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

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State Regulations

Board Member Vacancy

1. *Appeal of Butler*, 58 Ed Dept Rep, Dec. No. 17,544 (2018).

Petitioner, former board member, appealed decision of the board of education to declare his position on the board vacant and to remove him as a board member. Petitioner was absent at meetings held on August 24, September 14, and September 28, 2017.

During a March 15, 2018 executive session, the meeting became rancorous. Petitioner asserted that the board president attempted to "silence" him from expressing his views regarding the superintendent. He further asserted that a board member (Baldinger) threatened him by saying: "If I were only 20 years younger, there would be two hits …" Another board member claimed that Baldinger did "not raise his voice, pound the table, or do anything else which could reasonably be perceived as intimidating." This board member contended that he believed the comments made by Baldinger were aimed at him. Baldinger averred that he had never threatened petitioner, or any trustee, with physical violence.

Following the March 15 meeting, petitioner was absent from the next three meetings (4/4, 4/12 and 4/17), was present for the next three meetings (4/26, 5/3, and 5/15), and was absent from all subsequent meetings (5/21, 5/24, 6/7, 6/13, 6/21), including the June 28 meeting, at which the board declared petitioner's seat vacant. The record indicated that, in total, petitioner was absent from 11 of the 31 meetings from the time he was elected to the time his seat was declared vacant.

By letter, petitioner asserted that he refused "to be in the presence of Baldinger who has exhibited an extreme temper on at least two occasions towards sitting board members." He indicated that he feared for his safety and the safety of others and that, "[u]nless the board takes these accusations seriously and investigates the alleged actions and takes the appropriate actions, I cannot bring myself to sit in the same room as him."

By letter dated June 29, 2018, the district clerk notified petitioner that the district had declared his seat vacant due to his "habitual absences and that, effective immediately, he was no longer a board trustee."

Petitioner claimed, in part, that he provided a good and valid reason for his failure to attend; i.e. fear for his personal safety. The district asserted that the decision to vacate his seat on the board was a proper exercise of its authority.

The commissioner noted that Education Law 2109 provides, in part, that a board member who "refuses or neglects to attend three successive meetings of the board, … without rendering a good and valid excuse therefor … vacates his office by refusal to serve."

The commissioner concluded that the petitioner failed to meet his burden of demonstrating a good and valid excuse for his "frequent absences from board meetings." The commissioner noted that while Baldinger's comment was "clearly inappropriate" it, on its face, appeared to be an expression of anger rather than an imminent threat of physical attack. The commissioner noted; "Petitioner's subsequent behavior undercuts his contention that the remark was so egregious that he was afraid to attend board meetings for many months thereafter. The record does not establish that petitioner was too afraid to attend subsequent board meetings out of fear for his physical safety."

The commissioner further noted that the petitioner did not seek additional security measures or other accommodations so that he could attend meetings safely – other than to assert that he would not attend meetings at which trustee Baldinger was present."

Charter Schools

1. *Matter of DeVera v. MaryEllen Elia*, 32 N.Y.3d 423 (2018).

Issue: whether the statutory scheme governing charter school pre-k programs allows for shared oversight authority between charter entities and local school districts. The Court of Appeals answered the question in the negative.

Petitioner, Success Academy, a not-for-profit education corporation that operates charter schools across New York, responded to a request for proposals (RFP) from the New York City Department of Education, to receive funding for a total of 72 pre-k seats across three sites. The RFP required a detailed proposal concerning how the pre-k program would operate, including curricular submissions. The DOE conditionally approved funding for Success Academy's three sites. Final acceptance was contingent upon timely contract negotiations. Each contract was 241 pages and included provisions that sought to regulate the curriculum and operations of the charter school pre-k program. Success Academy objected to the contracts and DOE refused to pay without a contract.

The matter went to the commissioner of education who concluded that DOE "as a recipient of public grants funds from the State … has the responsibility to ensure proper disbursement and expenditure of the use of such funds" and thus, "in the absence of an executed contract, DOE was not required to pay Success Academy" for the pre-k programs.

The Court of Appeals held that the DOE cannot place conditions of state funding for pre-k programs at charter schools. The Court analyzed subdivision 12 of the Universal Pre-k law which provides that, for charter school pre-k programs, "all monitoring, programmatic review and operational requirements … shall be the responsibility of the charter entity and shall be consistent the requirements under article fifty-six of this chapter." The Court noted that the language of the statute was not ambiguous: it provides that "***all*** such monitoring, programmatic review and operational requirements … ***shall*** be the responsibility of the charter school." The use of 'shall' makes what follows mandatory, and 'all' means 'all'. The Court stated: "the Charter Schools Act contemplates exclusive – rather than shared – responsibility for oversight, thereby foreclosing the 'concurrent' authority scheme envisioned by DOE."

The text of subdivision 12 vests exclusive oversight authority in the charter entity, and thereby acts to divest the school district of any existing authority to set curricular or programmatic requirements for approved, state-funded charter school prekindergarten programs.

Dignity for All Students Act

1. *Eskenazi-McGibney v. Connetquot CSD,* 89 N.Y.S.3d 295 (2d Dep't 2019).

Issue: whether the Dignity for All Students Act (DASA) creates a private right of action in favor of a student injured by a school's failure to enforce its policies prohibiting discrimination and harassment.

Held: court held that DASA does not create a private right.

Plaintiffs alleged that the student sustained mental and emotional injuries due to, among other things, the defendants' negligent supervision of its students, negligent retention of certain employees, and a violation of DASA. It was alleged that the student, a learning-disabled high school student, was repeatedly bullied and harassed by a fellow student, including multiple physical assaults and death threats. This conduct allegedly took place at the high school, at BOCES, on school bus and on a school trip. Plaintiffs alleged that they made repeated complaints to the school district and BOCES teachers and officials, that they received assurances that the matter would be dealt with, but the other student was not disciplined and the bullying and harassment continued.

The defendants moved, in part, seeking to dismiss the DASA cause of action on the ground that DASA does not provide for a private right of action. The lower court denied the defendants' respective motions and the matter was appealed to the Second Department.

The Second Department noted that DASA "does not expressly provide for civil damages to a student who has been the victim of such harassment, bullying, or discrimination." The court further noted that a review of DASA's legislative history indicates that finding a private right of

action under the act would be inconsistent with the legislative scheme. "The legislative history plainly demonstrates that the Legislature did not intend to provide for civil damages for a violation of DASA, and that recognizing one would be inconsistent with the legislative scheme."

The court therefore found that the lower court should have granted the defendants' respective motions that sought to dismiss the cause of action seeking a DASA violation. The court, however, found that the complaint alleged sufficient facts to support the causes of action to recover damages for negligent supervision, negligent retention, and negligent performance of a governmental function.

Discrimination

1. *Fox v. Costco Wholesale Corp*., 918 F.3d 65 (2d Cir. 2019).

Plaintiff suffered from Tourette 's syndrome and Obsessive Compulsive Disorder. He brought actions against Costco under the ADA, NYSHRL, alleging a hostile working environment, disparate treatment, failure to accommodate, and retaliation.

The lower court dismissed the case. The Second Circuit affirmed except for the ADA hostile environment claim. The Second Circuit joined other Circuit courts and held that "hostile work environment claims are cognizable under the ADA. We also determine there is adequate evidence in the record for Fox's hostile work environment claim to survive summary judgment."

The plaintiff testified that the general manager made disparaging comments regarding his disability, including "I cringe every time I walk by you" and "[Y]ou finally did it."

Due to his condition, the plaintiff would often touch the floor before moving and would cough when he would feel a verbal tic come on in order to prevent others from hearing him swear. He described how certain employees would make "hut-hut-hike" remarks to mimic his verbal and physical tics. He testified that these comments "were audible to the managers of the Holbrook warehouse from their positon on the warehouse's podium," and "happened in plain view of the Supervisors and the Front End Managers and nothing was ever said." He testified that the comments happened for "months and months" and "whenever" he would experience tics.

To prevail on a hostile work environment claim, the plaintiff must show "(1) that the harassment was 'sufficiently severe or pervasive to alter the condition of [his] employment and create an abusive working environment,' and (2) that a specific basis exists for imputing the objectionable conduct to the employer." The court noted that while the victim "must subjectively perceive the conduct as abusive, the misconduct shown also must be 'severe or pervasive enough to create an objectively hostile or abusive work environment." However, the court noted that even "an isolated act may be so severe that it requires the conclusion that the terms and conditions of employment were altered." The plaintiff '"must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment."' Courts will look at the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with the plaintiff's work performance.

The court concluded that the plaintiff introduced evidence that his supervisors witnessed the conduct for '"months and months"' and did nothing, "demonstrating a specific basis for imputing the objectionable conduct to Costco."

The court noted in closing:

> …we note that teasing in the workplace is not uncommon, and in most instances probably not actionable. Stuttering is mimicked; the overweight are called names; acne, baldness and height are mentioned for a laugh. All of this can be hurtful. But mockery of overt features

does not necessarily support damages, and the fact that Fox was mocked for the manifestation of his disability rather than overt features does not bear on whether the workplace environment was objectively abusive. Here, however, viewing the evidence in light most favorable to Fox, Fox has raised an issue of fact as to whether the frequency and severity of the mockery rise to level of an objectively hostile work environment.

2. *Natofsky v. City of New York*, 921 F.3d 337 (2d Cir. 2019).

According to the facts, plaintiff suffered from a severe hearing impairment and wore hearing aids, and to fully understand what someone is saying, must focus intently on the speaker and read lips. He brought an action alleging violations of Section 504 of the Rehabilitation Act and state and city law. He claimed that he experienced several adverse employment actions because of his hearing disability, including his eventual demotion. In addition, he claimed that defendant failed to accommodate his disability and retaliated against him.

Issue: What is the Rehabilitation Act's causation standard for employment discrimination claims?

The Second Circuit concluded that when a plaintiff alleges an employment discrimination claim under the Rehabilitation Act, the causation standard that applies is the same one that governs a complaint for discrimination under the ADA. The ADA prohibits employers from "'discriminat[ing] against a qualified individual *on the basis* of disability in regard to … the hiring, advancement, or discharge of employee.'" The court concluded that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that discrimination was the "but-for" cause of any adverse employment action. "We conclude that 'on the basis of' in the ADA requires a but-for causation standard."

The court concluded that the plaintiff failed to demonstrate that the adverse employment decisions he experienced would not have been made but for his disability and affirmed the lower court's award of summary judgment to defendants.

3. *Atkins v. Rochester City School District*, 764 Fed. Appx. 117 (2d Cir. 2019).

Plaintiff, an African-American woman in her mid-sixties, was assigned to be principal of the Freddie Thomas HS for the 12-13 school year. That school was one of 10 schools targeted for phase-out and closure. In September 2013, Plaintiff received a rating of "developing" for the 12-13 school year. She appealed, but was denied by the appeals panel.

She alleged that the district treated her differently from other employees by "deliberately" submitting to the state "inaccurate" data, which was then used in calculating her score. She claimed in an EEOC complaint, race and age discrimination; that "the [APPR] rating of similarly situated" individuals who were younger and not African-American were not miscalculated the way hers was.

The court determined that the plaintiff could not establish a *prima facie* case of discrimination. The court noted that "A negative performance review, without more, does not constitute an adverse employment action." The plaintiff argued that her low APPR rating "resulted in her being assigned to schools that were failing and closing" and being deprived of the "'resources she needed to perform her Principal job,'" and that these consequences constituted a "material adverse change" in her work conditions.

The court determined that the evidence showed that the plaintiff's work conditions "were suboptimal before and after her APPR rating, but the evidence does not show a material adverse change as a result of the APPR rating … Because [the plaintiff] fails to present evidence of any 'negative ramifications' flowing from her unfavorable APPR rating, she cannot establish an adverse employment action."

4. *Parron v. Herbert*, 768 Fed. Appx. 75 (S.D.N.Y. 2018).

The plaintiff appealed the lower court's decision to grant defendants summary judgment with respect to age discrimination under the ADEA. The Second Circuit determined that the lower court properly concluded that there was no genuine dispute as to a material fact and that the defendants were entitled to judgment as a matter of law.

The plaintiff principally alleged that the defendants discriminated against him by suspending him from work. He attributed his suspension not to his age, but to his inability to learn how to complete new tasks. He contended that his difficulty adjusting to new assignments "was a function of age." The court rejected this argument noting that "even if a correlation between learning difficulties and age existed, an adverse employment action based on these difficulties would not constitute age discrimination under the ADEA." The court referred to a prior Second Circuit opinion that quoted the Supreme Court: "Employment decisions driven by factors that are empirically intertwined with age are not discriminatory so long as they are motivated by 'some feature other than the employee's age.'"

The court also concluded that the plaintiff failed to show that the employer provided inadequate training for his new assignments, because there was no evidence "that he was given different assignments or training than younger employees. To the contrary, [the Plaintiff] … did not know what other employees' duties were, and the parties agreed that [the Plaintiff] attended training with three younger associates and made no claims that those associates received preferential treatment based on age."

The court also noted that even if he established a prima facie case of age discrimination, the defendants offered a legitimate, non-discriminatory reason for his suspension; "his failure to arrive at work on time and complete assigned tasks."

Emergency Declaration

1. *W.D., on behalf of his minor children, A. & J. v. County of Rockland*, 63 Misc.3d 932 (Sup. Ct., Rockland Cnty. 2019).

Petitioners commenced an Article 78 proceeding challenging a "Declaration of a Local State of Emergency for Rockland County" that was issued by the Rockland County Executive in response to a measles outbreak. The declaration essentially prohibited parents from permitting their children, who were not vaccinated against measles, from entering any place of public assembly in Rockland County. According to the Emergency Declaration definition, a "place of public assembly" included schools.

Petitioners were parents of children who were not vaccinated pursuant to a religious exemption and were thus excluded from attending school and other places of assembly. They sought an order declaring the Emergency Declaration to be null and void and moved for a temporary injunction, enjoining the enforcement of the declaration and permitting their children to return to school.

Executive Law § 24 permits the issuance of an Emergency Declaration in the event of a "disaster, rioting, catastrophe, or similar public emergency with the territorial limits of any county, city, town or village …" The term "disaster" is defined to include "epidemic." The term "epidemic" however is not defined in Executive Law § 24 and the court referred to the dictionary definition as "an outbreak of disease that spreads quickly and affects many individuals at the same time" or "affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time."

The judge noted that the information provided to the court indicated that since 10/18 to 4/19, Rockland County has seen 166 cases of measles in a population of approximately 330,000 people (.05% of the population). The judge concluded that this "does not appear … to rise to the level of an 'epidemic' as included in the definition of 'disaster' under Executive Law § 24." The

judge stated that the County Executive's reliance on Executive Law § 24 in issuing the declaration "may have been misplaced."

The court also found that the Emergency Declaration exceeded 5 days which is inconsistent with Executive Law § 24. Further, the court noted that the petitioners produced adequate evidence of "irreparable injury" since their children would continue to miss school. The court further noted that the children posed no immediate threat to other children at the school since the school had no reported cases of the measles.

2. *C.F. v. The New York City Dep't of Health and Mental Hygiene,* Index No. 508356/19 (Sup. Ct., Kings Cnty. 2019).

The Commissioner of the New York City Department of Health and Mental Hygiene declared a public health emergency pursuant to the NY City Health Code and ordered any person that lives in designated zip codes who had not received the MMR vaccine, to be vaccinated. Failure to comply would result in civil fines.

Petitioners were parents of unvaccinated children that sought to vacate the order as arbitrary and capricious and contrary to the law.

The question posed was whether the Commissioner had a rational, non-pretextual basis for declaring a public health emergency and issuing the orders. The court noted: "The unvarnished truth is that these diagnoses represent the most significant spike in incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter. It has already begun to spread to remote locations."

The court noted that thru 4/8/19, there have been 285 diagnoses during the current outbreak in the affected area, as compared to 85 diagnoses nationwide during the 2016 calendar year. "Accordingly, this court can only conclude that there presently exists an emergent measles epidemic in the area codes in or bordering the Williamsburg neighborhood of Brooklyn, sufficient to warrant the declaration of a public health emergency."

The court took exception to the Rockland County case wherein that court looked at the percentage of overall population affected to determine whether there was an epidemic. The court rejected that approach and noted that the appropriate measure is "the sudden percentage rise in infection experienced by the subject population. If one were to wait till a significant percentage of overall population were infected, disaster would inevitably ensue."

Employee Discipline

1. *Matter of Browne v. NYC Dep't. of Educ.,* Index No. 656133/2017 (Sup. Ct. New York Cnty. 2018).

Petitioner brought an Article 75 proceeding to vacate an arbitration award made after a disciplinary hearing held pursuant to Education Law section 3020-a. The hearing officer (Burrell) had found the teacher guilty of charges and terminated the teacher.

The petitioner, a tenured math teacher, was employed with the DOE for over 15 years. The charges stemmed from an incident that occurred with a student on 3/6/16. The DOE alleged that the teacher "engaged in corporal punishment, excessive force, unnecessary physical contact, conduct unbecoming his position, and neglect of duties…" It was alleged that the teacher placed the student in a headlock and/or chokehold and punched and/or struck the student about his head and/or face with a closed fist, one or more times.

The hearing officer noted that the witnesses presented conflicting testimony as to what transpired and the only person who allegedly saw the teacher strike the student was the school safety agent who was in the hallway near the teacher's classroom. The safety agent heard students yelling "fight, fight" and observed the teacher punch the student twice outside the threshold of the classroom while the door was still open. No student "corroborated this account…"

The hearing officer concluded that the DOE had proven by the preponderance of the evidence that the teacher "put his arm around Student A's neck and body" but there was insufficient evidence "to establish that [the teacher] choked Student A."

The hearing officer found that the teacher pushed the student into the desks while removing him from the class and "punched Student A about (sic) his head and/or face with a closed fist one more times (sic)." The hearing officer concluded that "these acts by [the teacher] caused Student A to experience minor swelling and redness to his head, face and neck." The hearing officer, however, found that the student did not experience pain to the head or face.

The hearing officer found that the teacher's conduct was appropriate up until he reached the doorway and stated: "The use of a closed fist to punch Student A in the head was not reasonable and not needed for self-defense." The hearing officer recommended termination and noted that the teacher "has failed to convince me that under similar circumstances he would not again overreact and his misconduct would not be repeated. His denial precludes remorse, and therefore causes me to question whether remedial steps such as a fine or suspension and anger management training would be effective."

The teacher was criminally charged in connection with the incident, but was acquitted of all criminal charges and the record was sealed.

A "probable cause" hearing was held wherein a different hearing officer (Woods) did not find probable cause to believe that the teacher committed serious misconduct. The teacher claimed, in part, that the award in the 3020-a hearing was irrational because it contradicted with the probable cause determination. The court rejected this argument;

> The Court finds that the probable cause determination made by Woods is irrelevant for this petition and that it cannot collaterally estop Burrell's determination. In the probable cause determination, Woods specifically advises that his determination of probable cause applies to whether petitioner committed serious misconduct under the terms of petitioner's collective bargaining agreement. Woods' decision was limited to the legal standard of serious misconduct in relation to the criminal charges and whether petitioner should be removed from the payroll. Woods expressly states that any misconduct allegations regarding corporal punishment should be addressed in an alternate forum.

The court found the hearing officer's (Burrell's) determination to sustain the charges involving corporal punishment based on excessive use of force to be "supported by adequate evidence and is not irrational." However, the court ultimately found that the penalty of termination to be "shockingly disproportionate to petitioner's misconduct." While the court acknowledged that it does not support corporal punishment the hearing officer "failed to recognize that the incident was an active and ongoing situation….The record indicates that Student A's behaviors escalated quickly and without warning, starting by calling petitioner derogatory names to throwing a stapler and then hitting petitioner. Although there is normally a co-teacher, petitioner was the only teacher in the room at the time. Student A's removal created a scuffle where the parties were in constant motion and the episode happened in under two minutes."

The court also noted that it was unreasonable for the hearing officer to implement the harshest penalty of termination based on the teacher's lack of remorse and his denial of any wrongdoing. The court found that the hearing officer "'placed petitioner in a very difficult situation, when he expected petitioner to show remorse,' given that petitioner denied any wrong doing."

The court concluded: "In light of petitioner's unblemished record, lack of disciplinary history and the underlying circumstances, the penalty of termination is excessive and shocking. Furthermore, Burrell found that Student A did not experience any pain to his head or face."

The court remanded the matter to the district for the imposition of a lesser penalty.

2. *Ferraro v. The New York City Dep't of Educ*., 752 Fed. Appx. 70 (2d Cir. Nov. 9, 2018).

Plaintiff was a former teacher for the New York City schools. The DOE brought charges against the teacher which resulted in 7 days of administrative hearings pursuant to Education Law section 3020-a. The hearing officer sustained most of the charges, determined that that teacher should be terminated and found that the record "did not support the claim of retaliation or the claim that the observations and ratings were wrongfully motivated." The teacher's employment was terminated. The state supreme court denied the teacher's petition to vacate the 3020-a decision.

The teacher, thereafter, filed complaints sounding in discrimination and retaliation. The lower court held, in part, that those claims were collaterally estopped by the findings of the 3020-a proceedings.

The court noted the general rule that New York courts afford preclusive effect to "administrative determinations … if made in quasi-judicial capacity and with a full and fair opportunity to litigate the issue." Referring to prior decisions, the court concluded that 3020-a hearings satisfy those requirements, and courts therefore give 3020-a hearings preclusive effect. The court, however, noted that for certain federal claims, there is an "additional prerequisite: We give preclusive effect only to a state agency's finding that have been judicially reviewed." In addition, for findings of a 3020-a proceeding to preclude re-litigation on an issue, "the issue must have been material to the … proceeding and essential to the decision rendered therein."

Here, the teacher raised disability discrimination and retaliation-based defenses during the 3020-a proceeding and the hearing officer made findings.

The court agreed with the lower court that the defenses were litigated and resolved. The teacher raised the defenses, the hearing officer considered and addressed them and "if the hearing officer had credited one or more of them, Ferraro could have prevailed." Thus, "the issues were sufficiently litigated and essential to warrant preclusive effect."

First Amendment

1. *Vetrano v. Miller Place UFSD*, 369 F.Supp.3d 462 (E.D.N.Y. 2019).

The school district held an annual variety show which consisted of musical and talent acts separated by satirical skits performed by members of the senior class. The variety show was a school-sponsored event. The skits were submitted for approval to the Executive Council which passed them to the faculty advisor for approval. After the skit scripts are approved by the advisor, they were submitted for approval to any faculty member who is mentioned by name or likeness. If a staff member does not approve the script, that person may not be mentioned in the variety show.

One skit satirized the high school's enactment of a policy which limited use of the bathroom to one student at a time, "supposedly to combat the smoking in the bathroom." The assistant principal (AP) approved the draft and modified script for the bathroom skit. At the beginning of rehearsal, the AP advised the students as a group that they must stick to the script and not improvise lines. Students that did not do so would be pulled from the show. Also, on the date of the first night of the show, before the show, the AP reminded the students that they may not deviate from the approved script.

During the bathroom skit, the plaintiff improvised the following line omitted from the drafts of the script approved by the AP: "Is this why our Superintendent makes so much money, to write bathroom policy?" The plaintiff agreed that the line was not part of the script but

disagreed that his actions violated the rules. During the day of the second variety show the AP told the plaintiff that he would not be allowed to attend the second night of the variety show "because he failed to stick to the approved script and did not follow the rules." The plaintiff received no other discipline.

Regarding the plaintiff's due process claim, the court noted that students have no constitutionally protected interests in participating in an extracurricular activity meriting due process protections.

Regarding the plaintiff's First Amendment retaliation claim, the court set forth the elements that a plaintiff must establish: "(1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech."

Concerning whether the plaintiff's speech was protected, the court noted '"if the speech at issue is 'school-sponsored,' educators may censor student speech so long as the censorship is 'reasonably related to legitimate pedagogical concerns."' Whether speech is school sponsored depends on whether the speech '"might reasonably have been perceived to bear the imprimatur of the school."' The court concluded that the bathroom skit constituted school-sponsored speech, because the plaintiff performed the skit during the variety show, and the variety show was a school-sponsored event. "Here, the students performed in a school venue, and the High School curated, reviewed and approved the Acts and Skits." Because the speech was school-sponsored, it may be censored so long as the censorship is reasonably related to legitimate pedagogical concerns. The court noted that legitimate pedagogical concerns existed for the censorship; namely the promotion of civility and respect. Thus, the plaintiff's retaliation claim failed because he did not engage in protected speech.

The court also noted that the plaintiff suffered, at most, a *de minimis* deprivation. "As the Court previously explained, the participation in extracurricular activities is a privilege, not a right." Therefore, the plaintiff "failed to establish that he suffered a viable adverse action in connection with his speech."

2. *Waronker v. Hempstead UFSD*, 2019 WL 235646 (E.D.N.Y. 2019).

Plaintiff took the job as Superintendent and brought in special investigators and a forensic auditing firm to review the school's "entrenched financial woes, as well as a deputy superintendent to deal with the violence plaguing the school." Plaintiff provided examples of academic and financial mismanagement and facility issues. Plaintiff hired New American Initiative to help improve the school and four Master teachers were hired to improve the pedagogy of the district. Plaintiff also terminated the Assistant Superintendent for Business and Operations and the High School principal.

The board called an emergency session and fired the special investigators looking into abuse, mismanagement, and possible corruption. In response, the plaintiff sent an e-mail to each board member which stated in part:

> I am advising the board that after raising questions about suspected illegal financial activity to members of the District, no corrective action has taken place. As a fiduciary and as a guardian of the public trust I have been compelled to consult with several law enforcement agencies on the local, state, and federal level about disturbing facts which have become apparent to me, which I felt could not and should not be occurring. These matters are of a nature that endanger the public health, welfare, and safety of our district and appear to be both unlawful and unethical, and required disclosure to, and an evaluation by, governmental offices outside the confines of the Hempstead School District.

> The need to provide this information was mandated by two factors: first, the fact that instead of corrective action, I am seeing the opposite; and second, my professional, moral, and legal obligation to serve the District and those who are truly the consumers-our children-and the community at large.

It was alleged that on December 22, 2017, without notice, the board suspended plaintiff's authority, fired the expert teachers and terminated the district's contract with New American Initiative. On January 5, 2018, the plaintiff distributed an open letter to the community and posted it on the district website. The letter stated in part:

> Collaborate with me to make Hempstead Schools thrive again. If we are honest, the need of working together on all these levels must be admitted as something that is obvious. Politics, self-interests, patronage, vendettas, threat, and cover-ups cannot rule the day. Our collective goal must be to elevate the standards for all involved in and attached to the Hempstead School District. The transformation which is necessary in Hempstead will not happen without hard work, transparency, honesty, and commitment to meaningful change.

On January 9, 2017, the board voted 3-2 to place the plaintiff on administrative leave with pay.

Plaintiff claimed municipal liability for violations of 14th Amendment rights; violations of due process pursuant to the 14th Amendment; violations of 1st Amendment rights; violations of state law whistleblower protections; and breach of employment contract.

With respect to plaintiff's procedural due process claim, the court noted that the plaintiff was suspended with pay "so the question of whether he had a property interest in his position as a superintendent is effectively academic. Plaintiff cannot sustain a due process claim in light of the undisputed fact that he was suspended *with pay*." The court further noted that "even if Plaintiff had been terminated or suspended without pay, the Court is persuaded by the consensus in other Circuits and district courts in this Circuit that superintendents have no property right in their position."

Regarding the First Amendment claim the court noted that to prevail on a First Amendment retaliation claim, the plaintiff must prove "'(1) [his or her] speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against [him or her]; and (3) there was a causal connection between the adverse action and the protected speech.'"

The court noted that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, "and the Constitution does not insulate their communications from employer discipline." The court must first determine if the employee spoke as a citizen on a matter of public concern.

The court determined that the plaintiff did not speak as a citizen because the board e-mail: (1) was sent by Plaintiff in his capacity as Superintendent; (2) was signed by Plaintiff using his Superintendent title; (3) explicitly discussed his role and duties; and (4) was sent solely to the Board as a means of providing counsel based on Plaintiff's experience and position as Superintendent. The court also noted that there is no civilian analogue to the Superintendent's posting a letter directly on the district's website. "Thus, Plaintiff sent the Board E-mail and Collaborate and Elevate Letter as a public employee pursuant to his official duties."

The court dismissed the retaliation claims under New York law because those claims are barred for failure to file a written verified claim within three months after the accrual of the claims and before the instant action pursuant to Education Law section 3813(1). The court noted that the two exceptions did not apply.

The court also dismissed the breach of contract case for failure to file a written verified claim within three months after the accrual of the claim and before the instant action pursuant to Education Law section 3813(1).

FOIL

1. *Reiburn v. New York City Dep't. of Parks and Recreation*, 171 A.D.3d 670 (1st Dep't 2019).

Issue of whether the public entity was required to produce an un-redacted copy of a study prepared for the public entity by an outside company. The court found that the entity failed to meet its burden of showing that the intra-agency materials exemption applied, therefore the lower court "properly directed respondent to produce an un-redacted copy of the subject report." The court found that the public entity failed to establish that it retained the outside company "for purposes of preparing the report, a necessary prerequisite for invocation of the intra-agency materials exemption for documents prepared by an outside consultant."

The record demonstrated that the outside company was retained to "perform some work" but did not establish that it was retained to "prepare the subject study and report, nor establish what [the company] was retained to do, nor, in particular, establish that respondent itself, as opposed to some other entity, retained [the company] to prepare the report."

The court remitted the matter to the lower court to address the petitioners' request to counsel fees: that is whether the respondent had a reasonable basis to deny access to an un-redacted copy of the at issue report.

Labor Decisions

1. *Laborers' International Union of N. America*, 51 PERB ¶4570 (2018).

Union filed an improper practice charge alleging that the county refused to respond to an information request for documents related to the promotion of a bargaining unit member. The county alleged that the information was confidential.

By way of background, the county promoted unit member Cormier to position of Construction Equipment Operator. Another unit member, Wilson, had also applied for the positon, but was not selected. In anticipation of filing a grievance on Wilson's behalf, the union requested information related to the decision to promote Cormier. The county replied by providing a copy of Wilson's job application and most recent performance evaluation, but omitting the same documents with respect to Cormier.

The ALJ noted that it is well-settled that a public employer must upon request, provide relevant information reasonably necessary for the administration of a collective bargaining agreement including for the purpose of investigating or processing a grievance. The union's right to receive information for such purposes is circumscribed, however, by the "necessity and relevancy of the information sought, the reasonableness of the request, considering the burden on the employer, and the availability of the information elsewhere."

The union sought the information that was considered by the employer in its decision to promote Cormier and not Wilson. The CBA had provided that "where candidates' experience and qualifications are equal, as indicated in their applications, the most senior of the applicants will be selected."

The ALJ noted that where a union "suspects that an employer has violated the parties' agreement by promoting, in error, one unit member over another, the materials considered by the employer with respect to both candidates' qualifications are patently necessary and relevant in determining whether a violation has occurred."

The county asserted that the union's requested information was not reasonable because it may infringe on Cormier's privacy interests since Cormier did not authorize the release of information in his personnel file. While the ALJ recognized "certain limited circumstances"

when an employer may rightfully decline to release information protected by a "specific statute, regulation or the common law," the employer must first "engage in a good faith effort with the requesting party aimed at accommodating the need for the requested information." The ALJ noted that the county had not identified any specific statute, regulation or case that prohibits the disclosure of the information at issue, "nor has it engaged in a good faith effort to accommodate [the union's] request."

The ALJ therefore concluded that the county violated the Taylor Law and ordered the county to provide the information.

2. *In the Matter of Brocton CSD,* 51 PERB ¶4568 (2018).

The school district filed an improper practice charge alleging that the union violated the Taylor Law when a member of its negotiating committee failed to affirmatively support ratification of a tentative agreement (TA) and made public statements opposing portions of the TA.

The union's negotiating team included 7 members including Boettcher. On 8/10/17, the parties reached a TA for a successor collective bargaining agreement which was reduced to writing, with the parties executing nine separate agreements and incorporating six separate proposals agreed to by the parties at previous negotiation sessions. The agreement was subject to ratification by the union and the district. At no time prior to the ratification vote did the union advise the district that any of its negotiations team members, including Boettcher, did not or would not support the TA reached between the parties.

On the day before the ratification vote, the superintendent and board president witnessed Boettcher say to a union member words to the effect: "What do they expect us to do in that half hour?" The comment was taken by the superintendent and board president to reference a provision in the TA that increased the teacher work day by one half hour, four days per week.

At the union ratification meeting, prior to voting, Boettcher stated in sum and substance, that she would not be quiet and publicly called into question why the district was asking for a greater increase to the work day than the increase it was offering in salary. The other union team negotiating members defended the TA. The union labor relations specialist and union president advised the superintendent that Boettcher had not been supportive of the TA at the ratification meeting earlier that day (that she questioned whether the increase to union members' salaries was worth the increase in the length of the work day). The union membership voted against ratification.

The ALJ referred to the well-established rule that once a tentative agreement is reached, the negotiators on each side have "an affirmative duty to support, and not to jeopardize, the ratification of that agreement. This duty precludes a negotiations team member from speaking against the agreement, of from remaining silent in the face of opposition to the proposed contract. A limited exception to this general rule applies when a dissenting member of a negotiating team gives advance notification to the other side that he or she does not support the agreement."

The ALJ noted that Boettcher, on the day before the ratification vote, spoke critically to individual bargaining unit members about the disproportionate increase in the length of the school day without a comparable increase in salary. Thereafter, during the ratification meeting, Boettcher again criticized the increased working day proposal. Efforts by other negotiating team members were unsuccessful. The ALJ concluded that such negative statements to members of the unit regarding the TA, in an attempt to influence a negative outcome of the TA vote, "demonstrates failure of the duty to support an agreement reached by the negotiating team."

The ALJ stated: "The Act does not compel either party to agree to any proposal. However, as noted by the Board, nothing is more disruptive of a good faith negotiating relationship than one party agreeing to terms of a settlement, and then reneging on such agreement."

The ALJ, finding that the union committed an improper practice, ordered the union to execute a collective bargaining agreement embodying the TA.

3. *Matter of Teachers Ass'n of Pleasantville, NYSUT Local 15140, AFT, AFL-CIO v. Pleasantville UFSD*, 51 PERB ¶ 3024 (2018).

An Administrative Law Judge (ALJ) found that the district violated the Taylor Law by prohibiting unit employees from wearing union t-shirts *en masse* in a concerted display of support for the union, and by issuing a memo to unit members regarding the district's positions in bargaining and regarding the t-shirt activity.

The parties were at impasse and proceeded to fact-finding after unsuccessful mediation sessions.

The union leadership informed its members that it had purchased 240 t-shirts with the union insignia on the front and the quote: "Teachers affect eternity; they can never tell where their influence stops. – Henry Brooks Adams" printed on the back. The shirts were paid by a NYSUT fund known as "Vote Cope." Paperweights given to union members who received tenure contained the quote: "Teachers Affect Eternity" and were displayed on many teachers' desks and the desk of at least one assistant principal. The union requested that members in all three district buildings wear the shirts on 11/25/15, the day before Thanksgiving and a day scheduled for a planned emergency rapid dismissal drill. The union president testified that the activity was intended to build "solidarity" within the membership.

The superintendent called the union president and vice president for a meeting and informed them that, according to counsel, wearing the t-shirts would be a violation of state regulations and the Taylor Law. She indicated that it would be a distraction to the students and warned that retroactive pay would be taken off the table in negotiations if unit members participated in the activity.

The superintendent sent an email to unit negotiators "calling on" them to "convey the message to the faculty that they are not to wear the tee-shirts" in classrooms, student contact areas and public contact areas the next day. Within hours, the union president sent an email to members informing them of the directive, noting the possible consequences of not following it and advising members to not wear the t-shirts. The president and vice president testified that they feared charges of insubordination and potential adverse consequences on bargaining. The t-shirts were not worn.

The superintendent sent a letter dated 11/30/15 to unit members advising them of the district's proposals made during negotiations and its position on certain proposals for the purpose of resolving the impasse. The letter also addressed the district's position regarding the t-shirt controversy.

The district argued that its actions did not violate the Taylor Law because the planned activity of wearing the t-shirts was not a protected activity and because no employees suffered actual discipline or adverse consequences.

PERB affirmed the ALJ's decision. PERB first noted that a public employee has a protected right under the Taylor Law to wear union insignia in the workplace, while on duty, unless the employer can show "special circumstances that outweigh the employee's statutory right." PERB noted that the union planned to engage "in a protected activity by expressing their membership in and support of" the union. The district did not demonstrate "any special circumstances" which outweigh the employees' statutory rights.

The district cited cases wherein PERB held that a district may prohibit discussion of pending negotiations with the public on its property, and that conduct is unprotected which "enmeshes" students into a pending labor dispute. PERB distinguished those cases from the one at bar because the message on the t-shirts contained "no reference, expressed or implied, to pending negotiations, to the fact that parties were at impasse, or to any other labor dispute."

PERB also found that the absence of discipline is not a reason to reverse the ALJ's findings: "Although no employees suffered discipline in the current case, that is only because they elected not to engage in protected activity after being threatened with adverse consequences by the District."

Concerning the 11/30/15 letter sent by the Superintendent to unit members, PERB concluded that that letter did not violate the Act. PERB noted that an employer may communicate directly with unit employees about employment issues "so long as the communication does not contain threats of reprisal for their exercise of protected rights and does not promise them benefits for refraining from exercising those rights." PERB noted that the letter in question did not make promises nor threaten reprisals. PERB also found that the letter did not amount to direct dealing; "we do not find that the District … was seeking to negotiate or reach an agreement with employees separate from negotiations with the Association."

4. *United Federation of Teachers, Local 2, AFT AFL-CIO,* 51 PERB ¶4561 (2018).

Union filed an improper practice charge alleging that the District violated the Taylor Law when it unilaterally began placing a flag in its computer system next to the names of unit employees who had been subject to discipline, causing those employees to be denied opportunities for transfers and permanent assignments.

The district announced its plan to initiate a new method of flagging negative work history in its "Galaxy" computer system. The information was only available to principals if they indicated in Galaxy that they intended to hire an individual for a position in their school. If flagged, a box would appear next to the employee's name which indicated information that the principal should be aware of, that was available to the principal by clicking on the flag. The flag only appeared if the employee was applying for a new position.

A flag was placed next to the employee's name only when two criteria were met. First, a substantial report of discipline or misconduct must have been issued by one of the district's three investigatory bodies. As a second criterion, the Disciplinary Support Unit must have had obtained evidence that the employee received a copy of the relevant disciplinary document. Only documents that were in an employee's personnel file could serve as a basis for flagging an employee's name.

The district's witness testified that the flag served "a purely informational function; it assures that a hiring principal is aware of flagged information." She testified that flagging does not restrict an employee's ability to apply for a new position or impose any restriction or limitation on the employee. Principals are not required to take, or refrain from taking any action when an employee's name has been flagged, "they may, if they so choose, hire an employee whose name is flagged."

Before their names are flagged, employees would have received a copy of the letter of misconduct that is linked to the flag and would have been advised that the document had been placed in the employee's personnel file.

The Administrative Law Judge (ALJ) found no violation of the Taylor Law and dismissed the improper practice charge.

The ALJ found no violation "because the manner in which the District maintains employee personnel files does not constitute a term or condition of employment and, therefore, is not mandatorily negotiable." The ALJ referred to prior PERB decisions indicating, for instance, that an employer was privileged to maintain duplicate personnel files, one in its central office and a second at the location where the employee worked; that an employer could change from a manual method of recording employee attendance, to a computerized one. The ALJ stated: "In this matter, the files the District maintains in Galaxy are merely digitized duplications of the contents of employees' paper personnel files."

The ALJ rejected the union's argument that the flag, by itself, has negative employment consequences, noting that the flag "merely brings to a principal's attention the fact that certain documents are available for review from an employee's personnel file."

5. *Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 51 PERB ¶3032 (2018).

District filed exceptions to a decision of ALJ finding that the district violated the Act when it initiated an investigation against Bagarozzi, brought disciplinary charges against her, denied her per session work, and issued a disciplinary letter, which was placed in her personnel file.

Bagarozzi was employed as a high school English teacher since 2000. Until 2017, her performance had been rated consistently as "satisfactory" or "effective/highly effective." She was active with the union, serving for 2 years as the chapter chairperson, and thereafter as an unofficial "surrogate" for the chapter chairperson.

The principal in question (Akil), became principal of the school where Bagarozzi worked in the fall of 2015. In a May 2016 observation, Bagarozzi was rated "highly effective." She was rated "highly effective" on the "measures of teacher performance" (MOTP) scale for the 15-16 school year.

During the 16-17 school year, Bagarozzi filed multiple grievances against the school administration, she also filed safety reports.

During the second half of the 16-17 school year, her performance evaluations reflected lower ratings than her prior evaluations. One evaluation by Morris (new assistant principal hired by Akil) rated Bagarozzi as "developing" in the MOTP category. Morris observed her a second time and issued another negative evaluation.

In May of 2017, Bagarozzi was served with 3020-a disciplinary charges. Akil initiated the investigation that led to the charges. The arbitrator dismissed one of the sets of charges but sustained the other set and Bargarozzi was fined $2,000.

PERB noted the test regarding improper practice charges that allege retaliation in violation of the Taylor Law: "the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: 'a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken 'but for' the protected activity.'"

The ALJ had indicated that "Bagarozzi offers a compelling chain of adverse actions stemming from her intensified activities with respect to grievances and her complaint about the school's inadequate reporting of incidents." The ALJ also noted that "following closely on the heels of her actions were a series of reactions by Akil, most notably the initiation of a special investigation and the disciplinary charges which followed."

PERB noted that while a set of 3020-a charges was not time-barred, the fact that the charges "were not brought until shortly after Bagarozzi exercise of protected activity is a piece of circumstantial evidence tending to support the inference of discriminatory intent."

PERB also indicated that the ALJ did not err in finding that the district had failed to refute the elements of a *prima facie* case. PERB noted: "Here, the District has not provided any such objective evidence that establishes that the ALJ manifestly erred."

6. *State of New York (Dep't. of Civil Service)*, 51 PERB ¶3027 (2018).

ALJ found that the State violated the Taylor law when it established a schedule of fees for promotion/transition examinations (examination fees). The fees applied to, among others, employees represented by various unions. The State filed exceptions to the ALJ's decision.

By way of background, the State Department of Civil Service issued a bulletin (#09-01) that announced to State department and agency personnel, human resources and affirmative action office that DCS would begin assessing fees for the processing of applications for

promotion/transition examinations. The fees were implemented without collective negotiations. For at least 10 years prior to the bulletin, the State did not require employees in the affected units to pay examination fees.

PERB agreed with the ALJ that not charging the fee for promotion/transition examinations was a mandatorily negotiable economic benefit. PERB therefore affirmed the ALJ finding that the State could not unilaterally implement a fee for the exams without negotiations with the charging parties, unless a defense by the State had merit.

The State first argued that the fees were a prohibited or non-mandatory subject of bargaining pursuant to Civil Service Law section 50. PERB rejected this argument because Civil Service Law section 50 contains no express prohibition on bargaining. "Nor is the statute 'so unequivocal a directive to take certain action that it leaves no room for bargaining.' Nor does the statutory language expressly vest the employer with such unilateral discretion to act with respect to the subject of fees as to preempt or foreclose negotiations."

PERB also noted that the fees only applied to current employees and did not apply to members of the general public, "which could change the nature of our analysis." PERB noted a prior decision wherein the Board found the payment of an application fee as a prerequisite to participation in open competitive civil service examinations to be a non-mandatory subject of bargaining.

PERB concluded that the "exemption from the fee is an economic benefit that is a term and condition of employment for the State employees."

Medical Exemption

1. *Appeal of E.C.*, 58 Ed Dept Rep, Dec. No. 17,638 (2019).

The commissioner of education upheld the denial of a medical exemption wherein the school district consulted with a medical professional at the State Department of Health (DOH).

In his certification to the district, the student's doctor recommended the student be exempt from additional live virus vaccines based upon two factors. First, the doctor explained, the child had an adverse reaction to the varicella vaccine. Additionally, the child's sibling developed idiopathic thrombocytopenic purpura (ITP), a medical condition that affects the ability of blood to clot, after receipt of the MMR vaccine and a maternal aunt also died at age 35 from ITP.

In weighing the request, the superintendent consulted with the school nurse and the medical director of the DOH Bureau of Immunization. The school superintendent denied the exemption based in part upon the medical director's recommendation against granting the exemption. On appeal, the parent argued that the student is a great risk for developing ITP based upon "her unique genetic history" and that the district unreasonably ignored the recommendation of the child's pediatrician.

According to the commissioner, the parent failed to prove that the district's determination was arbitrary and capricious. A district is entitled to inquire into the certification submitted by the child's pediatrician in order to identify a medically necessary reason for the exemption. In this case, the district's consultation with DOH was a reasonable method to obtain written medical opinions and guidance as to the potential dangers if the child were to receive the MMR vaccine.

The commissioner noted that the medical director explained that a family history of ITP is not a reason to exempt a child from receipt of the MMR vaccine and bolstered this opinion through consultation with experts at the Centers for Disease Control and Johns Hopkins University. Those experts determined that the child's risk of ITP was no greater than that of a person in the general population and that even children with a personal history of ITP are still recommended to receive MMR so long as their condition is stable. Accordingly, the appeal was dismissed.

Negligence

A. Assumption of the Risk

1. *M.P. v. Mineola UFSD*, 166 A.D.3d 953 (2d Dep't 2018).

Plaintiffs commenced an action against the school district seeking to recover damages for personal injuries when the infant plaintiff was allegedly injured playing a game of touch football. The student conceded that he and his friends routinely disregarded the boundaries set by school employees for the playing area, and would play outside the boundaries on a portion of the field that was on the edge of an adjacent playground. In the months before the accident, recess monitors repeatedly warned the infant plaintiff and his friends to stay away from the playground area while playing football. The students would move back to the designated area for a while, but then resume playing near the playground.

On the day of the incident, according to the student, he and his friends were playing outside the designated boundaries; he ran toward the playground to catch the football, dove and hit his face on a piece of playground equipment. The family sued, alleging negligent supervision claiming, in part, that the defendants allowed the students to play football too close to the playground equipment.

The court set forth the basic principles of assumption of risk and noted that a school's "negligent supervision may constitute a failure to exercise reasonable care in protecting a student from an unreasonably increased risk." The court noted that the district failed to meet its burden of demonstrating that the risk of colliding into the playground equipment located near the edge of the field was inherent in the activity of playing touch football on the field. "Although the risks inherent in a sport include those 'associated with the construction of the playing surface and any open and obvious condition on it' … the playground equipment was not a part of the football field or related to the game." As a result, the defendants failed to establish that their alleged negligent supervision in permitting the students to play football near the playground did not "create a dangerous condition over and above the usual dangers that are inherent in the sport." In addition, the court noted that given the students age at the time of the incident (9 years old), "it cannot presently be determined as a matter of law that he was aware of and appreciated the risks involved in the activity in which he was engaged."

The court also noted that the district failed to establish that the incident occurred in so short a time span that even the most intense supervision could not have prevented it. The court indicated that is a triable issue of fact as to whether the student was participating in the prohibited activity for an extended period of time and whether more intense supervision could have prevented the incident.

The court reversed the lower court and denied the defendants motion for summary judgment.

B. *res ipsa loquitur*

1. *Dilligard v. City of New York*, 170 A.D.3d 955 (2d Dep't 2019).

The Plaintiff, a public school teacher, testified at her deposition that she was administering a test to her special education students when a student entered the room late. The student was disruptive and "stormed out" of the room "slamming" the door behind her. As the plaintiff/teacher was using a telephone to contact the school office about the student, the face plate of the overheard air-conditioning unit fell and struck her. The plaintiff sued the city and the DOE for damages for personal injury.

The custodian engineer testified that the air conditioning unit was not regularly inspected by the DOE or by outside contractors and that the DOE changed the air filters once per year, at the end of May, approximately 10 months before the accident.

The plaintiff moved for summary judgment based on the doctrine of *res ipsa loquitur*. The court noted that to establish negligence under the doctrine of *res ipsa loquitur*, a plaintiff must establish that: (1) the event is of a kind that ordinarily does not occur absent negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the plaintiff did not voluntarily create or contribute to the event. The court noted:

> Summary judgment is appropriate in res ipsa cases only where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable."

The court concluded that while the plaintiff demonstrated that a face plate falling off an air conditioner is an event of a kind that ordinarily does not occur absent negligence, the district raised a triable issue of fact as to whether the face plate could have fallen off the air conditioner "because of the slamming of the door and not as a result of negligence." In addition, the district raised an issue of fact which demonstrated that outside contractors were responsible for the repairs and installations of the air conditioning units. "Exclusive control is not established when third-party contractors have access to an instrumentality causing injuries."

C. Negligence/IDEA

1. *Shantz v. Union-Endicott CSD,* 2019 WL 330510 (N.D.N.Y. 2019).

Plaintiff sought damages resulting from the alleged negligence of the school district's agents in failing to prevent the student from being bullied throughout the school year. Plaintiff alleged, in part, that the district failed to have an aide or monitor assigned to the class, failed to have the teacher take steps to ensure the student could safely attend class without being subjected to "physical beatings, being called nasty names, and otherwise causing him emotional distress."

The district removed the case to federal court and then filed a motion to dismiss contending that the plaintiff's cause of action arises under the Individuals with Disabilities Education Act (IDEA) and that plaintiff failed to exhaust administrative remedies.

The court noted that the plaintiff did not allege claims under either the IDEA or the Rehabilitation Act. "He pleads his claim as one for negligence against the school district. Negligence is a common-law, state-court claim, and does not invoke federal subject-matter jurisdiction."

The district, however, claimed that the plaintiff's claim was really an IDEA or an Rehabilitation Act claim "masquerading as a state-law negligence cause of action" because plaintiff references the student's disabilities and complains about the staff level provided to deal with them.

The court disagreed and concluded that the plaintiff was not attempting to plead an IDEA or Rehabilitation Act claim: "His claim does not allege a failure to provide a free and appropriate public education or contend that the bullying he suffered came as a result of a failure to accommodate. Plaintiff's state-law claims can operate independently of the two federal statutes. While B.S.'s disability played a role in how his classmates treated him, the negligence alleged is related to the Defendant's failure to protect B.S., not to the District's failure to accommodate B.S.'s disabilities."

2. *Matter of P.S. v. Pleasantville UFSD,* 168 A.D.3d 853 (2d Dep't 2019).

Action to recover damages for negligence, the plaintiff appealed an order from the lower court.

The plaintiffs' compliant alleged causes of action for negligence and negligent supervision, hiring, training and retention. They alleged, among other things, that the defendants were aware that the infant plaintiff had been diagnosed with anxiety and depression, that she had been hospitalized multiple times as a result, and that the defendants had represented to the plaintiffs that the infant plaintiff would receive appropriate therapeutic support while at school. It was alleged that the infant plaintiff, on 3/11/15, left school during the day without the knowledge of the defendants, went home, and attempted to commit suicide.

Defendants moved to dismiss the case and argued that the complaint alleged that the district had provided inadequate educational services to the infant plaintiff under the Individuals with Disabilities Act and that the plaintiffs failed to exhaust the IDEA's administrative remedies prior to commencing the action. The lower court granted the motion and dismissed the complaint for lack of subject matter jurisdiction.

The Second Department reversed and found that the complaint alleged "only common-law causes of action to recover damages for … negligence, negligent supervision, hiring, training, and retention, and loss of consortium. Thus, the plaintiffs were not required to exhaust the IDEA's administrative remedies before commencing the instant action."

D. Negligent Supervision

1. *Palopoli v. Sewanhaka Cent. High Sch. Dist.*, 166 A.D.3d 639 (2d Dep't 2018).

During a fight on school bus, one student (a plaintiff) who was engaged in the fight fell on top of another student (another plaintiff). When the fight initially began, the bus driver exited the bus and a security aide entered during the fight, but according to one of the plaintiffs, did not intervene to stop the fight. According to the bus driver, the security aide told the students to stop fighting and then radioed for assistance, and 3 additional security aides entered, but the bus driver did not see whether any of the aides intervened to stop the fight.

The court found that the lower court should have denied the school district's motion for summary judgment. "Where the complaint alleges negligent supervision in the context of injuries caused be an individual's intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable."

The defendants failed to establish that they had no specific knowledge or notice of the student's propensity to engage in the misconduct alleged. When asked if the student's prior disciplinary history involved violence, the assistant principal testified, "Not that I remember." Thus, the court found, "the school defendant failed to sustain their *prima facie* burden of establishing that they had no actual or constructive notice of Torre's propensity to engage in the misconduct alleged."

In addition, one of the plaintiff students testified that a security aide entered the bus 3 minutes into the 6 minute fight, but the aide did not intervene. The bus driver testified that 4 aides entered the bus, but he did not see whether they intervened to stop the fight. "Thus, triable issues of fact also exist as to whether Torre's dangerous conduct occurred in such a short span of time that no amount of supervision by the school defendants could have prevented the infant plaintiffs' injuries, … whether the infant plaintiffs' injuries were a foreseeable consequence of the security aide's alleged failure to respond appropriately as the events unfolded, … and whether security personnel took 'energetic steps to intervene' in the fight …"

2. *Ponzini v. Sag Harbor UFSD*, 166 A.D.3d 914 (2d Dep't 2018).

Personal injury action claiming that the kindergarten student sustained injuries when he fell from playground equipment during recess. The student was playing on a "Swizzle Stix Bridge" hanging from a crossbar with both hands. His hands were "kind of wet," and he lost his grip.

The school district moved for summary judgment. The district submitted the deposition transcript of a monitor who testified that there were 7 – 10 monitors for a group of, at most, 80 children. In addition, the district submitted the deposition transcript of an employee of the manufacturer of the playground equipment who testified that the manner in which the student was using the equipment was acceptable. The district also submitted an affidavit from an expert who believed the equipment was in good condition and complied with all applicable standards.

The Second Department reversed the lower court and found that the district should have been granted summary judgment. The court concluded that the district established their *prima facie* entitlement to judgment as a matter of law: the submissions demonstrated that the level of supervision at the time of the accident was adequate and submitted a report and affidavit from expert establishing that the equipment was appropriate for the student's age group and was not defective.

3. *Deb B. v. Longwood CSD*, 165 A.D.3d 1212 (2d Dep't 2018).

A special education student, after arriving at school, entered the building with JG, another special education student who had been a passenger with her on the same bus. Before the first period class, JG asked the student to accompany him outside the school building near the bleachers. The student agreed and it was alleged that JG sexually assaulted her.

The court reiterated the general rules regarding negligence and supervision. The court, referring to prior decisions, noted that schools "have a duty to adequately supervise the students in their care, and may be held liable for foreseeable injuries … School are not, however, insurers of students' safety and 'cannot reasonably be expected to continuously supervise and control all movements and activities of students.'" The court noted that the standard for determining whether the school has breached its duty "is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information."

The district showed that the student's IEP did not provide for a school aide to escort her from the school bus or to escort her throughout the building between periods. The student's mother knew this and had no expectations of an escort. In addition, the district demonstrated that the student had no history of leaving the building improperly. Also, there was no allegation that JG had a propensity to engage in dangerous conduct, or that the district knew or should have known of any such propensity.

The court reversed the lower court and found that the district's motion for summary judgment should have been granted.

E. Dangerous Condition

1. *Gonzalez v. Bd. of Educ. of City of New York*, 165 A.D.3d 1065 (2d Dep't 2018).

Plaintiff allegedly sustained injuries as the result of a slip and fall that occurred in the vestibule area of school building during a period of snowy and rainy weather. The plaintiff testified that the floor looked "glossy" and was slippery and wet and that there was no floor mat at the location. The custodial staff established that they were aware that water regularly accumulated during inclement weather in the specific area of the fall, a condition which is routinely addressed by, among other things, placing floor mats at the location.

The court concluded that there was legally sufficient evidence to support the jury's verdict in favor of the plaintiff. Concerning the issue of notice, the court stated, "a defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition."

The court further noted that while the defendant was not required to cover all the floors with mats, nor continuously mop, the defendant had a duty to maintain the school premises in a reasonably safe condition under all of the attendance circumstances.

The court found that a "valid line of reasoning and permissible inferences could lead rational individuals to the jury's conclusion that a dangerous condition existed at the time of the plaintiff's accident, and that the defendant had notice of such condition but failed to undertake reasonable and appropriate measures to remedy it …"

F. Notice of Claim

1. *Matter of John P. v. Plainedge UFSD*, 165 A.D.3d 1263 (2d Dep't 2018).

The student, a seven year old autistic girl, was left unattended in a school bus parked in a school yard. The temperature was 87 degrees. The student was found by the bus matron 45 minutes after she was due home, wandering in the surrounding neighborhood. Petitioner sought to serve a late notice of claim.

Courts must consider all relevant circumstances, including whether: (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits. The court must also consider "whether the claimant was an infant, or mentally or physically incapacitated."

The court concluded that the school district acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter: the superintendent and other officials responded directly to and met with the petitioner and the student at the scene of the incident; the superintendent viewed multiple videos of the incident; and the president of the board engaged in email correspondence with the petitioner regarding the incident.

Because the school district had actual knowledge, there was no substantial prejudice to them in maintaining a defense, and the lack of reasonable excuse "will not bar the granting of leave to serve a late notice of claim."

2. *Meyer v. Magalios, Lindenhurst UFSD*, 170 A.D.3d 1163 (2d Dep't 2019).

Action for personal injuries wherein the Second Department concluded that the lower court should have granted the district's motion dismissing the cause of action alleging negligent supervision. The court also concluded that the lower court should have granted the district's motion for summary judgment dismissing other causes of action that were not raised in the notice of claim. The court stated: " … if the defendant is a municipality, the plaintiff may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that 'substantially alter' the nature of the claim or add a new theory of liability."

The court noted that in addition to the cause of action for negligent supervision, which was asserted in the notice of claim, the complaint and bill of particulars contained allegations that the district, among other things, "failed to detain, suspend, and remove the other student from the presence of the injured plaintiff; failed to file a PINS petition against the other student; and failed to provide a copy of the school's code of conduct to teachers and parents of the students."

> By submitting evidence that the notice of claim did not mention these causes of action and legal theories, the School District established its prima facie entitlement to judgment as a matter of law dismissing all of the causes of action, other than negligent supervision, that were asserted in the complaint and bill of particulars against the School District.

Qualified Immunity

1. *Gorman v. Rensselaer County*, 910 F.3d 40 (2d Cir. 2018).

Plaintiff brought an action under 42 USC §1983 alleging in part that defendants retaliated against him in violation of the First Amendment after he filed a report that a fellow sergeant in the Sherriff's Department had misused a digital repository of criminal justice information.

The court noted "bad blood" between the plaintiff (a former corrections officer), and a fellow officer due to the plaintiff's sister ending a long relationship with the fellow officer. The fellow officer used a police database to check out the man who was living with the plaintiff's sister and saw that the man was a felon. Plaintiff reported the fellow officer's misuse of the police database and the fellow officer was disciplined. Plaintiff alleged, in part, that he was the subject of harassment by the fellow officer and other officials, as retaliation for reporting the misuse, in violation of his First Amendment right to speak on a matter of public concern.

The fellow officer was suspended from work and charged with misuse of the eJustice program. He pleaded guilty to "misuse of a computer," a misdemeanor. Plaintiff claimed that he suffered retaliation including: being ordered to "'take deliveries of milk trucks or bread deliveries' during his lunch break, being asked to strip-search inmates, and being somehow hit by a heavy door." Plaintiff called in sick on 7/14/13 and never returned to work. His employment was terminated.

The court noted that the First Amendment protects a public employee who speaks as a citizen on a matter of public concern from the employer's retaliation. If the employee speech constitutes a matter of public concern the court will balance the interest of the employer in providing effective and efficient public services against the employee's First Amendment right to free expression.

> To constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of political, social, or other concern to the community.' But speech that 'primarily concerns an issue that is personal in nature and generally related to the speaker's own situation, such as his or her assignments, promotion, or salary, does not address matter of public concern.'

The court noted that the plaintiff's speech was a report of misconduct by a correction officer "which can be a matter of public concern." The court, however, noted that at the same time, "the obvious context was infighting about intimate family relationships." The court then analyzed the speech in the context of "qualified immunity" which protects public officials for civil damages when either (a) the defendant's action did not violated clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law.

The court noted that there was no indication that the fellow officer or the other defendants were engaged in "an ongoing pattern of misconduct that might concern the public. A single incident of official misconduct *may* touch on a matter of public concern…" However the conduct at issue – the isolated use of a computer program for a private purpose – "implicated neither public safety nor the use of taxpayers' money."

The court, therefore, concluded that a reasonable officer would not have known that is was clearly established law that plaintiff's speech constituted a matter of public concern. The court noted: "the context was a volatile, intra-family feud that embroiled [the fellow officer] and the [plaintiff's] siblings … It was score-settling, and had small practical significance to the public." The court concluded that the defendants were entitled to qualified immunity.

2. *Tooly v. Schwaller*, 919 F.3d 165 (2d Cir. 2018).

Plaintiff sued SUNY, Dolan and Schwaller for deprivation of due process in violation of 14th Amendment, Equal Protection Clause, disability discrimination in violation of the state's Human Rights Law and retaliation.

Issue: whether Schwaller, the then-president of SUNY was entitled to qualified immunity. The court found that Schwaller should have been granted qualified immunity and stated that: "Failure to comply with a state procedural requirement – such as the New York Civil Service Law – does not necessarily defeat a claim for qualified immunity under federal law. Moreover, because Schwaller's conduct did not violate clearly established federal law, we further hold that he is entitled to qualified immunity as a matter of law."

The plaintiff was placed on involuntary leave and directed to undergo a medical evaluation. The Plaintiff requested a written statement of facts as to why he was placed on involuntary leave and required to undergo a medical evaluation. Schwaller denied his request. Plaintiff did not attend the evaluation. The evaluation was rescheduled, but plaintiff did not appear. He was directed to report to the Office of Human Resources for a disciplinary interrogation meeting and indicated that he "may have committed acts for which formal disciplinary action may be initiated." The letter advised that "failure or refusal to report as directed may, in itself, be grounds for disciplinary action." The meeting was rescheduled twice and plaintiff requested it be postponed a third time. That request was denied. Plaintiff did not appear for the disciplinary interrogation.

SUNY sent notice informing plaintiff that he would be fired and included 3 charges of misconduct: (1) abandoning his job; (2) failing to report for a medical examination; and (3) failing to report to the disciplinary meeting.

NY Civil Service Law requires that, prior to ordering a medical examination, an employer must give its employee "written notice of the facts providing the basis for the judgment … that the employee is not fit to perform the duties of his or her position." It also requires that, prior to taking disciplinary action, the employer provide the employee with "written notice thereof and of the reasons therefor," as well as a "copy of the charges preferred against him," and allow the employee "at least eight days for answering the same in writing." The lower court found that because a reasonable jury could find that Schwaller's violation of the Civil Service Law deprived plaintiff of his due process rights, Schwaller was not entitled to qualified immunity.

A defendant is entitled to qualified immunity under federal law if: (1) the defendant's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was objectively reasonable for the defendant to believe that his/her actions were lawful at the time of the challenged act.

The court noted that since a violation of a state law does not *per se* result in a violation of the Due Process Clause, it cannot *per se* defeat qualified immunity. "Consequently, a defendant who violates the New York Civil Service Law has not necessarily violated clearly established federal due process law."

The lower court correctly determined that the plaintiff's termination was a deprivation of a protected property interest requiring due process, and the issue was whether Schwaller provide the plaintiff with adequate process prior to firing him. Pursuant to *Loudermill*, pre-deprivation requires: (1) "'oral or written notice of the charges against [the employee]'"; (2) "'an explanation of the employer's evidence'"; and (3) "'an opportunity to present [the employee's] side of the story'" and "'to present reasons, either in person or in writing, why [the] proposed action should not be taken.'" The issue presented was whether there was a clearly established federal law holding a violation of the Due Process Clause when the employer had provided the plaintiff with an opportunity to receive the process required by *Loudermill*, but the plaintiff, for possibly proper reasons, had not made use of that process by appearing or responding.

Schwaller argued that at the proposed disciplinary meeting, the plaintiff would have received all of the procedural protections required by *Loudermill*. The Second Circuit referred to

a prior decision that a "'failure to submit to the [disciplinary] procedures precludes consideration of the fairness of those proceedings in practice' … Because [plaintiff] never appeared for the interrogation meeting, we cannot say with certainty what would have occurred at the meeting, or whether the meeting would or would not have been fair."

> No case, in this Circuit or elsewhere, … has held that, where the defendant provides an opportunity for the plaintiff to receive due process at a meeting and the plaintiff, even for potentially valid reasons, fails to appear, the defendant must provide alternative procedures. Nor has any case established that the procedures required by *Loudermill* may not be provided at that same hearing or that they must be provided in a particular manner not satisfied here.

The court concluded that Schwaller had not violated the plaintiff's clearly established rights and Schwaller was therefore entitled to qualified immunity.

Seniority

1. *Bd. of Educ. of the Minisink Valley CSD v. Elia,* 170 A.D.3d 1472 (3d Dep't 2019)**.**

Beginning in 2007, DeRosa, certified in elementary education and special education, worked for the district in a variety of probationary and substitute roles, one being a probationary elementary teacher. That position was abolished in 2010 and her name was placed on a preferred eligibility list. A vacancy for an elementary teacher position arose in 2013. That position was offered to individuals on the preferred list "in order of their length of service in the system." Two other teachers, whose elementary teaching positons had also been eliminated in 2010, were found to have greater seniority than DeRosa "because her full-time regular substitute work as a special education teacher and elementary school librarian could not be counted toward her length of service." The board of education appointed another teacher to the position.

The commissioner of education concluded that DeRosa should have been credited for her long-term substitute work. The district appealed and the lower court dismissed the school district's article 78 proceeding seeking to annul the commissioner's determination.

The Third Department noted that "[d]eference is … afforded to the Commissioner's determination where, as here, it is based upon her expertise in applying an ambiguous statutory and regulatory framework."

The court noted the distinction between the situation when a teaching positon has been abolished and the situation when a teacher is recalled:

> Where a teaching positon is consolidated or abolished, "the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." … In contrast, when a similar vacant position arises, teachers are recalled "in the order of their length of service in the system" without reference to the tenure area in which that service was performed.

The court referred to prior decisions regarding abolition and recall in the context of school districts for cities with fewer than 125,000 inhabitants, and concluded that a calculation of recall rights dictates using "any and all service within the system, not just within the specific tenure area at issue."

The court concluded that for long-term substitute service for recall purposes under Education Law section 3013, "any and all service within the system" is counted without any "further qualification of service in a particular tenure area." The commissioner relied on this

distinction to conclude that DeRosa's long-term substitute work counted toward her "length of service in the system" for recall purposes, because she "substituted in areas where tenure could be granted so as to render the work 'full-time service as a professional educator' covered by Education Law section 3013(3)."

The court found that the commissioner's determination was supported by a rational basis and "that no reason exists to set it aside."

Settlement Agreements

1. *Nobile v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 166 A.D.3d 527* (1st Dep't 2018).

Plaintiff, a former tenured teacher, sought to rescind a stipulation with the New York City Department of Education (DOE) settling disciplinary charges brought against him. DOE agreed to discontinue the hearing on the pending charges and to take no further disciplinary action in exchange for the plaintiff agreeing to "irrevocably retire from his employment … effective the close of business January 31, 2017."

The agreement was signed by the plaintiff, his counsel and the counsel for DOE on October 7, 2016. Attached to the stipulation was a letter signed by the plaintiff and addressed to the superintendent stating: "I hereby irrevocably retire from [DOE], effective close of business January 31, 2017." The agreement contained a signature line for the superintendent, who signed several days later.

Before the superintendent signed the agreement, the plaintiff notified DOE that he changed his mind and wanted to rescind the agreement. He argued that the agreement was unenforceable when he changed his mind because "not all the parties had signed it."

The court disagreed with the plaintiff, stating in part: "…the stipulation signed by plaintiff and counsel acting on behalf of DOE is binding under general contract principles. Plaintiff failed to show the existence of fraud, collusion, mistake or accident, or that counsel lacked DOE's consent to enter into the stipulation." The court noted that the plaintiff's agreement to retire was irrevocable, and "plaintiff understood its consequences."

2. *Garvey v. Wegmans*, 2018 WL 5983374 (N.D.N.Y. 2018).

Plaintiff claimed, in part, that his former employer violated Title VII. The court found that plaintiff's claims were barred by a confidential settlement agreement and general release. An employee may waive his/her cause of action under Title VII as part of a voluntary settlement. The court must determine if the "employee's consent to the settlement was voluntary and knowing." To do so, courts apply the "totality of the circumstances test" which includes the following factors: 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. Courts will also consider "whether the employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so."

Based on these factors, the court found that the plaintiff voluntarily and knowingly entered into the settlement agreement with the employer, and that the language of the agreement "clearly precludes Plaintiff from asserting his discrimination claim under Title VII against Wegmans."

3. *Appeal of M.B. and J.B*, 58 Ed Dept Rep, Dec. No. 17,535 (2018).

Student faced a long-term suspension due to incidents that occurred on May 2 and 5, 2017. A superintendent's hearing was scheduled and then adjourned by the student's parents to engage in settlement discussions. A settlement agreement was then signed, pursuant to which the

student and the student's parents waived their rights to a superintendent's hearing and agreed to, among other things, a suspension until June 30, 2018, and that the student would be allowed to complete his senior year with alternative instruction and attend graduation.

The parents of the student appealed claiming, in part, that the notice of the suspension was improper, that they were denied the opportunity to question witnesses and were not notified of their right to appeal the suspension to the board of education. The school district asserted, among other things, that the parents had waived their rights to a superintendent's hearing and therefore waived their rights to claim procedural defects regarding the suspension.

The commissioner dismissed the appeal as moot since there was no matter in actual controversy: the student served the suspension, had graduated and the parents were not seeking to expunge the student's record.

The commissioner noted that even if the appeal was not dismissed as moot, it would have been dismissed on the merits. The commissioner stated that previous commissioner's decisions "have recognized that under certain conditions, parents may waive a student's due process rights under [the] Education Law …" The commissioner, however, noted that to be valid, the waiver must be "voluntarily, knowing and intelligent" and that the school district must "provide the student and parents with a written document clearly and concisely stating all of the rights to be waived, as well as the consequences of waiving such rights."

The stipulation of settlement in the case stated that the "[p]arent and [s]tudent voluntarily waive their rights to a superintendent's hearing…" and there was nothing in the record suggesting that the settlement was not entered in a voluntary, knowing and intelligent manner, the commissioner found. The commissioner therefore concluded that the parents were "precluded from challenging the facts and circumstances underlying the student's suspension."

Shared Decision-Making

1. *Appeal of Rhonda Tulip*, 58 Ed Dept Rep, Dec. No. 17,583 (2019).

Petitioners appealed from action of the BOE and its superintendent concerning adherence to the district's shared decision-making plan.

The board adopted a plan that provided for screening committees as part of the hiring process for teachers, supervisors, and administrators. The screening committee reviewed and interviewed candidates for employment provided by the human resources department and would determine by consensus the selection of finalists who would be recommended to the superintendent for additional interviews. The superintendent was required to consider the recommended candidates and may either recommend a candidate to the board or reject all of the candidates. If all are rejected, the screening process would then be carried out again with a new pool of candidates.

The screening committee met to consider a list of candidates for the position of high school assistant principal which included Prudente. The committee reached a consensus on only two finalists who were to be recommended to the superintendent and "despite the urging of [respondent board's high school principal] (one of the Chairs of the Screening Committee)," Prudente was not one of the two. However, according to respondents, the superintendent received an email from the high school principal indicating that the committee selected three candidates, including Prudente. The superintendent recommended Prudente to the board. The board appointed Prudente as high school assistant principal.

The petitioners argued, in part, that the district did not follow the plan by not appointing one of the two candidates properly put forward by the screening committee, or rejecting both candidates and returning the matter to the committee.

The commissioner noted that the "hiring and appointment of employees, including school administrators such as … Prudente, are non-delegable statutory duties and obligations of a board of education. … in various contexts the Commissioner has ruled that a board of education's

statutory duties and responsibilities are not delegable to a shared decision-making team. … Where a district policy constitutes an unlawful delegation of the board's powers it is void as against public policy." The commissioner stated:

> Regardless of the intent or ambiguity of [the language of the plan], however, to the extent the shared decision-making plan is interpreted to preclude the board … from considering a recommendation of the superintendent for appointment of a candidate who has not been recommended by the screening committee, such plan is void as against public policy. The board … could properly delegate the screening of candidates to the shared decision-making team and could allow the shared decision-making team to adopt procedures for selection of candidates consistent with board policy and the statutory authority of the board … however, allowing the shared decision-making team to make a binding decision to reject a candidate would constitute an unlawful delegation of the board's powers.
> … if the shared-decision making plan is interpreted to preclude the superintendent from recommending a candidate who has been screened by the screening committee and rejected by that committee, the plan would be void as against public policy.

The hiring of Prudente was within the non-delegable statutory authority of the BOE. The commissioner therefore rejected the arguments that the appointment of Prudente was in violation of the shared decision-making plan, and the appeal was dismissed.

Special Meeting Vote

1. *Board of Education of the Liverpool CSD*, 58 Ed Dept Rep, Dec. No. 17,587 (2019).

The board of education sought an order annulling the results of a December 11, 2018 special meeting. On October 9, 2018, the district adopted a resolution calling for a special district meeting for the purpose of voting on a proposition authorizing the district to appropriate additional funds from its capital reserves to complete capital projects. The intent was to appropriate up to $950,000 from the district's 2016 capital reserve fund. However, due to a clerical error, the ballot for the special meeting mistakenly referred to the district's 2009 capital reserve fund instead of the 2016 capital reserve fund. The district claimed that the 2009 capital reserve had already been expended to the full extent authorized by the voters. The vote passed by a significant margin.

The district requested that the commissioner either (1) affirm the results of the vote and deem the proposition as intended to have been accepted, or (2) invalidate the results of the December 11, 2018 results and order a new election.

The commissioner noted that the proposition erroneously referred to the withdrawal of $950,000 from the district's 2009 capital reserve fund instead of the 2016 capital reserve fund. The district claimed that the results should be affirmed "as intended" because "no voters commented on the discrepancy" and, thus, the commissioner "may assume that every voter who voted 'yes' to a $950,000 appropriation from the 2009 Capital Reserve Fund would have … voted 'yes' to the same appropriation from the 2016 Capital Reserve Fund." The commissioner, however, indicated that there was no basis in the record to make this assumption.

> Contrary to respondent's argument, there is no evidence in the record that the voters were notified prior to the vote that the 2009 capital reserve

> fund had expired and that all funds in that reserve fund had been expended.

Further, the commissioner could not conclude that the voters' approval extended to an expenditure from a different capital reserve fund.

> The voters could have reasons for objecting to the expenditure from the 2016 capital reserve fund that do not appear in this record, and I decline to speculate that the voters would have approved a first-time expenditure from the 2016 capital reserve fund. Under the circumstances, I find that the unfortunate error described herein vitiated the fundamental fairness of the vote.

Accordingly, the commissioner found that a new vote was necessary to determine the will of the voters.

Student Discipline

1. *Appeal of a Student with a Disability*, 58 Ed Dept Rep, Dec. No. 17,610 (2019).

High school student with friends participated in a paintball game off-campus to celebrate the student's birthday. The student took a photo of another student in front of a rack of mounted paintball guns and added the caption: "Don't come to school on Tuesday." He uploaded the photo and caption using social media application Snapchat.

The principal was made aware of the photo and the police were contacted. The police determined that the posting did not present a threat to the school district. The superintendent sent a letter to district parents informing them that a threatening posting had been made on Snapchat, that the police had investigated, and that the police "determined that the threat was made as a joke and posed no danger to our students or staff."

Petitioners and the student met with the principal on the morning of September 4, 2018 at 10:00 am. According to the commissioner, it appeared from the record that the district did not allow the student to attend school prior to that time. Later that day, the district delivered a letter to petitioners at their home indicating that the student was suspended for 5 days (9/4 – 9/12). By letter dated 9/5/18, the superintendent informed petitioners that a long-term suspension hearing would be held on 9/12. The notice of charges stated in relevant part:

> On or about Sunday, September 2, 2018, respondent student … posted a message on a social media account which stated, "Don't come to school on Tuesday," superimposed on a photograph of another student who was standing in front of objects that appeared to be weapons. Such conduct is in violation of the … School District Code of Conduct.

The hearing officer recommended that the student be found guilty of the charged conduct and that he be suspended through 9/30/18. The superintendent adopted the recommendations. The matter was appealed to the board. The board denied the appeal

Regarding the short-term suspension, the commissioner concluded that the principal improperly suspended the student prior to the delivery of the written notice and an opportunity for an informal conference with the principal. The district argued that the written notice included a finding that the student's continued presence was a continuing danger to persons or property or an ongoing threat of disruption to the academic process. The commissioner did not agree and noted that the police found that the threat was intended as a joke and that the student did not present a threat to the district. Moreover, the commissioner noted that the district allowed the student to be

on school property to take the ACT exam "if he so chooses." The commissioner therefore ordered the short-term suspension annulled and expunged from the student's record.

The petitioners argued that the student could not be disciplined (both short-term and long-term) because he uploaded the posting outside of school grounds and during non-school hours. The commissioner rejected this argument and noted prior commissioner decisions that upheld suspensions for off-campus conduct. She also referred to case law that has recognized that students may be disciplined for conduct that occurred outside of the school that may "endanger the health and safety of pupils within the educational system or adversely affect the educative process."

The commissioner also considered whether the suspension violated the student's First Amendment rights since the conduct consisted only of speech. The commissioner noted the *Tinker* standard that "a school district may discipline a student for speech where there are facts that might reasonably have led school officials to forecast substantial disruption or material interference with school activities." The commissioner indicated that the Second Circuit has ruled that "the fact that the speech occurred off school property does not insulate the student from discipline where the speech poses a reasonably foreseeable risk that it would come to the attention of school authorities and materially and substantially disrupt the work and discipline of the school." She noted that it was "reasonably foreseeable that the student's posting would come to the attention of school officials and that school officials could reasonably foresee that it would cause substantial disruption or material interference with the work and discipline of the school." The commissioner also noted that the "fact that the threat later proved not to be real and that the student did not intend to carry it out does not preclude discipline of the student for the posting."

The petitioners also claimed that the district failed to prove a violation of its code of conduct through competent and substantial evidence and that the charges did not identify the specific portion of the code of conduct that was violated. The commissioner indicated that there is no requirement that a notice cite to a specific provision of the code of conduct: the charges need only be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." The commissioner found that the language of the charge provided sufficient information for petitioners and the student to prepare an effective defense.

The commissioner also rejected the argument that the student could not be disciplined for his conduct because he did not intend to threaten anyone and did not actually "endanger" the "safety, morals, health or welfare of others." The commissioner concluded that "whether a student intended his or her conduct as a joke or whether he or she intended to carry out the threat is irrelevant to a finding of guilt as to charges concerning inappropriate threats."

The commissioner also found that the suspension of 18 days was not excessive.

2. *Appeal of L.M.*, 58 Ed Dept Rep, Dec. No. 17,561 (2018).

Appeal of a decision of the board of education regarding the short-term suspension of students and decision to impose academic penalties.

The students were enrolled in a college-level physics course. An investigation revealed that the 2015 mid-term exam and other secure, electronic course materials used in UHS Physics were disseminated due to the wrongful, unauthorized access of teacher's electronic files by a former student in the district who had taken the class during the 2014-2015 school year. The investigation revealed that the former student approached a current student and offered to sell him electronic files related to the class from the 14-15 school year. According to the district, two students paid the former student $35 for a flash drive containing the materials. The investigation revealed that one student made an electronic copy of the flash drive containing the material. Another student emailed copies of the 2015 mid-term exam and other assessment materials from Physics that were located on the flash drive, to several students enrolled in the class for the 2015-2016 school year.

It was determined by the district that student used the 2015 mid-term to their unfair academic advantage and, among other things; a grade of 0% was assigned to the midterm examination for the student's report card.

It was determined by the district that another student engaged in academic dishonesty/cheating based upon his use and dissemination of secure materials from the Physics course, including the 2015 mid-term and teacher answer keys, and that he gained an unfair advantage by doing so. A grade of 0% was assigned to the midterm examination for the student's report card. The student was also given a 5 day out of school suspension.

The petitioners alleged, in part, that the students were deprived of due process with respect to the academic consequences. The commissioner rejected this argument and noted that "decisions regarding student grading rest initially with the classroom teacher and ultimately with the board of education. … I will not substitute my judgment for that of school officials on a student's grade absent a clear showing that the determination was arbitrary, capricious, or unreasonable." The commissioner also stated that "where a student is found to have compromised the integrity of even one portion of an examination, a grade of zero, after a full investigation by the school district of the circumstances surrounding the grade, and after the student had an opportunity to present his or her version of the incident, is not arbitrary or capricious."

Petitioners argued, in part, that the students did not engage in academic dishonesty because they never had possession of a copy of the 2016 mid-term and did not know that the 2015 mid-term would be reused in its entirety as the 2016 mid-term. The commissioner rejected this argument "because knowing possession and use of a secure examination, with a teacher's answer key, without permission of the teacher or another school official is itself a form of academic dishonesty." She further stated that "under the circumstances of this case, C.M. and K.H. knew or should have known that they should not have been reviewing copies of past assessments that were obtained surreptitiously from a former student and, in C.M.'s case, were obtained with money passing to the former student."

The commissioner dismissed the appeal.

3. *Appeal of a Student with a Disability*, 58 Ed Dept Rep, Dec. No. 17,600 (2019).

Parent appealed the decision of the district to suspend his son. The principal notified the parent that the student was "involved in the use of an illegal controlled substance while on school grounds" and advised that the district "proposed to suspend [the student] from attendance in school for a period of five days" from 12/15 through 12/21. A December 15, 2017 letter indicated that the superintendent charged the student with "[d]isrupting the educational process: [u]se of an illegal controlled substance while on school grounds."

A long-term suspension hearing was scheduled and the student pled not guilty to the charge. The hearing officer recommended that the student be found guilty of the charge and recommended the suspension be extended for an additional 15 days.

The superintendent adopted the hearing officer's findings regarding guilt and penalty. The parent appealed the superintendent's decision to the board of education. In a February 21, 2017 letter, the board president notified the parent that the district had modified the hearing officer's findings as follows:

> While no competent and substantial evidence was provided that [the student] used an illegal controlled substance on school grounds, [the student] admitted that he was in possession of a "vape" pen, an electronic device capable of containing synthetic tobacco, the use of which is specifically prohibited by … [respondent's] Code of Conduct … Therefore, the Board of Education concludes that [the student] was guilty of possessing a "vape" pen on school grounds …

Notwithstanding the modification, the board upheld the penalty imposed by the superintendent and denied the parent's appeal.

Concerning the short-term suspension, the commissioner noted that while the principal provided the parent with written notice of the charged misconduct, "neither the original nor revised written notice advised petitioner or the student of their right to request an immediate informal conference with the principal or their right to question complaining witnesses." Because the district did not argue that the student was a continuing danger to persons or property or an ongoing disruption to the academic process, the written notices were deemed defective by the commissioner. In addition, the notices were both sent by regular mail which does not satisfy the regulations, the commissioner concluded. The short-term suspension was therefore expunged.

Regarding the long-term suspension, the commissioner noted that charges in a student disciplinary proceeding need only be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." The commissioner agreed with the parent that the board erred by finding the student guilty of a materially different charge "which it did not raise at, or at any time prior to, the long-term suspension hearing."

The commissioner noted that the board found that the district did not introduce competent and substantial evidence to support the charge, but rather than expunge the suspension, the board "determined that the record supported a finding of guilt on a completely different charge: possession of a vaping device on school grounds."

> I find that respondent's modification of the charges against the student was material, and that such modification violated petitioner's and the student's rights to a fair hearing pursuant to Education Law § 3214(3)(c)(1). The charges of drug use on school grounds and possession of a "vape pen" on school grounds are qualitatively different and, thus, would require different kinds of proof to demonstrate guilt or innocence.

The commissioner, therefore, expunged the long-term suspension from the student's record.

4. *Appeal of D.K.*, 58 Ed Dept Rep, Dec. No. 17,539 (2018).

The parent appealed the discipline of the student who was given a five day out of school suspension and a co-curricular suspension of 30 days.

According to an individual, the student had been observed using a vaping device backstage during rehearsal for a school musical. The student denied using a vaping device during the rehearsal, but indicated that she had used a "vape in her car in the … High School Parking Lot before rehearsal" on January 17, 2018. The principal contacted the parent by telephone and indicated that he "was considering a suspension" and asked if the parent could meet with him. The student started the five day suspension on January 18, 2018. The parent met with the principal at approximately 11:00 am on the 18th to discuss the incident. During that meeting the principal informed the parent that he was imposing the 5 days suspension and the co-curricular suspension. On January 19, 2018 the principal mailed written notice of the suspension to the parent.

The commissioner concluded that the short-term suspension must be expunged based on the district's failure to provide timely written notice. The district claimed that it sent the written notice by mail on January 19. The commissioner noted that this was improper. First, the provision of written notice by regular mail does not satisfy the requirement of the law. Secondly, the student's suspension began the previous day, January 18th. Thus, the district violated the law

by failing to provide written notice and an opportunity for an informal conference prior to the commencement of the suspension.

The commissioner also noted that the district's argument that it met with the parent at 11:00 am on January 18 to discuss the suspension was not persuasive because:

> the record indicates that the suspension commenced on January 18 and respondent admits that written notice was not provided until the next day by regular mail. Thus, even if I accepted respondent's argument that petitioner and the student were afforded an opportunity for an informal conference at the meeting on January 18, the student's suspension commenced prior to such meeting in violation of Education Law § 3214(3)(b)(1) and 8 NYCRR §100.2(1). Providing written notice to the parents of their statutory right to question complaining witnesses in the presence of the principal after commencement of the suspension and after the informal conference defeats the purpose of the written notice requirement …

While the commissioner expunged the short-term suspension, she did not expunge the 30-day extracurricular activities suspension for the "[u]se, [p]ossession, or [s]ale of [d]rugs." While there was no proof that the student used the vaping device to dispense marijuana or liquid nicotine, "respondent's code of conduct clearly prohibits possession of objects which may be used to facilitate drug use, and I find that a vaping device constitutes such an object." In addition, she noted that the Public Health Law explicitly prohibits the use of an electronic cigarette on school grounds. "Thus, it was not unreasonable for respondent to prohibit possession of devices themselves, even if they are capable of a benign use." The commissioner also concluded that the extracurricular activities suspension was not excessive.

5. *Appeal of J.D.*, 58 Ed Dept Rep, Dec. No. 17,551 (2018).

Parents appealed the decision of the board to discipline their son who admitted to buying and consuming a marijuana brownie on April 20, 2018. The student was given a five day short-term suspension, which was later expunged, and then given a long term suspension by the superintendent through May 29, 2018, with the ability to return on May 21, 2018 if he met several conditions. The family appealed the suspension to the board of education. The board overturned the expunged the short-term suspension but upheld the long term suspension

Petitioners raised a number of issues including the fact that the district did not allow the parents or their counsel to attend the executive session at which the student's appeal was considered. The commissioner indicated that although statutory provisions do not preclude the presentation of arguments to a board of education on appeal of a suspension determination, "there is no requirement which would have required respondent to permit petitioners to present arguments in person before it considered the student's appeal in executive session; nor is there any requirement that petitioners be allowed to attend such executive session." The commissioner, therefore, concluded that board properly based its determination on the record before it.

The parents also argued that because the superintendent attended executive session, this constituted an improper *ex parte* communication and cited to *Brown v. Board of Educ. of Rochester*. In *Brown*, the court noted that the district denied the parent's request that she and her attorney be present at an executive session of the board during which their appeal was considered, although the school district's attorneys attended the executive session. The court noted, in *dicta*, that "the seemingly *ex parte* nature of the meeting raises enough concerns to present serious questions going to the merits of plaintiff's claims." The commissioner, in the case at bar, noted that while the situation may present the possibility of an impermissible *ex parte* communication, "on the record before me I cannot conclude that any such impermissible communication occurred

in the instant appeal … While I cannot find that the superintendent's presence was prejudicial in this instance …, I caution respondent to take appropriate steps to avoid any appearance of impropriety."

Another argument raised by the family was that they were denied an opportunity to subpoena witnesses, and that the district unreasonably refused to identify student witnesses who implicated the student. The commissioner rejected these arguments, first noting that there is no authority supporting a right to discovery in a long-term suspension hearing; "Thus, petitioners had no right to compel the district to identify or produce witnesses, or to introduce certain evidence into the record." Concerning the subpoena issue, the commissioner stated that the record:

> reflects that petitioners requested that the hearing officer issue subpoenas at approximately 5:00 pm on the day before the hearing, and that the hearing officer offered to adjourn the hearing if petitioners wished to have the hearing officer sign the subpoenas. Petitioners then continued to participate in the hearing and did not raise the issue again. Under these circumstances, the record supports a finding that petitioners chose to proceed with the hearing instead of adjourning in order to have the subpoenas issued.

The commissioner dismissed the appeal.

6. *Appeal of a Student with a Disability*, 58 Ed Dept Rep, Dec. No. 17,560 (2018).

Petitioner appealed the determination of the board to impose discipline upon his son. The student was a member of the varsity rifle team. Members of the team informed the coach of certain allegations related to series of troubling and/or threatening statements attributed to the student that were directed at or overhead by team members. For instance, a member informed the coach that the student had said that he "makes explosive bombs in the basement and [that] he orders supplies off the internet."

The principal opened the student's locker and searched the front pouch of student's backpack and discovered an electronic device with an electronic circuit board, a timing device and "some kind of canister." A school lockdown and shelter-in-place drill was initiated and local police were contacted as well as the bomb squad. The student indicated that "he had a CO/smoke detector that he had taken apart to see how it worked in his back pack." The student was "cleared criminally of any wrongdoing".

A long-term suspension hearing was held on December 13, 18 and 19, 2017 and the student was suspended until the beginning of the 4th marking period of the 2018-19 school year with the possibility of return at the beginning of the 3rd marking period if conditions were satisfied.

The student appealed and challenged charges 1, 2 and 4-10.

Charge 1: "On or about November 16, 2017, [the student] engaged in conduct that was violent or physically aggressive. More specifically, [the student] had (what appeared to be by the Principal) an explosive device in his school locker."

The hearing officer found the student guilty of this charge reasoning that the student possessed the device in question. The commissioner, however, concluded that the evidence in the record did not support the hearing officer's conclusion since there was no evidence as to whether the student engaged in "violent or physically aggressive" conduct by possessing the device. The commissioner noted that the device was not a "weapon" as defined in the district's code of conduct. The district, "has pointed to no evidence in the record suggesting that the student's

possession of the carbon monoxide detector was 'violent or physically aggressive.'" The device was not a weapon and there was no proof that the student displayed the device to anyone on school property.

Charge 2: "On or about November 16, 2017, [the student] engaged in conduct that was disorderly. More specifically, by having (what appeared to be by the Principal) an explosive device in his school locker, lockdown procedures were implemented and this disrupted the normal operation of the school community.

The commissioner noted that the district's code of conduct cited "engaging in any willful act, which disrupts the normal operation of the school community" as an example of "disorderly conduct." The district contended that the student's possession of the carbon monoxide detector constituted a "willful act". The commissioner noted that the dictionary defines "willful" as "done deliberately: intentional." The commissioner concluded that the district could properly conclude that, in accordance with the dictionary definition, the student committed a willful act by deliberately and intentionally placing the device in his locker. The commissioner indicated that even assuming that the code of conduct's definition of "willful" included the element of wrongful purpose, "the record supports a finding that the student had a wrongful purpose in bringing the device to school."

Charge 4: "On or about November 14, 2017, [the student] engaged in conduct that was violent or physically aggressive. More specifically, during rifle team practice, [the student] was overheard stating that he has pointed his rifle directly at another student's head."

The commissioner concluded that a review of the record supported a finding of guilt as to this charge. "With respect to findings of fact in matters involving the credibility of witnesses, I will not substitute my judgment for that of a hearing officer unless there is clear and convincing evidence that the determination or credibility is inconsistent with the facts."

Charge 5: "On or about November 16, 2017, it was discovered that [the student] engaged in conduct that was violent or physically aggressive. More specifically, [the student] used a punching bag at home that had a student's picture taped on it."

The commissioner did not sustain this charge because "the student's conduct occurred off-campus and bore no nexus to in-school activity." The commissioner did note that case law has recognized that students may be disciplined for conduct that occurs outside of the school that may endanger the health or safety of pupils within the educational system or adversely affect the educative process. Here, the commissioner found that the student's conduct, which was unknown prior to its discovery by police and which did not cause any disruption to school operations or activities, "occurred off campus and could not properly be the subject of a disciplinary charge."

Charge 6: "On or about November 16, 2017, [the student] engaged in conduct that endangered the safety, morals, health or welfare of others. More specifically, [the student] asked a student to find out which students were talking to school administration about him. [The student] wanted this information for future reference. [The student] offered to pay this student $15.00 for this information."

The commissioner noted that the student admitted that he engaged in the actions underlying the charge and found that the district "properly determined that these actions 'endangered the safety, morals, health or welfare of others.'" The commissioner noted that while "the student disavowed any intent to retaliate against other students, respondent could properly conclude that the student's conduct created a risk of future conflict between the student and the other students."

Charge 7: "On or about February 9, 2017, [the student] engaged in conduct that was disorderly. More specifically, [the student] opened locked doors in the Middle School complex using a lock pick set that he was known by student's to carry in his possession."

The commissioner concluded that the record supported a finding of guilt as to this charge.

Charge 8: "On or about February 9, 2017, [the student] engaged in conduct that was violent or physically aggressive. More specifically, student(s) overheard [the student] tell other students on the rifle team that he was injecting fluid into other students' food which would cause their mouth and jaw to go numb."

The commissioner concluded that the record supported a finding of guilt as to this charge. The commissioner noted: "Even if the student intended the statement as a joke and did not intend to carry out the actions, that is irrelevant to determining whether he is guilty of engaging in conduct that was violent of physically aggressive."

Charge 9: "On or about February 9, 2017, [the student] engaged in conduct that was violent or physically aggressive. More specifically, [the student] told student(s) on the rifle team that he would put things into their drinks if they ever messed with him."

The commissioner concluded that the record supported a finding of guilt as to this charge. The commissioner noted that the district's determination that the student was guilty of this charge was supported by competent and substantial evidence in the record.

Charge 10: "On or about February 9, 2017, [the student] engaged in conduct that was violent or physically aggressive. More specifically, [the student] threatened to put a bullet into another student's head."

The commissioner concluded that the record supported a finding of guilt as to this charge. The commissioner noted that the district's determination that the student was guilty of this charge was supported by competent and substantial evidence in the record.

While the commissioner directed the district to expunge the student's record regarding the conduct described in charges 1 and 5, she did not disturb the district's penalty (approximately 14-15 month suspension) which was imposed in the case.

7. *Appeal of C.K.*, 58 Ed Dept Rep, Dec. No. 17,520 (2018).

The commissioner of education sustained the portion of the appeal which sought to expunge all references to the student's short-term suspension from the student's record.

An issue addressed by the commissioner was whether the parent-requested informal conference complied with the law. According to the commissioner, the purpose of the written notice is to "advise parents of their right to question complaining witnesses in the presence of the principal who suspended the students because the principal has authority to terminate or reduce the suspension. In order to assess the credibility of the complaining witnesses, the principal needs to be present when they are questioned."

The commissioner noted that there was no indication that the parent's interview of the student witnesses occurred in the presence of the principal. The commissioner indicated that the parent provided to the principal her notes regarding student witnesses' responses to her questions. However, "[t]hese notes do not indicate that [the] principal … was present during the questioning" the commissioner stated. The commissioner therefore concluded that an informal conference in full compliance with the law had not been held.

8. *Appeal of a Student with a Disability*, 58 Ed Dept Rep, Dec. No. 17,515 (2018).

Fifteen year old high school student was playing a video game at school with friends in which he "destroyed what looked like a school building." He then made, what is alleged by student to be a joke, about being a "school shooter."

On the day of a pep rally on January 13, 2017, a teacher overheard 2 students stating that they had overheard the student making statements that he was going to "shoot up the school" during the pep rally. The teacher notified the assistant principal who notified the principal. State troopers were called.

The student admitted to making the comments about the pep rally and that his nickname was "school shooter." He claimed that these statements were made as a joke.

A superintendent's hearing was held on March 20, 2017 and the student was found guilty of charge: "endangerment (making threats to shoot up the school)." The student was suspended until January 13, 2018 but would be permitted to return to school on September 6, 2017. However, if he violated the school's Code of Conduct prior to January 13, 2018, he would be required to serve the entire suspension.

On appeal, the petitioner alleged that the student's remarks regarding the pep rally, those he made at other times about committing violent acts at school, and his nickname of "school shooter" were all made in a joking manner. The parent asserted that the only student witness presented by the district at the hearing testified that he understood the comments to be a joke. She alleged that there was no evidence that the student endangered the staff, students or property of the school.

The commissioner denied the appeal. The commissioner noted that while the student asserted his conduct was intended as a joke and that he did not know any other students were frightened by his statements, "whether the student intended the conduct as a joke or never intended to carry out the threat is irrelevant to a finding of guilt on the charge of endangerment; specifically, 'making threats to shoot up the school.'"

Concerning the length of the suspension, she noted that the long-term suspension through January 13, 2018 was held in abeyance and that he was allowed to return to school on September 6, 2017 on a "probationary basis." The commissioner noted that there was no evidence indicating that the student did not return to school on September 6, 2017. She did state, however, that she would have upheld the entire suspension: "Regardless of whether the student intended the conduct as a joke, the extremely serious subject matter of the student's comments, particularly in this climate in which our nation is beset by an epidemic of school shootings, cannot be tolerated …Violence and threats of violence, even if intended as jokes, have no place in our schools."

Student Transportation

1. *Appeal of Edelkopf*, 58 Ed Dept Rep, Dec. No. 17,570 (2019).

Parent appealed the determination of the board denying his 3 children transportation for the 18-19 school year. Transportation requests for the 18-19 school year were submitted on April 10, 2018 for transportation to Cheder at the Ohel ("Cheder"), a nonpublic school. Later that day, petitioner's spouse explained to the transportation office that she "missed the April 1st deadline and (was) hoping (she could) still apply for it …" She further asserted that April 1st was on the holiday of Passover and, "she forgot to take care of it before the holiday."

The supervisor of transportation informed her that the district would not accept the late transportation request. The supervisor explained that a reminder phone call was placed to petitioner's residence on 3/27/18 and a mailing was sent to all families with students attending nonpublic schools explaining the transportation process. The petitioner's spouse acknowledged that she received the mailing and "missed the deadline" but denied receiving the reminder call, indicating that her phone lines were damaged.

In an April 16, 2018 letter, petitioner explained that the delay was the result of uncertainty as to the physical location of Cheder for the 18-19 school year and the family's preparation of the Passover holiday.

The district denied the petitioner's request because it was received after the 4/1 deadline and because it would impose additional costs on the district. The appeal ensued.

Petitioner argued that the delay was unavoidable given the uncertainty of the building location of Cheder for the 18-19 school year. He further contended that the deadline fell on the first day of Passover, which occupied his time due to its "extensive and time-consuming requirements."

The commissioner noted the general rule that a district may not reject a late request for transportation if there is a reasonable explanation for submitting a late request. With respect to the reasonableness of a request, a belated decision to enroll a student in a nonpublic school ordinarily need not be accepted as a reasonable explanation. "Additionally, a school board need not accept as a reasonable explanation the fact that a nonpublic school failed to receive a certificate of occupancy for a permanent facility until after the transportation request deadline." Also, the district need not accept as a reasonable explanation "the fact that a nonpublic school did not exist as of the transportation request deadline."

The commissioner noted that while the precise location of Chedar had not been established by 4/1/18, the record supports a finding that petitioner intended to enroll his children at Cheder for the 18-19 school year. "Because petitioner had filed timely transportation requests for one or more of his children in prior school years, he clearly knew and understood the process for requesting transportation from the district."

The commissioner distinguished a prior decision wherein the parents made timely requests for transportation to a new school building but untimely requests for transportation to a temporary site following delays in the construction of the new school building. In that prior case, the commissioner determined that the late transportation requests were reasonable because of unforeseen delays in the construction of the new school building and the required relocation to a temporary location.

Here, the commissioner noted, the petitioner did not submit a timely transportation request in 2018 despite his knowledge that his children would be attending Cheder. "Therefore, notwithstanding the alleged uncertainty as to the location of Cheder for the 18-19 school year, petitioner was not precluded from submitting a transportation request prior to the April 1 deadline."

The commissioner also noted that the district asserted that granting the transportation request would cost the district approximately $42,368 per month. "Therefore, I find that petitioner's requested transportation would impose additional costs upon the school district and, consequently, respondent did not act arbitrarily by denying such request."

Tenure by Estoppel

1. *Matter of Wilson v. Dep't of Educ. of the City of N.Y.*, 169 A.D.3d 513 (1st Dep't 2019).

Petitioner was hired in 2011 by the district to serve as a special education teacher and was given a 3 year probationary appointment that was set to expire on September 2, 2014. The district and the petitioner entered into a written agreement extending the probationary term until September 8, 2015. In March 2015, the district temporarily reassigned her from her teaching duties to a clerical job. The district did not provide the teacher with any decision regarding tenure by the expiration of her probationary period.

In March of 2016, the district reassigned her back to her teaching duties. According to the decision, after an incident occurred on April 12, 2016, the teacher took an unapproved leave of absence and on June 15, 2016, the district notified her that it was discontinuing "her probationary service as of July 15, 2016."

The court noted the general rule regarding tenure by estoppel: "Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term." The court determined that the teacher acquired tenure by estoppel:

> Here, petitioner obtained tenure by estoppel when she continued to be employed by the DOE and failed to receive any notice regarding the DOE's decision regarding her future by the expiration of her probationary period on September 8, 2015. In addition, the DOE failed to indicate to [the teacher] that the temporary assignment to perform clerical duties for the Committee on Special Education would not count toward her probationary period. Thus, [the teacher's] decision to accept the temporary reassignment did not 'serve to disrupt that teacher's probationary period, nor … lead to an increase in the length of that probationary period.'

Whistleblower Reporting

1. *Lilley v. Greene CSD,* 168 A.D.3d 1180 (3d Dep't 2019).

Plaintiff was head bus driver for the school district and responsible for buildings and grounds maintenance. Plaintiff reported to the interim superintendent that another bus driver had allegedly engaged in misconduct by texting while driving and punching in time cards of other employees who had not yet arrived at work, including the bus driver's daughter. Plaintiff alleged that despite a recommendation by district's counsel to terminate the bus driver, no action was taken against the bus driver. Plaintiff reported the misconduct to the police and appeared before the school board to report the issue. The day after appearing before the board, the plaintiff alleged that he was placed on administrative leave. He was provided with notice pursuant to Civil Service Law section 75 which set forth charges, including that he breached General Municipal Law (GML) section 800 by selling to the school district field lime and rock salt from a business that he and his wife owned.

Plaintiff commenced the action under Civil Service Law section 75-b seeking, in part, damages and reinstatement. The lower court granted the defendants' motion to dismiss and the plaintiff appealed.

The court noted that Civil Service Law section 75-b prohibits a public employer from taking disciplinary action to retaliate against an employee for reporting improper governmental action. While a claim pursuant to that section cannot be sustained when a public employer has a separate and independent basis for the action taken, "a disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction."

The court found that the lower court erred in dismissing the complaint based upon documentary evidence purportedly demonstrating that the plaintiff violated GML 800. The court noted that GML 800 "merely provides the definition of 'interest'; having an 'interest,' however, is not per se prohibited and, for the interest to morph into an illegal conflict of interest, GML 801 requires that an employee must not only have an interest, but also must have the 'power or duty to … negotiate, prepare, authorize or approve the contract or authorize payment thereunder.'" The court noted that the documentary evidence at most established that the plaintiff had an "interest" in contracts for the sale of rock salt and field lime from the company to the district, but the evidence "failed to 'conclusively establish' that plaintiff possessed any of the authority enumerated in GML § 801 … In fact, the court's decision is devoid of any reference to the factors enumerated in GML § 801."

The court also determined that the lower court erred in dismissing the whistleblower claim matter on substantive grounds. The lower court found that the purported GML violation

sufficed as a separate and independent basis for the adverse action and dismissed the claim. The Third Department, however, noted that even assuming the GML violation is ultimately demonstrated, the lower court must make "a separate determination regarding the employer's motivation" to ensure against pretextual dismissals and "'shield employees from being retaliated against by an employer's selective application of theoretically neutral rules.'"

I. New Laws

All chapter laws referenced in this outline were adopted in 2019 unless otherwise noted.

Annual Professional Performance Review (APPR)

Chapter 59 Part YYY §§ 25-29 amended the law with respect to aspects of the APPR process. The grades 3-8 state assessments in English language arts and math and all other state created or administered tests are not required to be utilized in any manner to determine an educator's evaluation. The commissioner of education must promulgate regulations defining what alternative assessments may be used as part of an evaluation and must include those assessments used to calculate transition scores (Educ. Law § 3012-d(16)). The selection and use of assessments will be subject to collective bargaining (Educ. Law § 3012-d(10), (16)). Current collective bargaining agreements with conflicting provisions to these changes will remain in effect until entry into a successor agreement (Educ. Law § 3012-d(16)).

For the student performance category, if a course ends in a state created or administered assessment such assessment may be used as the underlying assessment for the teacher's student learning objective. Previously, the use of such assessment was required (Educ. Law § 3012-d(4)(a)(1)). Changes were also made regarding the optional second subcomponent of the student performance category to state that the second measure may be based on a state-created or administered test or based on a state-designed supplemental assessment (Educ. Law § 3012-d(4)(a)(2)).

The provisions governing the overall rating determination were amended to reflect changes made to the evaluation process (Educ. Law § 3012-d(5), (7)).

BOCES Superintendent Salary Cap

Chapter 59 Part YYY §52-l amends the cap applicable to the salary a district superintendent may earn for the 2019-20 school year and thereafter. The cap would be the lesser of 98% of the salary earned by the commissioner of education in the 2013-14 school year or 6% over the salary cap applicable in the preceding school year (Educ. Law § 1950(4)(a)(2)).

Building Condition Surveys and Inspections

Chapter 59 Part YYY § 52-b amends the education law (§ 3641(4)(c)(1-a)) providing that commencing January 1, 2020 school districts will conduct building condition surveys every five years in accordance with regulations adopted by the commissioner. The regulations must establish a staggered system so that surveys are distributed as evenly as possible throughout the five year period and that such schedule ensures no region of the state is overrepresented in a school year. For the first two years the schedule will focus on those districts with the greatest proportion of buildings which previously received relatively low overall condition ratings.

Chapter 59 Part YYY § 52-e makes corresponding amendments to the Education Law by removing language which required annual inspections of public school buildings (Educ. Law § 409-e(2)(a)).

Chapter 59 Part YYY § 52-f makes additional amendments regarding building inspections required pursuant to Education Law § 409-d, which establishes the comprehensive public school building safety program. Pursuant to the comprehensive public school building safety program, building inspections will be required at least once between January 1 and December 31, 2020 and at least once between January 1 and December 31, 2022. However, inspections pursuant to this section of law will not be required during the aforementioned periods if the school district was required to conduct a building condition survey pursuant to Education Law § 3641(4)(c)(1-a) (Educ. Law § 409-d(1)). Under the comprehensive school building safety program, the commissioner may require such inspections as deemed necessary to maintain the safety of public school buildings (*Id.*).

Child Victims Act

Chapter 11 enacts into law the Child Victims Act. Under the Act, the statutes of limitation for civil claims are extended until the plaintiff reaches the age of 55 for conduct that constitutes a sexual offense against a child less than 18 years of age as defined under Penal Law Article 130, specified sections of Penal Law Article 255 regarding incest against a child less than 18 years of age or the use of a child in a sexual performance (CPLR § 208(b)). The act also allows for the revival of such aforementioned claims for a period of one year beginning six months after the effective date of the law (The law was effective February 14, 2019) (CPLR § 214-g). Lastly, the act amends provisions of the general municipal and education laws to eliminate the requirement that a plaintiff file a notice of claim with the school district (Gen. Mun. Law §§ 50-e(8), 50-i; Educ. Law § 3813(2)).

Employee Leave

Chapter 51 Part H amends Election Law § 3-110 to provide that a registered voter shall be provided up to three hours leave either at the beginning or end of the employee's shift to enable him or her to vote at any election. The employee shall provide no less than two working days' notice of the need for such leave. Employers must conspicuously post notice of an employee's rights under this section at least 10 working days before each election.

Extreme Risk Protection Orders

Chapter 19 adds a new Article 63-A to the civil practice laws and rules establishing authority for courts to issue an extreme risk protection order prohibiting a person from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun. The law establishes a two-step process. A temporary or final extreme risk protection order may be issued if a person presents a substantial risk of physical harm to him or herself or others. Petitions seeking a temporary or final extreme risk protection order must be filed in state supreme court. Under the law, the school principal or the principal's designee of the school in which a student is currently enrolled or was enrolled in the six months immediately preceding an application may be a petitioner in an action seeking an extreme risk protection order. The principal may designate a teacher, guidance counselor, school psychologist, school social worker, nurse or other school personnel required to hold a teaching or administrative license or a full or part-time employee required to hold a temporary or professional coaching certificate to act as the petitioner in such proceeding (CPLR § 6340(2)).

If an order is issued law enforcement will serve the order upon the student and request the student immediately surrender all firearms, rifles and shotguns in his or her possession. The officer shall take possession of any firearms, rifles or shotguns that are surrendered, in plain sight, or discovered pursuant to a lawful search (CPLR §§ 6342(8), 6343(2)(d)). If a person other than the student can prove ownership of the weapon and the court has made a written finding that there is no impediment to such person's possession of the weapon the court will direct the weapon be returned to that person and inform such individual of the obligation to safely store such weapon in accordance with the penal law (CPLR §§ 6343(5)(b), 6344(2)).

This law is effective beginning August 24, 2019.

Financial Reporting

Chapter 59 Part YYY § 2 amends the education law with respect to timelines for submission of school district financial reports. School districts will be required to submit to the state and post on its website the detailed statement of total funding allocation for each school in the district on or before the Friday prior to Labor Day (Educ. Law § 3614(1)). The commissioner of education ("commissioner") and

director of the division of the budget ("director") will now have 45 days after submission of a report to determine its completeness, if no determination is made in that timeframe a statement will be deemed approved (Educ. Law § 3614(1)(b)). If the commissioner or director determine further information is needed a school district must submit such information within 30 days and the commissioner and director will then have another 45 days to consider the statement (*Id*.).

If a school district fails to submit a statement on or before the Friday before Labor Day at the joint direction of the director and the commissioner, a city comptroller (for city school districts) or chief financial officer for other municipalities where a district is located is authorized to obtain the information and complete the statement for submission (Educ. Law § 3614(1)(c)).

A new subdivision was added to the law that establishes a formula for determining if schools are underfunded high need schools. Schools that meet the criteria will be identified by May 1 each year. By September 1 the school district must report to the commissioner specifying how such school district is effectuating appropriate funding for the underfunded high needs schools within its district (Educ. Law § 3614(3)).

Gender Identity and Expression

Chapter 8 § 16 amends the law to include gender identity or expression as an unlawful basis of discrimination as relates to a person's civil rights (Civ. Rights Law § 40-c(2)).

Chapter 8 §§ 17- 18 amend the education law to include gender identity or expression as an unlawful basis of discrimination in education (Educ. Law § 313(1)(a), (3)).

Chapter 8 §§ 19-23 amend various provisions of the penal law to provide that criminal activities perpetrated against another on the basis of gender identity or expression are hate crimes.

Chapter 8 §§ 2-15 amend the human rights law in various respects to provide protection from discrimination on the basis of gender identity or expression. It is the policy of the state to ensure equality of opportunity to obtain employment, education, use of public accommodations, and housing without discrimination on the basis of gender identity or expression (Exec. Law §§ 291(1), 296(1)(a)-(d), (1-a)(b)-(d)). Gender identity or expression is defined as a person's actual or perceived gender-related identity, appearance, behavior, expression or other gender related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender (Exec. Law § 292(35)).

Human Rights Law

Chapter 55 Part II Subpart O § 2 amends the human rights law to expand protections against discrimination based upon criminal history. The human rights law now includes volunteer positions as an aspect of employment for which it will be considered unlawful discrimination to inquire about or act adversely toward an applicant based upon certain criminal actions which were terminated in favor of an individual applicant. The law was also amended to provide that it will be considered discrimination to ask or consider criminal actions terminated by an order adjourning the action in contemplation of dismissal pursuant to specified sections of the criminal procedure law (Exec. Law § 296(16)). Additionally, an individual is not required to provide information about a criminal proceeding terminated in his or her favor, including those adjourned in contemplation of dismissal, and if a person is required to provide such information in violation of the law such person may respond as if such arrest never occurred (*Id*.).

Immunization Exemption

Chapter 35 repeals the religious exemptions from immunization previously included within the public health law. The law provides until June 30, 2020 that a principal or other person in charge of a school may permit a student without a certificate of immunization to attend school beyond 14 days if the parent can demonstrate the child has received at least the first dose of each immunization series required by the law and has age appropriate appointments scheduled to complete the immunization series (Pub. Health Law § 2164(7)).

Pursuant to a joint memorandum issued by the Department of Health, the Office of Children and Family Services and the State Education Department, in order to attend school in September, a child must receive at least the first dose of required immunizations at least 14 days before the start of school and within 30 days of the start of school parents or guardians must show that a child has appointments for all the required follow-up doses. The memo may be accessed at: (http://www.p12.nysed.gov/sss/documents/new_legislation_joint_statement.pdf).

New York City Education Structure & Authority

Chapter 59 Part YYY §§ 42 and 43 extends mayoral control of the New York City schools through June 30, 2022.

Chapter 59 Part YYY §§ 43-a- 43-g amends various provisions of the education law related to the city-wide board of education and community education councils (CECs). Under the amended law, a CEC shall have an opportunity to meet with the final candidate or candidates for community superintendent and provide feedback to the chancellor on the potential appointees (Educ. Law § 2590-e(20)). Additionally, a CEC is granted the authority to pass a resolution to recommend or not recommend a proposed change to school utilization after the public hearing on such change is held (Educ. Law § 2590-e(21)). If the city-wide board of education moves forward with a change in school utilization that was not recommended by the CEC, the city-wide board must provide an explanation to the CEC (Educ. Law § 2590-g(1)(h)).

Commencing July 1, 2020, the city-wide board of education will be expanded from 13 to 15 members. Each borough president may appoint a member, the mayor will appoint 9 members and one member will be elected by the community education council presidents (Educ. Law § 2590-b(1)(a)(1)(B)). The chancellor must adopt regulations to govern the election process for the community district education council presidents (*Id*.). Appointed members will serve a term co-terminus with the authority that appointed him or her, provided that any member may be removed at the pleasure of the appointing authority, who must provide written notice to the public of the reasons for removal (Educ. Law § 2590-b(4)).

Commencing in 2021, parents will be elected to serve on CECs by the parents of children attending such schools and pre-kindergarten programs in the community district pursuant to a process developed by the chancellor. A parent of a pre-kindergarten student elected to a seat will vacate his or her seat when the parent no longer has a child that attends a school or prekindergarten program offered by the community district (Educ. Law § 2590-c(1)(a)(2)). The election of CEC members shall occur on the second Tuesday in May (Educ. Law § 2590-c(2)).

The chancellor must develop a process for election of CEC members after reviewing recommendations from a task force appointed by the mayor (Educ. Law § 2590-c(8), (9)). The process must ensure to the extent possible that a school may have no more than one parent representative on the community council. Additionally, the measures must ensure that one parent representative is the parent of a current student who is or has been an English language learner and one parent representative is the parent of a student who has/had an individualized education program (Educ. Law § 2590-c(8)(c)(2)).

The law also amended the criteria and terms for representatives on the Council of high schools. Beginning with terms commending in 2021 two members representing each borough shall be parents of

public high school students selected pursuant to a process established by the chancellor. A parent may continue serving their two year term after the conclusion of their child's attendance at a public high school (Educ. Law § 2590-b(6)(a)(i)).

Lastly, the law amended the qualifications for chancellor to provide that a person certified as a school superintendent pursuant to Education Law § 3003 may only serve as chancellor for 6 months (Educ. Law § 2590-h).

Chapter 55 Part II Subpart B amends provisions of the education law regarding eligibility to serve on the city-wide council or a community education council to provide that a criminal conviction may be a bar to service on such councils only after consideration of such conviction in accordance with Article 23-A of the correction law (Educ. Law §§ 2590-b7)(f), 2590-c(5)).

Real Property Taxes and Exemptions

Exemptions for Energy Systems

Chapter 59 Part AA amends Real Property Tax Law § 487 to provide that a school district, other than a large city district, may by resolution grant a permanent tax exemption to property containing enumerated energy systems (RPTL § 487(10)).

Pro Rata Exemption for Non-Profit Organizations

Chapter 358 of the Laws of 2018 amends the real property tax law to provide that a municipal corporation, including school districts, may after a public hearing, adopt a resolution permitting non-profit organizations within its jurisdiction, who purchase property after taxes have been levied, to apply for a pro-rata exemption (RPTL §§ 420-a(16), 420-b(8)). A school district which receives notice of a pro-rata exemption from the assessor must include an appropriation in its budget for the next fiscal year equal to the aggregate amount of such credits (RPTL §§ 420-a(16)(a)(iv), 420-b(8)(a)(iv)). A non-profit organization that purchases property after the taxable status date and prior to the levy of taxes may also be permitted to apply for an exemption within 30 days after the property transfer (RPTL §§420-a(16)(b), 420-b(8)(b)).

Equalization Rates

Chapter 59, Part I provides that the school board of a district which encompasses property from more than one city or town may adopt a resolution directing how the proportion of school taxes shall be levied upon each part of a city or town included in the school district (RPTL §1314(1)(d)(i)). The law provides that the school board may direct that the proportions be based upon the average full valuation of real property in each school district over either a three or five year period (including the current school year).

Property Tax Cap

Chapter 59 Part NNN made permanent the provisions of the education law and general municipal law relating to the property tax cap (Educ. Law § 2023-a; Gen. Mun. Law § 3-c).

STAR Exemptions and Credits

Chapter 59 Part LL freezes the STAR property tax savings for homeowners receiving the basic or enhanced STAR exemption to that provided in the 2018-19 school year. Homeowners receiving the STAR tax credit will receive increases as calculated per law not to exceed 2% annually (RPTL § 1306-a(2)(a)(i)). A corresponding change was made to the Tax Law with regard to the definition of STAR tax savings (Tax Law § 606(eee)(1)(g)).

Chapter 59 Part PP § 1 amends the real property tax law to empower the commissioner of taxation and finance to annually verify the eligibility of a homeowner receiving the enhanced STAR exemption on the basis of age and residency, in addition to that of income (RPTL § 425(4)(b)(iv)(B)).

Chapter 59 Part PP § 2 amends the real property tax law to provide that an assessor has a duty to inform the commissioner of taxation and finance when a person has made a material misstatement on an application for the STAR exemption and further provides that if a person makes a material misstatement on an application filed on or after April 1, 2019 for a STAR credit he or she will thereafter be disqualified from receiving the credit for six years (RPTL § 425(13)(c) and (f)).

Chapter 59 Part PP § 3 makes a corresponding amendment to the Tax Law providing that individuals who make a material misstatement on an application for the STAR credit will thereafter be disqualified for six years from receiving the credit (Tax Law § 606(eee)(13)(E)).

Chapter 59 Part PP § 4 provides for recoupment if a STAR credit is improperly paid to a person whose home was receiving the STAR exemption (Tax Law § 606(eee)(10)(E)).

Chapter 59 Part QQ § 1 amends the real property tax law to provide that an assessor may request from the commissioner of taxation and finance a listing of the names and addresses of the owners of real property residing in the assessing unit who are receiving the enhanced STAR exemption or credit whose federal adjusted gross income meets statutory requirements. The assessor may then use such information to contact those owners not already receiving the exemption to suggest they consider applying for it (RPTL § 467(11)).

Chapter 59 Part RR § 1 amends the real property tax law regarding the eligibility for the basic STAR exemption to provide that beginning with the 2019-2020 school year the combined income of all property owners may not exceed $250,000 (previously the income limit was $500,000) (RPTL § 425(3)(b-1)).

Chapter 59 Part RR § 2 amends the tax law to provide that the income limit establishing eligibility for the basic STAR exemption is not applicable when determining eligibility for the basic STAR credit (Tax Law § 606(eee)(3)(A)).

Chapter 59 Part SS amends the real property tax law in relation to the content of the statement about advance payments for the STAR tax credit which must be included on tax bills (RPTL § 1306-a(6)).

Chapter 59 Part TT § 1 amends the real property tax law to provide that a school district is authorized to correct an applicant's tax bill and/or issue a refund when the commissioner of taxation and finance finds good cause to grant a late application for an enhanced STAR exemption (RPTL § 425(6)(a-2)).

Chapter 59 Part TT §§ 2 and 3 amend the real property tax law with respect to the fees associated with voluntarily renouncing a STAR exemption RPTL § 496(2)(a), (d)). Section 3 of part TT makes a corresponding amendment to the tax law regarding eligibility for the STAR credit after renouncing the STAR exemption (Tax Law § 606(eee)(5)).

School Safety Plans

Chapter 59 Part YYY § 31 amends the education law with respect to school safety plans. Every school district must define the roles and areas of responsibility of school personnel, security personnel and law enforcement in response to student misconduct. A district which contracts with law enforcement or public or private security personnel, including a school resource officer, must have a memorandum of understanding that defines relationship between the school district, school personnel, students, visitors, law enforcement/security personnel and defines the responsibilities of law enforcement/security personnel. The MOU must be developed with stakeholder input from parents, students, school

administrators, teachers, unions, parent and student organizations, the community, probation officers, prosecutors, defense counsel and the courts. The MOU must clearly delegate the role of school discipline to school administrators. It must be incorporated into and published as part of the district safety plan (Educ. Law § 2801-a(10)).

State Aid for School Districts

Chapter 59 Part YYY § 3 makes amendments to how the state personal income growth factor will be calculated (Educ. Law § 3602(1)(bb)). The personal income growth factor is utilized in the calculation of state aid increases.

Chapter 59 Part YYY § 4 amends the provisions for the community schools set aside of foundation aid to provide that any increase a school district receives in the 2019-20 school year must be used to support transformation of school buildings into community hubs to deliver co-located or school-linked academic, health, mental health services and personnel, after school programming, dual language programs, nutrition, trauma informed support, counseling, legal and/or other services to students and their families including programs for English language learners or to support other costs incurred to maximize student achievement (Educ. Law § 3602(4)(e)).

Chapter 59 Part YYY § 5-b amends the education law to provide a formula for calculating school district foundation aid increases for the 2019-20 school year (Educ. Law § 3602(4)(g)).

Chapter 59 Part YYY §§ 52-c and 52-d amends the education law to move provisions providing for building aid for testing of potable water systems for lead pursuant to the public health law from Education Law § 3602(6-e) (building aid for building condition surveys) into Education Law § 3602(6-h) (building aid for testing and filtering of potable water systems).

Taylor Law Amendments

Agency Shop Fee Deductions

Chapter 56 Part DD adds a new section of law to the civil service law that provides immunity from liability to public employers, any employee organization, the comptroller and other named organizations for any claim or action for requiring deductions of agency shop fees which were permitted or mandated prior to June 27, 2018. This law applies to claims pending or filed on or after June 27, 2018 (Civ. Serv. Law § 215).

Improper Practices

Chapter 55 Part E § 1 amends the civil service law to make it an improper practice for an employer to disclose the home address, personal telephone and cell phone numbers and personal email addresses of public employees, except where required by the Taylor Law and to the extent compelled by a subpoena, court order or otherwise required by law. This amendment does not preclude an employer from disclosing work-related publicly available information such as title, salary and dates of employment (Civ. Serv. Law § 209-a(1)).

Employee Organization Rights

Chapter 55 Part E § 2 entitles a recognized employee organization (i.e. union) to quarterly request from the employer the name, address, job title, employing agency or department and work location of all employees in the bargaining unit. A collective bargaining agreement may require disclosure of such information on a more frequent basis (Civ. Serv. Law § 208(1)(d)).

Impasse procedures

Chapter 55 Part F § 1 extends the applicability of impasse procedures of Civil Service Law § 209(4) through July 1, 2024.

Teachers' Retirement System Reserve Fund

Chapter 59 Part YYY §§ 52-g to 52-k made amendments to the general municipal law to authorize school districts and BOCES to establish by resolution a sub-fund within its retirement contribution reserve fund for contributions to the teachers' retirement system (Gen. Mun. Law § 6-r(1)(b), (c), (2-a)). Under the law in each fiscal year a board may only place in the sub-fund an amount equal to 2% of the total salaries of all teachers in the district paid in the previous fiscal year (Gen. Mun. Law § 6-r(2-a)). The balance of the sub-fund may not exceed 10% of the total salaries paid to all teachers during the preceding fiscal year (*Id.*). Expenditures from the retirement contribution reserve fund to finance contributions to TRS may only be made from the established sub-fund (Gen. Mun. Law § 6-r(5)). Monies in the sub-fund may by resolution be transferred to the retirement contribution reserve fund and vice-versa Gen. Mun. Law § 6-r(11)).

Transportation

Chapter 59 Part YYY § 12-a amends the law to permit a board of education to piggyback onto a contract bid by another school district with a private contractor for transportation to a location outside the school district of residence. The law requires the contract cost must be appropriate and result in cost savings to the school district (Educ. law § 305(14)(g)).

College Tuition for Dually Enrolled Students

Chapter 59 Part CC §§ 1-3 amended various provisions of the education law to provide that state universities, community colleges and CUNY schools may set a reduced tuition rate or waive tuition and fees entirely for concurrently enrolled high school students for which the student may receive both high school and college credit (Educ. Law §§ 355(2)(h), 6206(7)(e), 6303(6)).

Voter Pre-registration and Registration Policy

Chapter 2 § 2 adds a new section to the election law that requires boards of education to adopt a policy to promote student voter registration and pre-registration of those 16 years of age or older. Such policy may include collaboration with a county board of elections to conduct voter registration and pre-registration in high schools. The completion of registration or pre-registration forms cannot be a course requirement or a graded assignment (Elec. Law § 5-507)). This law becomes effective January 1, 2020.

Extensions of Current Law

BOCES Authority to Contract with Out-of-State Schools

Chapter 67 extends the authority of BOCES to contract with out-of-state schools for specified purposes through July 1, 2024. It also adds to those purposes the ability to contract for technology products, including computer programs and software packages that help students learn and assist districts in achieving greater efficiencies (Educ. Law § 1950(4)(h)(10)). An out-of-state school may be an elementary, secondary and higher education institutions located outside New York state, and in limited instances can include schools located outside the continental United States (*Id.*). The law also amends other provisions of law to remove references to common core standards and replace them with "next generation" (Educ. Law §§ 305(50), (51); 3602-d(3)(b)(2); Soc. Serv. Law § 421(5)(c)).

BOCES Leasing Buildings

Chapter 61 extends the ability of BOCES to enter leases with non–public entities for a 20-year duration (Educ. Law § 1950(4)(p)(a), (c)).

Contracts for Excellence

Chapter 59 Part YYY extends the requirement for a school district that implemented a contract for excellence in the 2018-19 school year to renew such contract in the 2019-20 school year unless all schools in the district are in good academic standing (Educ. Law § 211-d).

Conditional and Emergency Conditional Appointments

***Chapter* 59 Part YYY § 39** extends until July 1, 2020 the ability of school districts, BOCES and charter schools to make conditional and emergency conditional appointments while awaiting the outcome of criminal history record checks.

Employee Leave

Chapter 330 of the Laws of 2018 extends the effectiveness of Labor Law § 202-m until December 1, 2021. Under this provision of law employers, including school districts, must grant health care professionals a leave of absence from their employment in order to fight Ebola overseas. Such leave of absence is unpaid unless the employee requests to utilize portions of his or her accrued paid leave.

Gun Free Schools, Safe School Transfer

Chapter 59 Part YYY § 33 extends through June 30, 2020 the state law provisions implementing the federal Gun Free Schools Act and provisions of the education law relative to attendance at a safe public school. Note: The provisions of Education Law § 305(33), added by the same chapter law, relating to approval of supplemental educational services providers will lapse and expire June 30, 2019.

Leasing School Buses

Chapter 59 Part YYY § 44 makes permanent the ability of school districts to lease school buses (Educ. Law §§ 1604(21-a), 1709(25), 2503(12-a), 2554(19-a), 3623-a(2)(b)).

Mayoral Control of NYC Schools

Chapter 59 Part YYY §§ 42 and 43 extends mayoral control of the New York City schools through June 30, 2022.

Pre-Kindergarten Teacher Certification

Chapter 59 Part YYY § 24-a extends the exemption from certification for pre-kindergarten teachers through the 2019-20 school year if the teacher is registered pursuant to the statutory requirements (Educ. Law § 3602-ee(8)(c)(ii)). The school district must submit a report to the commissioner regarding the barriers, if any, to certification, the number of uncertified teachers registered according to the statute who are teaching prekindergarten (including those employed by community based organizations), the number of teachers previously uncertified who have completed certification and the expected certification dates of the remaining teachers (*Id*.).

Rochester City Schools District Purchasing from BOCES

Chapter 59 Part YYY § 50 authorizes the Rochester City School District to purchase required health and medical services with the consent of the BOCES board in its geographical area.

School Bus Idling

Chapter 49 extends the law prohibiting the idling of school buses in front of school buildings through June 30, 2024 (L. of 2007 C. 670 § 2).

Special Education

Chapter 59 Part YYY § 23 extends through June 30, 2024 the ability of the Big 5 City school districts to increase class sizes for students with disabilities in the middle and high school grades above limits established in commissioner's regulations, pursuant to a statutory formula (Educ. Law § 4402(6)).

Student Records

Chapter 59 Part YYY § 30 makes permanent the ban on including standardized test scores in a student's permanent record.

Chapter 59 Part YYY § 41 extends effectiveness of provisions of law related to homeless students and the transfer of disciplinary records until June 30, 2020.

Surplus Computer Equipment

Chapter 60 extends the ability of school districts and other municipalities to donate excess computer equipment through July 1, 2022 (Gen. Mun. Law § 104-c; Educ. Law § 318).

Taylor Law Injunctive Relief

Chapter 64 extends the provisions of the Taylor Law relative to an expedited method to receive injunctive relief for improper labor practices (Civ. Serv. Law § 209-a).

Transportation Contracts

Chapter 59 Part YYY § 45 extends until January 1, 2023 the ability of school districts to make amendments to transportation contracts upon a finding that such amendment is necessary to comply with a law adopted after the execution of the contract or to enhance the safety of pupil transportation, subject to approval by the commissioner of education (Educ. Law § 305(14)(d)).

Transportation based upon patterns of ridership

Chapter 59 Part YYY § 46 extends the ability of school districts to provide transportation based upon patterns of actual ridership through June 30, 2024.

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

Administrative Tenure

S.4007-A/A.8346 amends various provisions of the education law to provide that principals, administrators, supervisors and other members of the supervising staff who were previously granted tenure in a school district or BOCES and were not dismissed pursuant to disciplinary charges brought under sections 3020-a or 3020-b of the education law are entitled to a three, rather than four, year probationary period (Educ. Law §§ 2509(1)(b)(ii), 2573(1)(b)(ii), 3012(1)(b)(ii), 3014(1)(b)). The law would be effective June 30, 2020 and would apply only to administrators appointed after the effective date.

Anaphylaxis Policy

S.218-B/A.6971-B amends the public health law in several respects regarding anaphylaxis policy for school districts. In establishing anaphylaxis policies pursuant to Public Health Law § 2500-h the commissioners of health and education must consider existing requirements as well as current and best practices including voluntary guidelines for managing food allergies in school and early care and education programs issued by the U.S. department of health and human services. The commissioner of

health must create educational materials detailing the anaphylaxis policies to be distributed to school districts, BOCES and charter schools (Pub. Health Law 2500-h(1)(c), (d)). In developing the policies the commissioners must consider existing training programs for responding to anaphylaxis in order to avoid duplicating requirements. A pre-existing training program may be deemed to meet the requirements if its standards are at least as stringent as those promulgated in the development of the training course by the state (Pub. Health Law § 2500-h(2)(b)). The updated policy must include a communication plan for discussing allergies and anaphylaxis with children old enough to comprehend such discussion as well as all parents or guardians (Pub. Health Law § 2500-h(2)(f)). Schools will be required to notify parents at least once per year about the anaphylaxis policies and procedures (Pub. Health Law § 2500-h(3)). The updated policies created by the commissioners of public health and education must be forwarded to schools within six months of the passage of the bill into law and schools will have six months thereafter to update their policies accordingly (Pub. Health Law § 2500-h(4)). Lastly, the state policies must be updated at least once every three years (Pub. Health Law § 2500-h(5)).

BOCES

S.5629/A.7694 authorizes BOCES to enter into contracts with pre-school special education program providers relating to an online applications system for educators (Educ. Law § 1950(4)(h)(12)).

Capital Construction Projects

S.2394/A.3552 amends the general municipal law relative to substantial completion of a capital project and the terms under which any contract retainage may be released to a contractor. Substantial completion for school district and BOCES' capital projects is defined as the date when an architect or engineer certifies the construction is code compliant and substantially complete so that the building can be occupied (Gen. Mun. Law § 106-b(1)(a)). No later than 45 days after the date of substantial completion the school district or BOCES must submit to the contractor a written list describing all remaining items to be completed. Thereafter the contractor must provide the list to any subcontractors within 7 days (Gen. Mun. Law § 106-b(1)(b)).

Child Abuse in an Educational Setting

A. 5842/S.273-A clarifies that a school bus driver employed directly by a school district, in addition those employed by a contractor of the school district, are required to report incidents of child abuse in an educational setting (Educ. Law § 1126(1-a)). Additionally, section 1134 of the education law is amended to provide that reports filed with the statewide central register for child abuse and maltreatment which involve child abuse in an educational setting will be deemed to comply with the reporting obligation the law imposes for reporting such incidents.

Child Sexual Abuse Curriculum

S.4070-B/A.2577-B adds a new provision to the education law requiring that all students in grades K-8 in public schools of the state must receive instruction designed to prevent child sexual exploitation and abuse. The commissioner of education must define such program in regulation. Such program must include students and parents. The department may prepare a model curriculum or provide technical assistance in the development of such curricula (Educ. Law § 803-b).

Civil Service Recall Rights

S.5291/A.7248 amends the civil service law to provide recall rights to employees serving in the non-competitive or labor class. Upon abolition or reduction of positions, affected employees will be identified

in the inverse order of original appointment on a permanent basis in the same jurisdictional class and may be placed on a preferred list for re-employment (Civ. Serv. Law §§ 80(1), (2); 81(1)). Displaced employees may "bump" individuals in lower positions in the direct line of promotion, or if there is no direct line of promotion in accordance with the statute (Civ. Serv. Law § 80(6)).

Dignity for All Students Act

S.6209-A/A.7797-A amends the education law to clarify that the term race shall include traits historically associated with race, including but not limited to hair texture and protective hairstyles such as braids, locks and twists (Educ. Law §11(9), (10)).

Discrimination Protections

Expansion of Protections from Discrimination

A.8421/S.6577 amends various provisions of the executive, labor, and general obligations laws and the civil practice laws and rules. *Note the summaries of changes contained herein also include technical amendments made to this bill by subsequent bill* **S.6594/A.8424**.

Definitions

The executive law definition of employer as relates to the human rights law is amended to include all employers within the state (Exec. Law § 292(5)), eliminating any exemptions for applicability that previously applied. A definition was also added for private employer (Exec. Law § 292(37)).

Standard of Liability

Section 300 of the law is amended to clarify that the provisions of the human rights law are to be construed liberally and with a remedial purpose regardless of whether comparable federal civil rights are so construed. Exceptions from the law are to be construed narrowly to maximize deterrence of discriminatory conduct.

It will be an unlawful discriminatory practice for an employer to subject any person to harassment based upon a protected characteristic, because an individual opposed such harassment or filed a complaint, testified or assisted in a proceeding regardless of whether such harassment is severe or pervasive under precedent applied to harassment claims. Such harassment is unlawful when it subjects an individual to inferior terms, conditions, or privileges of employment based upon the individual's membership in one or more protected classes. The fact that an individual did not make a complaint about the harassment to such employer will not be determinative of whether such employer shall be liable. It will be an affirmative defense to liability that harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences (Exec. Law § 296(1)(h)).

Attorneys' Fees and Statute of Limitations

A court or the commissioner of human rights has discretion to award attorneys' fees in all cases of employment discrimination, not just those of sexual harassment (Exec. Law § 297(10)). Lastly, the time for filing complaints involving sexual harassment is subject to a 3 year statute of limitations (Exec. Law § 297(5)).

Harassment of Non-Employees

Section 296-d of the law which previously imposed liability on employers for permitting sexual harassment of non-employees in the work place is expanded to prohibit any unlawful discrimination against non-employees (Exec. Law § 296-d).

Non-Disclosure Agreements

The provisions relating to non-disclosure agreements regarding sexual harassment are expanded to include all claims of discrimination (Gen. Obg. Law § 5-336(1)(a)). The section is amended to provide that a non-disclosure agreement must be provided in writing to all parties in plain English and the primary language of the complainant, if applicable (Gen. Obg. Law § 5-336(1)(b)). Any confidentiality terms will be void to the extent they restrict a complainant from testifying or participating with an investigation conducted by an appropriate local, state or federal agency or disclosing any facts necessary to receive public benefits to which the complainant is entitled (Gen. Obg. Law § 5-336(1)(c)). Any provisions of a contract or other agreement entered into after January 1, 2020 that prevent disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee or potential employee that such agreement does not prohibit him or her from speaking to law enforcement, the EEOC, the state division of human rights, a local commission on human rights or an attorney retained by the employee or potential employee (Gen. Obg. Law § 5-336(2)).

The non-disclosure agreement provision in the CPLR which previously exclusively addressed agreements involving sexual harassment is broadened to include all claims of discrimination. Any agreements entered for the purpose of resolving a discrimination claim may not include non-disclosure clauses except as permitted by law (CPLR § 5003-b). The CPLR provisions prohibiting mandatory arbitration clauses is expanded to include all claims involving discrimination (CPLR § 7515(a)(2), (3)).

Policies and Prevention Programs

The law is amended to provide that an employer must provide employees in writing in English, and in the primary language identified by an employee, at the time of hiring and every annual sexual harassment prevention training, a notice containing the sexual harassment prevention policy and information presented at the training program (Labor Law § 201-g(2-a)(a)). The commissioner of labor shall prepare templates of the model policy and model training program. Additionally, the commissioner must prepare these materials in languages other than English based upon the size of the population in the state speaking such other language and any other factor the commissioner deems relevant but an employer may not be penalized for any errors within such templates (Labor Law § 201-g(2-a)(b), (d)). If an employee identifies as his or her primary language a language for which a template is not available from the commissioner, the employer shall comply with the law by providing the employee an English language notice (Labor Law § 201-g(2-a)(c)). A new subdivision was also added requiring the labor department to, in consultation with the division of human rights, evaluate the impact of the current model sexual harassment prevention guidance document and policy beginning in 2022 and every four years thereafter (Labor Law § 201-g(4)).

Public Schools Covered by Human Rights Law

S.4901/A. 3425 expands the state human rights law to encompass public schools. The term educational institution would be defined to include private schools and any public school, including a school district, board of cooperative educational services, public college or university (Exec. Law § 292 (35)). Additionally, the human rights law would provide that it is unlawful for any educational institution to deny use of its facilities to any person otherwise qualified or to permit the harassment of any student by reason of the student's race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status (Exec. Law § 296(4)). *Note: **A.8054/S.6470** renumbers the definitional section included in § 292 to subdivision 37 and makes technical amendments to the definitions as well.*

Protection for Religious Attire, Clothing, Facial Hair

A.4204/S.4037 amends the human rights law to clarify that individuals may not be subject to discrimination based upon attire, clothing or facial hair which is dictated by a person's religion. As such an employer may not require a person to forego wearing religious clothing unless an employer can prove

allowing the employee to wear such clothing or attire would present an undue hardship upon the employer's business (Exec. Law § 296(10)(a)).

Protections for Victims of Domestic Violence

S.1040/A.5618 amends the human rights law to provide greater protection from discrimination for victims of domestic violence. The definition of "victim of domestic violence" is revised to match that term as defined in Social Services Law § 459-a (Exec. Law § 292(34)). Additionally, a new subdivision would be added establishing that it is unlawful discrimination for an employer to refuse to provide reasonable accommodations to victims of domestic violence, including leave to seek medical attention or psychological counseling, to obtain services from a domestic violence shelter or program, participating in safety planning and other actions to increase safety from future acts of domestic violence, and obtaining legal services or assisting in prosecution of an offense (Exec. Law § 496(22)). Such leave may be charged to leave credits and if an employee lacks leave will be considered unpaid leave. An employee should give reasonable notice to an employer of the need for leave but if unable to do so the employer may request the employee certify the need for the leave which may involve providing medical documents, police reports, court orders or other evidence from a court (*Id.*). Employers may refuse to provide an accommodation if they can prove it presents an undue hardship. Employers must, to the extent possible, maintain the confidentiality of any information regarding an employee's status as a victim of domestic violence.

Natural Hair as Aspect of Race

S.6209-A/A.7797-A amends the human rights law to clarify that the term race shall include traits historically associated with race, including but not limited to, hair texture and protective hairstyles such as braids, locks and twists (Exec. Law § 292(37), (38)).

Reproductive Health Decisions

S.660/A.584 adds a new provision to the labor law to provide employees protection from retaliatory actions taken by an employer based upon an employee's or a dependent's reproductive health decision making (Labor Law § 203-e). Under the provision, an employer is prohibited from accessing an employee's personal information regarding the employee's or dependent's reproductive health decision making including the decision to use or access a particular drug, device or medical service without the employee's informed written consent. An employer that provides an employee handbook must include notice of an employee's rights and remedies pursuant to this section within the handbook. An employee may sue an employer for violation of this law and seek both injunctive relief and monetary damages. *Note **S.4413/A.6678** makes a technical amendment to the act establishing the effective date for employers to add this notice into employee handbooks shall be 60 days after it becomes law.*

Salary History Inquiries Prohibited

S.6549/A.5308-B adds a new provision to the labor law prohibiting inquiries into the salary history of a current employee or applicant for employment except in limited specified circumstances. Nor may an employer rely on the salary history of an applicant in determining whether to offer employment or in determining the salary for such individual; to refuse to interview, hire or promote such individual, discriminate against an employee or applicant who refused to provide salary history or because such applicant or employee files a complaint regarding a violation of this law. A court may award injunctive relief and attorneys' fees to any person who prevails in a lawsuit regarding violations of this law (Labor Law § 194-a).

Wage Differentials Based on Protected Status

S.456-B/A.1047-B amends the civil service law to clarify it is the policy of the state to ensure fair non-biased compensation for employees of the state and all its political subdivisions (including school districts) in accordance with the federal Equal Pay Act and other state laws. Under the law, no person

who is a member of a protected class may be paid less than that rate of an employee not in a protected class for the same or substantially similar work. The protected classes include: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status (Civil Serv. Law § 115(1), (2)). Civil penalties may be assessed against an employer found to have violated the law, including attorneys' and expert witness fees (Civil Serv. Law § 115(3)). Differentiation in compensation based upon a seniority or merit system, a system which measures earnings by quantity or quality of production, a system based upon geographical differentials, or a bona fide factor other than status within a protected class (education, training etc.) will not be unlawful (Civil Serv. Law § 115(4)).

Immigration Status

S.5791/A.5501 amends the labor law to clarify that to threaten, penalize or in any other manner discriminate or retaliate against an employee for reporting or participating in an investigation of wrongdoing under provisions of the labor law includes reporting or threatening to report an employee's suspected citizenship or immigration status or that of the employee's family member to a federal, state or local agency (Labor Law § 215(1)(a)).

Employee Leave

Military Leave

A.1093-B/S.5285-A amends the military law to provide that a municipal corporation (including a school district) may pass a resolution authorizing employees who served in a combat theater or combat zone of operations up to an additional five days of paid leave when the employee is utilizing healthcare services related to the duty in the combat theater or zone of operations (Mil. Law § 242(5)(c)).

Qualifying World Trade Center Condition (WTC Condition)

S.5890-A/A.7819-A clarifies that a municipal employee outside New York City must have filed and received approval for the filed notice of participation in World Trade Center rescue, recovery or clean- up operations in order to qualify for leave for treatment of a qualifying WTC condition (Gen. Mun. Law 92-d(1)(a)). A public employer is also precluded from taking any adverse employment actions against an employee for utilizing or requesting sick leave or any other available leave for a WTC condition (Gen. Mun. Law § 92-d(1)(b), (c)). Provisions establishing how municipalities make seek reimbursement from the state for the cost of providing qualifying WTC condition leave were also added to the law (Gen. Mun. Law § 92-d(3)-(8)). The civil service law is amended to give the civil service commissioner the authority to audit qualifying WTC leave reimbursement claims for approval (Civ. Serv. Law § 6(1-a)).

Family Court Act

A.7940/S.6535 amends the Family Court Act as it relates to permanency planning in juvenile delinquency and persons in need of supervision (PINS) proceedings. When a child is to be released from a facility or care and is of compulsory education age or elects to enroll in a program leading to a high school diploma the placement agency must prepare a release plan which involves consultation with the local educational agency (LEA) where the child will enroll in school (Fam. Ct. Act §§ 353.3(7)(c) (juvenile delinquency); 756(g) (PINS)). The placement agency must notify the LEA at least 14 days before the child's release and transfer all necessary records to the LEA. The LEA must enroll the child within five days of release, or immediately upon the start of school if the child is released in the summer months. The placement agency must work with the school district regarding timing of the child's release and enrollment in school in order to be minimally disruptive for the child and further his or her best interests. If the child is suspected of having a disability or is known to have one the placement agency must outline the steps it will take to ensure the LEA makes any necessary referrals or arranges for special education evaluations or services as appropriate.

Feasibility Study on Compulsory Education Age

S.5863-A/A.7559-A directs the commissioner of education to conduct a feasibility study by July 1, 2021 regarding lowering the compulsory education age of minors (Educ. Law § 305(60)).

Freedom of Information Law (FOIL)

A.3939/S.5496 amends the law to provide that when an agency is considering denying access to a record on the grounds that its disclosure would interfere with a judicial proceeding, the agency must notify the judge hearing such proceeding and the person making the request. The judge will thereafter make a decision regarding access after providing the requesting party an opportunity to be heard (Pub. Off. Law § 87(6)). The law is also amended to clarify that a denial of access to records pursuant to FOIL shall not limit or abridge any party's right of access pursuant to the civil practice laws and rules, criminal procedure law or any other law. When providing a denial of access to records an agency must provide particularized and specific justification that the records may be withheld (Pub. Off. Law §§ 87(2)(e); 89(6), (10)).

Industrial Development Agencies

A.2947/S.2769 amends provisions of the general municipal and public authorities laws to require industrial development agencies (IDAs) to provide a copy of any resolution adopted describing a project sponsored by the IDA and the financial assistance the IDA is contemplating for such project by certified mail, return receipt requested to boards of education and the superintendent of schools (Gen. Mun. Law § 859-a(1-a); Pub. Auth. Law §§ 1953-a(1-a), 2307(1-a)). The same notification procedure must be followed if the IDA seeks to deviate from the uniform tax exemption policy for a particular project (Gen. Mun. Law § 874(4)(b); Pub. Auth. Law §§ 1963-a(2), 2315(2)).

Kindergarten Attendance

A.1624/A.7112 amends the education law to provide that every school district within the state is authorized to adopt a resolution to require minors who are five years of age on or before December 1st to attend kindergarten instruction (Educ. Law § 3205(2)(c)). The provision would not apply to minors whose parents elect not to enroll their children until the following September, students enrolled in a non-public school or home instruction.

Menstrual Disorders Information

A.484/S.6368 amends the public health law to require, subject to appropriation, the commissioners of health and education to coordinate in creating educational materials regarding menstrual disorders to provide to school districts and healthcare practitioners for distribution to students and patients (Pub. Health Law § 268).

Real Property Tax Law- PILOTs

S.3972/A.218 adds a new provision to the real property tax law providing that if there is a change to a payment in lieu of taxes (PILOT) based upon a change of assessment any change in a PILOT due to a school district will not take effect until the following taxable status year (RPTL § 561).

Records Access

A.3939/S.5496 clarifies that any record or portion thereof which identifies any victim of a sexual offense as defined in specified provisions of law must be kept confidential and may only be released as provided by law (Civ. Rights Law § 50-b(1)).

Retiree Income Limitation

S.1866-B/A.2858-B increases the amount a public retiree may earn to $35,000 per year beginning in 2020 (Retir. & Soc. Sec. Law § 212(2)).

Reorganizational Meeting in Small City School Districts

A.768/A.7708 amends the education law to provide that a board of education in a small city school district may by resolution determine to hold the reorganizational meeting at any time in the first 15 days of July (Educ. Law § 2504(2), 2502(9-a)(o)). Previously the law required small city district to convene the reorganizational meeting during the first week of July.

School Buildings

S.6145/A.7986 adds a new provision to the environmental conservation law (§ 27-119) phasing out the use of mercury containing flooring. One year after enacted, the law would prohibit installation of any mercury containing flooring and also prohibit laying new flooring over the top of a mercury-containing floor (i.e. the mercury containing floor must be removed prior to installation of any new flooring).

School District Elections

Absentee Ballots in Districts with Personal Registration

S.2038-A/A.1922-A amends the education law with respect to the application process for absentee ballots in districts with personal registration to conform with changes previously made to the election law simplifying the process. The provision streamlines and simplifies the language regarding reasons for absence or inability to vote to four broader categories (Educ. Law § 2018-a(2)(a)). The state board of elections application for absentee ballot must be utilized for school district elections (Educ. Law §2018-a(2)(b)). Applications that are to be mailed must be received between 30 and 7 days before the election. If an application is received less than 7 days before the election the clerk may give the absentee ballot directly to the voter or his or her representative who appears in the district clerk's office (Educ. Law § 2018-a(2)(g)).

Military Ballots

S.5184/A.7293 adds a new provision to the education law establishing a procedure for individuals serving in the military outside their district of residence to receive a ballot for school board elections, budget votes, and special elections. The provisions will also apply to the spouse, child or dependent of such serviceperson if he or she is also a qualified voter of the district and will be absent based upon the military service (Educ. Law § 2018-d). A military voter may choose to receive his or her ballot by mail, facsimile transmission or e-mail. Ballots for military voters must be sent no later than 25 days before the election or 14 days before an election in small city districts. Boards of education are required to determine 3 days before the day of distribution for military ballots, the candidates and any referenda to be voted upon. If a change occurs among the nominated candidates, a ballot will not be invalidated, but any vote for an individual who does not appear on the ballot on the day of the election shall not be counted.

In order to be counted the military ballot must be received by the district clerk no later than 5 p.m. on the day of election. The commissioner of education is authorized to promulgate regulations to effectuate the provisions of the statute.

Polling Hours in Small City School Districts

A.4009/A.6540 amends the education law to provide that small city school districts may open their polling sites one hour earlier, at 6 am, than previously provided (Educ. Law § 2602(3)).

Buffalo Board of Education Elections Move to November

S.5224-B/A.4949-B amends the education law regarding the timing of the election of members of the Buffalo Board of Education by changing it from the second Tuesday in May to the same date as the general election in November. The terms of the members will commence January 1, rather than July 1 (Educ. Law § 2553(10)(o), (p)). Corresponding changes are made to additional subsections to implement moving the voting day. If enacted the bill provides that the terms of current board members that previously would expire June 30 shall be extended to December 31 of the same year.

School Safety

Weapons on School Grounds

A.1715-A/S.101-A restricts the ability of school districts, BOCES, charter and private schools to authorize anyone to possess a weapon on school grounds unless such person is primarily employed as a school resource officer, police officer, peace officer or security guard issued a special armed guard registration (Penal Law § 265.01-a).

School Safety Plans

S.5705/A.7538-A provides that school bus drivers and monitors be included in school district safety policies on responding to implied or direct threats of violence and actual acts of violence and receive informational materials for early detection of potentially violent behaviors. Bus drivers and monitors are also added as members of the district wide and building level school safety planning teams (Educ. Law § 2801-a(2)(a), (b), (g); (4)).

Fire Inspections

S.4663-B/A.1906-A amends the law relative to fire inspections in public schools. Under the provisions schools may only request fire inspections be completed by fire departments of the municipality where a school is located, a fire corporation which encompasses the school building, a county fire coordinator or a certified fire inspector (Educ. Law § 807(3)(a)). Flexibility to publish notice of the fire inspections on a district's website, rather than in a newspaper is also granted (Educ. Law § 807-a(5)). The law simplifies the reporting of any deficiencies found in an inspection and the proposed corrective actions by requiring notice be given to the local government that enforces the uniform fire prevention and building code for the municipality wherein the building is located (Educ. Law § 807-c(5)).

Telephone Lines Connecting Emergency Services

S.4756/A.458 adds a new provision of law that requires all public buildings, including schools, operating a multi-line telephone system to configure such system to allow any call to 911 emergency services to be directly connected. The provisions of the law would not apply to a school building which would have to upgrade the hardware of the telephone system to meet the requirement. However, in such school buildings the instructions to connect to a 911 operator must be posted next to every phone (Executive Law 717-a).

School Transportation

Stop-Arm Cameras

A.4950-B/S.4524-B authorizes boards of education to adopt a resolution to enter into an agreement with a county, city, town, or village within such district, for the installation and use of school bus photo violation monitoring systems (Educ. Law §§ 1604(43), 1709(43), 2503(21), 2554(28), 2590-h(39)). A new provision is also added to the vehicle and traffic law empowering local municipalities to pass a law or ordinance establishing a demonstration program imposing monetary liability on the owner of a vehicle for failure of the operator to stop when a school bus has its stop arms extended (Veh. & Traf. Law §1174-a). The total cost of the school bus photo monitoring system must be borne by the county, city, town or village that enters such agreement with a school district (Veh. & Traf. Law § 1174-a(1-b)). School districts which execute such agreements must report all expenses to the municipality by September 1 each year and the municipality must reimburse the school district by December 1 (*Id.*). Images captured by the system may not be used in any disciplinary proceeding convened by a school district or bus contractor. Participating districts are prohibited from accessing the images but must instead forward them to the municipality. Images for which a liability notice is not issued must be destroyed 90 days after alleged imposition of liability and images for which liability notice is issued shall be destroyed after final disposition of said notice of liability (Veh. & Traf. Law § 1174-a(2), (3)). The purchase of the necessary equipment to establish a school bus violation monitoring program is subject to competitive bidding.

Transportation for Students with Disabilities

S.4770-A/A.7962-A adds new provisions to the social services law empowering the commissioner of social services to study and review current regulations and policies under the state Medicaid plan for transportation of pre-school, elementary and secondary school transportation of students with disabilities and make any necessary amendments in order to secure the greatest level of reimbursement possible (Soc. Serv. Law §§ 368-d(7), 368-e(6)).

NYC Transportation Contracts

S.6208/A.7749 amends the education law to require contracts for transportation of school children in New York City to contain provisions for the retention or preferences in hiring of school bus workers and for the preservation of wages, health, welfare and retirement benefits and seniority for those school bus workers (Educ. Law § 305(14)(a)(2)). Provisions relating to aid for transportation expenses are adjusted to exclude the costs for the retention and preservation of school bus workers for a period of five years (Educ. Law § 3623-a(1)(g)).

Small City School Districts' Debt Limit Clarification

S.5425/A.7062 amends the local finance law to allow small city school districts to deduct state apportionments for debt service (i.e. building aid) in the calculation of debt limits (Local Fin. Law § 121.20(2)).

State Administrative Procedure Act

A.842/S.5812 amends the law to provide that as part of the regulatory flexibility analysis for small businesses and local government the agency must assess the minimum time needed by small businesses and local government to come into compliance and a description of the measures the agency intends to take to inform said entities with sufficient lead time for them to comply without unnecessary costs or burdens (State Admin. Proc. Act § 202-b(e)). Additionally an agency must assure it actively solicited the participation of small businesses and local government in the rule making through activities beyond publication in the state register which can include direct notification of organizations representing the interests of said entities (State Admin. Proc. Act § 202-b(6)).

State Aid

S.5757/A.7114 amends the education law to provide that a school district may count towards its 180 days of required instruction any day or days for which session was scheduled but could not be held due to a properly executed declaration of a state or local emergency pursuant to the executive law. This is in addition to the five days the commissioner has authority to excuse (Educ. Law § 3604(7)). Duplicative language within § 3604(8) regarding superintendent's conference days is also removed.

Student Health

S.2958-A/A.6968-A adds a new provision to the public health law that requires all entities operating a tackle football program, including schools, to provide parents of children participating in such programs with information on concussions developed by the department of public health (Pub. Health Law § 2595).

Syracuse Regional STEAM High School

S.5946-B/A.7914-A authorizes the Syracuse City School District to establish a regional STEAM high school open to enrollment by students residing in the Onondaga, Cortland Madison BOCES' jurisdiction and central New York whose district of residence have entered into memorandums of understanding (MOU) with Syracuse City School District to participate in the Regional STEAM high school. Such agreements must set out a methodology for calculation of tuition costs and must be approved by the commissioner of education. Students attending the STEAM high school will continue to be enrolled in their district of residence and for purposes of state aid shall be treated and counted as students of their district of residence. The district of residence is responsible for transporting students to the STEAM high school and the law explicitly does not set a mileage limitation for such transportation. Up to 30 miles of transportation will be eligible for state aid.

Teacher Certification

A.4448/A.2100 would remove the sunset clause and make permanent the ability of lawful permanent residents of the United States to receive permanent certification as a teacher (Educ. Law § 3001(3)).

Veterans' Diploma

A.4654-A/S.1660-A adds a new subdivision to section 305 of the education law empowering the commissioner of education to create a program whereby any veteran who served active duty in the armed forces and who was unable to complete a secondary education may be awarded a high school diploma based upon knowledge and experience gained in the service (Educ. Law § 305(29-c)).

Whistleblower Protections

A.375/S.2736 amends the whistleblower protections in the labor law to remove a provision which prohibited a whistleblower from bringing any other lawsuit if he or she files a claim for retaliatory employment action based upon whistleblower activity (Labor Law § 740(7)).

Workplace Violence Protection Programs

S.1720/A.6157 amends the labor law to add public school districts and BOCES to the list of public employers required to create and implement a workplace violence prevention program (Labor Law § 27-b(2)(a)). Under the law, a public employer is required to evaluate its workplace for factors that might

place employees at risk, for occupational assaults and homicides. Based upon that knowledge, an employer with 20 employees or more must create a written workplace violence protection program which includes methods the employer will use to prevent incidents of workplace violence and training it will provide employees.

III. Laws Enacted at the End of 2018

Career Education Data

Chapter 357 of the Laws of 2018 amends the education law (§ 3602(10)(e)) to require the commissioner of education to collect data from schools receiving aid under § 3602 regarding the number of students in grade nine who are enrolled in career education courses in trade/industrial education, technical education, agricultural education, health occupations education, business and marketing education family and consumer science education, and technology education programs. Such data collection would commence with data from the 2017-18 school year.

Child Abuse in an Educational Setting

Chapter 363 of the Laws of 2018 amends the education law to expand the applicability of provisions requiring reports of child abuse in an educational setting and requiring greater training for covered reporters.

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

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

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

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

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

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

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

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

The law provides that in any case where it is alleged that a child was abused by an employee or volunteer of a school other than the school the child attends where such case involves a nonpublic school, the appropriate school administrator or administrators, in additional to any appropriate superintendent of

schools shall be notified and thereafter the administrators shall comply with the investigation and reporting requirements (Educ. Law § 1126(2)).

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

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

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

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

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

Family Court Act- PINS and Educational Neglect Proceedings

Chapter 362 of the Laws of 2018 amends the Family Court Act in various respects as relates to truancy allegations in Persons in Need of Supervision (PINS) and child protective proceedings in family court.

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

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

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

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

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

Substance Abuse Education and Assistance

Chapter 323 of the Laws of 2018 requires the office of alcoholism and substance abuse in consultation with the state education department to develop or utilize existing educational materials to be provided to school districts and BOCES for use in addition to or in conjunction with any drug and alcohol related curriculum. The materials must be age appropriate and include an increased focus on substances that are most prevalent among school aged youth and provide parents with information to identify warning signs and address the risks of substance abuse (Men. Health & Hyg. Law § 19.07(l)).

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

IV. State and Federal Regulations

State Regulations

Approved Evaluator of Pre-School Children with Disabilities

8 NYCRR § 200.1(ppp)- Amendments establish that a school district, with staff who possess appropriate licensures, is an approved evaluator for pre-school children with disabilities without requiring separate approval by the commissioner of education.

Bilingual and ENL Waivers for Grade Span

8 NYCRR § 154-2.3(i)- Amendments permit school districts with less than 30 English Language Learner students to apply for a waiver to utilize a grade span for instruction in grades 1-12 in English as a New Language or bilingual classes of three contiguous grades versus two. The waiver is renewable annually. As part of the application the school district must submit data on the number and percentages of English language learners and the number of teachers certified in bilingual education and English to speakers of other languages employed in the district; evidence that the district will ensure students receive grade and age appropriate instructional support and documentation of the district's efforts to meet the two grade span requirement prior to seeking the waiver.

Graduation Participation Policy

8 NYCRR § 100.2(oo)- Amendments require school districts to establish a policy and adopt procedures to allow any student who has been awarded a skills and achievement commencement credential or a career development and occupational studies commencement credential who will not otherwise qualify for a regents or local diploma to participate in the graduation ceremony of the twelfth-grade class with which such student entered into 9th grade. The policy must provide for annual written notice to be provided to all students and their parents. The policy must also be consistent with other school policies relating to participation in graduation application to all students, including those which prohibit participation in the graduation ceremony and related activities as a consequence for a violation of the code of conduct.

Principal Preparation

Pilot P-20 partnerships for Principal Preparation

8 NYCRR § 52.21(c)(7)- A grant program for pilot partnerships between eligible public school districts, institutions of higher education and other organizations with experience supporting, developing and training leaders to improve the preparation of school building leaders is established. To participate, a school district must have a high level of student need in comparison to local resources as measured by the need/resource capacity index, be a re-identified Focus District (i.e. low academic performance on grades 3-8 ELA and math tests or low graduation rates for certain groups of students), have substantial numbers of students who are economically disadvantaged (>70%) and have a minimum of 15 schools. Funded partnerships will develop and implement a program leading to a certificate as a school building leader.

School Accountability

Definitional Changes in 100.19

8 NYCRR §§ 100.19(a)(3)- The definition of priority school was revised to provide that after July 1, 2018 the terms mean a school identified as a comprehensive support and improvement school pursuant to part 100.21 of the regulations.

8 NYCRR § 100.19(a)(4)- The definition of a school district in good standing was revised to provide that after July 1, 2018 the term includes a school district that has not been identified as a target district pursuant to part 100.21 of the regulations.

8 NYCRR § 100.19(a)(12)- After July 1, 2019 the definition of department approved intervention model or comprehensive education plan includes a school comprehensive education plan under 8 NYCRR §100.21(b)(4)(viii), a plan for a school under registration review pursuant to 8 NYCRR 100.21(l) or a school phase out or closure plan under 8 NYCRR §100.21(l).

District Report Cards

8 NYCRR § 100.2(m)(4)- This section was amended to provide that the School District Report Card must be posted on the district website, or if there is no website then it must be provided to the public in another manner as determined by the school district. A district or charter school may add additional information to the report card such as measures of school climate and safety, access to specific learning opportunities such as physical education, and teacher turnover and absences. Amendments also clarified that to the extent practicable report cards and other information should be translated into the languages most frequently spoken in the district.

ESSA Accountability System

8 NYCRR § 100.21- The Board of Regents adopted amendments to this section of the regulations in order to implement New York's ESSA Plan as approved by the federal government.

School Receivership

8 NYCRR § 100.19(d)(6)(i)- The provisions regarding school receivership were revised to provide that the designation as struggling or persistently struggling will be removed when a school is removed from the list of schools in need of comprehensive support and improvement.

Special Education

Declassification

8 NYCRR § 200.2(b)- Amendments remove the requirement for a school district to have a written policy on practices and procedures for declassification of students with disabilities. This regulatory amendment conforms to statutory changes made by Chapter 428 of the Laws of 2017.

Referrals to State Adult Service Agencies

8 NYCRR § 200.4(i)- Amendments repealed prior subdivision (i) and added a new subdivision which provides that no later than the annual review prior to a student's 18th birthday for a student placed in a residential program or a day program when the CSE has determined the student is likely to require adult residential services, the committee on special education (CSE) with parental consent or consent of a student age 18 or over will invite representatives of the Office of Mental Health, Office for People with Developmental Disabilities or the State Education Department as appropriate to participate in a CSE meeting for the development of recommendations for adult services. The CSE must give the parent or student the opportunity to give written consent to the release of relevant information to such other public agencies for purposes of determining the appropriateness of an adult program for such student. If the CSE

is notified by a state agency that it is not responsible for determining and recommending adult services, the CSE shall forward the report to another public agency. If a dispute arises regarding which state agency bears responsibility for determining and recommending adult services the CSE may forward the report to the Council on Children and Families for resolution of the dispute.

Residential Schools

8 NYCRR § 200.15(f)(1) and (n)- Amendments clarify that residential schools' policies and procedures for the protection of students from abuse and neglect must include the duty to report a reportable incident to the vulnerable persons' central register as well as establishing a new requirement for policies and procedures to identify and report possible crimes against a student by a custodian (director, operator, employee or volunteer of such school) to law enforcement.

Student Records

8 NYCRR § 104.3- An amendment to the regulation removed the sunset date regarding the prohibition on placement of a student's score on a state administered English Language Arts or mathematics assessment in grades 3-8 in a student's official transcript or permanent record.

Teacher Certification

Student Teaching

8 NYCRR § 52.21- Amendments to various subdivisions establish the greater clinical/student teaching experiences required in educator preparation programs beginning in the Fall 2022 semester. Educator programs will need to demonstrate how they will maintain partnerships with appropriate entities for the purpose of systematically aligning and improving preparation of teachers. This includes executing a memorandum of understanding with entities in which teacher candidates are involved in clinical experiences. Teacher candidates must have at least 100 clock hours of field experiences related to coursework prior to student teaching. The student teaching must be a full semester of at least 14 weeks in length full-time in an educational setting. Experienced teachers seeking additional certification will only be required to complete 50 clock hours of student teaching. A school-based teacher educator who works with teacher candidates must be certified in the subject area of certification sought by the teacher candidate or a related area and have at least three years full time teaching experience in the subject area of certificate sought by the teacher candidate or a related area and be designated by the district as a school-based teacher educator or be rated effective or highly effective in their most recent annual professional performance review or hold a national board certificate. School-based teacher educators must also participate in professional learning that focuses on the provision of effective clinical supervision.

8 NYCRR § 80-3.7- The requirements for a certificate pursuant to the individual evaluation pathway were also amended to align with the increased student teaching requirement commencing with candidates who apply for a certificate after September 1, 2026.

Statement of Continued Eligibility- Special Education in special classes grades 7-12

8 NYCRR § 80-3.15(a)- Amendments expand the type of certificate holders who may apply for a statement of continued eligibility for teachers of students with disabilities who teach a special class in grades 7-12. The certificates added are Students with Disabilities (grades 7-12) content specialist; Students with Disabilities (grades 5-9) content specialist, and Special Education (grades k-12).

Special Education Certificate Extension for Grades 5-6

8 NYCRR § 80-4.3(r)(1)- Teachers with a students with disabilities (grades 7-12) content specialist certificate may apply for a grade level extension to teach students with disabilities in grades 5-6.

Special Education Certificate Extension for Grades 10-12

8 NYCRR § 80-4.3(s)(1)- Teachers with a students with disabilities (grades 5-9) content specialist certificate may apply for a grade level extension to teach students with disabilities in grades 10-12.

Limited Extension for specific subject in a special class in grades 7-12

8 NYCRR § 80-4.3(t)(1)- Amendments expand the type of certificate holders who may apply for a limited extension to teach a specific subject in a special class in grades 7-12. The certificates added are Students with Disabilities (grades 7-12) content specialist; Students with Disabilities (grades 5-9) content specialist, and Special Education (grades k-12).

8 NYCRR § 80-4.3(t)(3)(v)(a)- Candidates for a limited extension must have at least two years full-time teaching experience in grades 7-12 in the subject area in which the limited extension is sought or in a closely related subject area acceptable to the department.

CTE Certificate Extensions for Grades 5 and 6

8 NYCRR § 80-4.3(b)- Amendments provide the ability for holders of teaching certificates in specific career and technical education subjects (7-12) to apply for an extension to teach said subject in grades 5-6. As with other extensions the teacher must complete six hours of coursework in middle childhood education, which include study in early adolescent development and instructional strategies in middle childhood education.

Endorsement Pathway

8 NYCRR § 80-5.8 and 80-5.20- Amendments were made to the endorsement pathway to a teaching or administrative certificate to revise the eligibility requirements to clarify that candidate's experience and certificates may be in other states or territories of the United States. The new phrasing eliminates an ambiguity that a person could combine experience from multiple states for the three years of experience. The window of time for a candidate to complete the prior experience is expanded from five to seven years immediately preceding the application for endorsement. Lastly, the evaluation ratings a candidate must have may be acquired during any of the three years of experience and do not necessarily have to be from the three most recent years.

Transitional G Certificate

8 NYCRR § 80-3.7(a)(3)(xiii)-Amendments expand the ability to pursue a Transitional G certificate to any individual with a graduate degree and at least two years of post-secondary teaching experience to all subject areas. Previously the Transitional G certificate was limited to specified math and science subjects. To qualify for the Transitional G certificate the two years of post-secondary teaching must have occurred within in past 10 years. An individual holding a Transitional G certificate may receive an initial certificate by completing either two years of teaching in a school district or pedagogical study requirements specified in the regulation.

Transitional H Certificate

8 NYCRR § 80-5.25(a)(3)(i)(c)- Amendments expand the type of eligible experiences a CPA may possess to pursue the Transitional H pathway for certification as a school district business leader to include three years of work in the business office of one or more school districts or BOCES.

Safety Net for Education Technology Specialist

8 NYCRR § 80-1.5(c)(2)- Amendments extend the availability of the safety net for candidates seeking certification as an Educational Technology Specialist, who failed to achieve a passing score on the revised Educational Technology Content Specialty test, until six months after the revised Educational Technology Specialist content specialist test is redeveloped and operational.

Transition Liaisons

8 NYCRR § 100.2(ff)- The Board of Regents amended this subsection to include that a board has a duty to ensure youth released from a local county correctional facility or juvenile detention center are promptly enrolled in school. The subsection previously did not address youth who are juvenile delinquents. Each school district must appoint a transition liaison to work with residential facility personnel, parents, students and other agencies to facilitate a student's effective educational transition from such facilities to a school by for example coordinating timely transmission of educational records, collaborating with staff in such facilities, and ensuring parents or guardians are informed and provided meaningful opportunities to participate in the education of their children.

Federal Regulations

School Nutrition Program Director Qualifications

7 CFR Part 210- Amendments were made to provide greater flexibility to the professional standards and qualifications for School nutrition program directors working in local educational agencies with an enrollment of 2,499 students or fewer. Pursuant to the changes, an applicant will qualify with relevant general food service experience. Previously, the required experience had to be in school food service. (7 CFR § 210.30(b)(1)(i)(B), (C), (D)). Additionally, with permission of the State agency, food service experience may be unpaid (I*d*.)

A local educational agency with less than 500 students may hire an applicant who meets one of the educational criteria in the statute but has less than the required years of relevant food service experience with permission from the State agency (7 CFR § 210.30(b)(1)(i)(E)).

Lastly, the regulation provides flexibility to pay the salary of a school nutrition program director who does not meet the hiring standards within the regulation so long as the school district is complying with a State agency approved plan to ensure the director will meet the requirements (7 CFR § 210.30(b)(1)(i)).

School Meal Nutrition Standards

7 CFR Parts 210, 215 and 220- Amendments were made to the nutrition standards with respect to milk offerings, whole grain and sodium requirements. Flavored low fat milk options may be offered in the national school lunch program, school breakfast program, the special milk program for children and the Child and Adult food care program (for participants ages 6 or older). The grain requirement is modified from requiring all grains meet whole grain-rich standards to just half the grains offered weekly meeting the whole grain-rich standards. Lastly, the sodium standards are modified to keep sodium Target 1 in place though the end of school year 2023-24 and the more restrictive sodium standard 2 will be imposed beginning July 1, 2024.