such property may be seized on an involuntary basis and a search for sexual images conducted, school officials must have sufficient evidence to lawfully conduct the search at its inception (e.g., an admission by the student, information from a reliable informant who has seen the images on the property to be searched or an admission against interest by the other person who transmitted their sexually explicit image to the student whose property will be searched) *(Phaneuf v. Fraikin*, 448 F. 3d 591 [2d Cir. 2006]). Once the search proceeds, it must, likewise, be reasonable in its scope (*Id.).* To the extent that evidence of sexting exists in the form of pictures or video on a school computer, the school authorities may have the legal right to review attachments to emails on student network accounts without having to satisfy the *reasonable suspicion* standard under the legal theory applicable to locker searches *(People v. Overton*, 20 N.Y. 2d 360, aff'd on reh'g 24 NY 2d 522 [1969]). It should be noted that a search without reasonable suspicion under the *Overton* standard requires placing the students on written notice that their student network accounts are not private and may be subject to inspection at any time by school officials.

FEDERAL CIVIL RIGHTS CLAIMS
(42 USC §1983)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States... to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law" (42 USC §1983)

There are two threshold elements of a §1983 Claim:

1. The Defendant acted under color of state law.

2. As a result of the Defendant's actions, the Plaintiff suffered a denial of his/her federal rights and privilege. (*Annis v. County of Westchester,* 136 F.3d 239, 245 [2d Cir. 1998].)

14th Amendment Liberty Interest in Protecting Students' Bodily and Mental Well-Being

Due Process Clause of the Fourteenth Amendment

> "[n]o state shall... deprive any person of life, liberty, or property, without due process of law."

1. *DeShaney v. Winnebago County Dept of Social Services,* 489 U.S. 189 (1989)

> In this case, a County Department of Social Services received several complaints that the plaintiff child may have been abused by his father. Although the Department took steps to investigate the complaints, it nevertheless placed him in the custody of his father, who abused him to the point that he suffered severe permanent brain damage. The child and his mother commenced a § 1983 action against the Department, arguing that it violated the child's right to substantive due process by failing to protect him from his father's abuse. The Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" *(Id.* at 197).
>
> "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means" *(Id.).*

Special Relationship

> "[W]hen a State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being". The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf" *(Id.* at 199-200).

General Rule: Generally, the state has no affirmative duty to protect the life, liberty or property of a citizen from deprivations of private actors.

Two Exceptions:

- **Special Relationship:** When a state takes a person into custody, confining him or her against his/her will.

- **State-Created Danger:** Where the state affirmatively places the plaintiff in a dangerous situation - When the state actor takes some affirmative step that "assisted in creating or increasing the danger to the victim" *(Dwares v City of New York,* 985 F.2d 94 [2d Cir. 1993]).

Second Circuit Cases

1. *Smith v. Guilford Bd. of Educ.*, 226 Fed. Appx. 58 (2007) (U.S. Court of Appeals, 2d Circuit)

   In this case, plaintiff parents brought action against school board, superintendent, school board members, and employees, alleging violations of the student's due process and equal protection rights and violations of student's right to a FAPE under the IDEA. The U.S. District Court for the District of Connecticut granted defendant School District's motion to dismiss. On *de novo* review, the Court of Appeals for the Second Circuit upheld the District Court's dismissal of plaintiff's due process and equal protection claims. The Court held, among other things, that the School's failure to respond to the harassing and bullying of a ninth grade student with ADHD who was 4'7" and 75 lbs., while highly unfortunate, did not give rise to the level of egregious conduct so brutal and offensive to human dignity as to shock the conscience, as required to support a substantive due process claim under either the "special relationship" or "state-created danger" exceptions. However, the Court vacated the District Court's dismissal of plaintiff's claim brought pursuant to §1983 that defendants violated the student's statutory right to a FAPE.

THE TAYLOR LAW AND OUR SCHOOLS

Taylor Law Origins

The Taylor Law, Article XIV of the New York State Civil Service Law, was enacted in 1967 to replace the Condon-Wadlin Act of 1947. The purpose of the Taylor Law is to regulate, through the Public Employment Relations Board (PERB), a compulsory collective bargaining process between public sector unions and employers where the right to negotiate arises through the employer's voluntary recognition or an involuntary certification process by a PERB conducted election or administrative review. Once recognized or certified to negotiate, the union or employee organization is also empowered as a grievance representative (*Rosen v. PERB*, 72 NY 2d 421 [1981]).

The failure of the Condon-Wadlin Act to stabilize public sector labor relations that led to the creation of the Taylor Law was attributable to its strike penalties which on many occasions during the 1960s were forgiven by the N.Y.S. Legislature. These penalties included: (1) abandonment of job rights *unless*: (2) re-employed at a salary no greater than that at the time of the strike; (3) no raises for at least three years following reinstatement; and (4) five years' service as an at-will probationary employee following reinstatement.

The Public Employment Relations Board

The Taylor Law Legislation created the Public Employment Relations Board (PERB). PERB is comprised of a three person panel serving in a quasi-judicial appellate capacity to make final agency determinations regarding: (1) Improper Practice Charges decided by administrative law judges; (2) Director's decisions in representation matters regarding unit determinations, elections and certifications of bargaining representatives; (3) Administration of strike penalties against labor organizations; (4) the Supervision of the Conciliation Department which employs or retains mediators and fact-finders; and (5) Enforcement carried out through the Legal Department which defends PERB's decisions and renders informal opinion letters.

Representation Rights

Under the Taylor Law there is a strong public policy calling for the representation of public employees in appropriate collective bargaining units. Unlike the private sector, where supervisors are not employees with the right to union representation, generally administrators and supervisors enjoy the right to unionize and be represented for collective negotiations and the presentation of grievances pursuant to collectively negotiated agreements. Employees who meet the definition of managerial or confidential within the meaning of §201(7)(a) of the Civil Service Law may be exempted from representation in a collective bargaining unit. Whether or not

certain titles are within bargaining units or should be added to bargaining units are addressed through petitions to PERB in the nature of unit clarification or unit placement. The following cases shed light upon these representation-related matters.

Subjects of Bargaining

A. ***Mandatory Subjects:*** Wages, hours and other terms and conditions of employment which, on balance, are more central to employee work rights than the public service mission of the public employer *(New Rochelle,* 4 PERB ¶3060; Yorktown, 7 PERB ¶3030).

B. ***Permissive Subjects:*** Inherently and fundamentally matters of (Non-Mandatory) policy making related to the primary mission of the public employer or because the legislature intended to commit these matters solely to the discretion of the public employer (*Bd. of Educ. [City of New York] v. PERB,* 75 NY2d 660 [1990] - citing *Webster CSD v. PERB,* 75 NY2d 619 [1990]).

C. ***Converted Subjects:*** Permissive subjects that have been placed within the parties' collectively negotiated agreement are treated as mandatory subjects for all purposes (*Greenburgh No. 11 Federation of Teachers,* 32 PERB ¶3024 [1999]).

D. ***Prohibited Subjects:*** Where the statute leaves no room for negotiability (*[Cheektowaga] UFSD v. Nyquist,* 38 NY2d 137 and *Bd. of Educ. [City of New York],* 75 NY2d 660 [1990], or where strong public policy concerns, whether express or implicit in the law, would be violated (see *Susquehanna Val. Teachers Assn.*, 37 NY2d 614,617, and *Cohoes CSD v. Teachers Assn,* 40 NY2d 774).

E. ***Reserved Right to Revert:*** Employer right to revert to express contract language notwithstanding past practice to the contrary (*State of New York - Unified Court System,* 26 PERB ¶3013 [1993]; *Florida UFSD,* 31 PERB ¶3056 [1998]; and *County of Nassau,* 31 PERB ¶3074 [1998]).

Past Practice

Chenango Forks Teachers Association, 40 PERB ¶3012 (2007) - In this case, PERB made clear its test for determining whether or not a binding past practice exists, by affirming the test that it had established in *County of Nassau,* 24 PERB ¶3029 (1991), while expressly overruling a number of PERB decisions decided between 1999 and 2005 that had deviated from the *County of Nassau* standard. PERB will deem a past practice to be binding if:

> "[The] practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."
>
> **[NOTE:** In *County of Nassau,* the practice was uninterrupted and endured for at least 17 months.]

PERB opined that the expectation of a past practice by unit members "may be presumed from its duration and does not require additional proof of mutuality of agreement" (such as knowledge on the part of a managerial employee or a high-level supervisor). PERB further noted that annual budget appropriations made by a Board of Education pursuant to §2022 of the Education Law (i.e., Medicare Part B payments to retirees from the bargaining unit) would constitute constructive knowledge of the past practice, since such expenses were subject to review during the budget preparation process.

Once notice of a past practice is presumptively established, the employer then bears the burden to prove that it lacked actual or constructive notice.

In *Chenango Forks, supra,* the Improper Practice Charge focused on whether or not current bargaining unit members had a reasonable expectation at the time of their retirement from the bargaining unit of the continuation of the District's past practice of funding Medicare Part B reimbursements. The evidence demonstrated that the District had for at least five years paid hundreds of thousands of dollars towards reimbursement of retirees for costs of Medicare Part B.

The case was remanded to the Administrative Law Judge to determine if the Association and/or its current employees in the bargaining unit had actual or constructive knowledge of the Medicare Part B reimbursement benefit upon retirement, such that the practice should continue. Finally, PERB reiterated that there is no duty under the Taylor Law to negotiate for those who are not in the bargaining unit, including retirees.

The Status Quo of Legislative Triborough

The statutory enactment of §209-a(1)(e) of the Civil Service Law in 1981 was aimed at restoring a PERB agency doctrine known as the Triborough Doctrine (*Triborough Bridge and Tunnel Authority,* 5 PERB ¶3037 [1972]), in light of a then-recent Court of Appeals decision (*Rockland County BOCES v. PERB,* 41 NY2d 753 [1977]), which overruled the doctrine regarding the right to automatic step increment in the year following the expiration of a collectively negotiated agreement (the hiatus period), but before a new agreement is concluded.

A. ***Life under the Agency Doctrine:***

1. Status quo on mandatory subjects contained within an expired agreement;

2. Step and other years of service driven benefits to be continued;

3. Employer right to unilaterally change non-mandatory subjects contained in the expired agreement;

4. Grievances must be promoted to highest pre-arbitral level in the expired contractual grievance provision;

5. Union without the right to arbitrate grievances since the courts would not recognize the existing contract arbitration clause to enforce;

6. Employer right to unilaterally change a mandatory subject of negotiations for compelling reasons at the post-true impasse stage, so long as willing to continue negotiations following the change (*Wappingers CSD*, 5 PERB ¶3074 [1972]).

B. ***Life under "Legislative Triborough":***

1. All of the provisions in the expired agreement, whether mandatory or non-mandatory, continue in full force and effect until a new agreement is ratified and legislatively approved.

2. Question as to whether or not unilateral change for compelling reasons may be made, absent proof that the subject constitutes a prohibited non- negotiable subject, as a matter of public policy.

3. Arbitration provisions are enforceable via improper practice proceedings brought to PERB;

4. Removal of non-mandatory subjects from an expired agreement requires a negotiated change (*Greenburgh No. 11 Federation of Teachers*, 32 PERB ¶3024 [1998]).

5. Does a violation of §209-a(1)(e) exist since *Surrogates II* case (79 NY2d 39 [1992] -- see *State of New York*, 26 PERB ¶4551 [1993] and *Seaford Union Free School District*, 26 PERB ¶4596 [1993]). PERB ruled that "(e)" violations exist because the contract does expire on its termination date (*State of New York*, 27 PERB ¶3001, [1994]).

C. ***Permissible Unilateral Changes after §209-a.l(e)*:**

1. School district had unilateral right to subcontract its cafeteria program without negotiating the decision to do so where the "management's rights" clause provided District right to "contract for performance of any of its services." Where the clause stated "any" of its services, PERB concluded that the specific service (cafeteria) was included within the sweep of the management's rights clause (*Garden City UFSD*, 27 PERB ¶3029 [1994]).

2. Unilaterally changing qualifications for promotion and/or employment notwithstanding a past practice of applying more limited non-contractual criteria (*Buffalo PBA*, 29 PERB ¶3023 [1996]).

3. To discontinue step increment where there is an express contractual waiver provision effective upon the expiration of the agreement (*Schuylerville Tea. Assn.*, 29 PERB ¶3029 [1996]).

4. Contractual language retaining unrestricted discretion in granting leaves will allow abandonment of a practice of always granting such leaves *(Schalmont CSD*, 29 PERB ¶3036 [1996]).

D. ***Impasse Procedures for Public Schools under §209 of the Civil Service Law***

1. Mediation in the event of impasse (120 day technical impasse or true impasse -- see *City of Mt. Vernon*, 11 PERB ¶3095 [1978] -- premature impasse determination by mediator;

2. Fact-finding;

3. Superconciliation;

4. No change except for agreed upon change.

E. ***Duty to Bargain in Good Faith***

Relevant Cases

1. Both parties are required to approach the negotiations table with the sincere desire to reach an agreement, where argument, persuasion and the free exchange of views may take place (*East Meadow Teachers' Assn.*, 16 PERB ¶3086 [1983] and *Southampton PBA*, 2 PERB ¶3011 [1969]).

2. There is a mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment (*Id.).*

3. There is no duty to agree to any particular proposal (*Lynbrook PBA*,10 PERB ¶3067, at pg. 3119 [1977]). However, a failure to make any concession or reach any agreement is a factor to be considered in determining a party's good faith (*Deposit Teachers Assn.*; 27 PERB ¶3020 [1994]).

4. Good Faith bargaining must be demonstrated from the ground rules stage through the ratification process;

   a. Since ground rules are not required under the Taylor Law, insistence upon the presence of the press or public at negotiations sessions violates the law (see *County of Saratoga*, 17 PERB ¶3053 [1984]; and *Town of Shelter Island*, 12 PERB ¶3112 [1979]).

   b. At the mediation stage, insistence on the confidentiality of proposals over the other party's objection violates the Taylor Law as an unlawful ground rule (*Greenburgh No. 11Federation of Teacher*s, 32 PERB ¶3035 [1999]).

   c. One side may not insist upon who will be present as the representative(s) of the other side (*County of Nassau*, 12 PERB ¶3090 [1979]) and may not condition negotiations upon the release of team members with pay *(Town of Riverhead*, 25 PERB ¶3057 [1992]).

   d. Meetings must be reasonably scheduled with dates fixed in time (*Uniformed Firefighters Assn. [Mt. Vernon]*, 11 PERB ¶4539 aff'd 11 PERB ¶3095 [1978]).

   e. A two month delay is violative of the law (*Harrison Assn. of Teachers*, 7 PERB ¶3041 [1974]) and *Town of Hempstead*, 27 PERB ¶3039 (1994). A teachers union's four month delay in filing a fact-finding brief also violates the duty to negotiate in good faith (*Poughkeepsie City School District*, 27 PERB ¶3079 [1994]).

   f. Reasonable efforts must be made to resolve differences (*Lynbrook PBA*, 10 PERB ¶3067 [1977]).

   g. Information meaningful to the negotiations must be made available by either party (*Village of Johnson City*, 12 PERB ¶3020 [1977]).

h. A zero increase proposal, indicative of "hard bargaining", is not a *per se* violation of good faith bargaining (*Columbia County CSEA*, 10 PERB ¶3047 [1977]). Adamancy or hard bargaining is not by itself evidence of a failure to negotiate in good faith. (*Town of Scriba*, 35 PERB ¶3011 [2002]).

1. The withdrawal of previously reached tentative agreements may be considered in bad faith, absent extenuating circumstances (*Merrick UFSD*, 17 PERB ¶3006 [1984]; *Peekskill CSD*, 16 PERB 3075 [1983]).

j. Awaiting state aid figures before promoting salary offer is permissible *(Yonkers CSD*, 17 PERB ¶3006 [1984]).

k. Awaiting teachers' contract settlement before negotiating to conclusion with another unit (nurses) violates the duty to negotiate *(East Ramapo School Nurses*, 31 PERB ¶3038 [1998]).

l. Proceed to the negotiating table when union demands impact negotiations arising from management decision - may not decide unilaterally that there is no impact (*North Babylon UFSD*, 7 PERB ¶3027 [1974]).

m. Subcontracting of services requires decision bargaining and not just impact bargaining (e.g., transportation services - *Odessa Montour CSD*, 28 PERB ¶3031 [1995]). Exceptions for BOCES CoSer agreements where only the impact of the decision is subject to negotiations (e.g., head custodian services - *Scio CSD*, 29 PERB ¶4545 [1996]; cosmetology and machine shop - *Lackawanna Tea. Assn.*, 28 PERB ¶3023 [1996]; and summer school - *Webster CSD v. PERB*, 75 NY2d 619 [1990]).

n. Negotiators must be empowered to make agreements necessary to conclude negotiations (*Sachem CSD*, 6 PERB ¶3014 [1973]; and *Somers CSD*, 3 PERB ¶3001 [1970]).

Pressure Tactics in Taylor Law Negotiations

A. ***Residential Picketing:***

The First Amendment protects the rights of employees to picket, whether at school or in residential neighborhoods, on the public streets, and even in front of the work places of Board members (*East Meadow UFSD* 26 PERB ¶7509 [Sup. Ct. Nassau Co. 1993]).

However, "targeted residential picketing: may be enjoined because of its disruptive effect upon family life, an unwarranted invasion of privacy." (*Id.*) Thus, a court might order no

picketing within 200 feet of a Board member's home or that the pickets may not pass in front of the home more frequently than every five minutes, between the hours of 7 AM and 7 PM (*East Meadow, supra* and *Greenburgh Eleven UFSD.*, ___ Misc. 2d ___, Index No. 1071-94 [Westchester Co. Supreme Ct. 1994])

B. ***Communications about Board Members:***

During contentious negotiations, Board members may be subjected to public ridicule and even criticized to their private employers.

1. *Wappingers CSD,* 27 PERB ¶3033 (1994)

The school district alleged that its teachers union violated the duty to negotiate in good faith under §209-a.2(b) of the Civil Service Law when it reprinted in its newspaper a cartoon that had previously appeared in a student newspaper, depicting a District administrator and certain board members as clowns and circus animals. PERB ruled that this union activity did not violate the Taylor Law, even if it was intended to vilify or punish the administrator and board members for their positions in resolving grievances and in contract negotiations.

In addressing the use of pressure tactics, PERB opined:

> "... a negotiations process always includes myriad pressures which are specifically intended to cause a party to change its position on a matter involving some aspect of the employer-employee relationship. Labor negotiations under the Act are fundamentally all about pressure in one form or another. Only when conduct away from the bargaining table becomes unlawful does the Act seek to regulate or curtail that conduct." (*Id.* at 3078)

C. ***Employer Communications with Unit Members:***

School Officials have an unmitigated right to communicate facts without threats of reprisal or promise of benefits.

1. *Greenburgh No. 11 Federation of Teachers,* 32 PERB ¶3035 (1999)

A school district may communicate in writing directly to its staff regarding negotiations, so long as the contents are factual, informative and do not contain threats of reprisal or promise of benefits or otherwise attempt an end

run around the union. The fact that memoranda were issued to staff on 16 occasions regarding negotiations sessions shortly after each session by school officials did not constitute bad faith negotiations (*Id.* at 3080).

PERB further held that a union demand that the employer not communicate with its rank and file or the public about its proposals in mediation sessions violated the Taylor Law because ground rules are non-mandatory, and substantive negotiations may not be conditional upon the agreement to ground rules. (see also *Town of Shelter Island*, 12 PERB ¶3112 [1979])

2. *City of Albany*, 17 PERB ¶3068 (1984)

PERB held that city representatives had the right to express their opinions regarding the merits of a proposed agreement and its potential economic consequences to members of the bargaining unit, so long as they did not do so in a coercive manner. The speech neither promised a benefit nor threatened reprisal against the employees.

D. ***Strikes and Penalties***

Any strike or other concerted stoppage of work or slowdown by public employees (§201[9], Civil Service Law).

1. Failure to report to work (11 PERB ¶3065**);**
2. Refusal to work overtime after signing on list (8 PERB ¶3056**);**
3. Refusal to work scheduled hours (67 Misc. 2d 793, aff'd 38 AD 2d 691);
4. Resignation from extra-curricular assignments (11 PERB ¶3060; 13 PERB ¶3046);
5. Refusal to attend and/or participate in faculty meetings (11 PERB ¶3060; 13 PERB ¶3040)**;**
6. Failure to attend parent orientation night when expected (15 PERB ¶3110);
7. Failure to attend customary after-school staff meetings (22 PERB ¶4554);
8. Failure to participate in field trips (11 PERB ¶3085);
9. Failure to perform expected extra help for students (11 PERB ¶3085);
10. Sympathy strike (21 PERB ¶3033);

11. Blue flu (sick-out) (13 PERB ¶3026, aff'd 78 AD 2d 1016);

12. One day sick-out; excessive absence rate (28 PERB ¶3050).

E. ***Penalties:***

1. Two for one gross pay payroll deduction;

2. Injunction vs. strike;

3. Civil and criminal contempt;

4. Union's loss of automatic dues check-off (15 PERB ¶3110).

EMPLOYING THE NON-INSTRUCTIONAL STAFF

The non-instructional staff serves under the Civil Service System and the Department of Education has no jurisdiction over their employment. The classifications of civil service employees are: Exempt, Competitive, Non-competitive and Labor. The designation of positions into each class is determined by the local Civil Service Authority (i.e., County Civil Service Department or City Civil Service Department) and not by the Board of Education. The Civil Service Rules issued by the local civil service authorities govern all municipal and school district units of government within their jurisdiction.

The only civil service positions that are not at-will positions are the Competitive Class Positions for which examinations are conducted by the civil service authorities. Pursuant to §61 of the Civil Service Law, the Board of Education must select an individual from a certified list of eligibles for the position, one among the three highest scored applicants willing to take the position upon canvassing the candidates on the list. Local school districts may not act contrary to the determination of the County or City Civil Service Department in selecting from within the top three willing eligibles.

Hearing Rights

After the completion of the probationary term, as set forth in the County or City Civil Service Rules, competitive class employees may not be removed from office except after a due process hearing described in §75 of the Civil Service Law. Non-competitive class employees attain the same right after five years of employment with the school district. Hearing rights are also afforded to civil service employees who have completed their probationary terms and who are veterans of a wartime period or serve as exempt volunteer firefighters. Sometimes, through collective bargaining agreements, hearing rights are modified, including by extending the rights to those in positions not covered by the statutory right to a hearing.

Layoff and Recall Rights

Competitive class employees are entitled to layoff and recall rights pursuant to §§80 and 81 of the Civil Service Law. Layoff protocols are determined by the County or City Civil Service Rules and the recall rights are for a period of four years from the effective date of the layoff. The Civil Service Rules describe bumping rights to lesser positions in a line of titles and retreat rights, if any, to job titles in previous lines of service. It is common for school districts to establish contractual layoff and recall procedures for the non-competitive and labor class positions.

EMPLOYING THE PROFESSIONAL STAFF

The professional staff in a school district or BOCES is commonly referred to as the certified staff, meaning that their positions are pedagogical, covered by Part 80 of the Regulations of the Commissioner of Education and exempt from the Civil Service System by reason of §35-g of the Civil Service Law. The lists of pedagogical job titles exempt from the Civil Service are set forth in documents issued by the Commissioner of Education to the New York State Department of Civil Service.

Nature of Employment by Position

A. ***Superintendent of Schools*** **-** Superintendents generally are employed for contract periods of between three and five years or, in the case of a small city school district Superintendent, one to five years. A contract of lesser or greater duration would be illegal and the employment would be *at-will*.

B. ***Other Administrators*** **-** Deputy Superintendents, Associate Superintendents, Assistant Superintendents, Directors, Supervisors, Principals and Assistant Principals serve in tenure bearing positions subject to a three year probationary term, except in small city school districts where the under-Superintendents are not in tenure bearing positions, but may be granted a contract of between one and five years duration.

C. ***Teachers*** **-** Teachers serve in tenure bearing positions subject to a three year probationary term, that may be shortened by: (1) previous tenure as a teacher in New York's public schools or BOCES, in which case it would be a two year probationary term or (2) up to four semesters of credit towards probation for long-term substitute service that immediately precedes appointment to probation in the same tenure area (must be full-time continuous service as a substitute in that tenure area) - *Jarema Act* credit. Only one of the shortening provisions may be applied to reduce the probationary term. There must be at a minimum of one-year period of probation. These provisions apply only to teachers (not to administrators or teaching assistants).

D. ***Teaching Assistants*** **-** Teaching assistants serve in tenure bearing positions subject to a three year probationary term.

E. ***Exceptions*** **-** Part-time service is neither tenure bearing nor seniority bearing service unless specified as such in a collective bargaining agreement. Substitute service that is part-time or does not lead immediately into probationary service is neither tenure bearing nor seniority bearing.

Probationary Employment

During the probationary term, employees in tenure bearing positions may have their employment terminated without a hearing pursuant to the provisions of §3031 of the Education Law, commonly known as *"The Fair Dismissal Law"*. A termination before the end of the

probationary term is referred to as a mid-term termination and may only occur upon the recommendation of the Superintendent of Schools and concurring vote of the Board of Education. At the end of the probationary term, either the Superintendent or the Board of Education may deny tenure.

The termination process, when initiated by the Superintendent, begins with a letter notifying the probationer of a Board meeting that will occur upon at least 30 days' notice, at which the Board will review a recommendation from him/her to terminate probation or deny tenure effective at the end of the probationary term. Then, at least 21 days before the meeting the probationer may make a written request to the Superintendent for a written letter with a reason or reasons for that recommendation. Within seven days of the request for reasons, The Superintendent must issue a letter to the probationer and at least seven days before the Board meeting, the probationer may submit to the Board a rebuttal letter (§3031[a] Ed. Law). In addition, when a mid-term termination occurs, the probationer is entitled to at least 30 days' notice of the effective date when employment will end (§3012 Ed. Law). When the Superintendent issues a negative tenure recommendation, the same must be given to the probationer at least 60 days before the final day of the probationary term (*Id.*).

If the Superintendent issues a positive recommendation for tenure and the Board votes in the negative, the Board's vote is, by operation of law, deemed to be advisory and a second vote, upon at least 30 days' notice to the probationer, must be held to finally determine the tenure question. During that period, the probationer may request the Board's reason(s) and write a rebuttal letter, with all required time frames being parallel to those described above (§3031[b] Ed. Law).

When the *Fair Dismissal Law* was enacted, the Legislature did not intend the letter writing aspects of the law to create an expectation of continuing employment for the probationary term so as to create a property interest in employment that would confer rights to a pre-termination due process hearing by reason of the 5th and 14th Amendments of the U.S. Constitution (§3031[c] Ed. Law).

The enactment of §3012-c of the Education Law regarding the evaluation of classroom teachers and building principals under the recent Annual Professional Performance Review (APPR) law that restricts termination from employment of such probationers during the pendency of an appeal from their annual composite APPR Score, raises questions about the necessity to follow federal due process standards when terminating the employment. Litigation on this issue is expected.

***Tenure rescission and resignation in return for tenure*:**

- A Board may rescind tenure conferral for good cause after voting to grant tenure, but before the effective date of the tenure conferral passes (*Shaffer v. Schenectady Sch. Dist.*, 96 NY2d 271).

- Tenure may be granted in exchange for a resignation without conferring any rights beyond the mere granting of tenure (*Roman v. Tompkins-Seneca-Tioga BOCES*, 98 AD2d 835).

Juul Agreements

The N.Y.S. Court of Appeals, in *Juul v. Bd. of Educ.*, 55 NY2d 648 (1984), recognized that a pedagogical employee's probationary term could be extended without creating *tenure by estoppel* for a period of an additional one year. A legally enforceable "Juul Agreement" establishes forbearance on the part of the Superintendent and Board of Education from making a tenure decision and an agreement on the part of the probationary employee to have the tenure decision making deferred for the period of the agreement.

A written agreement is required to be signed by the Superintendent of Schools, a Board representative and the probationary employee after approval by the Board of Education.

LAYOFFS AND SENIORITY

Introduction

The lawful implementation of reductions in force (layoffs) incidental to the abolition of positions first calls for the identification of the positions that will be discontinued and a matching of those employees with the least seniority in the positions that will be affected by the layoffs. The layoff process is concluded by at least a quorum of the Board of Education voting on layoff resolutions at a duly convened open meeting, followed by notification letters addressed to the affected personnel.

There are separate layoff protocols for teachers, teaching assistants, administrators, competitive class civil service employees and all other civil service employees.

Teacher Layoffs

Teacher layoffs are governed by Education Law §2510 (small city school districts) and the corresponding statute, §3013 (all other school districts, except for large city school districts), Part 30 of the Regents Rules (for teachers appointed to positions on or after August 1, 1975) and decisional law. Collective bargaining agreement provisions, by reason of Court of Appeals decisions and certain Appellate Division decisions, may provide relative seniority rights for part-time teachers and for the tacking of prior non-consecutive service.

The legal interpretation of matters that are litigated regarding pedagogical layoff and recall rights may be channeled under the legal doctrine of *primary jurisdiction* to the Commissioner of Education (by motion to dismiss in the local State Supreme Court when such actions are initially filed in court). Court review of Commissioner's Decisions would then be venued in Albany County Supreme Court, appealable to the Third Judicial Department of the Appellate Division of the New York State Supreme Court. Thus, where there is no Court of Appeals precedent, the precedent cases of the Third Department should be determinative notwithstanding inconsistent precedent from the other judicial departments of the Appellate Division where school district cases are usually venued.[6]

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[6] In *Jester v. Bd of Educ*, 109 AD2d 1004 (3d Dept 1985), the Third Department decided that recall rights are determined by analysis using the position from which the layoff occurred.

While in *Leggio v. Oglesby*, 69 AD2d 446 (2d Dept), *Aff'd* 48 NY2d 882 (1979), the Second Department opined that the recall could be to a position in another tenure area that is "similar" to the position from which the layoff occurred. The Third Department and the Commissioner of Education has consistently stated that reappointment to a vacant position requires that a vacancy be both in the employee's tenure area at the time of layoff and be similar in fact to the former position. See *Matter of Joan M. Kelley*, 83 AD2d 733 (3d Dept. 1981) (citing underlying Commissioner opinion); *Appeal of Janice Walters*, 49 Ed. Dep't. Rep. 115, Decision No. 15,973; *Appeal of Barker and Pitcher*, 45 Ed. Dep't. Rep. 430, Decision No. 15,375; *Appeal of Debowy*, 41 id. 161, Decision No. 14,648.

The abolition of positions does not invoke the notice periods applicable under the Fair Dismissal Law (Education Law § 3031) nor the notice provision under §3019-a of the Education Law.[7] Sections 2510 and 3013 of the Education Law do not set forth a minimal notice requirement to employees whose positions will be abolished by Board resolution. (*Appeal of Sroka*, 31 Ed. Dept. Rep. 513, Decision No. 12,718 [1992]; *Matter of Steadman*, 15 Ed. Dept. Rep. 298, Decision No. 9183 [1976]).

Applying the Seniority Rules

Education Law §§3013(2) and 2510(2) call for the layoff of the least senior teacher in the tenure area of the abolished position.

- Teacher tenure areas for those appointed on or after the August 1, 1975 effective date of Part 30 of the Regents Rules (8 NYCRR Part 30) are defined **solely** by Part 30.

Part 30 Tenure Areas

- **Pre-K through Grades Six (Elementary)**
- **Middle Grades (7 & 8) that are not departmentalized**
- **Grades 7-12 Core Academic Areas**
  - Mathematics
  - Science
  - English
  - Foreign Languages
  - Social Studies
- **Grades K-12 Tenure Areas**
  - Art
  - Music
  - Physical Education
  - Business Education - General
  - Health
  - Home Economics - General
  - Industrial Arts - General
  - Driver Education
  - Remedial Reading
  - Speech - Remedial
  - English as a Second Language

[7] *Appeal of Laurencon*, 45 Ed. Dept. Rep. 514 (2005).

- Special Education - Blind and Visually Impaired
- Special Education - Deaf
- Special Education - Speech and Hearing Impaired
- Special Education - General (Emotionally Disturbed, Mentally Retarded, Physically Handicapped, Multiply Handicapped and Children with Specific Learning Disabilities)
- School Attendance Teacher
- School Counseling & Guidance
- School Dental Hygienist
- School Media Specialist
- School Media Specialist (Library)
- School Media Specialist (Educational Communications)
- School Nurse Teacher
- School Psychologist
- School Social Worker
- Agriculture*
- Health Occupations*
- Home Economics - Occupational*
- Occupational Business & Distributive Occupation Subjects*
- Technical Subjects*
- Trade Subjects*

[**These tenure areas are described as being co-extensive with the certification possessed at the time of the probationary appointment.*]

- An Instructional Support Services ("ISS") provider need not teach at least 40% of the time in the tenure area of employment as long as ISS services are performed for at least 40% of the time or a combination of teaching and ISS are performed for at least 40% of work time ([new] §30-1.9[b]).

- A Board of Education may not create new tenure areas and may not fractionalize the Part 30 areas (*Baer v. Nyquist*, 34 NY2d 291 [1974]; *Abrantes v. Bd of Educ*, 233 AD2d 713 [3d Dept 1996]).

- An agreement with a union cannot modify tenure areas, thereby creating seniority rights in an area in which work is not being performed (*Appeal of Tropia*, 32 Ed Dept Rep 606).

- The funding source of positions has no bearing on tenure area or seniority rights of probationary and tenured teachers (*Oneida v. Bd of Educ*, 45 NY2d 975).

- Positions that do not call for the performance of 40% or more of teaching duties within any tenure area may not be assigned to a tenure area for the purposes of seniority acquisition, except in the case of Instructional Support Services providers (*Appeal of deVente & Jesenof*, 48 Ed. Dept. Rep. 150, Decision No. 15,822 [2008]; *see* new Regents Rule – §30-1.2[b][1]-[4] & §30-1.9[b][1] & [2]).

Seniority Accrual

***Full-Time Service*:**

- Seniority count applies to full-time probationary and tenured teachers in the tenure area of paid employment at the time of the abolition of positions, without taking any other factors into account (Education Law §§2510[2] & 3013[2]; *see Lezette v. Bd of Educ*, 35 NY2d 272 [1974]; *see also Appeal of Fallick*, 18 Ed Dept Rep 586).

- Seniority accrues whenever a full-time probationary or tenured teacher works at least 40% of the workday in one or more teacher tenure areas, exclusive of time spent in preparation, monitoring or in co-curricular activities (i.e.: a secondary science teacher who teaches two classes is credited with 40% service within the 7-12 science tenure area) (*see* Regents Rules §30-1.1 [g]; *see also Maine-Endwell Teachers Ass'n*, 92 AD2d 1052 [3d Dept 1983]).

  [Note: An administrator who works 40% of the workday in a teacher tenure area is not entitled to seniority rights or tenure acquisition rights in the teacher tenure area in which he or she works. See *Matter of Cesaratto*, 17 Ed. Dept. Rep. 23 (1977).]

- Regular full-time substitute service that precedes probation without a break in service or occurs upon recall from a layoff also counts towards seniority accrual (*Appeal of Crandall*, 20 Ed. Dept. Rep. 16, Decision No. 10,294 [1980]).

- Seniority continues to accrue in a prior tenure area of service when a teacher unknowingly departs a tenure area of employment as long as there was previous service (40% or more of the workday) in that tenure area (*Kaufman v. Fallsburg CSD*, 91 NY2d 57).

- Seniority accrues in dual tenure area appointments (as if the teacher is working full-time in each tenure area) whenever the teacher works at least 40% of the time in the tenure area(s) (Regents Rules§ 30-1.9[c]).

- Military service leave, covered by Section 242(4) of the New York State Military Law, and the Federal Law (Uniform Services Employment and Reemployment Rights Act of 1994 ["USERRA"], 38 USC §§ 4301 *et seq.*, 20 CFR §§1002.10 & 1002.193) requires the granting of seniority credit for time served in the military while on leave from a school district, whether or not pay is received from the school district.

- Instructional Support Services providers accrue seniority in their tenure area of appointment or in the tenure area for which they are certified pursuant to the amended Part 30 Regents Rules.

- A probationary or tenured teacher who performs services that fall within a recognized tenure area of employment, but who has been appointed to another tenure area, accrues seniority in the tenure area of actual employment (*Appeal of Lessing*, 34 Ed. Dept. Rep. 451 [1995]).

***Regular Full-Time Substitute Service*:**

[**Note: "Regular full-time substitute services"** means that the teacher assumed the duties of the regular classroom teacher (*Matter of Ducey*, 65 St Dept Rep 65 [1943])].

Example: *A teacher substitutes in the same class from October 20th through January 31st, when appointed to probation effective February 1st. The seniority count begins on October 20th.*

- Teachers who have only served on a substitute basis have no seniority rights and must be displaced by probationary and tenured teachers whose positions have been abolished and who are willing to accept substitute service (*Abrams v. Ambach*, 43 AD2d 883 [3d Dept 1974] and *Anderson v. BOCES*, 128 AD2d 614 [2d Dept 1987]).

***Part-Time Service*:**

- ***Part-time service does not generally count for seniority purposes*** but is recognized to tack prior full-time service to that which follows the part-time service (*Kransdorf v. Bd of Educ*, 81 NY2d 871 and *Appeal of Carey*, 31 Ed Dept Rep 394).

- A reduction to part-time service from full-time service at the District's request results in the part-time service counting as if it were full-time service (*Matter of Nicolette*, 17 Ed Dept Rep 381). Otherwise, a change from full-time to part-time service freezes the seniority count as of the last day of full-time service (*Matter of Walsh*, 17 Ed Dept Rep 434).

- Teachers who have only served on a part-time basis have no seniority rights and must be displaced by willing probationary or tenured teachers whose positions are abolished (*Ceparano v. Ambach*, 53 NY2d 873), unless a collective bargaining agreement or Board policy provides otherwise (*Schlosser v. Bd of Educ*, 47 NY2d 811 [1981]; *Garcia v. Newburgh ECSD*, 100 AD2d 967).

***Break in Service*:**

- A break in service causes the loss of all prior seniority, unless modified by the provisions of a collective bargaining agreement or by Board policy (*Bd of Educ v. Lakeland Federation of Teachers*, 51 AD2d 1033; *Garcia, supra*).

- Itinerant per diem substitute service between periods of regular substitute service has never been held to tack periods of full-time regular substitute service (No case law directly on point, but see *Ducey, supra, Crandall, supra,* and *Speichler*, 90 NY 2d 110).

***Leaves of Absence and Unpaid Time*:**

- A paid leave of absence counts towards seniority, but an unpaid leave or a workers' compensation leave not supplemented with sick leave pay does not.

- Any and all unpaid leave time is discounted from the seniority count and may be an unexpected tie-breaker (*Appeal of Halayko*, 23 Ed. Dept. Rep. 384; *Appeal of Goldman*, 43 Ed. Dept. Rep. 338).

Bumping Rights for Teachers:

- Part 30-1.13 of the Regents Rules allow for teachers who were previously employed in another tenure area to bump (displace) a teacher with less tenure area seniority than his or her seniority in that area.

  [**Note**: There are no inter-tenure area bumping rights for administrators.]

The Steele Shuffle:

- Whenever a layoff occurs in a tenure area covering multiple certifications (e.g., 7-12 science or 7-12 foreign languages) and the layoff of the least senior person(s) results in the remaining members of the tenure area lacking the certification to instruct all of the courses that remain in programs within the tenure area, there is a duty to shuffle assignments such that the most senior teachers are assigned to classes for which they are certified. At the end of this process, the least senior teacher or teachers who are not certified to instruct in the courses that would be assigned to them, must be removed from their assignments and either placed on a consensual leave (without pay) or made subject to §3020-a Education Law termination proceedings based upon charges of lack of certification (*Matter of Steele*, 43 NY2d 706 [1977]).

Seniority List by Tenure Area:

- There is no duty to prepare a list for presentation to employees or unions (*Appeal of Tucholski*, 28 Ed Dept Rep 112). However, an internal list is necessary for preparing layoff resolutions and determining bumping rights for teachers.

- There is a duty is to maintain preferred eligibility lists based upon district-wide seniority (§§ 2510[3] & 3013[3] Education Law and *Tucholski, supra*).

Teaching Assistants

- All teaching assistants in full-time service are covered in a single tenure area for layoff and recall purposes (§30-1.8[d] Regents Rules; *Madison-Oneida BOCES v. Mills*, 4 NY3d 51).

- Time served as a teacher aide accrued under civil service law employment does not count towards seniority when the position is changed to that of a teaching assistant, even if the duties of a teaching assistant had been performed when serving as a teacher aide (*Volk v. Bd of Educ*, 83 NY2d 930; *Matter of Johnson*, 26 Ed. Dept. Rep. 42, Decision No. 11,671 [1986]).

Administrator Tenure Areas and Layoff Protocols

- Layoffs are based upon seniority within the tenure area of employment (§§2510[2] & 3013[2] Education Law).

- Part 30 of the Regents Rules does not apply to administrators (*Matter of Cesaratto,* 17 Ed Dept Rep 23 [1977]).

- If administrative duties are assigned to a pedagogical employee that comprise less than a majority of his/her workday/work year, the administrative service does not yield seniority rights in any administrative tenure area (*Matter of Cesaratto, supra*).

- Seniority is based upon full-time probationary and tenured service in the tenure area of employment. There is no provision for regular full-time substitute service that precedes appointment to probation to count towards seniority (*McManus v. Bd of Educ*, 87 NY2d 183 and *Roberts v. Community School District*, 66 NY2d 652).

***General Administrative Tenure Areas*:**

- Appointment resolutions may establish a General Administrative Tenure Area (*Matter of Roloff*, 16 Ed Dept Rep 274 [1977] and *Matter of Durso*, 19 Ed Dept Rep 78 [1979]).
  [***Caveat***: If building level and district-wide positions are both within this tenure area, a layoff may result in one or more senior administrators in the tenure area being uncertified for the remaining positions in the tenure area. Then, it may be necessary to bring §3020-a Education Law charges to remove the uncertified administrator(s) from their employment

(*see Matter of Steele*, *supra* at 84 *and Winter v. Bd of Educ*, 79 NY2d 1 [1992]).]

***Job Specific Tenure Areas*:**

- The Board of Education may define tenure areas on a job specific basis via the appointment resolution. However, the Board may not retroactively fractionalize pre-existing administrative tenure areas (*Schlick v. Bd of Educ*, 227 AD2d 407 [2d Dept 1994]; *Baer v. Nyquist*, 34 NY2d 291 [1974]).

    - Where the appointment resolution specified the "Principals Tenure Area" a transfer from High School to Elementary Principal was deemed to be within the same tenure area (*Bell v. Bd of Educ*, 61 NY2d 149 [1984]).

    - When a Director of Special Education was transferred to the position of Administrator of Special Education and given a new probationary appointment, sufficient evidence existed for the Commissioner of Education to determine that the two positions were within distinct administrative tenure areas (*Appeal of Caruana*, 41 Ed. Dept. Rep. 227 [2001]).

***The Default Tenure Area*:**

- In the absence of stating a tenure area in the appointment resolution (which regrettably occurs all too often) the default tenure area is the broadest grouping, subject to individual charges that the tenure areas of the positions at issue are not the same (*Matter of Peterson*, 18 Ed. Dept. Rep. 494 [1979]).

    - When the tenure area is not stated, a party asserting that a tenure area of employment is narrow would bear the burden of proving intent to create such narrow tenure area (*Demo v. Sachem CSD*, 224 AD2d 690 [2d Dept 1996]; *Appeal of Cipriano*, 32 Ed Dept Rep 302 [1992]).

SECTION 3020-a EDUCATION LAW

Over the past 30 years, the laws governing disciplinary proceedings brought against tenured pedagogical employees have transitioned from proceedings culminating in Board of Education findings on guilt and penalty determinations, appealable to the Commissioner of Education, to proceedings over which neither the Board of Education nor the Commissioner of Education has any say. Today, under statutory §3020-a Education Law proceedings, both issues of guilt and penalty are decided by a sole hearing officer or a panel of three, chaired by a hearing officer, selected by the parties or appointed by default from a list of labor arbitrators prepared for the State Education Department by the American Arbitration Association. The burden placed upon a school district in challenging a penalty determination is to prove that it lacks a rational basis or is wholly irrational (depending upon the Department of the New York State Appellate Division in which the school district is located). The employee against whom the §3020-a proceedings have been brought, if suspending during the pendency of the proceedings, on average is entitled to full pay and benefits for nearly the one and one-half year period of time that it takes to process a case from the bringing of charges through the issuance of the hearing officer's or panel's report, unless the charges fall within the exceptions for suspension without pay.

The average §3020-a case now takes approximate six months to prosecute from the Board's probable cause finding through the hearing officer's decision based upon reform measures implemented in April 2013.

The History of §3020-a

Tenured pedagogical employees in New York's public schools may not be disciplined or discharged without notice and an opportunity to be heard pursuant to §3020-a of the Education Law.[8]

The complexity of §3020-a proceedings can be traced back to federal court decisions such as *Kinsella v. Board of Education* (378 F Supp 54 [WDNY 1974]) and the rigors of its procedures have not diminished as federal due process standards in the public employment context have abated, notably in the U.S. Supreme Court's 1985 decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532. The 1994 reforms to §3020-a brought fundamental changes to the process establishing new, burdensome, discovery requirements

[8] In *Board of Regents v. Roth*, 408 US 564 (1972), the U.S. Supreme Court announced a federal constitutional procedural due process requirement before a governmental educational employer could deprive employment to an educator who had an expectation of continuing employment (e.g., tenure status or an employment contract).

and, for the first time, removed the Commissioner of Education from a primary role in overseeing the discipline of professional educators.

Section 3020-a Applicability

Section 3020-a assures that tenured administrators, teachers and teaching assistants shall not be disciplined prior to a hearing determination.

Section 3020-a is inapplicable to Superintendents of Schools and, in small city school districts, it is also inapplicable to deputy, associate or assistant superintendent who serve either on a contractual or at-will basis (see §2509[b], Ed Law; *Matter of Hoffman*, 18 Ed. Dept. Rep. 466 [1979]).

Alternative Disciplinary Procedures

Section 3020(1) of the Education Law allows for the continuation of contractual alternative disciplinary procedures that were negotiated prior to September 1, 1994 and not subsequently renegotiated.

Alternative disciplinary procedures collectively negotiated on or after September 1, 1994 must allow each teacher subject to charges to elect between the statutory process or the alternative procedure. The time lines of any alternative procedure must result in a disposition of the charges consistent with the statutory time frame.

As an important matter of information, the Office of School District Employer-Employee Relations, after issuing a preliminary list of hearing officers, will make an appointment of any mutually selected hearing officer who is qualified under §3020-a to conduct such proceedings.

Nature and Proof of Charges

Charges in §3020-a proceedings fall within the categories newly announced in 1994 in the nature of "incompetency or misconduct" (see §3020-a[1]) as well as those charge labels that have historically been referenced in §3012[2] of the Education Law:

- conduct unbecoming a teacher
- neglect of duty
- insubordination and immoral character
- incompetency
- inefficiency
- physical or mental disability
- failure to maintain certification

[**Note:** In 1998, the Commissioner of Education determined that Misconduct was not a charge label in pre-1994 §3020-a proceedings *(Appeal of Grihin,* 38 Ed. Dept. Rep. 399 [1998]). Section 3020-a(l) currently refers to misconduct.]

For disciplinary charges to be upheld, §3020(1) of the Education Law mandates:

> *"No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for* ***just*** *cause."*

The statute does not define "just cause" and §3020-a hearing officers/panels have rarely infused the private sector test for just cause discipline described by arbitrator Carroll R. Daugherty in *Grief Bros. Cooperage Corp.,* 42 LA 555 (1974).

- Was the employee forewarned or given foreknowledge of the possible or probable disciplinary consequences of the conduct?
- Was management's rule or order reasonably related to the orderly, efficient and safe operations of the business?
- Prior to administering discipline, was an effort made by management to discover whether or not the employee did, in fact, violate a work rule or order?
- Did management conduct a fair and objective investigation?
- Was the evidence upon which discipline was predicated substantial?
- Has management applied its rules, orders and penalties evenhandedly and in a non-discriminatory manner?
- Was the degree of discipline administered reasonably related to the seriousness of the proven offense and the employee's service record with the company?

Prior to the 1994 legislation that called for disciplinary action to be based upon just cause, disciplinary charge had to be proven by a preponderance of the credible evidence (*Martin v. Ambach,* 67 NY 2d 975 [1988]). School District advocates should, nevertheless, meet this burden of proof in presenting a case under the just cause standard.

APPR Based Incompetency Cases

A key component of the State's Race to the Top legislative initiative was to establish pedagogical accountability through an evaluation system to reviewed classroom teacher and building principal performance in their duties as pedagogues, taking into account student achievement or growth based upon local testing and growth on State assessments. This new

evaluation system was promised to streamline the process for removing the incompetent pedagogical employee through §3020-a Education Law due process proceedings where the sole evidence necessary would be two consecutive ineffective annual composite scores, that included remedial efforts during the second year in the form of a Teacher Improvement Plan or a Principal Improvement Plan. School authorities were stunned by the time and expense incurred by school districts in removing incompetent teachers under the preexisting law (832 days to process at an average expense of $313,000 and a 60% chance of termination as the penalty. Remarkably, on average, only ten or eleven incompetency cases were litigated in a typical school year statewide.)

Under the APPR statutes, a case can be brought when there is a "pattern of ineffective teaching performance" that is defined by two consecutive annual composite ineffective ratings (§3012-c Ed. Law). When such a case is brought, the two consecutive ineffective evaluations are deemed to constitute "very significant evidence of ineffective teaching" (§3020-a[3][c][i-a][B]). That standard does not reflect the quantum of evidence required to prove §3020-a charges; namely, a preponderance of the credible evidence.

Timeline for the "Solely Case"

In order to bring an incompetency case based **solely** on the two consecutive ineffective annual composite evaluations, two complete school years must pass (730 days) and then an appeal of the TIP, PIP or other aspects of the second year's annual composite score can be brought within negotiated timeframes. That would usually occur during the fall of the third year, whereafter if the appeal is not sustained, sometime by November or December §3020-a charges may be filed. Then approximately six months later, there will be an outcome. In total, the timeframe for an expedited §3020-a under the new statute will take more than 1,000 days!

School Districts have been successful in addressing the incompetent in disciplinary cases based upon neglect of duty and insubordination charges. That approach remains effective and may be the only reliable approach in light of "amnesty" legislation passed by the NYS Legislature in 2014 that requires a recalculation of APPR scores for teachers whose scores are below the effective rating due to their students' Local and/or State Assessments being based upon State Grades 3-8 ELA and Math testing.

Statute of Limitations

Section 3020-a(1) requires that charges be brought within a period of three years' time measured from the date of the alleged occurrence. The bringing of charges should be measured to the date of the Board's vote.

The three year time limit does not apply in cases that constituted a crime when committed *(DeMichele v. Greenburgh Central School District No.* 7, 167 F3d 784 [2nd Cir. 1999] - where

charges of sexual misconduct that were criminal in nature were brought 23 years later and sustained as being timely).

Due process requires the proof of each element of the crime that underlies the §3020-a charges in cases brought more than three years after the occurrence (*Aronsky v. Gardner,* 75 NY 2d 997 [1990]).

The Bringing of Charges

Typically, §3020-a charges are brought to the Board of Education for a *probable cause finding* by the Superintendent of Schools. The statute does not restrict any person, including parents, from seeking a probable cause finding by the Board of Education (*Matter of Van Dame,*15 Ed. Dept. Rep. 63 [1975]).

Employee Request for Hearing

- If the employee desires to have a §3020-a hearing, he/she must notify the board clerk or secretary in writing within **ten (10) days**.

- If the case involves charges of pedagogical incompetence and/or pedagogical judgment, the employee, within the same ten (10) days, must advise of his/her choice between a three person panel or a single hearing officer (§3020-a[2][c]).

Failure to notify the board clerk within the ten (10) day period constitutes a waiver of the right to a hearing (§3020-a[2][d]; also see *Matter of Gagnon v. Wappingers CSD*, 268 A.D.2d 472 [2nd Dept 2000]).

When the Hearing Right is Waived

If the employee waives the right to a hearing (by filing the appropriate form or by failing to request a hearing within the 10 day period), the board shall proceed *within fifteen (15) days* by a majority of all members of the board to determine the case and fix the penalty, if any, to be imposed (§3020-a[2][d]).

The board's determination of the case presupposes an evidentiary review in the nature of an inquest. Best practices would include a record of the board's proceedings and evidence review.

LEGAL REQUIREMENTS FOR ANNUAL PROFESSIONAL PERFORMANCE REVIEWS

Introduction

The Annual Professional Performance Review (APPR) that originally covered all teachers and was embodied in Commissioner's Regulations at 8 NYCRR §100.2(o) remains in effect for other than classroom teachers (e.g. psychologists, social workers, etc.) The new law, §3012-c of the Education Law and its implementing regulations, Part 30-2 of the Regents Rules, describe the Annual Professional Performance Review requirements for classroom teachers and their building principals.

The key components of the new APPR is the use on an evaluation rubric, a state assessment for growth (based upon State developed testing or certain local testing where there is no State exam) and a local assessment of student growth or achievement. These components, weighted 60%, 20% and 20% respectively (until the State's "value added model" changes the weight of the State and Local assessments to 25% and 15%, respectively)[9], comprise the "Annual Composite Score" for classroom teachers and building principals.

The determination of the evaluation to be used from a State approved list is a mandatory subject of negotiations with teachers' union and, if organized, the principals' union, along with the weighting of points for each element of the rubric, the choice of the local measure of student achievement and the points allocated for such testing. Bands for Ineffective, Developing, Effective and Highly Effective performance are negotiable for the rubric and the local measure. The State measure of growth is chosen by the State or the local school district for the State where there is no State Assessment and is not a mandatory subject of negotiations. The cut scores for Ineffective, Developing, Effective and Highly Effective for the 100 Point Composite APPR Score are determined by the State and are not subject to local negotiations.

The Part 100.2(o) APPR for other than classroom teachers is negotiable in accordance with pre-§ 3012-c Education Law negotiations conventions based upon Public Employment Relations Board (PERB) precedent decisions (i.e., unless contained in a collective bargaining agreement, all evaluation criteria other than those prescribed in the regulations are non-mandatory subjects of bargaining that are subject to unilateral change by the school district. The evaluation procedures are mandatory subjects of bargaining, as is the form of the evaluation instrument (check list, narrative, rubric or any combination). (See *Somers CSD*, 9

[9] The introduction of the "value added model" has been delayed until the 2015-16 school year at the earliest as a result of Board of Regents action during July of 2014.

PERB ¶3014 [1976], *Elwood UFSD* 10 PERB ¶3107 [1977], *Newburgh ECSD,* 21 PERB ¶3036 [1988] and *Genesee EA,* 29 PERB ¶3072 [1996]).

Part 30-2 of the Regents Rules

In 2011-2012, the Regents Rules added to the APPR Plan Document in several ways. Under Part 30-2.3 there are quite specific items that must be addressed, including:

- The process for ensuring the accuracy of teacher and student data, with provision for teachers and building principals to verify the subjects and/or student rosters assigned to them;
- How the individual subcomponent scores and the total composite effectiveness score for each classroom teacher and building principal will be reported on the SED format and timetable;
- A description of the assessment development, security and scoring process used, with assurances that assessments and/or measures used to evaluate teachers and principals are not disseminated to students before administration and that the teachers and principals do not have a vested interest in the outcome of the assessments they score;
- A description in detail of the Local 0-20/15 Point measures of student achievement that will be used and the Local 0-60 Point rubrics that will be used to evaluate teachers and principals, as well as the assignment of point values for the Local 0-20/15 and other Local 0-60 Point rubrics;
- A description of how timely and constructive feedback will be given to classroom teachers and building principals on their APPRs;
- A description of the Appeals Procedures;
- Any required certification (e.g., certain options that might be certified by the Superintendent for the Local 20/15 Point measures of student achievement);
- A description of the nature and duration of training provided to evaluators and lead evaluators, and the process for certifying lead evaluators; and
- The process for assuring inter-rater reliability over time (e.g., data analysis over time to detect disparities, use of annual calibration sessions, and process for periodic recertification).

The Negotiated Local APPR Provisions (governed by Part 30-2.4 [for the 2011-12 school year] and Part 30-2.5 [for the 2012-13 school year and thereafter])

Part 30-2.4 and Part 30-2.5 of the Regents Rules require that negotiations be conducted with the Taylor Law negotiations representatives of the classroom teachers' bargaining unit and their building principals' bargaining unit regarding these issues:

- Procedures to determine the local measure of student achievement that will comprise 20% of the APPR Composite Score that totals 100%.

- Choosing a rubric for the Other local 60% of the composite score and the point allocation for the components of the 60% for classroom teachers; the local 60% can be based solely upon multiple measures of observations (a minimum of one which must be unannounced commencing with the 2012-13 school year) in person and/or by videotape and may include certain other measures if negotiated (i.e., portfolio or binder of artifacts of teacher practice). For Building Principals, the entire local 60% may be based upon the Leadership Standards derived from ISSLC or, if more measures are desired, through negotiations of one or more ambitious and measurable collaboratively set goals, as set by the principal and superintendent of schools that includes one about the principal's contribution to improving teacher effectiveness.

- An APPR Appeals Process addressing the scope of review, time limits, form of review (paper submission or hearing), tier(s) of review, finality of the review authority (i.e., ending with the Superintendent and not subject to judicial, administrative or arbitral review).

- A format for Teacher Improvement Plans (TIPs) and Principal Improvement Plans (PIPs). Issues to be addressed include: duration of the TIP/PIP, area(s) in need of improvement, the manner of assessment of improvement and, where appropriate, differentiated activities to support improvement.

- Procedures for determining how the APPR will be a significant factor in employment decisions (e.g. tenure, promotion, retention, termination, supplemental compensation, induction support, etc.) and in planning for professional development and coaching, to the extent required by the Taylor Law.

Teacher Improvement Plans (TIPs) and Principal Improvement Plans (PIPs) (Part 30-2.10)

The format for Teacher Improvement Plans (TIPs) and Principal Improvement Plans (PIPs) must be locally negotiated with each respective bargaining unit for those building principals who were covered by Part 30-2.4 and, by Part 30-2.5 commencing with the 2012-13 school year. The elements subject to negotiations include: the duration, issue(s) to be addressed, how improvement will be measured and, where applicable, differentiated activities to support

improvement. A TIP or PIP must be in place within the first 10 days of the ensuing student instructional year.

APPR Appeals Process (Part 30-2.11)

Consistent with Section 3012-c of the Education Law, Part 30-2.11 of the Regulations describes the features of the APPR Appeals Process whereby a classroom teacher or building principal under Part 30-2 may challenge:

- The substance of the APPR review;
- Adherence to the standards and the methodologies for conducting such review;
- Adherence to Commissioners Regulations;
- Adherence to locally negotiated procedures;
- Appeals relating to TIP/PIP implementation and/or compliance.

The issues to be negotiated regarding the appeals process include: the scope of matters to be reviewed, time limits, manner of review (i.e., based on papers only vs. hearings), tier(s) and finality of the process (e.g., ending with the superintendent of schools and not subject to arbitral review).

The Annual Composite Score and Employment Decisions

Section 3012-c(5)(b) of the Education Law is intended to address the ability of a board of education to either terminate a probationary classroom teacher or building principal during the probationary period or at the time of tenure conferral (or denial). It purports to leave intact the school board's or BOCES board's authority to terminate a probationer under the tenure statutes (§§3012, 3019-a and 3031, Ed. Law), except where it adds that when an appeal is pending regarding an annual composite APPR score, a termination cannot occur before the appeal is determined if the reasons involve performance that is the subject of the appeal. In June and July 2014 there was legislation to provide a *Safety Net* for teachers whose composite annual 2013-14 and 2014-15 annual composite APPR scores fell into the Ineffective or Developing range to have their scores recalculated if a component of the same was dependent upon counting a State or Local Assessment derived from Grades 3-8 State ELA and /or Math Assessments. If the legislation is signed into law by the Governor and the formula of this legislation raises the scores and/or effectiveness ratings, the higher scores prevail. This legislation also allows for school districts to take action to terminate probationary classroom teachers and probationary building principals for performance reasons based upon observation, testing and other factors before the annual composite APPR scores and effectiveness ratings are issued.

The Regents, through an amendment to Part 30-2.1(d) of the Regents Rules, defined performance for the purposes of not terminating employment based upon a composite APPR rating that is

under appeal, until the appeal is finalized as being the composite performance taken as a whole. This, by negative implication, this Rule would allow for the conventional right to terminate probationers for all other reasons at all other times except when the reason is bound up in an appeal that has been filed from the annual composite APPR rating.

Questions that still need concrete answers are:

- What to do with a third year probationer whose tenure denial is followed by an APPR appeal that would be ongoing past the tenure date?

- Will tenure by estoppel occur? (It certainly would if the employee is not suspended from work during the pendency of that appeal). However, SED Guidance (July 2014 at C. 11-15) informs that prior years' composite APPR scores may inform a tenure denial decision so long as the decision is not based, in whole or in part, on the performance that is subject to appeal for the final year of probation. The same would hold true for a mid-probationary term termination at the conclusion of the second year of probationary service.

- Is the ability to terminate the employment of a first year probationary classroom teacher or building principal before the first year's annual composite APPR score is finally determined, if the reason is performance subject to evaluation under the APPR Plan Document? (The SED Guidance Document at C.13 indicates that performance prior to the issuance of the composite score may be used for a mid-year termination. However, that answer depends upon the legality of new Rule 30-2.1(d) that challenged for exceeding the legal requirements of Education Law Section 3012-c(5)(b) and caution should be used and if other reasons for termination are present, the same should be primary.

Board Monitoring Activities

The Board should be aware that the lead evaluators under APPR must be certified, and recertified annually (or periodically, depending upon the language contained in each District's approved APPR Plan), before completing the scoring of the annual composite APPR document for classroom teachers and building principals. A Board resolution to that effect is warranted each year. The Board should also monitor the timely filing by the end of August each year of the Implementation Certification Form for the District's APPR Plan Document, that must be signed by the Board President and Superintendent of Schools during August each year. If a negotiated change to the APPR Plan Document is made, then the District Certification Form submitted in SED's Review Room must additionally be signed by the Teachers' and Principal's union representative, respectively.

NEW YORK'S TAX CAP LAW

The Tax Cap Law (Chapter 97 of the Laws of 2011) added a new section to the Education Law (§2023-a) that restricts any proposed tax levy increase to the lesser of 2% or the rate of inflation, unless a supermajority vote (60% or more) approves exceeding the tax levy limit. The law applies to all school districts located outside of New York City, but does not apply to BOCES. It became effective with the budget for the 2012-13 school year.

Tax Levy Growth Factor

The law establishes the "Allowable Levy Growth Factor" with a range of no greater than 2% and no less than 0% for a current school year budget tax levy, benchmarked against the preceding school year budget. If the inflation factor is less than 2%, then that shall be the allowable tax levy growth factor.

The inflation factor works on a six-month lag, using the December CPI of the U.S. Department of Labor National Inflation Indexes and uses 12-month averaging from the prior year's lag.

The *excludables* from the allowable local growth factor are:

- Court orders or judgments in tort cases where the amount to be paid exceeds 5% of the previous year's total tax levy;
- ERS and TRS contributions in excess of a 2% increase over the previous year's contribution rates (calculated separately for each pension fund); and
- Capital local expenditures.[10]

Tax Base Growth Factor

The Commissioner of Taxation and Finance determines the tax base growth factor for each school district by no later than February 25th each year. The Commissioner of Taxation and Finance is also charged with calculating a "quantity change factor" based upon physical or quantity changes in the real property subject to levy. The elements that affect the quantity change factor are:

- Value added from new construction;
- Additional property that was omitted from the prior tax roll or decreases due to destruction from fire or demolition; and
- The deletion of duplicate parcels from the prior tax roll.

[10] Budgeted expenditures from the financing, refinancing, acquisition, design, construction, reconstruction, rehabilitation, improvements, furnishing and equipping of, or otherwise providing for school district capital facilities or equipment, including debt service and lease expenditures, and transportation capital debt service, subject to voter approval where required by law.

If the quantity change factor is a negative number, the Commissioner will not calculate a "tax base growth factor".

If it is a positive number, then the Commissioner will calculate a tax base growth factor equal to 1.0 plus the tax base growth factor.

Tax Levy Limit Formula

The Tax Levy Limit for the school year is determined by the following formula:

- Take the total tax levy from the last school year;
- Multiply by the tax base growth factor, if any;
- Add the total of payments in lieu of tax from the last school year;
- Subtract the tax levy necessary to support the expenditures on excess tort litigation cases and capital levy for the prior school year (if any);
- Multiply the result by the allowable levy growth factor;
- Subtract any payments in lieu of taxes receivable for the current school year and add the "available carryover" (if any).

  (**Note:** The "available carryover" is the amount by which the school district tax levy is less than the allowable tax cap limit, but in no event more than 1.5% of that year's tax levy.)

March 1st Reporting Deadline

Before March 1st each year, the school district must furnish to the Commissioner of Taxation and Finance, as well as the Commissioner of Education and the N.Y.S. Comptroller, the information necessary for the calculation of the tax levy limit for the ensuing school year.

Addressing Erroneous Tax Levies

Any erroneous taxation beyond the permissible tax levy limit must be reserved for the purpose of applying the same against the next school year's tax levy.

Budget Votes in Excess of the Statutory Tax Levy Limit

If the Board presents a budget for voter approval with a tax levy implication that would cause a tax levy increase in excess of the allowable tax cap limit, *at least 60%* of those who vote on the budget would have to cast a "Yes" vote in order for that tax levy amount to be approved. Further, the ballot would be required to bear the statement:

> "Adoption of this budget requires a tax levy increase of ___% which exceeds the statutory tax levy increase limit of ___% for this school fiscal year and therefore exceeds the state tax cap and must be approved by sixty percent of the qualified voters present and voting."

Separate propositions that are presented on the same ballot as the budget proposition (whether placed on the ballot by the Board or by the voters via petition) will be subject to the 60% approval requirement, if any one or more of them causes the total tax levy for that school year to exceed that school year's tax cap limit.

Failed Budget Votes

A first budget vote that fails may be responded to by the Board submitted a budget for a second vote for its adoption of a contingency budget calling for a levy that does not exceed in amount the last school year's tax levy. If the budget vote fails twice, then the Board must adopt a contingency budget with a tax levy that does not exceed the last school year's tax levy (0% tax levy increase).

Property Tax Freeze

The Property Tax Freeze Credit Program was created as part of this year's N.Y.S. Budget agreement. It is a two-year tax relief program that reimburses qualified homeowners (those eligible for the STAR property tax exemption) for increases in local property taxes on their primary residence. In order for the credit to be available to homeowners in a school district, the school district must:

- In the first year, comply with the tax levy limit.
- In the second year, comply with the tax levy limit and also develop and implement a Government Efficiency Plan to reduce costs by consolidating services. The Plan must be submitted to the State Division of the Budget by June 1, 2015.

The Superintendent of Schools must certify to the Commissioner of Education, State Comptroller and Commissioner of Taxation and Finance that the budget is within tax levy limit within the first 21 days of each new fiscal year.

The freeze credit will be the greater of the actual increase in the homeowner's tax bill (by the specific local taxing jurisdiction) or the previous year's tax bill multiplied by an inflation factor (the lesser of 2% or inflation). Homeowners whose tax bills go down, stay the same or increase less than the inflation factor will receive a credit equal to the previous year's tax bill multiplied by the inflation factor. The Department of Taxation and Finance will calculate the amount of the tax freeze credits.

COMPLIANCE WITH THE AFFORDABLE CARE ACT

About the Law

It has been four years since the enactment of the Affordable Care Act ("ACA"), commonly referred to as "Obamacare". The ACA provisions of greatest import to school districts became effective on March 23, 2010. That is the date against which health insurance plans that are *grandfathered* are benchmarked for limitations placed by the law upon changes to plan features. Grandfathered Plans had to make some changes in benefits as a result of the ACA's "*minimum essential coverage"*. Plans that are not grandfathered have additional requirements. Many plans that began as Grandfathered Plans have decided to discontinue in that status and to assume the obligations of Non-grandfathered Plans.

All plans of employers with 100 or more employees, must provide for their 2015 Plan Year an offer of at least individual coverage to at least 70% of their full-time employees *(defined as working 30 or more hours per week or 130 or more hours per month)* so long as plans are being made to offer individual plus dependent coverage to at least 95% of their full-time employees (FTEs) effective with the beginning of their 2016 Plan Year. Employers with between 50 and 99 FTEs will not be held to the offer requirement for their 2015 Plan Year, but will be subject to the 95% standard for their 2016 Plan Year.

The insurance must be of at least *minimum value* (meaning that it is expected that the return on benefits per premium dollar under the insurance would be 60% or greater) and *affordable (*meaning that individual coverage in the employer's least expensive plan would not bear an employee premium contribution greater than 9.5% of household income or, under a "safe harbor test" no greater than 9.5% of the employee's W-2 income).

The other key aspects of the law include:

- The requirement to furnish employees with a Summary of Benefits and Coverage ("SBC") document for Plan Years commencing with the 2013 Plan Year; and

- *Depending upon final regulations under §105h of the Internal Revenue Code* potential liability for providing any of the highly compensated employees (top 25% earners) with greater benefits than those provided to the lower 75% compensated employees. Greater benefits may include exacting a lesser employee premium contribution towards the cost of the health insurance from one or more of the highly compensated employees.

The compliance measures are largely to be implemented by the health insurance providers, typically the NYSHIP Plan and local school district health insurance consortiums. School

districts that are self-insured must assure that their health plans are compliant with the requirements of the ACA.

The 2015 and 2016 Plan Years

The most significant liability under the ACA derives from the excise taxes of IRC Section 4980H[a] and [b] that could be assessed for non-compliance starting with the 2015 Plan Year regarding employers with at least 100 FTEs. Thus, if the Plan has a January 1st anniversary date (e.g., NYSHIP), then this liability could occur during the 2014-2015 school year. If the Plan Year commences on July 1st (e.g., PNWHIP, SWSCHIP, DEHIC and U-OBOCES) the liability would not affix until the 2015-2016 school year.

If the District (employing at least 100 FTEs) is in the NYSHIP Plan or other plan that has a Plan Year commencing January 1st, make sure that at least individual health insurance coverage is afforded to at least 70% of the full-time employees in the District (95% starting in the 2016 Plan Year). For Districts with July 1st Plan Years, the 70% standard will apply for the 2015-2016 School Year and the 95% standard effective with the 2016-2017 School Year.

Known Full-Time Employees

All employees who are hired for a fixed period of time in excess of 90 days must be offered health insurance coverage as of the 91st day of employment to assure compliance with the test set forth above. For those who are regularly employed but as to whom the employer does not know if they will work 30+ hours per week (130 hours per month), the employer must make an analysis using a "standard measurement period" (commonly a 12-month or six-month period) to see if that level has been met. If so, then there is a "stability period" of at least equal length that follows (after a brief "administrative period" for enrollment that may not exceed 90 days - typically 30 days), during which time health insurance must be offered for the entirety of the stability period regardless of hours that are actually worked during the stability period.

(**Note:** *Per Diem Substitutes* are the key employees to review in this regard. Also, be aware that part-time coaches or others who perform after-school stipend activities should be analyzed on the basis of all hours worked per week/month in measuring full-time status.)

1. ***The 4980H[a] Penalty:*** A penalty of great significance will be assessed, that will go into effect with the 2015 Plan Year, if a District or BOCES does not broadly offer health insurance with minimal essential benefits to at least 70% of all full-time (30+ hours per week/130 hours per month) employees (95% coverage as of the 2016 Plan Year).

[**Example:** If offered to fewer than 70%, if one full-time employee whose family income is between 133% and 400% of the federal poverty level (e.g., $24,000 - $94,000) is granted in 2015 by the federal government a health insurance premium assistance credit for participating in the New York Health Insurance Exchange, then the employer penalty is $2,000 x the number of 30+ hour FTEs including part-time employees on a prorated basis - 80. So assuming 150 net FTEs, the penalty for the year would be $140,000. Effective with the 2016 Plan Year the formula will change to FTEs - 30.]

2. ***The 4980H[b] Penalty:*** A lesser penalty is assessed if an employer does not offer "affordable health care" of minimum value. "Affordable" means that the employee does not have to contribute towards the premium more than 9.5% of household income (counting the employee, spouse and dependents living in the household) or the "safe harbor measure" of 9.5% of the employee's W-2 income (adding back in deferred compensation in §403(b), §457(b) and §125 IRC Plans). This affordable to income test is measured against the cost of the individual health insurance premium (not having to consider family or two-person health premium costs). If the premium cost share assessed to the employee exceeds 9.5% of such income, then for each such 30+/130 hour employee who enters the Health Insurance Exchange and receives a premium assistance credit, the employer must pay the feds $3,000 per each such employee (but not for dependents who access coverage through an Exchange - defined as excluding the spouse).

   In 2016, the offer of coverage must be extended from individual only to include non-spouse dependents. However, the income test for affordability will remain applicable to the individual premium contribution costs and not individual plus dependent premium costs.

Employer Administrative Duties

- Providing the "Summary of Benefits and Coverage" (SBC) information sheet: The health plan should provide this to the school district for its distribution to employees upon request within seven business days of a request. This provision is in effect in 2013, as of the start of the 2013 Plan Year. Changes in plan features must be made upon at least 60 days' notice to employees. [Penalty for Non-compliance: $1,000 per failure per employee who is not so notified.]

- W-2 Reporting of Value of Health Care: This requirement went into effect in January 2013 for informational purposes only at this time.

(*see* http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions)

- Notice of Health Insurance Exchange: This requirement has been in effect since final regulations were issued earlier in 2014. The purpose is to let employees know of the availability of the New York Health Insurance Exchange, how to access coverage and that a premium tax credit may be available. Also, that coverage through the Exchange could result in a loss of district contributions towards its group health plan.

- Notice of Grandfathered Plan Status: If your health plan has Grandfathered Status, employees must be given notice in materials provided to participants describing the benefits of the plan and that the plan considers itself grandfathered within the meaning of §1251 of the ACA (see model language in interim final regulations at Federal Register/Vo. 75, No. 116/June 17, 2010).

- Medicare Tax Charge for High Income Employees: Starting with W-2 filings for 2013, the Medicare Tax will be .9% greater for employees who earn $200,000 or more, or who are married filing a joint return with income of $250,000 or greater, or filing separately a return of $125,000 or greater.

- For employers with 200 or more FTE employees, there must be automatic enrollment into the employer's health insurance plan for known full-time hires, commencing as soon as final regulations are issued.

The New Student, Teacher and Principal Data Privacy Laws
New York State Education Law Sections 2-c and 2-d

As part of the 2014 New York State Budget Bill, the Legislature passed two new provisions of the New York Education Law: Article 1, Sections 2-c and 2-d which address the areas of data collection and transmittal regarding students, classroom teachers and building principals, with protections against the release of personally identifiable information. While the laws went into effect on March 31, 2014, regulations have not yet been promulgated. A "Parents Bill of Rights" is a centerpiece of the legislation and had to be posted on the website of each school district and BOCES as of July 29, 2014. The Parents Bill of Rights must also be included with every contract a District enters into with a "third party contractor". Educational agencies (including school districts and BOCES) are not defined as third party contractors and are not subject to the provisions of these sections of law when receiving data from another source.

Section 2-c Education Law. Section 2-c specifically authorizes school districts and BOCES, to "opt out of providing personally identifiable information to a Shared Infrastructure Service Provider (SLIP) or data dashboard operator for the purpose of creating data dashboards." It further provides that such an educational agency is authorized "at any time" to request of the State Education Department that any personally identifiable information associated with the educational agency that SED possesses not be shared or provided to a SLISP or data dashboard operator and that, upon receipt of such a request, SED is required "to immediately ensure that any personally identifiable information provided to any SLISP or data dashboard operator is deleted from such SLISP or operator and destroyed in a secure manner."

Finally, Section 2-c prohibits SED from providing any student information to a SLISP and directs the Commissioner of Education and the SED "to immediately ensure that any personally identifiable information already provided to a SLISP is deleted from such SLISP and destroyed in a secure manner." This legislative directive effectively eliminated the State's ability to contract with a private third party vendor like inBloom to establish a statewide student data tool and data dashboard.

Section 2-d Education Law. Section 2-d of the Education Law further endeavors to protect student data and to address the unauthorized release of personally identifiable information.

- **The Chief Privacy Officer.** The Commissioner of Education was directed to appoint a Chief Privacy Officer within the State Education Department who will serve for renewable three year terms. Among the functions of the Chief Privacy Officer are the promotion of the implementation of sound information practices for privacy and security of student data or teacher or principal data, assisting educational agencies in establishing standards for protecting private data and promoting best practices associated with privacy and security of student data or teacher or principal data with educational agencies.

The duties of the Chief Privacy Officer include the solicitation of input from parents and other education system stakeholders in developing additional elements for the Parents Bill of Rights. As the Commissioner of Education develops Regulations for the implementation of the data privacy laws, the Chief Privacy Officer , during the comment period, is expected to receive

input from parents and other members of the public to help inform the development of the Regulations.

- **Parents Bill of Rights.** This Section also calls for the creation of a "Parents Bill of Rights" to be posted on each educational agency's website (and provided to any third party contractor with which a district or BOCES may contract, which involves the contractor receiving student, teacher or principal data) to inform parents of the following specific rights to privacy and data security:

1. A student's personally identifiable information cannot be sold or released for any commercial purposes;

2. Parents have the right to inspect and review the complete contents of their child's education record;

3. The District is committed to implementing safeguards associated with industry standards and best practice under state and federal laws protecting the confidentiality of personally identifiable information, including but not limited to, encryption, firewalls, and password protection, must be in place when data is stored or transferred;

4. A complete list of all student data elements collected by the State is available for public review at (insert website address here) or by writing to (insert mailing address here); and

5. Parents have the right to have complaints about possible breaches of student data addressed. Complaints should be directed to (insert phone number, email and mailing address here).

In the event that an educational agency contracts with a third party contractor to receive student, teacher or principal data, the Parents Bill of Rights must also include the following supplemental information:

1. the exclusive purposes for which the student data or teacher or principal data will be used;

2. how the third party contractor will ensure that the subcontractors, persons or entities that the third party contractor will share the student data or teacher or principal data with, if any, will abide by data protection and security requirements;

3. when the agreement expires and what happens to the student data or teacher or principal data upon expiration of the agreement;

4. if and how a parent, student, eligible student, teacher or principal may challenge the accuracy of the student data or teacher or principal data that is collected; and

5. where the student data or teacher or principal data will be stored (described in such a manner as to protect data security), and the security protections taken to ensure such data will be protected, including whether such data will be encrypted.

Clearly, the Parents Bill of Rights should give notice of contracts with third party contractors that are provided with personally identifiable data of all students, such as data dashboards. As we receive more information regarding the third party contractor notice obligations from SED through regulations or guidance documents, we will advise further.

- **Limitations on SED Use of Student Data.** In order to limit the student information that may be reported by school districts and BOCES to the State, Section 2-d (1) mandates that "[e]xcept as otherwise specifically authorized by law, the department shall only collect personally identifiable information relating to an educational purpose", (2) provides that the "department may only require districts to submit personally identifiable information where such release is required by law or otherwise authorized under" FERPA and the personal privacy protection law, and (3) specifically prohibits the following data elements being reported to the State Education Department: juvenile delinquency records, criminal records, medical and health records and student biometric information.

- **Prohibition Against Marketing Student Data.** The law further prohibits the sale or use for marketing purposes of personally identifiable information maintained by educational agencies, including data provided to third party contractors and their assignees

- **Parental Rights to Review Student Records/Data.** This Section also establishes the right of parents to inspect and review their child's educational records, including any student data stored or maintained by the school district or BOCES. In this regard, it directs SED to develop policies for school districts that provide for annual notification to parents of their right to request student data, ensure security when providing student data to parents and specify a reasonable amount of time in which school districts should respond to the parental requests for student data.

- **Regulating Data Security.** Section 2-d provides that the Commissioner of Education, in consultation with the Chief Privacy Officer, shall promulgate regulations establishing standards for educational agency data security and privacy policies and shall develop model policies for use by such educational agencies. Following the promulgation of such regulations, each

educational agency, including school districts and BOCES, will be required to ensure that it has a policy on data security and privacy in place applicable to student, teacher and principal data, which must be published on the educational agency's website and provided to all of its officers and employees.

- **Third Party Contractors.** This provision of the law establishes required terms of contracts or agreements between educational agencies and third party contractors with regard to safeguarding student, teacher or principal data and mandatory limitations on the use of, and access to, such data.

In addition to providing mandatory safeguards against the dissemination of student, teacher or principal data, Section 2-d provides for mandated reporting and serious penalties in the case of a third party contractor engaging in the unauthorized release of personally identifiable information as regards student, teacher or principal data.

The statute provides that in the event of an unauthorized release, the third party contractor is required to notify the educational agency of the event "in the most expedient way possible and without unreasonable delay." The educational agency is then required to report the unauthorized release to the Chief Privacy Officer, who is further authorized to report the unauthorized release to law enforcement.

In any event of unauthorized release of student data or teacher or principal data that includes personally identifiable information from that person's annual professional performance review, regardless of its source, the educational agency must notify the parent, teacher or principal of the release “in the most expedient way possible and without unreasonable delay.”

The statute further provides that in the event of an unauthorized release of personally identifiable information by a third-party contractor, the contractor is punishable by civil penalty of no less than $5,000 and up to $10 per student, teacher and/or principal up to a maximum penalty of $150,000.

Further, in the event of an unauthorized release by a third-party contractor, the Chief Privacy Officer, after affording the third-party contractor notice and an opportunity to be heard, is authorized to (1) order that the third-party contractor be precluded from accessing student, teacher or principal data, as applicable, from the educational agency from which it obtained the data for up to five years; and/or (2) if determined that the action was knowing or reckless, preclude the third-party contractor from (a) accessing such data from any educational agency in the state for up to five years, and/or (b) being deemed a responsible bidder for any data sharing contract with a school district or BOCES under General Municipal Law Section 103 for up to five years; and/or (3) require a third-party contractor to provide training at the contractor's expense on applicable law governing confidentiality of student, teacher or principal data prior to being permitted to receive subsequent access to such data from the educational agency from which the data was obtained or from any educational agency; and/or (4) the Commissioner may impose no penalty if it is determined that the unauthorized release was inadvertent and done without intent, knowledge, recklessness or gross negligence.

H. **No Private Cause of Action.** Section 2-d expressly states that it creates no private cause of action against either an educational agency or the State Education Department. Importantly, to avoid confusion, it further provides that nothing in the statute limits the administrative use of student, teacher or principal data by any person acting exclusively in his/her capacity as an employee of the educational agency or of the State that is otherwise required by law. This would appear to be designed to permit school personnel to use such data in administrative proceedings such as Education Law Section 3214 student disciplinary proceedings, Education Law Section 3020-a pedagogical employee disciplinary hearings, Civil Service Law Section 75 disciplinary proceedings, CSE meetings and IDEA proceedings.