

The Education Law Committees of the Suffolk and Nassau County Bar Associations in partnership with the Suffolk and Nassau Academies of Law present:



# 2018 ANNUAL SCHOOL LAW CONFERENCE



## **Printing Sponsor:**



December 7, 2018 Touro Law Center, Central Islip, New York



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The Education Law Committees of the Suffolk and Nassau County Bar Associations in partnership with the Suffolk and Nassau Academies of Law present:

# THE 2018 ANNUAL SCHOOL LAW CONFERENCE



This annual conference provides valuable information and insights for lawyers, educators, school board members, and representatives of bargaining groups and others with an interest in legal developments affecting the school community.

DATE: Friday, December 7, 2018

TIME: Sign-in and Breakfast 8:00 a.m.

Program 8:30 a.m. - 2:45 p.m.

PLACE: Touro Law Center

225 Eastview Drive Central Islip, New York CONFERENCE CHAIRS

Carrie Anne Tondo, Esq. &
Michael G. Vigliotta, Esq.
Co-Chairs, SCBA Education Law Committee

John P. Sheahan, Esq.
Chair, NCBA Education Law Committee
Candace J. Gomez, Esq.
Chair, NCBA Education Law Committee

### **MORNING AGENDA**

Morning Main Session I (8:30 am -9:45 am)

"Collective Bargaining in the Age of Janus and the Tax Cap"

Moderator:

Eugene R. Barnosky, Esq., Lamb &

Barnosky, LLP

Panel: John H. Gross, Esq., Ingerman Smith, LLP

Gregory J. Guercio, Esq., Guercio & Guercio, LLP

Peter L. Verdon, Esq., Regional Staff Director, NYS United Teachers

> Networking Break (9:45 am = 10:00 am)

Morning Main Session II (10:00 am -11:15 am)

"How to Protect Your School District in the Age of the 'Me Too' Movement"

Moderator:

Richard K. Zuckerman, Esq.,

Lamb & Barnosky, LLP

Panel: Emily J. Lucas, Esq., Ingerman Smith, LLP

Howard M. Miller, Esq., Bond, Schoeneck & King, PLLC

Thomas M. Volz, Esq., The Law Offices of Thomas M. Volz, PLLC

Lunch Break (11:15 am - 12:15 pm)

### AFTERNOON AGENDA

### Afternoon Main Session

(12:15 pm = 1:30 pm)

"Recent Initiatives to Address School Safety Issues and the Legal Implications?

Moderator: Gary L. Steffanetta, Esq., Guercio & Guercio, LLP

### Panel:

Stuart K. Cameron, Chief of Department, Suffolk County Police Department Christopher J. Clayton, Esq., Ingerman Smith, LLP Laura M. Dilimetin, Esq., Frazer & Feldman, LLP Candace J. Gomez, Esq., Bond, Schoeneck & King, PLLC

Networking Break (1:30 pm - 1:45 pm)

### Afternoon "Focus" Sessions (1:45pm - 2:45 pm)

A. Special Education "Advantages and Disadvantages of Selecting Different Administrative Forums"

#### Panel:

Robert H. Cohen, Esq., Lamb & Barnosky, LLP Jacob S. Feldman, Esq., Frazer & Feldman, LLP Bonnie L. Gorham, Esq., Guercio & Guercio, LLP Rebecca Sassouni, Esq., Rebecca Sassouni, Esq., PLLC

B. 'The Non-Resident "Resident" Student

### Panel:

Diana M. Cannino, Esq., Ingerman Smith, LLP Mara N. Harvey, Esq., Lamb & Barnosky, LLP Christie R. Jacobson, Esq., Frazer & Feldman, LLP Lawrence J. Tenenbaum, Esq., Jaspan Schlesinger, LLP C. "Drilling" into Construction Issues in the School Setting

#### Panel:

Christopher F. Mestecky, Esq., Guercio & Guercio, LLP Mary Anne Sadowski, Esq., Ingerman Smith, LLP Christopher W. Shishko, Esq., Guercio & Guercio, LLP Carrie Anne Tondo, Esq., Ingerman Smith, LLP

D. Drugs and Alcohol in the Workplace

#### Panel:

Douglas E. Libby, Esq., Lamb & Barnosky, LLP Joseph Lilly, Esq., Frazer & Feldman, LLP John P. Sheahan, Esq., Guercio & Guercio, LLP Michael G. Vigliotta, Esq., The Law Offices of Thomas M. Volz, PLLC

### 5.5 MCLE Credits **Professional Practice**

Purchase orders also accepted from school districts. Please call 631-234-5588 with the order number.

Certificates of Attendance will be available at the end of the conference for Suffolk County attendees.

	REGISTRATION: 2018 SCHOOL LAW CONFERENCE - De Touro Law Center, 225 Eastview Drive, Cen
Suffolk Acade	my of Law: To PRE-REGISTER, return form with payment to:

Email

### **REGISTRATION:**

Fax: 631-234-5899 // Call: 631-234-5588

Suffolk Academy of Law, 560 Wheeler Rd. Hauppauge, NY 11788

2018 SCHOOL LAW CONFERENCE - December 7, 2018 Touro Law Center, 225 Eastview Drive, Central Islip, NY

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☐ Tuition:	\$200
Same price for membe non-members, school personnel, union mem	•
Note: Registration incl electronic link to mate Touro Law Center has Fi	rial.
TOTAL:	

Written materials are available upon request

# Trust, Personal Attention and Results



Eugene Barnosky is a graduate of Regis High School, Colgate University (A.B. 1975 in Philosophy and Religion) and St. John's University School of Law. He began his career at the Nassau County law firm now known as Farrell Fritz and joined our firm in 1982. With a varied background in many areas of the law, including real estate development, Mr. Barnosky now focuses his practice upon municipal, education and labor matters. He has served as the Village Attorney of two Suffolk County villages and works extensively for our school district clients. He is a frequent lecturer for the Suffolk and Nassau County Academies of Law. Mr. Barnosky is past President of the New York State Association of School Attorneys and past Chair of the Education Law and Municipal Law Committees of the Suffolk County Bar Association. He has served on the Board of Directors of the Family Service League of Suffolk County, the Advisory Board of First American Title Insurance Company of New York, and as a Fellow of the American Bar Foundation and the New York Bar Foundation. He has served as President of the Colgate Club of Long Island and as Vice Chair of the South Huntington Educational Foundation. His articles on education law have been published in the New York Law Journal and Newsday. Mr. Barnosky was selected to appear in the New York Super Lawyers® Metro Edition in the areas of Schools and Education in 2016, 2017 and 2018. He is admitted to the courts of New York State, the U.S. District Court for the Eastern and Southern Districts of New York ane the United States Court of Appeals for the Second Circuit.



Eugene R. Barnosky PARTNER

631.694.2300 erb@lambbarnosky.com

### PRACTICE AREAS

Education

Employment

Labor

Land Use, Planning and Zoning

Municipal

Real Estate

### EDUCATION

Regis High School

Colgate University (A.B., Philosophy and Religion, 1975)

St. John's University School of Law (J.D., 1979)

### **BAR ADMISSIONS**

New York



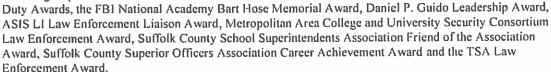
### Stuart K. Cameron

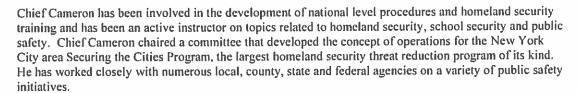
### Suffolk County Police Department Chief of Department

Stuart K. Cameron is a 33 year veteran of the Suffolk County Police Department. He was promoted to Chief of Department (the highest sworn position in the department) in November of 2015.

Chief Cameron is a graduate of the 208<sup>th</sup> session of the FB1 National Academy and he has a Master's Degree from SUNY Albany. Chief Cameron has extensive law enforcement experience and has run numerous high profile operations during his career, including the Gilgo Beach homicide crime scene searches.

During his career Chief Cameron has received several awards and recognitions including Cop of the Year; Meritorious Service Award, Five Excellent Police





Chief Cameron developed five department programs which were recognized with Achievement Awards from the National Association of Counties. He has published over two dozen articles on a variety of public safety and counter-terrorism related topics in the FBI Law Enforcement Bulletin, FBI National Academy's The Associate Magazine, IACP's The Police Chief, IACSP's The Journal of Counter Terrorism & Homeland Security. CBRNe World magazine, Law and Order Magazine, Fire Rescue Magazine, the IABTI's The Detonator magazine, Tactical Response Magazine, Tactical Edge Magazine and the Domestic Preparedness Journal, among other publications.

Chief Cameron has been married to his wife, Margaret, for 32 years. They have three children and one grandchild.





Diana M. Cannino, Associate
University of Rhode Island, B.A., magna cum laude, 2004;
New York Institute of Technology, M.S., with distinction, 2010;
Hofstra University School of Law, J.D., 2013

Diana M. Cannino received a B.A degree from University from Rhode Island, an M.S. degree in Counseling from the New York Institute of Technology, and a Juris Doctor from Hofstra University School of Law. While in law school, she served as an Articles Editor on the Hofstra Labor and Employment Law Journal.

Ms. Cannino joined the law firm of Ingerman Smith, LLP in 2014 and practices extensively in education, commercial and labor and employment law. As an associate attorney with the firm, Ms. Cannino represents school district clients before the Commissioner of Education, Public Employment Relations Board and New York Courts. Ms. Cannino works regularly with school district clients on student residency issues and other education law matters.

Ms. Cannino is admitted to practice law in New York and is a member of the New York State Bar Association and the Suffolk County Bar Association.



Christopher J. Clayton, Partner George Washington University, B.A., 1988; Syracuse University, J.D., 1992

Mr. Clayton, a Partner in the Law Firm of Ingerman Smith, L.L.P., is actively involved in the representation of public and private schools and school districts, colleges and municipalities in matters involving municipal law, education law, public sector labor law, employment law and corporate matters as general and labor counsel. In addition to having an active court litigation and appellate practice, Mr. Clayton frequently litigates before the Commissioner of Education, teacher tenure discharge tribunals, the State Division of Human Rights, labor arbitration tribunals, the New York State Public Employment Relations Board and the National Labor Relations Board. He also represents clients in collective negotiations and labor contract administration matters.

Mr. Clayton joined Ingerman Smith after serving as an Assistant District Attorney in Suffolk County for over eight years, including three in the Homicide Bureau. In his capacity as an Assistant District Attorney, Mr. Clayton successfully tried to verdict a wide variety of felonies including murder, armed robbery and rape, and he is a two time recipient of the Suffolk County District Attorney's Distinguished Trial Advocacy Award. He has addressed numerous organizations and has participated in a great number of seminars and instructional programs for organizations including the New York State School Boards Association, the Nassau Academy of Law and the Suffolk Academy of Law, the Suffolk County Board of Ethics, the New York State Coalition Against Sexual Assault and the New York Prosecutors Training Institute. Mr. Clayton also serves as an Adjunct Professor at the State University of Stony Brook, New York, instructing Master's Degree candidates in the School of Professional Development.

Mr. Clayton is admitted to practice law in the State of New York, the U.S. District Court for the Eastern District of New York, the U.S. Court of Appeals for the Armed Forces and the U.S. Supreme Court.

# Trust, Personal Attention and Results



Robert H. Cohen received both his undergraduate degree (magna cum laude) and his law degree (with distinction) from Hofstra University. As an undergraduate, he was a member of Phi Beta Kappa. In law school, he was an associate editor of the Law Review. Following graduation, Mr. Cohen joined our firm as an associate and has spent his entire career here. He concentrates his practice in education and municipal law, appellate practice and commercial litigation. Mr. Cohen is a past President of the New York State Association of School Attorneys. He was co-chair of the Suffolk County Bar Association's Education Law Committee through June 30, 2009. Mr. Cohen has been a panel member and lecturer on education and employment law issues for the New York State Association of School Attorneys, the Nassau and Suffolk Academies of Law and the Long Island Association of Special Education Administrators. He has conducted numerous seminars and workshops on issues ranging from special education and Section 504 to seniority and tenure rights to student discipline. In April, 2016, Mr. Cohen co-presented a program on "Restorative Justice Techniques" at the National School Board Association's Annual Meeting in Boston.



Robert H. Cohen PARTNER

631.694.2300 631.454.3832 (fax) rhc@lambbarnosky.com

### PRACTICE AREAS

Education

Employment

Labor

Litigation

Municipal

### **EDUCATION**

Hofstra University (B.A., Psychology, *magna cum laude*, 1980)

Hofstra University School of Law (I.D., with distinction, 1983)

### **BAR ADMISSIONS**

New York

# F&F FRAZER & FELDMAN, LLP



LAURA M. DILIMETIN, is admitted to practice in the courts of the State of New York, the Second Circuit Court of Appeals and the District Courts in the Eastern, Northern and Southern Districts. Ms. Dilimetin attended Bucknell University where she received her Bachelors degree in Double Major English and Political Science, and received her Juris Doctor at St. John's University School of Law. She is a member of numerous Bar Associations and is a past member of the Theodore Roosevelt American Inn of

Ms. Dilimetin is a seasoned litigator, and has managed the litigation departments of several top rated firms. She brings with her over 27 years of successful litigation experience, including all phases of trial work. Ms. Dilimetin spent seventeen years as the managing partner of DILIMETIN & DILIMETIN, P.C. where she worked alongside her father, Anthony K. Dilimetin, concentrating on employment litigation, commercial litigation and criminal defense. Ms. Dilimetin has been counsel to celebrity clients and corporations alike, and has handled complex media and high profile cases in the public and private sectors. Ms. Dilimetin began her career with the Kings County District Attorney's office from 1990-94, where she tried a wide variety of cases and was appointed to the elite Sex Crimes Unit. Most recently, Ms. Dilimetin served as Senior Counsel at the Governor's Office of Storm Recovery, helping New York become more resilient after Hurricane Sandy.

Ms. Dilimetin is an active member of North Hills Country Club in Manhasset, NY and a member of the Metropolitan Woman's Golf Association. She is involved with a number of community and charitable organizations, including her membership and former position as General Counsel to Manhasset Women's Coalition Against Breast Cancer. Ms. Dilimetin is the Prosecutor of the Village of Munsey Park, Manhasset, NY.



JACOB S. FELDMAN is a founder and the managing partner of Frazer & Feldman, LLP, an education law firm located in Garden City, NY. He received his Juris Doctor from Brooklyn Law School in 1976 and his B.A. (cum laude) from Brooklyn College. He is admitted to practice law in the State Courts of New York, the United States Supreme Court, the Second Circuit and the Federal Circuit Courts of Appeals, the Court of Federal Claims, and the Southern and Eastern District Courts of New York. He served 10 years in the office of the General Counsel to the New York State United Teachers, where he handled school-related litigation involving constitutional and education law rights, seniority disputes, tenure rights and tenure areas in federal and state courts. Since 1987 he has represented public school districts as general counsel. He has handled the defense of public school districts in major federal and state litigation involving civil rights, age, race, disability and sexual discrimination matters, sexual harassment complaints, and special education matters, and appeals to the Appellate Division, First and Second Departments, the New York State Court of Appeals and to the Second Circuit Court of Appeals. He has handled the successful defense of dozens of impartial hearings and appeals to the SRO on behalf of school districts. Mr. Feldman is a frequent speaker and participant in various special education law programs, speaking on topics including "Developing a Bulletproof IEP," student discipline, preparation for and defense of impartial hearings and Section 504, conducted by the Nassau-Suffolk Academies of Law, NYSSBA, LIASEA, the Council of New York Special Education Administrators, Lorman Education Services, PESI, St. John's University, and many of the firm's school district clients. He is the author of the "Read All About It" column, a monthly compilation of special education cases appearing in the "Attorney's Corner" of Frontline's Directors' Website. He received LIASEA's 2010 Award of Distinction for his special education work on behalf of school districts. He has been recognized annually by Pulse magazine as one of Long Island's Top Legal Eagles in the field of Education Law annually since 2010 and as a "Legal Leader - New York Area's Top Rated Lawyers" annually in New York Magazine since 2013 in the fields of education and labor law.





### Candace J. Gomez

Senior Counsel cgomez@bsk.com 1010 Franklin Avenue Suite 200 Garden City, NY 11530-2900 (516) 267-6336 (516) 267-6301 fax

### **Profile**

Candace represents school districts, colleges, universities, corporations and individuals. She has successfully represented clients in the courts of New York State, federal court, New York State Education Department impartial hearings, New York State Commissioner of Education appeals, and U. S. Department of Education, Office for Civil Rights (OCR) investigations.

Candace has provided general counsel services and litigation services to some of the largest school districts and universities in New York State. Her experience includes policy development, contracts, school board elections, employee disciplinary proceedings, student residency requirements, special education and student disciplinary hearings. She also has extensive experience defending clients in a variety of civil litigation matters.

Candace routinely serves as an impartial investigator regarding employee complaints involving discrimination and harassment in the workplace. Her investigation experience includes matters involving claims of racial discrimination, ethnic discrimination, gender discrimination, sexual orientation discrimination and sexual harassment. In addition, Candace assists employers with preventing discrimination and harassment complaints by conducting anti-harassment training sessions for employees. Furthermore, Candace advises employers regarding the proper handling of situations before they become official complaints.

Candace has conducted numerous seminars and workshops on various education law topics, including presentations for the Nassau County Bar Association, the Annual School Law Conference hosted by the Nassau and Suffolk Academies of Law, and the Annual School Attorney Law Conference hosted by the New York State Association of School Attorneys.

Candace is the Chair of the Nassau County Bar Association Education Law Committee, and she is also a member of the Long Island Hispanic Bar Association (LIHBA) Board of Directors.

Candace's early legal training includes a prestigious internship at Rolls-Royce, North America while attending law school. As an undergraduate student, she was selected as the commencement speaker of her university's graduating class.

### Honors & Affiliations

New York State Bar Association, President's Committee on Access to Justice

### Education

- American University, Washington College of Law (J.D. 2007)
- Tufts University (B.A., with honors, 2004)

### **Bar/Court Admissions**

New York

### **Practices**

- School Districts
- Higher Education
- Litigation
- · Labor and Employment



- Nassau County Bar Association, Chair, Education Law Committee
- Nassau County Long Island Hispanic Bar Association, President
- Suffolk County Bar Association, Pro Bono Foundation
- 40 Under Forty Honoree, Long Island Business News, 2018

### Representative Matters

- Malter of School Administrators Association of New York State v. New York State
   Department of Civil Service, et al., 2013 N.Y. Misc. LEXIS 1956 (N.Y. Sup. Ct.
   2013) (successfully argued that claims against the defendant school district
   should be dismissed in a matter regarding health insurance coverage)
- Invention Submission Corporation t/d/b/a InventHelp v. IP Watchdog, Inc., et al., Civil Action No. 5:10-cv-74 (N.D.N.Y. 2010) (served as local counsel for plaintiff in a federal lawsuit alleging that defendants made untrue statements that constituted unfair business practices; reached a mutually satisfactory settlement agreement between the plaintiff and defendants)

### Representative Presentations

- New Year, New(ish) Laws: a Practical Guide to New York's Sexual Harassment Law and New York's Paid Family Leave Act, Commission on Independent Colleges and Universities (CICU), August 15, 2018
- ABC, 123: Education Law Primer, Bridge-the-Gap, The Nassau Academy of Law, March 4, 2018
- Getting Your Fair Share: Dealing With a Board of Education Regarding a Commercial or Residential Property Development Within a School District's Boundaries, Nassau County Bar Association - Education Law Committee, February 26, 2018
- Conference Chair and Moderator, "R-E-S-P-E-C-T" Evolving Issues in Athletics and Extracurricular Activities: Concussions and Clearance, Mixed Competition Appeals and Transgender Issues, 2017 Annual School Law Conference, December 8, 2017
- Negotiations and Legal Issues: Trends, Policies and Practices, Westchester Putnam School Boards Association Conference, June 1, 2017
- School Law Legal Update, Westchester Putnam School Boards Association District Clerk Workshop, March 1, 2017
- Panel Moderator, Students in Crisis (mandatory reporting obligations, CPS, etc.), Nassau and Suffolk Academies of Law and the Education Law Committees of the Nassau and Suffolk County Bar Associations 2016 Annual School Law Conference, December 9, 2016
- Program Co-Chair, Nassau and Suffolk Academies of Law and the Education Law Committees of the Nassau and Suffolk County Bar Associations 2015 Annual School Law Conference, December 14, 2015
- Transgender Students and Employees, Suffolk and Nassau Academies of Law and the Education Law Committees 2015 Annual School Law Conference, December 14, 2015
- Dignity for All Students Act (DASA), Suffolk and Nassau Academies of Law, and the Education Law Committees of the Suffolk and Nassau County Bar Associations 2014 Annual School Law Conference, December 8, 2014



- Provision of Summer Services to Disabled Students in the Least Restrictive Environment, Recent Significant Decisions from the Second Circuit Involving Special Education: Analysis of the Scarsdale and Cornwall Decisions, Nassau County Bar Association Education Law Committee Presentation and CLE Seminar, November 20, 2014
- Hot Topics in ADA and Section 504 Litigation, Suffolk and Nassau Academies of Law and the Education Law Committees 2013 Annual School Law Conference, December 9, 2013
- Legal Guardianship: Hot Topics & Issues, Nassau County Bar Association CLE Seminar, October 2, 2013

### Representative Publications

- "Immigrant Students, ICE and the Role of Public Schools," Nassau Lawyer, July/August 2017
- "Trump Administration Rescinds Federal Guidance on Transgender Bathroom Use," The Suffolk Lawyer, April 2017
- "U.S. Supreme Court Deliberates Important Special Education Case," The Suffolk Lawyer, March 2017
- "Transgender Students' Name Change Requests," The Suffolk Lawyer, December 2015
- "Defending Tuition Reimbursement Claims," The Suffolk Lawyer, May 2015
- "Behind the Headlines: Immunizations, Religion and Schools," The Suffolk Lawver, March 2015
- "Public School's DASA Duty to Private School Student," The Suffolk Lawyer, February 2015
- "Sex Offenders on School Property," New York State School Board's On Board, January 26, 2015
- "Changes to Emergency Medical Treatment in Schools," The Suffolk Lawyer, December 2014
- "Educating Unaccompanied Immigrant Children in Public Schools," The Suffolk Lawyer, November 2014
- "NY Court of Appeals Rejects Local Cyberbullying Law, The Suffolk Lawyer, September 2014
- "Key Questions When Developing Section 504 Plans Part Two," The Suffolk Lawyer, July 2014
- "Key Questions When Developing Section 504 Plans Part One," The Suffolk Lawyer, May 2014
- "Addressing Racial Discrimination in Student Discipline," The Suffolk Lawyer, March 2014
- "School District Residency for Students of Divorced Parents," The Suffolk Lawyer, November 2013
- "Are School Lunch Mandates a Nutritional and Financial Flop," The Suffolk Lawyer, October 2013
- "Students with Life-Threatening Allergies," The Suffolk Lawyer, September 2013
- "New Regulations Regarding the Dignity for all Students Act," The Suffolk Lawyer, June 2013



- "Sex Offenders on School Property," The Suffolk Lawyer, May 2013
- "After Newtown, Boards Consider New Safety Plans," New York State School Board's On Board, January 28, 2013
- "Amendment to the Dignity for all Students Act," The Suffolk Lawyer, January 2013
- "Anti-discrimination & Harassment in NYS Human Rights Law Not Applicable to Public School Districts," The Suffolk Lawyer, November 2012
- "Notable Title IX Legal Developments," The Suffolk Lawyer, October 2012
- "Celebrating the Bittersweet Anniversary of Title IX," The Suffolk Lawyer, September 2012
- \*School Safety v. Students' First Amendment Rights,\* The Suffolk Lawyer, June 2012

### Other Activities

- · American University, Washington College of Law, Moot Court Honor Society
- Tufts University Commencement Speaker, 2004
- Tufts University Wendell Phillips Award, 2004
- Tufts University Ivan Galantic Award, 2004

### **BONNIE L. GORHAM**

Guercio & Guercio, LLP
77 Conklin Street
Farmingdale, New York 11735
(516) 694-3000
bgorham@guerciolaw.com

Bonnie L. Gorham is a graduate of Hofstra University School of Law. She is admitted to the New York State Bar and to the United States District Court for the Eastern and Southern Districts. Ms. Gorham, a Partner with Guercio & Guercio, LLP, joined the firm in October of 2004. Prior to joining the firm, Ms. Gorham was of counsel to several law firms, concentrating in appellate law and insurance coverage litigation.

Ms. Gorham currently provides advice and counsel to school districts and BOCES in all areas of the education law with a concentration in special education law. Ms. Gorham represents school districts in litigation matters pending before State and Federal Courts and in State due process special education and other administrative hearings. Ms. Gorham is a member of the Education Law Committee of the Nassau County Bar Association and presents on special education topics for continuing legal education. She also provides workshops for school administrators on elections, school budgets, student disciplinary matters, legislation affecting school districts, and general education law. Ms. Gorham was a member of her local school board for eight years, serving as president and vice president.



John H. Gross, Partner Cornell, B.S., 1968; J.D., 1971

Mr. Gross is a graduate of the Cornell School of Industrial Labor Relations and the Cornell Law School. He has been actively involved in representing school districts, colleges, non-profit organizations and municipalities in matters involving municipal law, education law, public sector labor law, employment law and corporate matters as general and labor counsel for over forty years. In addition to having an active court litigation and appellate practice, Mr. Gross frequently litigates appeals before the Commissioner of Education, teacher tenure discharge tribunals, the State Division of Human Rights, labor, commercial and construction arbitration tribunals, the courts, and the New York State Public Employment Relations Board. He has negotiated scores of labor contracts during the past thirty years. He has represented chief school officers including a Chancellor of the City School District of the City of New York and several Superintendents of large city school districts throughout the country. Mr. Gross has addressed numerous organizations and has participated in a great number of seminars and instructional programs concerning municipal law, public sector labor relations, labor negotiations and education law. In addition, Mr. Gross has taught courses on the subjects of education law, collective bargaining, and labor law. He has served as an adjunct professor with New York University and as a member of the faculty of the Cornell University Industrial and Labor Relations Program in New York City. Mr. Gross served as President of the 3,500 member Suffolk County Bar Association. He has been a member of the New York State Bar Association House of Delegates, its statewide Nominating Committee, and has served as Suffolk County Bar Association's delegate to the American Bar Association. He is a member of the Suffolk, Nassau and Westchester County Bar Associations and the American Bar Association. He served as Chairperson of the New York State Bar Association Alternative Dispute Resolution Committee. In 1999, New York State Chief Judge Judith Kaye appointed him a founding member of the New York State Judicial Institute on Professionalism in the Law. Mr. Gross continues as a board member of that organization. He is the Treasurer of the New York State Fair Trial-Free Press Conference. He has served for several years as a member of the House of Delegates and the Finance Committee of the New York State Bar Association. Mr. Gross was a member at large of the New York State Bar Association Executive Committee and thereafter served for three years as the Vice President of the State Bar Association for the Tenth Judicial District. Mr. Gross is counsel to the Suffolk County Bar Association and has represented the New York State Bar Association. He is counsel to the Suffolk County Board of Ethics. He is the past President of the New York Bar Foundation, the philanthropic arm of the New York State Bar Association. He is admitted to the Supreme Court of the United States, the Northern District of the New York Federal Court, the Eastern District of the New York Federal Court and all New York State Courts.

Mr. Gross is married and resides in Northport. He served as an officer in the United States Army, Military Police Corps. Mr. Gross is the Senior Managing Partner of Ingerman Smith, L.L.P.

LAW OFFICES OF

**GUERCIO & GUERCIO, LLP** 

77 Conklin Street
Farmingdale, New York 11735
(516) 694-3000
FAX: (516) 694-4738

www guerciolaw com

24 Century Hill Drive, Suite 101 Latham, New York 12110 (518) 690-7000 Fax: (518) 690-0783

e-mail: first initial last name @guerciolavy com

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\*admission pending

OFFICE ADMINISTRATOR DOREEN GIAQUINTO

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RICHARD J. GUERCIO

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JOHN P. SHEAHAN

RANDY GLASSER

BARBARA P. ALOE.

LISA L. HUTCHINSON

BONNIE L. GORITAM

GARY L. STEFFANETTA

ERIN M. O'GRADY-PARENT

CHRISTOPHER F. MESTECKY

Reply to: Farmingdale x Latham

### **GREGORY J. GUERCIO**

Mr. Guercio is a graduate of the Law School at St. John's University, Class of 1973 where he was a member of the Law Review. Since 1973, Mr. Guercio has been engaged in private practice and has founded the firm currently known as Guercio & Guercio, LLP, one of the largest firms devoted to the practice of Education/Municipal Law and Public Sector Labor Relations with offices located on Long Island and the Capital Region. He concentrates his practice in school related matters as general, labor and litigation counsel to numerous school districts in Nassau and Suffolk Counties as well as various other municipal corporations.

He has served two terms as Chairman of the Education Law Committee of the Nassau County Bar Association. He is the Past President of the New York State Association of School Attorneys and is one of only two attorneys to have been made a permanent member of the Board of Directors and is also the treasurer. He is a charter member of the Sustaining Legal Partners Program of the New York State School Boards Association.

Mr. Guercio is a member of the Board of Directors of the national Council of School Attorneys (COSA), the premiere association representing over 3,000 school attorneys nationwide. Mr. Guercio was the National Chair of COSA in 2014, a position which entitled him to membership on the Board of Directors of the National School Boards Association (NSBA). He has lectured on behalf of the National, State and Nassau/Suffolk School Boards Associations, as well as the Nassau/Suffolk Academy of Law, the American Arbitration Association, the Cornell University ILR School and many other organizations on Municipal/Labor Law issues. He is also a member of the New York State Trial Lawyers Association and the Association of Trial Lawyers of America.

Mr. Guercio has over 40 years of trial experience in all courts in New York state and the Federal Courts of the Southern and Eastern Districts. He has been honored by his peers who appointed him as a Fellow of the New York State Bar Association, an organization comprised of what is considered the top 1% of lawyers in the State of New York. Mr. Guercio also served as a member of the Board of Directors of that Association.

# Trust, Personal Attention and Results



Mara N. Harvey received her undergraduate degree in accounting from Binghamton University and her law degree from Syracuse University College of Law (magna cum laude) where she was Notes and Comments Editor of the Law Review and a member of Phi Alpha Delta and the Order of the Coif. Ms. Harvey was a summer associate at Lamb & Barnosky, LLLP in 2002. Mara is a member of the Education Law Committee of the Suffolk County Bar Association, and is a past co-chair of the Committee Ms. Harvey has lectured on education law issues at conferences sponsored by the Nassau and Suffolk Academies of Law, as well as the New York State School Attorneys Association, New York State School Boards Association and the Long Island Attendance Professionals and Teachers Association. She has been listed in Long Island Business News' Who's Who in Women in Professional Services and was the co-author of the article "Legal Considerations When Seeking to Improve School Security" which appeared in the New York State School Boards Association's May 23, 2018 issue of On Board In addition, she was the author of the article "Legal and Practical Concerns with New Regulations on Residency," which appeared in the New York State School Boards Association's March 2, 2015 issue of On Board. Ms. Harvey works in the Firm's Trusts and Estates and Education, Labor and Municipal Departments



Mara N. Harvey COUNSEL

631.694.2300 mnh@lambbarnosky.com

### PRACTICE AREAS

Education

Municipal

Trusts and Estates

### **EDUCATION**

Binghamton University (B.S. Accounting, 2000)

Syracuse University College of Law (J.D., magna cum laude, 2003)

### **BAR ADMISSIONS**

New York

CHRISTIE R. JACOBSON received her Juris Doctor Degree from Hofstra University School of Law in 2006 and B.A. (Magna Cum Laude, Phi Beta Kappa) from the Hofstra University Honors College in 2003, where she majored in English & American Literature. She is admitted to practice law in the State Courts of New York and Federal Eastern District Courts of New York. During law school, she studied under the "Commissioner Monica Gollub Memorial Endowed Distinguished Full Academic Scholarship in Law." She served as a judicial intern for the Honorable Joanna Seybert of the Eastern District of New York, and the Honorable Peter B. Skelos of the Appellate Division, Second Department. Christie became associated with the firm in 2006. Christie handles administrative litigation on matters including discrimination, discipline, transportation, FERPA, FOIL, homeless/residency matters and statutory interpretation. She provides staff development regarding various legal mandates, and routinely issues legal updates to our clients about new laws, regulations, court cases and administrative decisions.

In May of 2015, Christie was re-elected for a three-year term to the Board of Directors of the Nassau County Bar Association ("NCBA"). She is Chair of the NCBA Women in the Law Committee. Christie has also been featured in New York Magazine's "New York Women Leaders in the Law."

Christie has authored several legal articles including, "Can Schools Limit Student Speech? Should They?," which was featured in the Nassau Lawyer (Aug. 2018), "When Students Mimic White Supremacists," which was featured in NYSSBA's statewide newspaper (Aug. 2018), and "Solutions to Five Common Problems Involving Unpaid Leaves of Absence," which was also featured in NYSSBA's statewide newspaper (Jan. 2014).

# Trust, Personal Attention and Results



Douglas E. Libby served as counsel for the Sewanhaka Central High School District from 1980 through 2012. He is a certified impartial hearing officer to hear cases arising from special education disputes within the City of New York. Mr. Libby is a past President of the New York State Association of School Attorneys. He has served as Chair of the Nassau County Bar Association's Education Law Committee and as Program Chair for the New York State Association of School Attorneys and the Nassau-Suffolk Academies of Law. Mr. Libby has lectured at seminars sponsored by the New York State School Boards Association, the Mid-Hudson School Study Council and the Nassau and Suffolk Bar Associations. He has lectured at the Continuing Legal Education Program sponsored by Hofstra University School of Law and has served as adjunct professor at C.W. Post's Graduate Department.



Douglas E. Libby COUNSEL

631.694.2300 del@lambbarnosky.com

### PRACTICE AREAS

Education

Employment

Labor

Municipal

### **EDUCATION**

Fordham University (B.A. 1971)

St. John's University School (J.D., 1974)

### **BAR ADMISSIONS**

New York

JOSEPH LILLY received his Juris Doctor Degree from St. John's University School of Law in 1992 and his B.A. from Fordham University in 1989. Upon graduation from law school, he served as an Assistant District Attorney in the Suffolk County District Attorney's Office. During his years as an Assistant District Attorney, Joe tried numerous criminal cases involving a variety of criminal charges. After leaving the District Attorney's Office, Joe was an associate with a firm in Melville, New York, where he worked on behalf of a number of different insurance carriers investigating and litigating cases involving insurance fraud, and defending personal injury law suits. From 1999 until 2008, Joe maintained a private law practice, working primarily in the area of criminal defense. He became associated with the firm in 2008, and became a partner in July 2018. Joe handles a wide variety of cases, including Education Law section 3020-a and Civil Service Law section 75 employee discipline, student discipline, student residency issues, and general litigation. Joe has defended administrative appeals to the Commissioner of Education on matters involving student discipline and residency.

Joe is a frequent speaker on topics including the obligations of public school districts related to student discipline, the Dignity for All Students Act, and student concussions. In November, 2014, Joe authored an article entitled, "Executive Sessions and the Open Meetings Law," which appeared in the Nassau County Bart Association monthly newsletter. Joe also had an article featured in the October 2017 edition of On Board, the statewide newspaper published by the New York State School Boards Association ("NYSSBA") entitled "Reasonable Suspicion Must Precede Cellphone Search."





Emily J. Lucas, Partner Ingerman Smith LLP Pepperdine University School of Law, J.D.

Ms. Lucas is a partner in the law firm of Ingerman Smith, LLP She received her law degree from Pepperdine University School of Law and her undergraduate degree from Queens College. Ms. Lucas joined Ingerman Smith, LLP in 2004 and has represented school district clients in all facets of education law, labor law, and employment law. Ms. Lucas has prosecuted tenured employee disciplinary matters, non-instructional disciplinary matters, labor grievances, arbitrations, student disciplinary matters, special education impartial hearings, matters before the Public Employment Relations Board, New York State Division of Human Rights, United States Department of Education Office of Civil Rights, and the Equal Employment Opportunity Commission. Ms. Lucas also represents clients in the collective bargaining process including, face to face negotiations, mediation, and fact finding. Additionally, Ms. Lucas has lectured on a variety of topics including: student discipline, sexual harassment, teacher evaluations, progressive discipline, students with disabilities, Family and Medical Leave Act, and residency issues.

Ms. Lucas is a member of the New York State Bar Association and the Westchester County Bar Association and is licensed to practice law in New York.



### CHRISTOPHER F. MESTECKY

Christopher F. Mestecky is a partner with Guercio and Guercio, LLP. Mr. Mestecky graduated summa cum laude from St. John's University where he majored in English and Government and Politics. He graduated magna cum laude from St. John's University School of Law where he served as a member of the American Bankruptcy Institute Law Review and graduated in the top 2% of his class. Mr. Mestecky is admitted to practice in all New York State Courts and the United States District Court for the Eastern District of New York. He is a member of the New York State Bar Association and the New York State Trial Lawyers Association. Mr. Mestecky joined the firm in 2005. He concentrates on general counsel and labor matters for school districts, construction litigation as well as personal injury litigation. He has been actively engaged in court litigation in school related matters, including construction matters and employee and student discipline matters. Mr. Mestecky attends and participates in conferences held by the New York State School Boards Association and the New York State Association of School Attorneys.

### Areas of Practice:

School Related Matters Labor and Employment Law Construction Litigation/Negotiations Personal Injury Litigation

### **Bar Admissions:**

New York (all courts)
U.S. District Court for the Eastern District of New York

### **Education:**

St. John's University School of Law, Jamaica, New York, 2005 - J.D. - magna cum laude Law Review: American Bankruptcy Institute Law Review

St. John's University, Jamaica, New York, 2002 - B.A. - summa cum laude

### **Professional Associations and Memberships:**

New York State Bar Association





### Howard M. Miller

### Member hmiller@bsk.com 1010 Franklin Avenue Suite 200 Garden City, NY 11530-2900 (516) 267-6318 (516) 267-6301 fax

### Profile

Howard combines innovative thinking and pragmatic problem solving with committed advocacy on a day to day basis to help his clients achieve their goals and objectives.

In today's rapidly changing and highly regulated business environment, a lawyer must do more than tell a client what cannot be done; he must stay one step ahead, guiding the client on a steady path forward.

### A Path Forward in Education

In the area of education law, Howard represents public school districts and private universities throughout New York. He provides collaborative real time day to day advice on the most complex and controversial matters facing his clients. When problems cannot be solved amicably, Howard provides zealous, yet cost effective, advocacy, collaborating with his clients at each and every phase of the matter.

#### A Path Forward in Business

In private sector employment litigation, Howard litigates all types of employment discrimination and retaliation claims. He also represents clients in noncompete and trade secret cases and has won two significant appellate court decisions strengthening and cementing New York's "Faithless Servant Doctrine." Due to Howard's extensive litigation experience, his clients can expect to be fully informed up front of both the strengths and weaknesses of their case, as well as potential fees. There is simply no substitute for informed strategic decisions at the outset.

### **Beyond the Courtroom**

Many of Howard's cases have received media attention and have been reported in national employment law periodicals. In addition, Howard frequently lectures and writes articles on topics such as Constitutional Law, non-compete and trade secret litigation, employment and Constitutional issues relating to social networking sites and various aspects of employment discrimination and education law.

### Representative Matters

- Gingrich v. William Floyd School District, 2018 U.S. Dist. LEXIS 103371 (E.D.N.Y. 2018) (dismissing constitutional claims arising out of student-on-student assault)
- Nadolecki v. William Floyd School District, 2016 U.S. Dist. LEXIS 88399 (E.D.N.Y. 2016) (recommending dismissal of First Amendment retaliation claims), adopted in its entirety 15-cv-2915 (September 13, 2016)

### Education

- St. John's University School of Law (J.D. 1990)
- State University of New York at Albany (B.S., cum laude, 1986)

### **Bar/Court Admissions**

- New York
- Connecticut
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Southern District of New York

### **Practices**

- School Districts
- Municipalities
- Higher Education
- · Labor and Employment
- · Health Care



- City of Binghamton v. Whalen, 2016 N.Y. App. Div. LEXIS 4167 (3d Dep't June 2, 2016) (argued and on the brief in case enforcing full and complete compensation forfeiture under the "faithless servant doctrine" and rejecting task-by-task apportionment of damages)
- Westchester Cnty. Independence Party v. Astorino, 2015 U.S. Dist. LEXIS 133318 (S.D.N.Y. 2015) (dismissing RICO and Constitutional claims)
- Lasillo v. Pilla, 120 A.D.3d 1192, 992 N.Y.S.2d 143 (2d Dep't 2014) (affirming Village's termination of post-termination health care benefits)
- Hommel v. City of Long Beach, 2014 WL 1010654 (E.D.N.Y. March 14, 2014) (successful defense of First Amendment retaliation claim)
- Mohawk v. William Floyd School District, 2014 WL 838162 (E.D.N.Y. March 3, 2014) (dismissing employment discrimination and retaliation claim)
- Saliba v. Five Towns College, 2014 WL 92690 (E.D.N.Y. Jan. 10, 2014)(holding
  that alleged complaint by faculty member about another faculty member's
  harassment of student did not constitute protected activity under Title VII and
  dismissing retaliation claim on additional ground of lack of "but-for" causation and
  failure to exhaust remedies).
- Dong v. Town of North Hempstead, 2013 WL 6407724 (E.D.N.Y. December 9, 2013)(dismissing Fifth Amendment takings claim).
- Spataro v. Glenwood Supply, 479 Fed. Appx. 403 (2d Cir. 2012) (affirming grant of motion to dismiss age discrimination claims)
- Carroll v. City of Mount Vernon, 2011 WL 6759597 (2d Cir. 2011) (argued and on the brief in case granting post-Ricci motion for summary judgment dismissing reverse race discrimination claim), affirming 707 F.Supp.2d 449 (S.D.N.Y. 2010) (analyzing post-Ricci disparate impact claims)
- Mosby v. William Floyd School District, 2010 WL 376842, 363 Fed. Appx. 788
  (2d Cir. 2010) (argued and on the brief in case affirming grant of summary
  judgment in discrimination, hostile environment and retaliation case)
- Hammond v. Keyspan, 2009 WL 337727 (2d Cir. 2009) (on the brief in case affirming grant of summary judgment in disability discrimination case)
- Capone v. Weeks, 326 Fed. Appx. 46 (2d Cir. 2009) (argued and on the brief in case seeking recovery of defendant's attorney's fees in employment case) on remand 2010 WL 2771845 (E.D.N.Y. 2010) (granting fee shift against plaintiff's counsel)
- New York & Atlantic Railway Company v. Surface Transportation Board, 635
   F.3d 66 (2d Cir. 2011) (upholding right of Town to enforce local zoning ordinances on transloading facility)
- Evans v. City of Mount Vernon, 92 A.D.3d 829, 939 N.Y.S.2d 130 (2d Dep't 2012) (argued and on the brief in case dismissing negligent hiring and supervision claims)
- William Floyd School District v. Wright, 61 A.D. 3d 856, 877 N.Y.S.2d 395 (2d Dep't 2009) (argued and on the brief in novel application of "faithless servant doctrine")
- Ciancuilli v. Bronxville Police Commissioners, 57 A.D.3d 661, 868 N.Y.S.2d 548 (2d Dep't 2008) (argued and on the brief in case upholding termination of police officer)
- Murray v. Downey, 48 A.D.3d 817, 852 N.Y.S.2d 387 (2d Dep't 2008) (argued



and on the brief in case requiring exhaustion of remedies under collective bargaining agreement prior to filing lawsuit)

- Beale v. Mount Vernon Police Department, 2012 WL 4473282 (S.D.N.Y. 2012) (dismissing sex-based hostile environment claims)
- Guardino v. Village of Scarsdale Police Department, 2011 WL 4000999 (S.D.N.Y. 2011) (granting motion to dismiss ADA claim)
- Zucker v. Five Towns College, 2010 WL 3310698 (E.D.N.Y. 2010) (granting motion to dismiss age discrimination claim)
- Burchette v. Abercrombie & Fitch Stores, Inc., 2010 WL 1948322 (S.D.N.Y. 2010) (dismissing claims alleging selective enforcement of "look policy")
- Blanco v. Village of Scarsdale, 2009 U.S. Dist. LEXIS 42773 (S.D.N.Y. 2009) (granting motion to dismiss retaliation claims)
- Meyer v. William Floyd School District, 2009 WL 33227208 (E.D.N.Y. 2009) (successful motion to dismiss employment discrimination claims)
- Kempkes v. Marvin, 2008 WL 5330673 (S.D.N.Y. 2008) (successful motion to dismiss First Amendment retaliation claim)

### Honors & Affiliations

- · Listed in:
  - The Best Lawyers in America® 2019, Education Law (listed for 5 years)
  - New York Super Lawyers 2017®, Employment & Labor
- New York State Bar Association
- Nassau County Bar Association
- National Association of College and University Attorneys
- · Member, Law Review
- · St. Thomas More Scholar

### Representative Presentations

- Switching to Offense in Employment Cases, Long Island Chapter Labor and Employment Relations Association, December 12, 2018
- Sexual Harassment, Nassau and Suffolk Academies of Law School Law Conference, December 7, 2018
- Sexual Harassment in the Viral News World, New York State School Boards Association, Sheraton New York Times Square Hotel, October 26, 2018
- Switching to Offense in Employment Cases, New York State Bar Association
   Labor & Employment Law Section, Montreal, Quebec, Canada, October 12, 2018
- Student Activism: The Past Visits the Present Again, New York State School Boards Association, Plainview, NY, July 26, 2018
- Preventing Sexual Harassment in the Workplace, New York State Public Employer Labor Relations Association, Inc. (NYSPELRA), Saratoga Springs, NY, July 19, 2018
- Managing Employees in the Digital Era, The Accounting & Finance Show NY, Javits Center, New York, NY, July 11, 2018
- Social Media Investigations in the Workplace, County Attorneys' Association of the State of New York Annual Meeting, The Otesaga Hotel, Cooperstown, NY, May 21, 2018



- Title IX, Long Island Association of School Personnel Administrators, April 25, 2018
- Interviewee, Tower Talk Business Radio, February 23, 2018
- Panel Member, "Express Yourself!" Standard for Disciplining Staff and Students for Exercising Their Freedom of Expression - Mock 3020-a Proceeding and Legal Analysis, 2017 Annual School Law Conference, December 8, 2017
- Religion in the Public Schools, New York State School Boards Association, October 13, 2017
- Hot Topics in Higher Education and Technology & School Policy~A Panel Discussion, Mid-Hudson School Study Council, Monroe-Woodbury High School, Central Valley, New York, August 4, 2017
- Sections 3020-a and 3020-b A Timely Update, New York State School Boards Association, July 27, 2017
- Labor & Employment Law What's Hot, What's New, What's Next, New York State Industries for the Disabled, October 6, 2017
- Aggressive Litigation Techniques in Defending Employment Cases, Bond's In-House CLE Series, February 27, 2017
- Digital Fingerprints: The Legal Double-Edged Swords of Social Media and Email, Long Island Association of School Personnel Administrators Event, December 1, 2016
- Hot Topics in Public Sector Employment Law, Association of Towns of the State of New York 2016 Personnel Management School, November 18, 2016
- Student Use of Heroin and Other Drugs The Legal Issues and More, New York State School Boards Association, October 27, 2016
- Labor & Employment Law Developments and What They Mean for Your Agency,
   New York State Industries for the Disabled, September 8, 2016
- Investigations & Student Rights Relative to Social Media, Mid-Hudson School Study Council, August 5, 2016
- Litigating and Defending Retaliation Claims: Overcoming the Complex Challenges of These Claims and Pitfalls to Avoid, American Conference Institute 8th Annual Forum on Defending and Managing Employment Discrimination Litigation, July 28, 2016
- Transgender Individuals in the Schools: Lingering Issues, New York State School Boards Association, July 21, 2016
- First Amendment Claims and Employer Counter-Claims, New York State Public Employer Labor Relations Association, July 20, 2016
- Guidance on Transgender and Gender Nonconforming Students, Mid-Hudson Catskill Council of Superintendents, April 12, 2016
- Public Education and the Law The New Frontier: From Debates over Implementation of the Common Core to Student Opt-Outs of Standardized Testing, as well as the Rights of Transgender Individuals in the Schools – Where Will it End?, New York State Bar Association, Committee on Law, Youth & Citizenship, January 27, 2016
- Transgender Students and Employees, Nassau and Suffolk Academies of Law, School Law Conference, December 14, 2015



- Transgender Individuals in the Schools Lingering Issues, New York State School Boards Association, October 18, 2015
- Update on Age Discrimination Litigation Trends: The Latest Class Action Developments, Guidance on Wrongful Reduction in Force Claims, and Practical Solutions for Overcoming the Most Common Challenges Employers are Now Facing in the Age Discrimination Landscape, American Conference Institute's 7th Annual Forum on Defending and Managing Employment Discrimination, July 27, 2015
- The New APPR What Does It All Mean?, New York State School Boards Association Summer Law Conference, July 23, 2015
- §3020-a Proceedings in the Age of APPR, New York State School Boards Association, January 14, 2015
- Title IX, Transgender and Inter-Scholastic Sports, Nassau and Suffolk Academies of Law, School Law Conference, December 8, 2014
- Social Media in the Schools The Legal v. Practical Issues, New York State School Boards Association, October 27, 2014
- Social Media, New York State Association of School Personnel Administrators, October 20, 2014
- Big Brother is Watching...But is it Legal? A Review of Current Issues Relating to Background Checks - Panelist, New York State Bar Association, Labor & Employment Law Section, Fall Meeting, September 13, 2014
- Religious Discrimination, American Conference Institute, August 1, 2014
- Section 3020-a Proceedings in the Age of APPR, New York State School Boards Association, July 24, 2014
- Legal Update for School Stakeholders, Mid-Hudson School Study Council, April 10, 2014
- The Changing Face of School Athletics, New York State School Boards Association, January 9, 2014
- What Every School Board member Should Know About Litigation, New York State School Boards Association, October 26, 2013
- Sexual Harassment Involving Faculty Under Title IX, Touro College Jacob D. Fuchsberg Law Center, April 5, 2013
- Americans with Disabilities Act, Nassau and Suffolk Academies of Law, December 3, 2012
- Constitutional Issues Related to Supermajority Votes, School Funding and Unfunded Mandates, Mid-Hudson School Study Council, August 3, 2012
- How Unfunded Mandates and the Tax Cap Jeopardize a Sound Basic Education,
   Mid-Hudson School Study Council, May 7, 2012
- Current issues in Employee and Student Discipline, Mid-Hudson School Study Council, May 12, 2012
- Legal Update -- Legal Implications for Board Members Using Social Media Sites,
   Orange County School Boards Association, December 7, 2011
- Hot Topics in Employment Discrimination Law, Nassau and Suffolk Academies of Law, School Law Conference, December 5, 2011
- Legal Issues in Classroom Assignments and Activities, New York State School Boards Association, October 28, 2011



- Recent Developments in the Electronic Workplace, New York State Association of School Personnel Administrators, October 19, 2011
- Discipline for Off-Duty Conduct with an Emphasis on Social Media, Mid-Hudson School Study Council, August 5, 2011
- Student Free Speech and Religious Opt-Out Issues in Classroom Assignments and Activities, Nassau Association of District Curriculum Officials, February 17, 2011
- Discipline for Off-Duty Conduct with an Emphasis on Social Media, New York State Bar Association Labor and Employment Law Committee Section Meeting, January 28, 2011
- Executive Sessions & Emails: What's Public and What's Private, Nassau and Suffolk Academies of Law, School Law Conference, December 6, 2010
- Protecting Public Funds, New York State Association of School Business Officials, Fall 2010 School Treasurers Workshop - Panel Discussion, October 27, 2010
- The Electronic Workplace, New York State School Boards Association, October 23, 2010
- Hypothetical School Law Case Studies, Panel discussion of First and Fourth Amendment Issues, Mid-Hudson School Study Council, August 6, 2010

### In-House and Firm Sponsored Presentations

- Howard has presented on numerous topics involving students, such as: discipline; special education; teen pregnancy and suicide; child abuse; student free speech; peer-on-peer harassment; and legal issues involving MySpace, Facebook and Twitter.
- Howard has also presented on numerous workplace issues such as: conducting workplace investigations; documenting performance; anti-harassment training; protecting trade secrets and enforcing non-compete agreements; and social networking.

### Representative Publications

- New York High Court Renders Important Decision Deferring to Institutional Determination in Sexual Misconduct Proceeding, Bond Information Memo, November 2018
- Immigration and Related Foreign Workers, Contributing Author, Chambers and Partners, October 2018
- Dr. Dolittle and the Faithless Servant Doctrine in 2018 (So Far), New York Labor and Employment Law Report, August 2018
- Class action waivers good for business or bad for employees?, Long Island Business News, August 2018
- "Litigation Over The Flu Shot: A New Symptom Of Flu Season," Law360, February 23, 2018
- "The Faithless Servant Doctrine: An Olden Law for Modern Times," Nassau Lawyer, January 2018
- Quoted in "Ignore at your own peril," Long Island Business News, November 17, 2017
- "Ships Passing in the Night: The First Amendment and the Employee Grievance," Nassau Lawyer, July/August 2017



- "Adding Inevitability to the Often Disfavored Inevitable Disclosure Doctrine," New York Labor and Employment Law Report, April 27, 2017
- "A 'Fair and Balanced' Look at a Salary Claw-Back Against an Alleged Serial Sexual Harasser," New York Labor and Employment Law Report, April 20, 2017
- Quoted in "Suits and Armour: Top 5 Reasons Employers Are Sued by Their Workers, and How to Cut Your Risk," Long Island Business News, August 15, 2016
- "Employment Law's "Hulk"-Like Superhero The Faithless Servant Doctrine —
  Just Got Stronger," New York Labor and Employment Law Report, June 7, 2016
- "Tax Cap Upheld Over Strong Dissent Next Stop N.Y.'s Highest Court,"
   Bond Information Memo, May 2016
- "How Would A Noncompete Hold in The 'Star Wars' Universe?," New York Labor
   & Employment Law Report, February 25, 2016
- "'Cat's Paw' Liability in faculty Decision-Making," Higher Education Law Report,
   January 8, 2016
- "Privilege Issues in the Media Firestorm," Higher Education Law Report, Febuary 3, 2015
- "Lloyd Dobler's View of Job Responsibilities Can't Defeat Garcetti Defense,"
   New York Labor & Employment Law Report, December 19, 2015
- "Employee's "Trick" Results in a Halloween Bag of Rocks From the Jury,"
   New York Labor and Employment Law Report, October 15, 2015
- "Pooh Corner and a Zen Approach to Employment Law," New York Labor & Employment Law Report, March 2015
- "A Labor and Employment Audit of Santa's Workshop," New York Labor & Employment Law Report, November 2014
- "Sun Tzu And the Art of Defending an Employment Discrimination Claim,"
   New York Labor & Employment Law Report, August 2014
- Howard M. Miller, Louis P. DiLorenzo and Christopher T. Kurtz, "Striking Out A-Rod: The Faithless Servant Doctrine," Law360, February 14, 2014
- "When Complaining About "Everything" Defeats A Retaliation Claim," Bond Higher Education Law Report Blog, January 31, 2014
- "The Power of Moving to Dismiss the 'False Syllogism' Discrimination Claim,"
   New York Labor & Employment Law Report, March 3, 2011, with contributions by Jessica Moller

### Other Activities

· Long Island Business News, 2017 Leadership in Law Award



Mary Anne Sadowski, Partner State University of New York at Stony Brook, B.S., 1987; Hofstra University, J.D., 1990

Ms. Sadowski represents the Firm's school district clients in all general education law and labor related issues including policy review, employment issues, student matters and school board grievance and liability. She has extensive experience in all facets of fiscal management, commercial and construction issues faced by the Firm's clients. On a daily basis, Ms. Sadowski provides advice and counsel on budgeting issues, including permissible appropriations, establishing funding, expending from and abolishing reserves, and the drafting of propositions and other legal documents in connection with the preparation of the budget.

With respect to commercial/construction law, she provides assistance to school district clients through all stages of construction projects, from the issuance of requests for proposals to architects and other design professionals to the drafting of contracts and the completion of construction projects. In addition, she provides significant legal advice and counsel in all other aspects of commercial law that have a daily impact upon the functioning of a school district including public bidding issues, review of business agreements and contracts for licensing of computer software. Ms. Sadowski has litigated for and defended claims against the Firm's school district clients in all forums, including court, arbitration and mediation. She frequently speaks on public bidding, finances, construction and other commercial matters.

Ms. Sadowski is admitted to practice before the United States District Courts for the Eastern Districts of New York and the Courts of New York. She is a member of the ABA Forum on the Construction Industry, the New York State Bar Association, and the Suffolk County Bar Association. She is the former Co-Chair of the Suffolk County Bar Association's Education Law Committee.



Rebecca Sassouni, Esq., PLLC www.rebeccasassounilaw.com 516.423.2599 rsedlaw@gmail.com

Rebecca Sassouni understands students and schools. Her practice consists entirely of representation of students of all ages in various school, college, and university settings. Ms. Sassouni consults with and represents families of students with special learning needs at CSE and in due process hearings. She has also successfully sought reimbursement for unilateral placement by parents. In addition, Rebecca represents students facing disciplinary actions such as suspension or academic probation. Sassouni is also one a select cohort of IEP Facilitators certified by New York State.

Ms. Sassouni previously interned at the Long Island Advocacy Center and practiced in the Corporate department of a large Manhattan law firm. She graduated as Associate Editor of the <u>Hofstra Law Review</u>, and winner of her class prize in Contracts, from Hofstra University School of Law. Prior to law school, Rebecca graduated, *cum laude* with Distinction in English Literature from Barnard College, Columbia University.

Rebecca is admitted to the Bar in New York State and at the United States Supreme Court. She is a member of the Nassau Bar Association, serving the Education Law Committee as a presenter of CLEs on special education matters for several years.

In May 2017 Rebecca was elected to a three year term as a Trustee of a school board in Nassau County. In October 2017 Sassouni was elected President of SHAI, Sephardic Heritage, Alliance, Inc. In 2016 Sassouni was selected by the Anti Defamation League as a fellow in its Glass Leadership Institute. In 2014 Rebecca was installed to the Town of North Hempstead Women's Roll of Honor in recognition of her extensive volunteer efforts in the public schools, public library, and several not-for-profits. From 2014 through April 2017 Sassouni served as a member of the Board of Trustees of a private day school with NYS accreditation. She has twice been honored as Woman of the Year by Hadassah and honored by her synagogue several times. Sassouni and her spouse are the parents of four young adults and reside in Great Neck, New York.



### JOHN P. SHEAHAN

Mr. Sheahan is a graduate of the New York Law School. He is admitted to practice in all New York State courts and in the United States District Court for the Eastern District of New York. Mr. Sheahan has over 20 years of experience in labor and employment law with districts employing staffs ranging in size from 50 employees to 1,800 employees. Mr. Sheahan is a member of the New York State and Nassau County Bar Associations. He advises school districts on general counsel and labor matters, and concentrates in the areas of education and municipal law, construction law and special education law. Mr. Sheahan has lectured on employment, special education and sexual harassment matters.

### **Bar Admissions:**

New York (all courts)
U.S. District Court Eastern District of New York

### **Education:**

New York Law School, New York, New York, 1994 J.D.

Honors: cum laude

Harriman College, 1987 M.S.

State University of New York, Stony Brook, NY, 1987 B.A.



### CHRISTOPHER W. SHISHKO

Mr. Shishko is a graduate of Stony Brook University, and of Touro Law Center, where he graduated summa cum laude, Salutatorian of the class of 2010 and was a member of Law Review. Mr. Shishko's areas of concentration are in Education Law, Municipal Law, General Counsel & Compliance, Labor & Employment Law, Construction Law, and Litigation. Mr. Shishko regularly advises municipal clients on the legal implications of various financial matters including the application of the tax cap, the impact of payments-in-lieu-of-taxes (PILOTS) on school district budgeting procedures, the effect of tax certiorari proceedings, and the interpretation of various statutes which affect municipal finances. In addition, he advises clients about legal compliance in procurement practices, competitive bidding, and awarding contracts under the General Municipal Law. Mr. Shishko also regularly presents to school boards, administrators, school employees, and outside practitioners on education-related legal compliance. During law school Mr. Shishko interned with Justice Leonard B. Austin of the Nassau County Supreme Court - Commercial Division and at the United States Attorney's Office – Eastern District in the White-Collar Crimes Division. Prior to attending law school, Mr. Shishko conducted investigations regarding litigation matters on behalf of various insurance companies. Mr. Shishko also serves as a village prosecutor in the Village of Malverne where he also resides.

### **Areas of Practice:**

Education Law, Municipal Law, Labor & Employment Law, Tax Certiorari/PILOTs, Construction Law, Litigation

### **Bar Admissions:**

New York State (all courts)

U.S. District Court for the Eastern District of New York

### **Education:**

Touro Law Center, Central Islip, New York, 2010 – J.D. *summa cum laude*, Salutatorian Touro Law Review: Member 2008-2010

State University of New York, Stony Brook, New York, 2006 - B.A. - Political Science

### **Professional Associations and Memberships:**

Nassau County Bar Association – Member Education Law Committee

### Gary L. Steffanetta

Guercio & Guercio, LLP

E-mail: gsteffanetta@guerciolaw.com



Mr. Steffanetta joined the firm in 1986, and has been actively engaged in administrative and court litigation and appellate practice in school related matters both as general and labor counsel to school districts. He served for two years as co-chair of the Suffolk County Bar Associations' Education Law Committee (2011 – 2013). He also served as co-chair of the Suffolk County Bar Association Federal Courts Committee for two years (2005 – 2007). He is an inaugural member of the Board of Advisors of the Center for Labor and Employment Law at St. John's University School of Law. He currently serves on the Executive Committee of the Long Island Labor and Employment Relations Association. He has lectured on behalf of the New York State School Attorney's Association, the New York State School

Boards Association, local school board associations, as well as other school related organizations. He has presented numerous workshops for boards of education, members of school administration and building level staff, on issues such as hiring practices, workplace discrimination, evaluation of staff, employee discipline, special education, student discipline, insurance coverage, labor negotiations, and a host of other topics of concern to today's school boards. Mr. Steffanetta has over thirty three years of trial experience in New York.

Year Joined Organization: 1986

Areas of Practice: Administrative, Court Litigation & Appellate Practice in School Related Matters

General & Labor Counsel to School Districts

Personal Injury Litigation

### **Bar Admissions:**

New York, 1984

U.S. District Court Eastern District of New York, 1984

U.S. District Court Southern District of New York, 1984

U.S. Court of Appeals Federal Circuit, 2005

U.S. Court of Appeals for the Armed Forces, 2005

U.S. Supreme Court, 2005

### Education:

St. John's University School of Law, Jamaica, New York, 1983

Cornell University, New York State School of Industrial and Labor Relations, 1979 B.S., I.L.R.

### **Professional Associations and Memberships:**

St. John's University School of Law Center for Labor and Employment Studies Member, Board of Advisors

Long Island Labor and Employment Relations Association Member, Executive Committee Nassau County Bar Association Member, Education Law Committee

Suffolk County Bar Association Member, Education Law Committee

New York State Bar Association Member

New York State Association of Management Advocates for School Labor Affairs (MASLA) Member

Labor and Employment Relations Association (LERA) Member of Executive Committee, Long Island Chapter

National Council of School Attorneys (COSA) Member

New York State Association of School Attorneys (NYSASA) Member

### **Past Employment Positions:**

District Attorney's Office, Suffolk County, New York, Assistant District Attorney, 1983 – 1986





CONTACT: T: 516.393.8271 F: 516.393.8282

PRACTICE AREAS:

Education Labor and Employment Law Municipal

### Lawrence J. Tenenbaum

### Partner

Itenenbaum@jaspanllp.com

Lawrence J. Tenenbaum is a partner in the Firm's Education, Labor and Employment Law, and Municipal Law Practice Groups where he provides general counsel and labor and employment counsel services to public school districts, libraries, not-for-profit organizations, as well as municipal and private entitles.

Mr. Tenenbaum's labor and employment law practice includes proposal development, negotiations, impasse, fact-finding, contract administration, grievance arbitration, proceedings before the Public Employment Relations Board and representation of clients before the State Division of Human Rights and the Equal Employment Opportunity Commission. In addition, Mr. Tenenbaum provides advice and counsel with respect to the Fair Labor Standards Act, Family Medical Leave Act, Americans with Disabilitles Act and various anti-discrimination statutes.

Mr. Tenenbaum is a frequent lecturer on many labor and employment law topics. He is also a past President of the New York State Association of School Attorneys and continues to serve on the Association's Board of Directors.

Mr. Tenenbaum received his Juris Doctor from Brooklyn Law School and his Bachelor of Science from the New York University College of Business and Public Administration (now the Leonard N. Stern School of Business). He is admitted to practice law in the courts of the State of New York and in the United States District Courts for the Southern and Eastern Districts of New York. He is also a member of the American, New York State and Nassau County Bar Associations, including their respective Education Law, Labor and Employment and Municipal Law Sections.

### **EDUCATION**

- B.S., New York University Leonard N. Stern School of Business 1983
- J.D., Brooklyn Law School 1991

### **BAR ADMISSIONS**

• New York



Carrie Anne Tondo, Esq. Columbia University, B.A., 1999; Hofstra University School of Law, J.D., 2002

Ms. Tondo is a partner in the law firm of Ingerman Smith, L.L.P. In addition to education law and labor law issues facing school districts, Ms. Tondo has concentrated her practice in the areas of construction, municipal, commercial, public finance and energy law. She works closely with the Firm's clients and provides workshops, guidance and support regarding preventative measures and the navigation of legal and economic challenges.

On behalf of the Firm's clients, Ms. Tondo has drafted, negotiated and structured commercial, real estate and municipal financial transactions. Ms. Tondo advises the Firm's clients regarding real property matters and budgetary impacts related to these matters. Ms. Tondo also has extensive experience in all facets of construction law, including preparation and drafting of public bidding documents, architect and construction manager agreements, contractor agreements and construction documents, claims prevention, bid protests, contractual disputes, contract defaults and termination, delay claims, surety claims, complex commercial litigation, lien foreclosure actions, prosecution of errors and omissions claims, Department of Labor and Department of Health proceedings, environmental matters, and compliance with regulations and codes, labor law and the State Environmental Quality Review Act (SEQRA). She is well versed in the applicability of energy law to school districts and has assisted many of the Firm's clients in connection with energy performance contracts and energy savings initiatives. She has been invited to lecture on legal issues concerning public bidding, construction, real property, matters related to payments-in-lieu-of-taxes, procurement, energy savings and other commercial matters to varied audiences.

Ms. Tondo has litigated on behalf of the Firm's clients in state and federal court, and in alternative dispute resolution forums. She is admitted to practice before the United States District Courts for the Eastern and Southern Districts of New York and the Courts of New York and Connecticut. She is a member of the American Bar Association, New York State Bar Association, Connecticut Bar Association, Nassau and Suffolk Bar Associations, the Association of the Bar of the City of New York and the National School Boards Association, Council of School Attorneys.

### Peter L. Verdon, Esq., NYSUT

Peter L. Verdon is the Regional Staff Director of the New York State United Teachers' (NYSUT's) Suffolk Regional Office. The staff he oversees services and represents over 32,000 NYSUT members in the county in all manner of labor relations issues including, but not limited to: collective bargaining, grievance arbitration, representation and disciplinary matters and trainings. Prior to becoming Regional Staff Director five years ago, Peter was a Labor Relations Specialist in NYSUT's Suffolk Office for over thirteen years. Before joining NYSUT, he was an associate at the law firm of Bracken & Margolin, LLP where he was Long Island Counsel to the School Administrators' Association of New York (SAANYS). Peter began his career in labor relations as a Labor Relations Specialist for the Civil Service Employees' Association (CSEA) where he represented members in both Long Island and New York City. Peter is also the cochairperson of the Long Island Education Coalition (LIEC) - a diverse coalition of key stakeholders in public education that advocate for proper funding and support for Long Island schools.

### The Law Offices of Thomas M. Volz, PLLC

Michael G. Vigliotta, Esq.



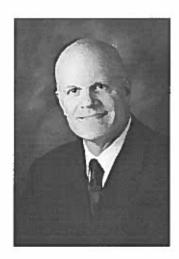
Michael Vigliotta is an attorney at the Law Offices of Thomas M. Volz, PLLC in Nesconset. The firm represents public school boards of education as well as public and free association libraries in Nassau and Suffolk County. They advise their clients on all aspects of general and labor counsel.

Mr. Vigliotta received a B.S. Degree in Business Administration from Fordham University and his Juris Doctor from St. John's University School of Law, where he served as the Managing Editor of the New York Real Property Law Journal and as a member of the New York International Law Review. He is a member of the New York State Bar Association, the New York State Association of School Attorneys, the Suffolk County Bar Association and the St. John's School of Law Alumni Association. He is also Co-Chairperson of the Suffolk County Bar Association Education Law Committee.

### The Law Offices of Thomas M. Volz, PLLC

### Thomas M. Volz

Mr. Volz received a B.A. Degree in Political Science from the State University of New York at Oneonta and his J.D. Degree from St. John's University School of Law where he served as Chief Justice of the Moot Court. He is a member of the New York State and Suffolk County Bar Associations; the New York State Association of School Attorneys, of which he is a member of the Board of Directors and Past President; the Suffolk County Bar Association Education Law Committee, which he is Co-President; an Inaugural Member of the Board of Directors for the St. John's University School of Law Center for Labor and Employment Law. He is a frequent lecturer on Education Law and employment matters.



### **Bar Admissions**

- New York
- U.S. District Court Eastern District of New York
- U.S. District Court Southern District of New York

### Education

- St. John's University School of Law -Jamaica, New York 1990 J.D.
  - Honors Moot Court Chief Justice
- State University of New York Oneonta, New York 1986 B.A. Political Science Honors - Dean's List

### **Professional Associations and Memberships:**

- New York State Bar Association Member
- New York State Association of School Attorneys Board of Directors and Past President
- Suffolk County Bar Association Member
- Suffolk County Education Law Committee Member
- St. John's University School of Law Center for Labor and Employment Law Inaugural Member, Board of Directors

### **Affiliations**

 State University of New York -Stony Brook, New York Adjunct Professor: School Law

### Trust, Personal Attention and Results



Richard K. Zuckerman represents management in all public and private sector labor and employment law areas, including collective bargaining, discipline and litigation-related matters. His public sector clients include school districts, libraries, cities, counties, towns, villages and fire and ferry districts. He also serves as general counsel to school districts and as a hearing officer in General Municipal Law Section 207-a and 207-c disputes

Mr. Zuckerman is the Chair of the New York State Bar Association (NYSBA's) Local and State Government Law Section and a former Chair of the NYSBA's Labor and Employment Law Section, as well as a former President of the New York State Association of School Attorneys. He has also served as a member of the NYSBA's House of Delegates. Mr. Zuckerman is a Fellow of the Governors of The College of Labor and Employment Lawyers, a Fellow of the American and New York Bar Foundations, and an Inaugural Member of the Board of Advisors for the St. John's University School of Law Center for Labor and Employment Law. He is one of the co-editors for the New York State Bar Association's treatise "Lefkowitz on Public Sector Labor and Employment Law, Fourth Edition," as well as its Third Edition and Supplements, and was an editor for the American Bar Association's treatise "Discipline and Discharge in Arbitration" and Supplement. In addition, he was a contributing author to the 6th edition of the ABA's contract arbitration treatise "How Arbitration Works" (Elkouri & Elkouri), and has co-authored numerous articles, including those entitled "Romance in the Workplace: Employers Can Make Rules if They Serve Legitimate Needs" and "Romance in the Workplace: To What Extent Can Employers Dictate the Rules?"

Mr. Zuckerman has been named as a Best Lawyer in America© since 2012 and is the Best Lawyers' 2019 "Lawyer of the Year: Labor Law -Management" for Long Island, as well as in 2017, in addition to being the 2015 New York City "Labor Law - Management "Lawyer of the Year." He has repeatedly been named a New York Super Lawyer® in Labor and Employment Law, a Who's Who in American Law®, and a Long Island Business News' Who's Who in Labor Law. He has presented at numerous programs regarding various labor, education and employment law-related topics. He is admitted to practice before the United States Supreme Court, the federal Second Circuit Court of Appeals and the Eastern and Southern Districts of New York, as well as New York State courts. Mr. Zuckerman is a graduate of the Columbia University School of Law, where he served as Director of the First Year Moot Court program. He graduated summa cum laude from the State University of New York at Stony Brook, where he was elected to Phi Beta Kappa in his junior year and received the William J. Sullivan Award, the University's most prestigious academic and service award.



### Richard K. Zuckerman PARTNER

631.414.5808 rkz@lambbarnosky.com

### PRACTICE AREAS

Education

Employment

Labor

Litigation

Municipal

### **EDUCATION**

State University of New York at Stony Brook (B.A., summa cum laude, Phi Beta Kappa, 1981)

Columbia Law School (J.D., 1984)

### **BAR ADMISSIONS**

New York





### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

### "Collective Bargaining in the Age of Janus and the Tax Cap"

### COLLECTIVE BARGAINING IN THE AGE OF JANUS AND THE TAX CAP

GREGORY J. GUERCIO, ESQ.
PETER VERDON, ESQ.
MODERATOR: EUGENE R.
BARNOSKY, ESQ.

### Janus - the Demise of Agency fee

## Summary of "Janus" Decision

- WL 3129785 (U.S. June 27, 2018). employees violate the First Amendment prohibition on state compelled speech. that state statutes requiring the payment of agency fees by public sector On June 27, 2018, the United States Supreme Court in Janus v. AFSCME declared <u>Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31,</u> No. 16-1466, 2018
- The Janus decision now requires employees to affirmatively consent or "opt-in" to the payment of dues. This means that the automatic deduction of agency fee from deduction may only take place if the employee affirmatively consents. non-union members' paychecks must cease immediately. According to Janus, the
- When a public sector union negotiates with a school district it is petitioning government. Wages, staffing, class size, etc. affect and impinge on government's policy/political making decisional process that deals directly with allocation of imited resources and taxes
- Compelled agency fee violates "anti-union" employee free speech.

### The Impact of Janus - Introduction to New York's Taylor Law Amendments in the 2018 Budget Bill

- The New York State Legislature, in anticipation of the Janus decision, amended sections of the Taylor Law relating to the rights accompanying certification or recognition of an employee organization as well as what constitutes an improper employee organization practice.
- finding agency fee unconstitutional The amendments were designed to ameliorate the impact of a Janus decision
- The recent amendments:
- (1) establish timelines regarding when union member dues deduction by the public employer must take place, and when the dues must be paid to the union by the employer;
- (2) address how an employee can revoke consent for the deduction; and
- (3) provide union access to new employees for the certified or recognized employee organization has been facilitated.

# New York's Taylor Law Amendments in the 2018 Budget

### Bi

## Rights Accompanying Certification or Recognition

- than thirty (30) days from receipt of a signed authorization card. Once collected by the A public employer must begin making the deduction as soon as practicable, but not later (30) days of the deduction. public employer, the dues must be transmitted to the employee organization within thirty
- Public sector employers must now accept an electronically signed authorization card in lieu of a signature by hand, if the employee chooses to sign the card electronically.
- Mere representation of consent to dues deduction from the union/employee organization, whether in writing or in another form, such as a member list, is insufficient authorization discussed more in depth later on.] forms of authorization that likely would be deemed acceptable by PERB. [This is because it does not satisfy the new Taylor Law requirements. However, there are other

### New York's Taylor Law Amendments in the 2018 **Budget Bill**

# Rights Accompanying Certification or Recognition \*continued

- and submit dues deduction authorization cards because of Janus should continue without interruption. In other words, union members do not need to re-sign file for employees, no further information is needed from the employees and dues deduction Dues Deduction Cards - If the district already has dues deduction authorization cards on
- Under the Budget Bill How does an employee revoke consent for the deduction?
- General Municipal Law Section 93(b) has been repealed revocation is no longer a simple task in providing a public sector employer's CFO with notice of revocation.
- the signed authorization, or is no longer employed. card until the employee either revokes union membership in writing in accordance with The dues deduction remains in effect for any employee who has given an authorization
- Federal courts have characterized an executed dues deduction authorization as a "contract" between the employee and the Union.

### New York's Taylor Law Amendments in the 2018 **Budget Bill – Access to Employees**

### Access to New Employees

- Within thirty (30) days of a new employee hire or a promotion that results in and provide the union with the employee's name, address, job title, employing agency, department or other operating unit and work location. the transfer into a new bargaining unit, the employer must notify the union
- Thereafter, within thirty (30) days of this notice to the union, a duly appointed representative of the union must be given the opportunity to consultation with an administrator of the school district. working hours and without charge to leave credits at a time scheduled in meet with the employee for a reasonable amount of time during

### The 2018 Budget Bill and the Duty of Fair Representation – How is it now defined?

- The duty means that as exclusive representatives of the employees in a bargaining unit the Union must exercise its discretion in representation with "... complete good faith and honesty, and to avoid arbitrary conduct."
- The Budget Bill modifies the Union's Duty of Fair Representation or put another way what rights can be denied to bargaining unit members who refuse to pay union dues?
- The amendments contained in the budget bill also made changes relating to the duty owed by a union to those bargaining unit members who choose not to join the union and pay union dues.
- The union's duty is now limited to "negotiation and enforcement" of the terms of the collective bargaining agreement.
- contract this does not constitute interference, restraint or coercion with an services and representation of non-members to negotiation and enforcement of the Further, the amendments specifically set forth that when a union chooses to limit its employees' right to join or not join a union under the Taylor Law.

### The 2018 Budget Bill and the Curtailment of the **Duty of Fair Representation**

- This new definition of the duty of fair representation is for a Union to "negotiate and enforce" the collective bargaining agreement.
- Amends Section 209-a(2) of the Taylor Law which describes union improper

practices

- The amendment now provides representation to a non-member: that മ union is not required to provide
- during questioning by the employer;
- regulatory right; or in statutory or administrative proceedings or to enforce a statutory or
- in any stage of grievance, arbitration or other contractual process concerning by his or her own advocate the evaluation or discipline of an employee where the non- member is permitted to proceed without the employee organization and be represented

### **Employee Withdrawal of Dues Deduction** Authorization

- In order for an employer to cease deduction of dues from an employee's paycheck deduction authorization. Gen. Municipal Law Section 93 has been modified the employer must receive a written revocation that complies with the signed dues
- In the absence of access to the employee's dues deduction authorization card or other form of a signed authorization, it is impossible for an employer to determine document as a binding contract, the terms of which are enforceable.) characterized an employee dues deduction authorization card or other such if the employee's request is legally valid. (It should be noted that the courts have
- Some unions have asserted that they will inform the employer when an employee paycheck. resigns from membership and is no longer to have dues deducted from his/her
- As a result of such refusal, a public employer is faced with a dilemma. Without being able to reference the terms set forth in the dues card or authorization to employer risks liability either by honoring the request or continuing dues determine whether the employee's withdrawal request is legally valid, a public

### Payroll Deductions in Light of "Janus" The Conundrum

to have deductions cease? WHEN DOES MANAGEMENT PICK A FIGHT OVER THE CARDS? No cards on file for the the employer have a duty to "police" authorization or only investigate when employee seeks bargaining unit. Union refuses to produce cards. Failure to deduct will lead to litigation. Does

- If the school district during the course of its due diligence discovers that it does not have dues deduction authorization cards on file for certain employees, the employer has the right to demand the union, after notice and a reasonable opportunity, provide executed cards or other sufficient employee written/electronic authorization for all unit employees.
- But first, check the contract?
- Or should the school district only make such request when an individual employee tells the employer he/she wants out of the prior authorization of dues deduction?
- authorization cards? Does the school district have a duty to tell its employees it does not have on file dues deduction
- In the event an employee (or a union) insists on submitting a document electronically signed by the employee, such as an email, it is likely such document would satisfy the constitutional mandate expressed in the Janus decision.
- When demanded, absent some form of written or electronic authorization, the district should cease deduction of dues.

### New York's ESSA Plan Collective Bargaining Implications of

### (The Every Student Succeeds Act) **Background to ESSA**

- Federal Reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA) provides federal funds to states to improve public elementary of secondary education.
- ESSA supersedes the No Child Left Behind Act of 2001 (NCLB). As a condition of this federal funding, states and school districts are the education they need for future success. required to take certain actions to ensure all children are provided
- than NCLB, especially in terms of standards, accountability, and Intended to provide significantly more flexibility to states and LEAs educator evaluation systems.

### School and District Accountability and Support and Interventions for Designated Schools - Section 100.21: ESSA Accountability System

The system and support and interventions set forth in Regulations implement the new accountability the State's approved ESSA Plan commencing with the 2018-2019 school year. amendments to the Commissioner's

### New York's Approved ESSA Plan Includes New Accountability and Support and Interventions (continued)

- Section 100.2(e): each school year, commencing with the the performance of all public schools and school districts in the State and determine whether such public schools shall be 2017-2018 school year results, the Commissioner shall review identified as a:
- Comprehensive Support and Improvement (CSI) School; or
- Targeted Support and Improvement (TSI) School; and/or
- Whether each school district shall be identified as a Target District

### Collective Bargaining Implications For CSI Schools

- CSI Schools must, as a Required Intervention include, among other things, in its school comprehensive education plan:
- A description of goals, targets, and activities, and include timelines for the embedded professional development" implementation of school-level evidence-based interventions and "job-
- Section 100.21(i)(1)(i)(b)(6)
- Limit incoming teachers transfers to teachers rated effective or highly effective Service Law, and require that any successor collective bargaining agreement year, subject to collective bargaining as required under article 14 of the Civil pursuant to Education Law 3012-d by a school district in the previous school authorize such transfers unless otherwise prohibited by law
- Section 100.21(i)(1)(i)(c)

# Job-Embedded Professional Development

- Job-embedded professional development means:
- Professional development for teachers and leaders school and by the teacher or leader evaluation system teacher and student needs and any applicable supports, and addresses identified assessment or progress needs assessment of the that is informed by the results of comprehensive needs
- Section 100.21(b)(3)(ix)

### Collective Bargaining Implications For TSI Schools

- TSI Schools must, as a Required Intervention:
- Develop a school comprehensive education plan the implementation of school-level evidencethat, among other things, includes timelines for professional development based interventions and job-embedded
- Section 100.21(i)(2)(b)(6)

### Collective Bargaining Implications for **Target Districts**

- Target Districts must develop a district comprehensive improvement plan that, among other things:
- Includes a description of the goals, targets, and activities, and and professional development that address the needs includes timelines for the implementation of interventions identified by the district and school needs assessment
- Section 100.21(i)(3)(i)(b)

# Schools Under Registration Review (SURR)

### The Commissioner

- shall place under preliminary registration review schools identified for receivership; and
- may place under preliminary registration review any school identified as a CSI school for at least 3 consecutive years; or
- Schools that have conditions that threaten the health, safety, and/or educational welfare of students; or
- Schools that have been the subject of persistent complaints to SED by parents and haves been identified student learning; or by the Commissioner as a poor learning environment based on a combination of factors affecting
- Any school for which the district fails to provide in a timely manner the student performance data required for the Commissioner to perform the annual assessment; or
- Any school in which excessive percentages of student fail to fully participate in the State assessment program
- Regulations include procedures for placing schools under registration review and for revoking a schools registration
- Section 100.21(k)

### Collective Bargaining Where Registering a New School to Replace a SURR or Struggling or Persistently Struggling School

- In the event a school district seeks to register a new school to replace a SURR that is being closed or phased out or to close and replace a struggling or regarding persistently struggling school, the Commissioner may require information
- The process for identifying and appointing the leadership and staff of the new school, school leaders and a staff that consists primarily of experienced teachers (i.e., at least 3 which must result in the selection of school leaders with a track record of success as such appointments unless otherwise prohibited by law. currently assigned to the school to be closed or phased out, unless waived by the have been rated Effective or Highly Effective...in each of the past 3 years, and are not Service Law, and require that any successor collective bargaining agreement authorize Commissioner, subject to collective bargaining as required under article 14 of the Civil years of teaching experience) who are certified in the subject area(s) they will teach,

### SCHEDULES FOR ALL TEACHERS EMPLOYED BY A SCHOOL WHEN AND WHERE DID **INCREMENTAL SALARY** DISTRICT ORIGINATE?

# History of Teacher Compensation

- 1800's Initial rural tradition of paying teachers room and board.
- Teachers in the 1800's generally lacked professional training. Most were quite seventeen (70) and twenty-four (24) years old young, 77% of female teachers in southeastern Michigan in 1860 were between
- Few had more than an elementary education
- Job requirements instead focused on basic knowledge of the 3Rs (reading, writing, appearance and arithmetic), and possession of "certified moral character" and a middle-class
- "Room and Board" was followed by grade-based differentiated salary schedules of the late 1800's and early 1900's. Differentiation was discriminatory based not only on grade level but also on gender and race. Differentiation reflected a concurrent shift in the compensation scheme with the establishment of graded schools.

### and Race gives way to the "Single salary Schedule" Differentiated Schedules based on Grade, Gender,

- In Boston, in 1876 salaried pay was based on grade level and gender:
- Pay for male grammar school teachers ranged from \$1700 to \$3200.
- Pay for female grammar school teachers ranged from \$600 to \$1200.
- High school teachers were paid more male teachers earned \$1700 to \$4000; female teachers earned \$1000 to \$2000.
- The ranges were set based on the grade level a teacher taught, and where the teachers fell within that range reflected years of experience and the administrators' assessment of their merit.
- The Interborough Association of Women Teachers (IAWT) in New York successfully lobbied the State for a 1911 law requiring equal pay for equal work in teaching.
- Today's single salary schedule began with New York statewide minimum salary schedules enacted by the New York State Legislature in the early 1900's.
- By 1956 Local School Districts were required to adopt by-laws establishing teacher salary schedules no lower than prescribed minimums including step and horizontal (lane) increment.

# The 1966-67 Minimum N.Y.S. Salary Schedule

### **Districts Employing Eight or More Teachers**

STEP	Less Than BA	BA	BA30	BA60
_	\$4,900	\$5,200	\$5,500	\$5,800
2	\$5,100	\$5,450	\$5,750	\$6,050
ω	\$5,300	\$5,700	\$6,000	\$6,300
4	\$5,500	\$5,950	\$6,250	\$6,550
ഗ	\$5,700	\$6,200	\$6,500	\$6,800
တ	\$5,900	\$6,450	\$6,750	\$7,050
7	\$6,100	\$6,700	\$7,000	\$7,300
ω	\$6,300	\$6,950	\$7,250	\$7,550
9	\$6,500	\$7,200	\$7,500	\$7,800
10	\$6,700	\$7,450	\$7,750	\$8,050
11	\$6,900	\$7,700	\$8,000	\$8,300

## Everything Old Is New Again Increment Percentages in 1966

	Less Than			
STEP	BA	BA	BA30	BA60
_				
2	4.08%	4.81%	4.55%	4.31%
ω	3.92%	4.59%	4.35%	4.13%
4	3.77%	4.39%	4.17%	3.97%
5	3.64%	4.20%	4.00%	3.82%
6	3.51%	4.03%	3.85%	3.68%
7	3.39%	3.88%	3.70%	3.55%
8	3.28%	3.73%	3.57%	3.42%
9	3.17%	3.60%	3.45%	3.31%
10	3.08%	3.47%	3.33%	3.21%
1	2.99%	3.36%	3.23%	3.11%

### Increment Five Years after the Adoption of the Taylor Law

- In 1972 in the Triborough Bridge and Tunnel Authority case, PERB ruled: Public employers may not unilaterally alter the terms and conditions of employment following contract expiration while the parties are negotiating.
- Known as the Triborough Doctrine.
- All mandatory subjects of bargaining addressed in a labor contract or in effect as a practice outside of the contract were to continue
- Non-mandatory subjects of bargaining addressed in a labor contract or in effect as a practice could be extinguished unilaterally, e.g. class size.
- Reasoning:
- Since unions could not strike, employers should not be able to unilaterally change "terms and conditions of employment" while negotiations are underway.
- the parties had agreed upon. Therefore, upon expiration the Triborough doctrine required payment of increment. The Single Salary Schedule providing for horizontal steps and increment is the "wage system"
- "Old" Money vs. "New" Money" argument is created by Triborough

#### Reverses Use of the Triborough Doctrine to Require the Automatic Payment of Increment The New York State Court of Appeals 1977 Rockland BOCES

- It is not a violation of a public employer's duty to negotiate in good faith to discontinue payment of automatic annual salary increments during negotiations for a new agreement.
- The Court prophetically said: ". . in times of escalating costs and diminishing tax bases, many public employers simply may not be able in payment of increments does not operate to preserve an existing relationship between the parties, but extends that relationship, giving an edge in negotiations by making the payment a right." good faith to continue to pay automatic increments to their employees. The
- All money is negotiable!

# 10 Years Later - 1982 - The Legislature Acts

- an "improper practice" for an employer to refuse to continue all the terms of an organization during or prior to negotiations engages in an illegal job action. expired agreement until a new agreement is negotiated, unless the employee In 1982, Governor Hugh Carey and the Legislature amend the Taylor Law to make it
- The Triborough doctrine is abrogated and replaced with the Triborough Amendment.
- Within one year, PERB rules that the Triborough Amendment requires public employers to continue paying for both steps and lane movements in the absence of a new contract
- All non-mandatory subjects of collective bargaining contained in a labor contract become mandatory subjects under the "conversion theory" of negotiability.

#### ABANDONMENT OF THE 100+ YEAR OLD "SINGLE SALARY IS IT TIME TO CONSIDER SCHEDULE"?

# The Single Salary Schedule - Advantages

- The single salary schedule addressed two important teacher needs: equity and objectivity.
- Teachers were finally paid simply for teaching, not for the level they taught.
- under the same rules The salary schedule was accessible, giving all teachers an equal chance to earn a pay raise
- greater numbers of teachers to attend and complete college. The education component of the single salary schedule (columns) successfully encouraged
- administrative assessments of their merit. Salary increases were no longer partially based on what teachers viewed as arbitrary
- The single salary schedule treats teachers equitably on the basis of seniority and education, thus minimizing pay bias possibilities (e.g., favoritism, gender, and race).
- It has fairly mechanical rules (negotiation aside) for determining pay and pay increases.
- It allows a teacher to view career progression in a known and predictable way.

# The Single Salary Schedule - Disadvantages

- mediocrity, if not to positive ignorance and incompetency. Inducements should always be held out to teachers to duly qualify themselves for their work. "History of teacher pay and incentive reforms" Jean Protsik, Consortium for Policy Research in Education, University of Wisconsin, 1995. (Emphasis added). schools, Aaron Sheeley, claimed that paying all teachers the same wages "offers a premium to Mediocrity: "As far back as 1867, the superintendent of the Adams County, Pennsylvania
- Cost implications. Granting increment often equals between 1.5% and 3% of the entire base payroll of the teacher bargaining unit. With the advent of the Tax Cap, little left for Management to spend on "across the board" increases for more senior teachers.
- flexibility for compensation discretion in attracting, rewarding, and retaining teachers Criticisms include perception that the single salary schedule is too rigid, leaving districts little
- impact of these factors on student performance Primarily rewarding seniority and education is problematic since research findings question the
- While predictable, career and pay progression is slow and does not allow newer teachers to leapfrog quickly into high pay based on their accomplishments or effectiveness.
- because of revenue decreases resulting from funding declines. Automatic step and lane pay increases lock in pay that a district may not be able to afford

### THE TAX LEVY CAP HAS FUNDAMENTALLY CHANGED THE BARGAINING LANDSCAPE

- Since its inception annual percentage salary increases have substantially diminished
- Bargaining by TOTAL DOLLAR COST No more X% PLUS Increment!
- Goal Spend no more than Increment costs or lower!
- diminished revenue position. be, the tax cap works to erase perceived advantage and every school district is placed in a The tax cap law is the "GREAT EQUALIZER." No matter how wealthy a school district may appear to
- Now negotiating the "second or third time around"
- Some escalation in amount of percentage increases to the salary schedule in face of state aid increases, partial restoration of GAP elimination, diminished TRS/ERS costs and in some cases healthy reserves.
- NYSUT asserts "we gave" during the Great Recession and beyond.
- UNKNOWN IMPACT OF SALT ON PUBLIC WILLINGNESS TO PAY TAX INCREASES.
- DRIVING SALARY COSTS HOWEVER AUTOMATIC INCREMENT REMAINS THE GREAT BARRIER TO SETTLEMENT INEXORABLY

# EACHER COMPENSATION THROUGH NEGOTIATED SALARY SCHEDULE REFORM

A FIGHT WORTH FIGHTING?

# Long Island School District Salary Schedule in 75th Percentile

600	1	653									100	1 150								-
20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	5	4	ယ	2	1	Step
\$101,040	\$97,504	\$93,968	\$88,917	\$88,917	\$86,391	\$83,864	\$81,336	\$78,812	\$76,285	\$73,759	\$71,232	\$68,707	\$66,180	\$63,654	\$61,127	\$58,601	\$55,569	\$53,044	\$50,516	BA
\$104,174 \$119,674	\$100,460	\$96,748	\$91,443	\$91,443	\$88,917	\$86,391	\$83,864	\$81,336	\$78,812	\$76,285	\$73,230	\$71,232	\$68,707	\$66,180	\$63,654	\$61,127	\$58,097	\$55,569	\$53,044	BA15
	\$115,782	\$111,893	\$106,334	\$103,051	\$99,769	\$96,485	\$93,202	\$89,920	\$86,635	\$83,353	\$80,070	\$76,786	\$73,503	\$70,221	\$66,936	\$63,654	\$60,623	\$58,097	\$55,569	ВА30
\$123,428	\$119,326	\$115,227	\$109,365	\$106,082	\$102,799	\$99,515	\$96,233	\$92,951	\$89,665	\$86,384	\$83,102	\$79,817	\$76,535	\$73,253	\$69,968	\$66,686	\$63,654	\$61,127	\$58,601	MA
\$126,562   \$129,698	\$122,284	\$118,004	\$111,893	\$108,610	\$105,326	\$102,043	\$98,760	\$95,477	\$92,193	\$88,910	\$85,628	\$82,345	\$79,061	\$75,779	\$72,494	\$69,211	\$66,180	\$63,654	\$61,127	MA15
	\$125,242	\$120,784	\$114,419	\$111,136	\$107,853	\$104,569	\$101,287	\$98,003	\$94,720	\$91,437	\$88,152	\$84,869	\$81,587	\$78,303	\$75,022	\$71,739	\$68,707	\$66,180	\$63,654	MA30
\$132,830	\$128,196	\$123,562	\$116,945	\$113,663	\$110,379	\$107,096	\$103,812	\$100,529	\$97,246	\$93,963	\$90,680	\$87,397	\$84,114	\$80,831	\$77,547	\$74,262	\$71,232	\$68,707	\$66,180	MA45
\$135,962	\$131,151	\$126,342	\$119,471	\$116,187	\$112,904	\$109,621	\$106,339	\$103,055	\$99,773	\$96,490	\$93,206	\$89,923	\$86,638	\$83,356	\$80,073	\$76,789	\$73,759	\$71,232	\$68,707	MA60
\$139,093   \$141,437	\$134,106 \$136,454	\$129,120 \$131,467	\$121,998	\$118,714 \$121,062	\$115,432 \$117,779	\$112,148 \$114,494	\$108,865 \$111,212	\$105,581 \$107,928	\$102,298 \$104,644	\$99,014	\$95,732	\$92,447	\$89,166	\$85,882	\$82,599	\$79,317	\$76,285	\$73,759	\$71,232	MA75
	\$136,454		\$121,998 \$124,344		, ,		\$111,212			\$99,014 \$101,362	\$98,078 \$98,431	\$92,447   \$94,796   \$95,147	\$91,513 \$91,865	\$88,229 \$88,581	\$82,599   \$84,945   \$85,300	\$81,663 \$84,196	\$78,632 \$78,984	\$73,759   \$76,105   \$76,457	\$73,579	MA90
\$141,790 \$144,137	\$136,806	\$131,818	\$124,696 \$127,042	\$121,413	\$118,130	\$114,846 \$117,193	\$111,565	\$108,281	\$104,998	\$101,714	\$98,431		\$91,865		\$85,300	\$84,196	\$78,984		\$73,931	PHD
\$144,137	\$139,150	\$134,167	\$127,042	\$123,760	\$120,475	\$117,193	\$113,910	\$110,626	\$107,343	\$104,060	\$100,776	\$97,494	\$94,210	\$90,927	\$87,646	\$84,363	\$81,329	\$78,806	\$76,277	М9РНД

# Percentage Increases Upon the Grant of Increment

ſſ		_																			
	20	19	18	17	16	15	14	13	12	11	10	9	8	7	6	۲J	4	ယ	2	1	Step
	3.63%	3.76%	5.68%	0.00%	2.92%	3.01%	3.11%	3.20%	3.31%	3.42%	3.55%	3.68%	3.82%	3.97%	4.13%	4.31%	5.46%	4.76%	5.00%		BA
-	3.70%	3.84%	5.80%	0.00%	2.84%	2.92%	3.01%	3.11%	3.20%	3.31%	4.17%	2.80%	3.68%	3.82%	3.97%	4.13%	5.22%	4.55%	4.76%		BA15
	3.36%	3.48%	5.23%	3.19%	3.29%	3.40%	3.52%	3.65%	3.79%	3.94%	4.10%	4.28%	4.47%	4.67%	4.91%	5.16%	5.00%	4.35%	4.55%		вА30
	3.44%	3.56%	5.36%	3.09%	3.19%	3.30%	3.41%	3.53%	3.66%	3.80%	3.95%	4.12%	4.29%	4.48%	4.70%	4.92%	4.76%	4.13%	4.31%	:	MA
	3.50%	3.63%	5.46%	3.02%	3.12%	3.22%	3.32%	3.44%	3.56%	3.69%	3.83%	3.99%	4.15%	4.33%	4.53%	4.74%	4.58%	3.97%	4.13%		MA15
	3.56%	3.69%	5.56%	2.95%	3.04%	3.14%	3.24%	3.35%	3.47%	3.59%	3.73%	3.87%	4.02%	4.19%	4.37%	4.58%	4.41%	3.82%	3.97%		MA30
	3.61%	3.75%	5.66%	2.89%	2.98%	3.07%	3.16%	3.27%	3.38%	3.49%	3.62%	3.76%	3.90%	4.06%	4.23%	4.42%	4.25%	3.68%	3.82%		MA45
	3.67%	3.81%	5.75%	2.83%	2.91%	2.99%	3.09%	3.19%	3.29%	3.40%	3.52%	3.65%	3.79%	3.94%	4.10%	4.28%	4.11%	3.55%	3.68%		MA60
	3.72%	3.86%	5.84%	2.77%	2.84%	2.93%	3.02%	3.11%	3.21%	3.32%	3.43%	3.55%	3.68%	3.82%	3.97%	4.14%	3.97%	3.42%	3.55%		MA75
	3.65%	3.79%	5.73%	2.71%	2.79%	2.87%	2.95%	3.04%	3.14%	3.24%	3.35%	3.46%	3.59%	3.72%	3.87%	4.02%	3.85%	3.32%	3.43%		MA90
	3.64%	3.78%	5.71%	2.70%	2.78%	2.86%	2.94%	3.03%	3.13%	3.23%	3.34%	3.45%	3.57%	3.71%	3.85%	1.31%	6.60%	3.31%	3.42%		рнд
	3.58%	3.71%	5.61%	2.65%	2.73%	2.80%	2.88%	2.97%	3.06%	3.15%	3.26%	3.37%	3.49%	3.61%	3.74%	3.89%	3.73%	3.20%	3.32%		м9PHD
	36	- 10   110				- 612	N N														

# Salary Schedule Amelioration Currently in Use

- February 1st.) Wage freeze (Do not use delayed increase to salary schedule, or grant of increment, e.g., o% September 1st, 2%
- No increase or delayed increase to extracurricular, co-curricular, and interscholastic sports pay schedules
- Freeze step movement
- ½ step movement (groups of two)
- Reduce the number of salary columns.
- Expand 15 credit columns to 30 credit columns
- more than 3 to 6) Limit the number of in-service credits that may be recognized for column movement in a given year (e.g., no
- Add predominance of graduate courses for column movement, the credit for which must be recognized in the graduate programs of the university or college offering the course
- One column movement per year or every other year
- Use flat dollar salary schedule increases to reduce the percentage of spread between steps
- Use "one time" cash payments not added to base salary

## The NEA Wage System Approach

- Single Salary Schedule the cornerstone
- NEA supports:
- Additional pay harder to staff schools
- Additional "competency-based pay"
- Fluency in additional language reflective of stude
- Fluency in additional language reflective of student population
- Completing specialized certification training or professional development components, related directly to District needs
- Achieving National Board Certification
- Pay for mentoring
- Group pay for special collaborative enterprise

#### • NEA opposes:

- Pay based on testing or evaluation
- Pay for harder to staff subjects (e.g., STEM)

### Techniques to Permanently Modify Existing Salary Schedule by Reduction of the Value of Increment

- In large measure distribution of the existing staff on the District's "scattergram" will identify potential paths to modification:
- steps" receiving no increment or who are on the verge of 20 years of service, concomitant upwards of 4% built in increment. If there is sufficient number of teacher in the "higher Current unit members on top step no longer receive increment. Junior teachers receive reduction of average step cost of increment with the addition of new steps beyond 20 can reduce long term costs. The reduction in increment percentage must be substantial.
- steps will reduce costs. Or add "hold steps" requiring two years to move onto the next step. If bargaining unit contains more junior teachers there will be great opposition. Introduction of "frozen" steps, for example the addition of 5 new steps between lower
- to the compensation system. Complete hard freeze of incremental salary movement in last year of the contract, eliminating increment with the payment of percentage or cash increases to fixed steps. This will require substantive negotiations in next agreement to establish some rationality

### Schedule by Introducing a Second Salary Schedule for Techniques to Permanently Modify Existing Salary New Employees

- Create and negotiate a new salary schedule that reduces the cost of the current value of increment increment gauged to the level of an external factor, i.e. tax cap of 2% or 50% of
- Modify column movement to 30 credits?
- Reduce cell values from current schedule by a percentage factor or create a new matrix with overall reduced value
- Applicable to new hires only
- Can result in cost shift downward over time
- TEACHER UNION OPPOSITION creates a "second class"; destroys egalitarian premise of the "Single Salary Schedule"

### Existing Salary Schedule - Sunset Increment Simplest Technique to Permanently Modify

- Increment no longer automatic once contract terminated
- Salary structure is maintained but all base wage compensation Increment and any "across the board" increase is bargainable
- Addresses cost only and ignores differentiation issues in teacher compensation
- Significant Union opposition
- Will reduce wages over time but may place school district in an uncompetitive recruitment position

### Selected Issues in Health Insurance

### Retiree Health Insurance

- PERB has held that health insurance for future retirees, also known as Other Post Employment Benefits (OPEB) is a mandatory subject of negotiation.
- employees in the same bargaining units. A state law affecting only school districts prohibits employers from "diminishing" health insurance for current retirees unless a "corresponding diminution" in benefits is negotiated with active
- OPEB for government employees in New York is generally financed on a pay-as-you-go basis
- GASB Rule 45, first effective in 2007-08 fiscal years, revealed the long-term financial liability associated with promised retiree health benefits at every level of New York government. In NYS the cost will soon reach \$300 billion.
- Beginning in 2017, GASB Rule 75 will require governments to report their total net unfunded OPEB liabilities on their balance sheets.
- Each school district must undertake actuarial calculation of these costs.
- Steps to contain costs:
- Do not modify favorable pre-existing contribution rates for retirees. Contractual promises of contribution rates for active employees in retirement are binding.
- When negotiating new rates for active employees consider unilateral extension of the increase to retirees who have no contractual promise
- Negotiate lower rates for District retirement contributions for new employees
- Increase service requirement for eligibility above 5 year NYSHIP minimum.

# Active Employee Health Insurance

- On Long Island NYSHIP is the "name of the game"
- NYSHIP will allow competitor plans to be offered to district employees provided the plan is a "non-indemnity" plan
- Current high end for Long Island active employee contribution rate is 25%
- Consider reduction or elimination of "buy out" plans. High may be sufficient to motivate declination. employee premium contribution rates to District health care plan





#### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

#### "How to Protect Your School District in the Age of the 'Me Too' Movement"

# MORNING MAIN SESSION II (10:00 am – 11:15 am)

### How to Protect Your School District in the Age of the "Me Too" Movement

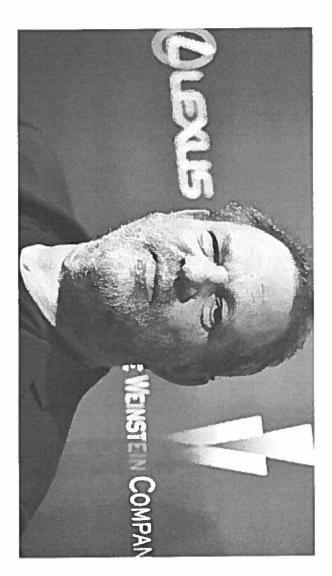
#### Moderator

Richard K. Zuckerman, Esq., Lamb & Barnosky, LLP

#### Panel

Thomas M. Volz, Esq., The Law Offices of Thomas M. Volz, PLLC Howard M. Miller, Esq., Bond, Schoeneck & King, PLLC Emily J. Lucas, Esq., Ingerman Smith, LLP

## Harvey Weinstein: Catalyst



## The "Weinstein Effect"

# High Profile Individuals Have Been Accused of Sexual Harassment:\*

- Kevin Spacey, Actor
- James Tolbeck, Screenwriter
- Ben Affleck, Actor
- President George H.W. Bush
- Chris Savino, Nickelodeon Writer
- Matt Lauer, NBC Morning Show Host
- George Takei, Actor
- Danny Masterson, Actor
- Dustin Hoffman, Actor
- Roy Moore, Politician
- Lockhart Steele, Vox Media
- Jann Wenner, Rolling Stone
- Jeffrey Tambor, Actor

- Roy Price, Amazon
- John Besh, Celebrity chef
- Mark Halperin, Journalist
- Terry Richardson, Fashion Photographer
- Michael Oreskes, NPR executive
- Al Franken, Politician
- Louis C.K., Comedian
- Nick Carter, Singer
- Jeremy Piven, Actor
- Charlie Rose, CBS/PBS Morning Show Host
- John Conyers, Politician
- Leon Wieseltier, the Atlantic
- Russell Simmons, Record Producer

<sup>\*</sup>As of November 29, 2017

### speaks out Brett Kavanaugh 'sexual assault victim'

O 17 September 2018

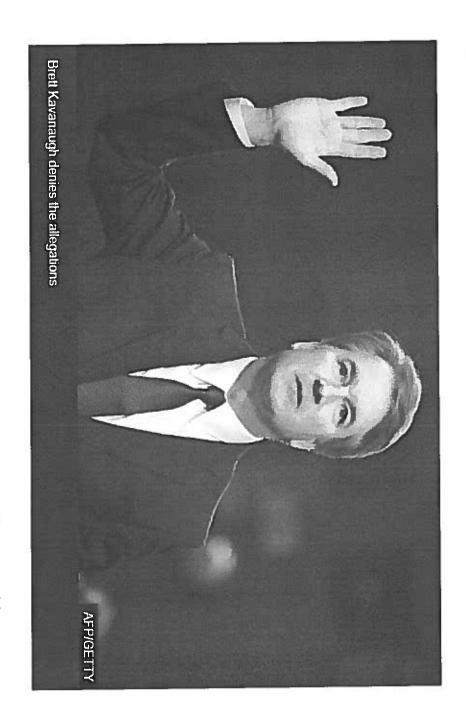








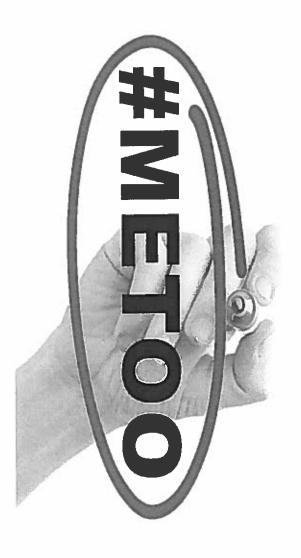




A woman who alleged she was sexually assaulted by US President Donald Trump's Supreme Court nominee, Brett Kavanaugh, has identified herself.

## Why Does This Matter?

- Impacted persons now pursuing publicity and/or humiliation vs. confidential monetary settlements
- Media / social media impact on reputation and goodwill of alleged harasser and the harasser's employer
- Widespread examination of legal and social standards



#### National Dilemma A Sexual-Assault Claim Spotlights

legal system struggles in the #MeToo era A woman accuses, a man denies and the

.S.U.S.

By KATE KING

Brennan spent more than a year trying to get authorities man she accuses of sexually to take action against the assaulting her. Finally, she Murphy. emailed New Jersey Gov. Phil JERSEY CITY, N.J.-Katie

at the state's housing agency attacker, saying ot didn't thinks jury would convict after a campaign staffer al-legedly forced himself on April 2017, one day, she said and a former volunteer for charges against her alleged gation, the county prosecuthe governor's campaign, first called the police in him. She turned to state law tor's office declined to file her. After months of investi-Ms. Brennan, chief of staff

pider is up 707

URWAL

" said

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enforcement and high-rank-

ing members of the Murphy

administration, Nothing

changed.

Jersey City resident, who agreement, emailed Mr. Murshe signed a nondisclosure \$15,000 settlement offer said she turned down a phy and first lady Tammy from her alleged assailant if Murphy/directly. Finally, the 31-year-old

She didn't explicitly men-tion the alleged assault in "sensitive matter" that had happened during the cam-paign. The governor reasked to speak with the govher June 2018 email, but said he was looping in staff sponded within the hour and

"Hang in," the governor email, which was reviewed wrote to Ms. Brennan in the by The Wall Street Journal "We are on it."

A meeting with the gover-Please turn to page A10

**Workplace Gender Gap** WHAT HATH OLO HAS TO DO WITH THE

A new survey from Lean in and McKinsey shows both the pervasiveness of sexual harasment and the persistence of inequality. That isn't a coincidence.

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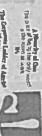
Mare Online Video Northletts of Sheet attReng's remarks of kerpytts termen on the Westsland event contine treatmentary) A video that looks at

inhibite wenter ase too many ordination points in the part entails with entails with entails who inhibited the pende to exhibite a fermioners at entered part or the pende to exhibite a fermioners at entered part of the pendes.

Articles from the Wall Street Journal (Oct 15, 2018, Oct. 23, 2018).



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Carrie Carrie Carrie Copperson The Real Property

Manage Plans for Magazine

## The Effect of the Media

Minarsky v. Susquehanna Cnty., 895 F.3d 303 (3d Cir. sexual advances). cases appearing in the national 2018) (discussed the recent authority to make unwanted celebrity have exploited their positions of power and increase of sexual harassment news and that "people in

## The Problem of False Claims

- Avoid rush to judgment.
- e.g., Duke University lacrosse team widely team were falsely accused of rape. reported 2006 criminal case in which three members of the Duke University men's lacrosse



## Duke's President, Richard H. Brodhead:

forces that play to it in our culture, achieving this goal will I'll end with the deepest lesson this case taught me. When danger of prejudgment and our need to defend against it the world should take from the Duke lacrosse case, it's the before the facts had been established. If there's one lesson were at the mercy of so much instant moral certainty, episode, the scariest thing to me, is that actual human lives I think back through the whole complex history of this at every turn. Given the power of this impulse and the not be easy. But it's a fight where we all need do our part.

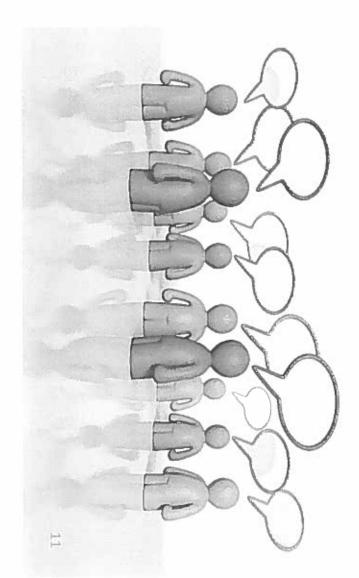
See Duke President Shares Lessons Learned, Regrets About Lacrosse Case, Duke Today, September 29, 2007, available at https://today.duke.edu/2007/09/rhb lawconf.html

## Social Media Harassment

- Food service director complained that someone drew a graphic sexual image of her on a bathroom wall.
- Image was posted on Facebook and shared with co-workers
- sharing images of the drawings but ignored plaintiff's Court held that a reasonable jury could find Employer liable for harassment because plaintiff's supervisor knew employees were complaints
- Alleged harassment was severe enough to create a hostile work environment because the drawings were shared on Facebook during work.
- See Meng v. Aramark Corp., 2015 U.S. Dist. LEXIS 36278 (N.D. III. Mar. 23, 2015).

### What Should Be Investigated and Why?

- School concerns/obligations extend beyond the school/work day and the physical campus
- Social media
- Work events/parties
- Conferences



# Off-Hours Harassment - Takeaways

- protecting its employees from sexual Employers have a legitimate business interest in and outside of the workplace. harassment from co-workers that occurs inside
- If an employer neglects to address sexual sustaining a hostile work environment. harassment complaints, it may be held liable for
- Anti-harassment policies should clearly specify discipline. that off-duty harassment would lead to

# Off-Hours Harassment - Takeaways

- The employment relationship does not end when employees "punch out" for the day.
- Must be mindful of employee interactions outside of work that may create concerns regarding prohibited harassment.



# Off-Hours Harassment – Policies

- Anti-harassment policies should contain the following:
- Behavior at work, and outside of work.
- How employees will be held accountable.
- What actions may be taken if policies are violated.
- Prohibitions against harassment/threats of coworkers and complaints/threats against customers on social media.
- A warning that misconduct on social media may be treated as seriously as other workplace misconduct.

## Off-Hours Harassment

- Employee terminated for sexually harassing his co-workers at work and outside of work.
- Employee filed a grievance.
- Employee's union argued that the incidents outside of work should not be considered.
- Termination was upheld at arbitration.
- See Thyssenkrupp Budd Co., 121 Lab. Arb. (BNA) 164 (Goldberg, 2005).

## Off-Hours Harassment

- **Employee terminated for sexually harassing** his co-worker outside of work.
- Employer's anti-harassment policy did not mention harassment outside the workplace.
- Arbitrator upheld the termination because the and her family. harassment was egregious and because of the psychological strain it placed on the employee
- See Escalade Sports, 118 Lab. Arb. (BNA) 1761 (Kilroy, 2003).

### **Employer Liability for Employee Posts** Blakey v. Cont'l Airlines

- false messages about her on "Continental Forum", an Plaintiff claimed co-workers posted defamatory and online bulletin board where employees posted messages and "threads" for each other.
- E.g.: "Lawsuit, lawsuits lawsuits. That is all we hear about zero respect for you and your kind." with your ALLEGED problem) on the judicial system. I have Tammy Blakey. ... you are a wart (really bad choice of words
- If on notice of retaliatory harassment, employer had duty to remedy the harassment.

## Liability for Employee Posts

a television series a few years ago called "Wings." Wings (NBC television broadcast, April 1990 through May 1997). The program concerned a small, employment and to create an intimidating, hostile, or offensive working criteria of being "sufficiently severe or pervasive to alter the conditions of if management had notice of messages that met the required substantive were at that small airport a lounge used exclusively by the pilots and crew of regional airline, its pilots, ground crew and maintenance people. If there environment," Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 592, 626 A.2d 445 comments and asides by the pilots and crew, there would be little doubt that that airline and a bulletin board in that lounge contained the same or similar To put the issue in perspective, we need to shrink the context a bit. There was could be asserted (1993), a cause of action for hostile work environment sexual harassment

- Blakey v. Cont'l Airlines, 164 N.J. 38, 56 (N.J. 2000).

### Retaliation

who has made a complaint of harassment ultimately found to have merit. regardless of whether the complaint is It is unlawful to retaliate against an individual

# Limiting Retaliation Liability

Do you utilize retaliation notices when harassment? investigating complaints of discrimination and

supervisors on what constitutes retaliation and how to avoid retaliation claims? Have you trained your managers and

- Who must be trained:
- All employees, including:
- Full-time
- Part-time
- Per Diem
- Temporary/Transient/Seasonal
- Individuals employed for one day for the employer, or only working one day in New York State

- What must be included in the training?
- Employers must use the NYS model sexual harassment prevention training program; or
- Employer must use a program that meets or exceeds the NYS minimum standards.

(cont'd)

- NYS minimum standards:
- The training must:
- be interactive
- include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
- include examples of conduct that would constitute unlawful sexual harassment

## NYS minimum standards:

- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
- include information concerning employees' rights of complaints redress and all available forums for adjudicating
- include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

## NYS-Mandated

# Sexual Harassment Training

- Additional key elements noted in the Model Training:
- Provide training in the language that is spoken by employees
- Address:
- Who can be the target of sexual harassment.
- Who can perpetrate sexual harassment.
- Where sexual harassment can occur.
- Sex stereotyping.
- What to do if you are harassed or witness harassment?
- Investigation process and corrective action
- Additional protections and remedies
- Retaliation.
- Other types of workplace harassment.

- When must employees be trained?
- All employees must receive training prior to October 9, 2019 and annually thereafter.
- "Annual" can be based on a calendar year, a year based upon each employee's start date, or any other method (e.g., school or fiscal year)
- Training for new employees is "encouraged" "as soon as possible" from their start date.

- Where must the training occur in order for it to be "interactive?"
- The training may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation.
- To be interactive, the training should include as many of the following participation elements as possible:
- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner;
- Require feedback from employees about the training and the materials presented.

## NYS-Mandated

# Sexual Harassment Training

### FAQ for Training #9

- Examples of employee participation include:
- If web-based, include questions at the end and employee must select the right answer.
- If web-based, employees can submit a question online and receive response immediately or in a timely manner.
- If in-person or live, presenter asks questions or gives them time throughout the presentation to ask questions.
- Web-based or in-person trainings that provide a feedback survey for employees to turn in after training is complete

interaction, is not considered interactive by NYS. reading a document, with no feedback mechanism or \*Training that involves only an individual watching a video or

- Why is it important to train employees using your own training program?
- An employee trained by another employer would technically meet the annual training requirement, but:
- How do you prove the employee was actually trained?
- The Draft FAQs make it clear that it is each employer's responsibility to make sure that their employees are trained
- It's a best practice to ensure that your employees are trained on your expectations and reporting procedure
- The Model Training expressly states that training should provide information on an employer's unique reporting procedures and the contact information for such designees

- How can employers deal with an employee who fails to attend training?
- The FAQs state that if, despite an employer's best See, FAQ for Training #12. administrative remedies to ensure compliance" efforts, an employee fails to complete the training, the employer "may take appropriate employees receive training on an annual basis because employers are required to ensure that all

## Training Best Practices

### Primary goals should be:

- educate as to the employer's conduct expectations.
- foster a culture where employees are encouraged to speak up on behalf of themselves and others and to "boundary set".
- foster a culture where employees are willing to adjust their behaviors to accommodate others' thresholds of tolerance
- educate as to the mechanics of making a report.
- assure all employees that reports will be taken seriously (a (a respondent's concern). complainant's concern) **but also** that reports will be *fairly investigated*
- Note: Even if harassment alleged does not rise to violation of intentionally false charges of harassment. retaliation is not intended to protect persons making had a good faith belief that law was violated. However, the law, individual is protected from retaliation if the person

## NYS Guidance on Training (10/1) Other Key Points from Updated

- Not required, but "strongly recommended" to include model provisions exceeding minimum requirements.
- Must follow federal law, providing that training time is generally compensable.
- separate training for supervisors. Employers are free to provide different and

## NYS Guidance on Training (10/1) Other Key Points from Updated

- practice." Live training (including by phone or video conference) is not required, but is a "best
- May be able to provide employees with supplemental training to cover any minimum requirements omitted from prior anti-harassment training.
- Verified and compliant prior training from a requirement. different employer may satisfy the annual

### Training –

#### Train

- Avenues of complaint
- Administrators
- Supervisors
- All employees
- In a consistent manner (using the same delivery method)
- Address retaliation
- Retaliation includes threats of physical violence outside of work hours
- Include examples/case studies
- Keep records of training materials and who attended

### Training – Don'ts

- Limit to sexual harassment
- employer's expectations Focus on legal standards, while failing to address
- same format you've delivered year after year Go through the motions, delivering the same training in the
- Allow employees to share personal/confidential experiences
- If this happens, the trainer should interrupt and recommend the story be discussed privately and with the appropriate office contact
- After the training, follow up with this individual to ensure they are aware of the proper reporting steps
- Managers and supervisors must report all incidents of harassment.

# Conducting a Proper Investigation

## Investigations

#### Must

- Be commenced immediately and completed **ASAP**
- Whether or not employee formally complains beware of informal reports.
- Even if individual asks you not to take any action, or tells you something "off the record."

## What Juries Look For

- Promptness
- Fairness
- Impartiality
- Thoroughness
- Dignity
- Planning
- Application of Sufficient Skills and Resources

# Write an Investigative Report

- Provide the context of the investigation employees involved). (overview of relevant facts, allegations, and
- the complainant, accused, and all witnesses. Describe the scope of the investigation listing
- Summarize witness testimony and credibility.
- Identify what was verified by records or corroborating statements.

## Investigative Report Cont'd

- Set forth conclusion regarding the facts and evidence substantiating the conclusion.
- Apply conclusions of fact to employer policies and legal standards
- Obtain legal counsel regarding application of relevant law.
- Specify steps for implementing and communicating the decision.
- Martinez v. Triangle, 293 A.D.2d 721, 741 N.Y.S.2d 427 (2d company investigated the claims). Dep't 2002) (dismissing sexual harassment claims where





#### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

#### "Recent Initiatives to Address School Safety Issues and the Legal Implications"

### RECENT INITIATIVES TO ADDRESS AND THE LEGAL IMPLICATIONS SCHOOL SAFETY ISSUES

Nassau/Suffolk Annual School Law Conference

December 7, 2018

Gary L. Steffanetta, Esq., Guercio & Guercio, LLP Moderator

Stuart K. Cameron, Chief of Department, Suffolk County Police Department Candace J. Gomez, Esq., Bond, Schoeneck & King, PLLC Christopher J. Clayton, Esq., Ingerman Smith, LLP Laura M. Dilimetin, Esq., Frazer & Feldman, LLP Panel





### 2018 Annual School Law Conference



### Suffolk County Police Historical Perspective

- Early adopter of the Rapid Deployment Concept — study events — learn from others
- Initially NTOA model four officer diamond
- Now LSU LASER model two officer teams
- Policy has always allowed single officer

deployments



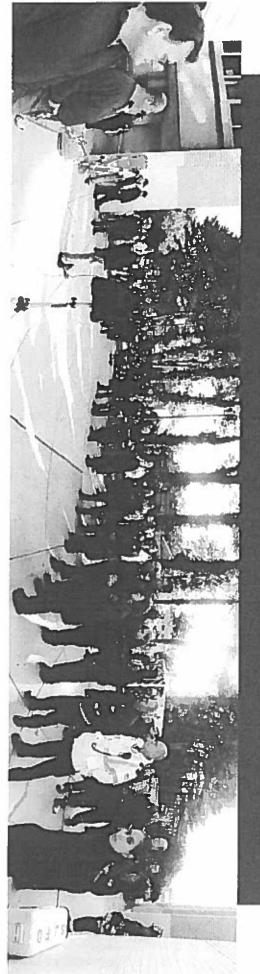
# Extensive History of Collaboration

- Training for Schools
- Exercises with Schools
- SIEGE
- school facilities Regular active shooter response drills held at
- Building floors plans





# Smithtown HS Active Shooter Exercise



# Reunification & Accountability

5:27 video

### Prevention

- Prevention is possible should be the paramount goal
- Threat assessment teams NTAC training
- Working together is key
- School incident category We have prevented attacks in Suffolk County
- Criminal Intelligence



1:45 video

## Constant Training

- Training school staff
- Supervisory training
- Holistic preparedness
- Law enforcement
- Fire
- EMS
- Rapid deployment training
- Regular refresher training
- All LE agencies follow the same model



## Response Enhancements

- Tactical unit
- Rifle
- Breaching equipment
- Medical equipment
- PPE for all patrol vehicles
- Increase staffing in Emergency Service Section





# Rapid Deployment Training

1:13 video

## Casualty Concerns

- Compressible hemorrhage is the leading cause of death
- Priority second only to stopping the shooter
- Urgent as death can occur rapidly
- PD extraction vs. Rescue Task Force
- Stop the Bleed training



## Time as a Factor

Greatest opportunity for life saving intervention is early on....

90% of deaths occurred prior to definitive care

42% immediately

26% within 5 minutes

16% within 5 and 30 minutes

THE BLEED CO

8-10% within 30 minutes and 2 hours

prolonged extrication to care Remainder survived between 2 and 6 hours during

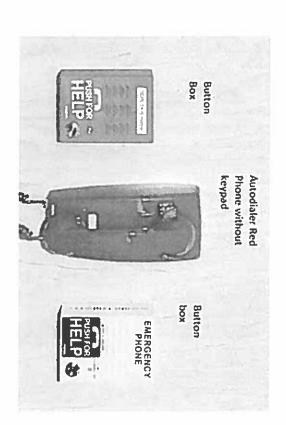
Only 10% of combat deaths occurred after medical care initiated

## Communications

- Save Hotline
- School Active Violence Emergency Hotline

- Rave App
- Trunked radio
- Nixle school group





### Share

- Remote access to school video and access control systems
- Live video streams and recorded video



### Share

• 3:11 video

## RESPONSE PRIORITIES

### **CRITICAL TASKS: 1**

- Rapid Deployment / Contact Teams (Active Shooter)
- Perimeter and Traffic Control
- Transition to Unified Command (Fire, EMS, SCHOOL OFFICIALS)
- Fire and EMS Staging Area
   Liaisons (Unified Presence)

### **CRITICAL TASKS: 2**

- Force Protection Teams
- Casualty Treatment and Extraction Teams
- Casualty Collection Point Liaison (Unified Presence)

### **CRITICAL TASKS: 3**

- Hospital Teams
- Media Staging Area Team
- Reunification Center Teams

# Additional Recent Initiatives

- Text-a-Tip
- Visits to schools
- Additional SRO training
- Stop the Bleed training
- health Additional focus on reunification and mental
- Text to 911

# Reunification / Accountability

- aspects of many school emergency plans Reunification is one of the most neglected
- An entire school needs to be relocated
- Accountability is a key component
- Injured / fatalities need to be ID'd
- Accuracy is essentail
- Schools need student roster / photos
- Parents need to be managed
- Video / photos will need to be collected

## The Media

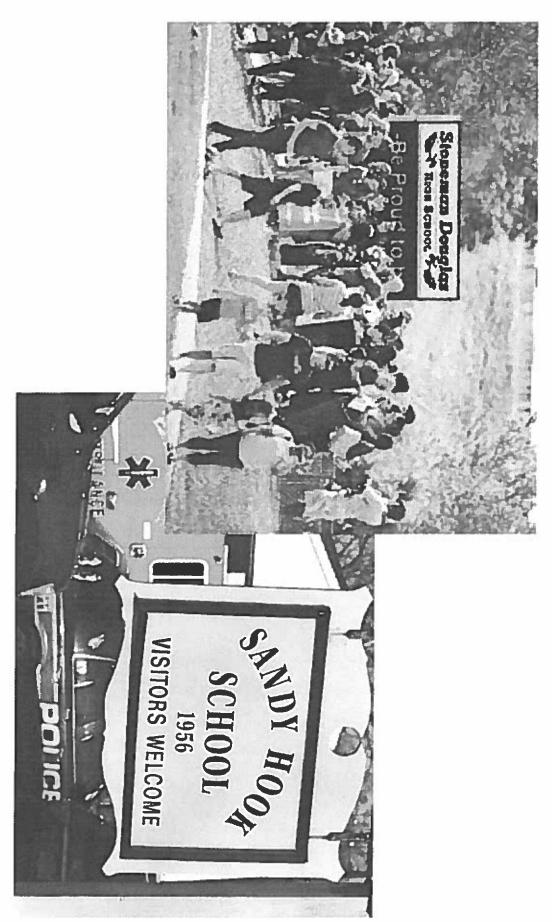
- Media staging areas
- Coordinated message
- Who will speak for the schools?
- website Pre-scripted messages / social media / school
- Likely to be more than one location of interest
- Reunification center
- Hospitals



### Recovery

- On-going mental health issues
- Staff
- Students
- Responders
- Community
- COOP planning
- Restart of classes alternative site

## "By failing to prepare, you are preparing to fail." "The way to be safe is never be secure." Benjamin Franklin



# What is a School Safety Plan?

and a building-level plan. safety plans must include both a district-wide plan school districts to create safety plans. These schools. See N.Y Education Law § 2801-a; Shortly after the April 1999 shootings at provision of this law includes a requirement for most comprehensive legislative plans in the Columbine High School in Colorado, Governor Commissioner's Regulation 155.17. A key country with respect to increasing safety in our Pataki signed Project SAVE into law, one of the

## District-Wide Plan

School districts are required to file a days after their adoption. must be filed with the Commissioner within 30 Commissioner of Education. All amendments Comprehensive School Safety Plan with the

and parent organizations and school safety school safety team appointed by the Board of for at least 30 days. the school board, student, teacher, administrator The plan must be developed by a district-wide plan must be made available for public comment personnel. Prior to adoption, the district-wide Education and must include representatives from

components, including but not limited to: The Plan must be comprised of several

(1) policies and procedures for responding to the school teachers, other school personnel and visitors to implied or direct threats of violence by students,

state and local officials designed to ensure that strategies such as collaborative agreements with school safety officers and other security personnel situations are trained to de-escalate potentially violent (2) appropriate prevention and intervention

appropriate law enforcement officials in the event of a violent situation (3) policies and procedures for contacting

students of the district in the event of a violent guardians or persons in parental relation to the (4) policies and procedures for contacting parents, incident.

## **Building Level Plan**

The Building Level Plan must be developed by a other emergency response teams. enforcement officials and local ambulance or organizations, school safety personnel, local law of teacher, administrator and parent principal. The team must include representatives Building Level Safety Team appointed by the

# Building Level Plan (cont.)

amendments must be filed with the appropriate are confidential and not subject to disclosure within 30 days of its adoption. For security reasons, building-level emergency response plans law enforcement agency and the State police Each building-level safety plan and any under the Freedom of Information Law.

# Building Level Plan (cont.)

safety evacuation policies and procedures to be The Plan must be comprised of several of internal/external communication systems in emergency response team; and (4) establishment command; (3) designation of a school-based other emergency; (2) definition of the chain of components, including but not limited to: (1) used in the event of a serious violent incident or emergencies

## property? Are firearms permitted on school

valid New York State firearm permit - unless the any school, college, or university, even if you have a 265 Section 265.01-a, it is generally a felony crime in possession or discharge of guns on school premises. Federal and State laws generally prohibit the "educational institution". person has the written authorization of the New York State to possess a rifle, shotgun, or other firearm when in the buildings or on the grounds of In accordance with New York State Penal Law Article

### property? authorization to carry a firearm on school for purposes of granting written Who/what is the "educational institution"

permit the Superintendent to issue such written school districts have adopted board policies that Superintendent or the Board of Education. Some is not clear whether this term refers to the 265 does not define "educational institution", so it Unfortunately, New York State Penal Law Article authorization.

# What are the exceptions to this law?

and certain military personnel may possess to these exceptions, police officers, peace officers, forth in New York Penal Law § 265.20. Pursuant There are certain exceptions to this law, as set institution. written authorization of the educational licensed firearms on school property, without the

## May school districts place armed security guards in school buildings?

guards in schools is left up to the discretion of The question of whether to place armed security Security Guard Act of 1992 (Gen. Bus. Law section security guards including, but not limited to, the 89-f(5), (7)). regarding the training and employment of such careful to follow applicable laws and regulations that decide to employ armed guards must be local school districts. However, school districts

## concerns that should be considered? Are there liability insurance

School districts that decide to permit armed personnel company should include defense and indemnification agreements between a school district and a security and types of coverage are provided for accidental or professionals to ensure that the adequate amounts on school property should consult with insurance company's liability policies. provisions and require that the security company name the district as an additional insured on the intentional discharges of a firearm. Any vendor

## Prospective Legislation

series of bills focused on increasing school safety. school shooting in Parkland, Florida, the New It is yet to be determined whether these bills will York State Senate and Assembly each acted on a In early March 2018, in the wake of the recent become laws.

# Prospective Legislation (cont.)

would: Included in this package was legislation that

- Make all threats of mass violence against a school a felony
- Alter the reimbursement for the Smart Schools **Bond Act payments**

# Prospective Legislation (cont.)

- Establish grant programs for some districts to access resource officers funding for mental health coordinators and school
- Increase the salary limits for retired police officers serving as school resource officers
- Require that a NYC police officer be placed in every NYC school
- Designate all school resource officers as peace officers
- Create distinctive license plates, the fees for which would fund school safety programs





### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

## Special Education "Advantages and Disadvantages of Selecting Different Administrative Forums"

### Fact pattern for December 7 Education Law Conference "Advantages and Disadvantages of Selecting Different Administrative Forums"

Susie is a 15 year old ninth grade classified student who, until recently, was attending a BOCES special education program as recommended by the CSE. Prior to this school year, Susie attended middle school in her home school district where her family had moved when Susie was a ten year old fourth grader.

Susie has been classified OHI, Other Health Impaired, since fifth grade, due to a diagnosis of ADHD. Since her arrival in District she was noted to be a bit of a loner, low energy, avoidant of eye contact, and diffident. In sixth grade at CSE her parents revealed to the school that Susie was seeing a private psychologist regarding her social anxiety since moving to the District. Her family sought counseling regarding lack of playdates during fourth and fifth grade, and following incidents on the school bus where Susie was targeted by several other students and shunned for her appearance.

In seventh grade at CSE Susie's parents shared that Susie had been steadily losing weight and that she was being evaluated for bulimia by their family physician. During seventh grade Susie went to her guidance counselor and the school nurse several times to ask to rest, mentioning that her head was throbbing and that she felt nausea, especially during gym and at lunchtime. In the second week of June of seventh grade, following the year-end CSE, Susie was observed by her English teacher during the change of class periods in the hallway being surrounded by three girls who were shoving cheese sticks and potato chips in her face and blocking Susie from passing on her way to class. The teacher observed the interaction and reported it to the Dean. The following day Susie refused to get out of bed and told her parents she could not return to her school through the end of June. The parents reported that Susie felt she was being bullied and would not attend school. Since classes had now ended and finals were being administered, the District allowed Susie to take her finals in a separate location, and she passed all of her classes. The District did not investigate the allegations of bullying due to the timing of the complaints, but did offer to convene the CSE to review Susie's program for 8th grade. The parents declined the offer.

In eighth grade, Susie's attendance at school became sporadic. She was frequently late, made frequent requests of teachers to allow her to go to the bathroom, and was observed to routinely sit alone in the cafeteria. Her grades dipped from B range to C and D range although her homework effort was still strong across all content areas. At the year-end CSE, upon the advice of Susie's psychologist, Susie's parents did not allow Susie to participate in the meeting. The CSE recommended that Susie attend a BOCES therapeutic day program the following fall. Over the summer, as the District attempted to find an appropriate program, only one was available.

In 9<sup>th</sup> grade, during her first semester at the BOCES therapeutic program, Susie refuses to go to school. She told her parents that the students in the BOCES program are belligerent and she is afraid to talk to them. Several have begun to target her on the bus and during lunch. At home,

Susie has begun cutting herself and voices suicidal ideations to her family and her psychologist.. Susie emphatically states she cannot go to BOCES because she is afraid to use the restrooms, afraid to ride the bus, and is tormented by other students at lunch and between classes. She also screenshotted multiple Snapchats and Instagram posts from other students which depict photos of Susie with a toilet bowl drawn near her face. The parents brought this information to the school district and demanded a different placement. The CSE reconvened and agreed to look for other appropriate placements. However, in the interim, the CSE recommended that Susie remain at BOCES.

Last month, Susie and her parents unilaterally withdrew Susie from the BOCES program and enrolled her in a therapeutic out-of-state facility which costs 15,000 per month.

Meanwhile, Susie's very popular older brother, Jonah, was elected Senior Class president last Spring. This Fall the Principal and Dean removed him from office citing a party he had attended over the weekend placed him in violation of the Student Code of Conduct. The parents questioned the removal as they believed it was a harsh punishment for a first time offense and that it was done in retaliation for their complaints about the BOCES program and their placement of Susie in the out of state facility.

Susie and Jonah's parents send Notices of Claim to the school district that they are suing for:

- reimbursement of Susie's private school tuition for the remainder of her years until 21 based on the District's denial of FAPE under IDEA;
- Civil Rights violations under Section 504 Rehabilitation Act;
- reporting the District to NYSED for failure to enforce DASA;
- claims against the English teacher, Superintendent and Board of Education for intentional and negligent infliction of emotional distress.
- Claims against Dean, Principal, Superintendent, Board of Education for retaliatory action against Jonah.

GGDOCS-2000945162-617

### THE 2018 ANNUAL SCHOOL LAW CONFERENCE

**December 7, 2018** 

FOCUS SESSION: Special Education - Advantages and

**Disadvantages of Selecting Different** 

**Administrative Forums** 

### SECTION 504 OF THE REHABILITATION ACT AND STATE COMPLAINTS

### Presented by:

Robert H. Cohen, Esq. Lamb & Barnosky, LLP 534 Broadhollow Road, Suite 210 Melville, New York 11747 631-694-2300 RHC@Lambbarnosky.com www.lambbarnosky.com

### LAMB & BARNOSKY, LLP

EUGENE R BARNOSKY SHARON N BERLIN' ROBERT H COHEN LINDSAY TOWNSEND CROCKER MICHELLE S FELDMAN MARCIA L. FINKELSTEIN STEVEN GODSBERG SCOTT M KARSON P.L. LAMB ALYSON MATHEWS JEFFREY A ZANKEL PETER N. ZOGAS

RICHARD K. ZUCKERMAN \* ALSO ADMITTED IN CT

\*\* ALSO ADMITTED IN NJ

534 BROADHOLLOW ROAD, SUITE 210 PO Box 9034 MELVILLE, NY 11747-9034 631.694.2300 • FAX 631.694.2309

INTERNET: WWW.LAMBBARNOSKY.COM

EMAIL: ATTORNEY'S INITIALS @ LAMBBARNOSKY COM

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COUNSEL PATRICIA C DELANEY MARA N HARVEY DOUGLAS E LIBBY MATTHEW J MEHNERT DIANE J MOFFET RICHARD A SHANE

OF COUNSEL GARY HOLMAN JOEL M MARKOWITZ HON, MICHAEL F MULLEN THOMAS A. O'ROURKE

ASSOCIATES LAUREN SCHNITZER" JOSHUA S SPRAGUE ALYSSA L. ZUCKERMAN

I.

### Section 504 of the Rehabilitation Act of 1973

### A. Who is Subject to Section 504?

- Section 504 applies to recipients of federal financial assistance from the U.S. Department of Education and to the program or activity that receives that assistance.
- A "handicapped person" is any person who: (i) has a physical or mental impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.<sup>1</sup>

### B. What are the General Requirements of Section 504?

- Section 504 prohibits discrimination on the basis of disability.<sup>2</sup>
- Section 504 also prohibits retaliatory or intimidatory acts against any individual because that individual has made a complaint or otherwise asserted his/her rights or privileges pursuant to Section 504 or because of the individual's participation in a Section 504 proceeding.<sup>3</sup>
- Section 504 requires school districts to provide a free appropriate public education (FAPE) to each qualified handicapped person within its jurisdiction.<sup>4</sup> School districts must provide a FAPE in the least restrictive environment.

<sup>&</sup>lt;sup>1</sup> 29 U.S.C. § 794(a); 34 C.F.R. § 104.3(j).

<sup>&</sup>lt;sup>2</sup> 34 C.F.R. § 104.4.

<sup>&</sup>lt;sup>3</sup> 34 C.F.R. § 104.61 (incorporating, inter alia, the retaliation language of the regulations pursuant to Title VI of the Civil Rights Act of 1964, including 34 C.F.R. § 100.7[e]).

<sup>4 34</sup> C.F.R. § 104.33(a).

- O An "appropriate education" is the "provision of regular or special education and related aids and services that: (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met"; and (ii) comply with the procedural requirements contained in Section 504.5
- o The requirement to provide a FAPE pursuant to Section 504 may be met by implementing an Individualized Education Program (IEP) that was developed in accordance with the IDEA.<sup>6</sup>
- o In contrast, the IDEA defines a FAPE as "special education and related services" that: (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet State standards and comply with the IDEA; (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in accordance with a properly developed IEP.<sup>7</sup>
- o Section 504's FAPE standard applies to: (1) students receiving services pursuant to the IDEA; and (2) students who are not eligible for IDEA services, but who receive modifications, accommodations or related aids and services in order to participate in the general education curriculum.
- If a student is eligible for services pursuant to both the IDEA and Section 504, the Student must have an IEP. A Section 504 plan cannot be used in place of an IEP in these circumstances. The school district would satisfy Section 504's FAPE requirements by implementing an appropriate IEP.
- Section 504 requires school districts to evaluate students suspected of having a
  disability before taking any action with respect to the initial placement of the student
  in regular or special education and before any subsequent significant change in
  placement.<sup>8</sup>
- In interpreting evaluation data and in making placement decisions, school districts must:

  (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all of these sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child,

<sup>&</sup>lt;sup>5</sup> 34 C.F.R. § 104.33(a)(1) (emphasis added).

<sup>6 34</sup> C.F.R. § 104.33(a)(2).

<sup>&</sup>lt;sup>7</sup> 34 C.F.R. § 300.17.

<sup>8 34</sup> C.F.R. § 104.35.

the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with Section 504's requirements.<sup>9</sup>

- School districts must establish and implement a system of procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a handicap, need or are believed to need special instruction or related services.<sup>10</sup>
  - O The procedural safeguards must include: (1) notice; (2) an opportunity for the parents/guardian to examine relevant records; (3) an impartial hearing with opportunity for participation by the parents/guardian and representation by counsel; and (4) a review procedure.
    - o This requirement may be met by complying with the procedural safeguards requirement set forth in the IDEA.

### C. How is Section 504 Enforced?

- The U.S. Department of Education, Office for Civil Rights (OCR) enforces Section 504 in programs and activities that receive federal financial assistance from the U.S. Department of Education.
  - OCR receives complaints from parents, students or advocates, conducts agency initiated compliance reviews, and provides technical assistance to school districts, parents or advocates.<sup>11</sup>
  - OCR also enforces Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by state and local government (including public schools) regardless of whether they receive federal financial assistance.<sup>12</sup>
- Parents/guardians may bring a Section 504 complaint through a request for an impartial hearing filed with the school district or through the court system.
- Section 504 provides relief from discrimination, whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination.

<sup>&</sup>lt;sup>9</sup> Id.

<sup>10 34</sup> C.F.R. § 104.36.

<sup>&</sup>lt;sup>11</sup> U.S. Department of Education, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, available at <a href="https://www2.ed.gov/about/offices/list/ocr/504faq.html">https://www2.ed.gov/about/offices/list/ocr/504faq.html</a>.

<sup>12</sup> Id.

Thus, Section 504 requires a showing of discrimination, which requires something more than proof of a mere violation of the IDEA (for example, a faulty IEP).<sup>13</sup>

- o To establish liability pursuant to Section 504, a parent/guardian must establish that: (1) the student is disabled; (2) the student is otherwise qualified to participate in school activities; (3) the school or the board receive federal financial assistance; and (4) the student was excluded from participation in programs at, denied the benefits of, or subject to discrimination at, the school on the basis of the student's disability.<sup>14</sup>
- In addition, there must be evidence that the school district acted with deliberate or reckless indifference to the student's federally protected rights or with bad faith or gross misjudgment.<sup>15</sup>
- Last year, the U.S. Supreme Court held that a plaintiff must exhaust his/her administrative remedies pursuant to the IDEA before filing an action pursuant to Section 504, the ADA or similar laws when (but only when) the gravamen of the complaint seeks relief for the denial of FAPE pursuant to the IDEA. Exhaustion of administrative remedies is not necessary, however, where the gravamen of the lawsuit is something other than the denial of the IDEA's core guarantee of a FAPE. 17

### D. Has OCR Issued Guidance Regarding Section 504?

 OCR has published a resource guide entitled "Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools (December 2016)," which is available at: <a href="http://www2.ed.gov/about/offices/list/ocr/index.html">http://www2.ed.gov/about/offices/list/ocr/index.html</a>.

<sup>&</sup>lt;sup>13</sup> Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 564 (S.D.N.Y. 2010).

<sup>&</sup>lt;sup>14</sup> *Id.* (emphasis added).

<sup>&</sup>lt;sup>15</sup> Id.; see also Bd. of Educ. of the North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, \*2 (S.D.N.Y. 2017).

<sup>&</sup>lt;sup>16</sup> Fry v. Napoleon Community Schools, 137 S.Ct. 743 (2017).

<sup>&</sup>lt;sup>17</sup> Id. at 748.

H.

### State Complaints Pursuant to Part B of the IDEA or State Law/Regulation (VESID)

### A. What are the Permissible Subjects of a State Complaint?

- A parent, individual or organization can submit a written complaint to the New York State Education Department's (SED) Office of Special Education alleging a violation of: (1) Part B of the IDEA (children and youth ages 3 through 21 receive special education and related services pursuant to Part B); or (2) State law or regulation related to students with disabilities.
  - o If a complainant fails to adequately allege a violation of one of these laws or regulations, SED will not investigate the complaint (see Exhibit A).
- SED must set aside any part of a State Complaint that is contemporaneously being addressed in a due process hearing until the conclusion of the hearing.
- If an issue included in a State Complaint has been previously decided by an impartial hearing officer in a due process hearing involving the same parties, then the due process hearing decision is binding on that issue.

### B. What are the State Complaint Procedures?

- The school district or public agency is provided with an opportunity to respond to the State Complaint and to engage in mediation with the complainant.
- Additional information regarding State Complaints, including a copy of SED's optional Complaint Form, is attached as Exhibit B and is available at <a href="http://www.p12.nysed.gov/specialed/formsnotices/samplecomplaint.htm">http://www.p12.nysed.gov/specialed/formsnotices/samplecomplaint.htm</a>.

THIS OUTLINE IS MEANT TO ASSIST IN THE GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

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### **EXHIBIT A**



OFFICE OF SPECIAL EDUCATION
SPECIAL EDUCATION QUALITY ASSURANCE
LONG ISLAND REGIONAL OFFICE
Perry B. Duryas, Jr. State Office Building, Room #2A-6 • Hauppauge, NY 11788
www.p.t2.nysed.gov/specialed/

Telephona (631) 952-3352 Fax: (631) 952-3834

April 14, 2017



This letter is in response to your letter dated April 7, 2017 and identified as "complaint number 138". Your letter included issues that were previously submitted by you in correspondences labeled "complaints 1-137" for investigation by this Office.

Throughout your letter, you repeat that you are not getting "proper help", "proper documentation", or "proper contact" from the and/or Absent any further explanation in your letter, it appears that you believe certain actions should have occurred because of the documentation you submitted to the New York State Education Department (NYSED).

As has been explained to you previously, this Office investigates alleged violations of federal and State special education laws or regulations. Upon receipt of a State complaint, this Office determines the sufficiency of each allegation. Upon review of each of your "complaints", this Office notified you of which allegations it would investigate and which allegations were insufficient. For each allegation that would not be investigated, NYSED provided an explanation for its decision.

Most of the allegations in your complaints were determined to be insufficient and therefore, were not investigated. Each letter you received provided the reasons why NYSED determined the allegation insufficient (e.g. the alleged violation was more than one year from receipt of the complaint, the allegation did not allege a violation of special education law or regulation, or the allegation failed to include information to support that a violation of special education law or regulation occurred, etc.)

When an allegation is investigated and a determination is made that a violation occurred, this Office determines whether a correction action is required. If a corrective action is required, this Office issues a Compliance Assurance Plan and monitors completion of the plan. When the plan has been completed, the noncompliance is considered resolved.

Many of the complaints submitted to this Office contained the same allegations and information. Moving forward, this Office will no longer respond to allegations that have already been received and responded to by NYSED unless this Office determined the

allegation insufficient because of a lack of information to support a violation occurred and additional information was provided.

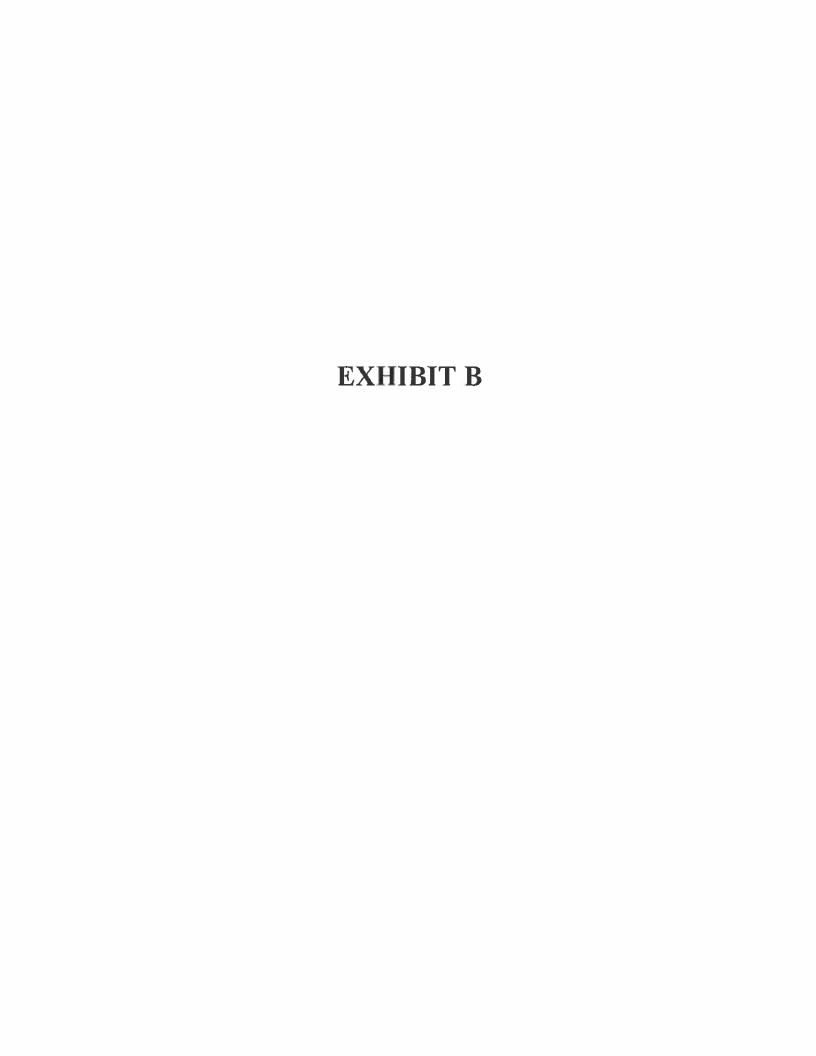
Though I understand you want to be closely involved with the education of your child, many of the issues you have identified are not regulated by special education laws or regulations and therefore, a State complaint is not the appropriate procedure to address these concerns.

Elleen Taylor

Regional Supervisor

C:







OFFICE OF P-12 EDUCATION: Office of Special Education ASSISTANT COMMISSIONER Room 301M EB, 89 Washington Avenue • Albany, NY 12234 www.p12.nysed.gov/specialed/

Telephone (518) 402-3353 Fax: (518) 402-3534

### New York State Education Department Revised Sample State Complaint Form

If a parent, individual or organization believes that a school district or public agency has violated a requirement of Part B of the Individuals with Disabilities Education Act (IDEA) or State law/regulation related to the education of students with disabilities, they may submit a written, signed State complaint to the New York State Education Department (NYSED). Attached is a revised New York State (NYS) Sample Complaint Form that may be used to submit a complaint. Use of this form is recommended, but not required. If using your own format to submit a State complaint, you must provide the required information, as appropriate, as indicated on the sample form. Upon receipt of a written complaint by an individual or agency, NYSED must determine if the alleged violation occurred and issue a written decision of its findings.

NYSED encourages parents and school districts to use mediation to resolve complaints regarding the education of a student with a disability.

### Parent, Individual or Organization (Complainant) Submitting the State Complaint

- Requests for a State complaint must be made in writing.
- A State complaint must be signed by the complainant (faxed or e-mail signatures will not be accepted).
- The State complaint must include:
  - a statement that a school district or public agency has violated a requirement of Part B of IDEA or State law/regulation related to students with disabilities;
  - the facts on which the statement is based:
  - contact information of the person filing the complaint;
  - if alleging violations with respect to a specific child, include:
    - > the name and address of the residence of the child:
    - > the name of the school the child is attending:
    - > in the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending;
    - > a description of the nature of the problem of the child (the concerns that led you to file the complaint), including the facts relating to the problem; and
    - > a proposed resolution of the problem to the extent known and available at the time the person is filing the complaint.
- The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received by NYSED.

 The individual filing the complaint must forward a copy of the complaint to the school district or other public agency serving the child at the time the person files the complaint with NYSED.

### **State Complaint Procedures**

- The school district or public agency must give the procedural safeguards notice to the parent upon receipt of the first State complaint in a school year.
- The parent, individual or organization filing the complaint has the opportunity to submit additional information, either orally or in writing, about the allegations in the State complaint.
- The school district or public agency has the opportunity to respond to the State complaint, including, at a minimum: (a) at the discretion of the school district or public agency, a proposal to resolve the complaint and (b) an opportunity for the school district or public agency and the parent who filed the complaint to voluntarily engage in mediation.
- Within 60 calendar days after a complaint is filed (received), NYSED will issue a written
  decision to the complainant that addresses each allegation in the complaint and
  contains findings of fact and conclusions and the reasons for the final decision.
  NYSED will include, if needed, procedures for effective implementation of its final
  decision, including technical assistance, negotiations and corrective actions to achieve
  compliance.
- NYSED can grant an extension of the 60-calendar-day time limit only if exceptional circumstances exist with respect to a particular State complaint or the parent, individual or organization and school district or other public agency involved voluntarily agree to extend the time to resolve the matter through mediation.
- NYSED is required to set aside the complaint or any part of a State complaint that is being addressed in a due process hearing until the conclusion of the hearing. Any issue in the complaint that is not part of a due process hearing must be investigated and resolved. If an issue raised in a State complaint has previously been decided in a due process hearing involving the same parties, then the due process hearing decision is binding on that issue and NYSED will inform the complainant that the decision is binding. A complaint alleging a school district's or other public agency's failure to implement a due process hearing decision will be resolved by NYSED.
- NYSED will review all relevant information and make an independent determination as
  to whether the school district or other public agency is violating a requirement of Part B
  of IDEA or State law/regulation and must, if it determines it to be necessary, carry out
  an independent on-site investigation.

Ins for	tructions: Complete, sign and make two copies of the original State complaint m.
	Send the original State complaint form to NYSED, Office Special Education, 89 Washington Avenue, Room 309, Albany, NY 12234, Attention: State Complaints.
	Send one copy of the State complaint form to the school district serving the child at the same time that the complaint is filed with NYSED.
	Retain a copy of the State complaint form for your records.

A question and answer document clarifying the procedures used by NYSED in the investigation and resolution of State complaints which allege that a school district or public agency has violated federal and New York State law or regulation relating to students with disabilities is available at <a href="http://www.p12.nysed.gov/specialed/quality/complaintqa.htm">http://www.p12.nysed.gov/specialed/quality/complaintqa.htm</a>.

### Sample New York State Complaint Form

The following sample form may be used to file a State Complaint. Use of this sample form is not mandated, however the asterisked (\*) information on the sample form is required under section 300.153(b) of the Code of Federal Regulations and section 200.5(l)(1) of the Regulations of the Commissioner of Education to file a State Complaint. State Complaints should be mailed to: The Office of Special Education, New York State Education Department, 89 Washington Avenue, Room 309, Albany, New York 12234.

Complaint Contact Information (Complainant)

Name of Person/Organization filing the complaint:	Date:		
Relationship to the Student-Check One:  Parent or Person in Parental Relationship Surrogate Parent Parent's Attorney School District/State Agency Representative Other			
*Contact Information for Complainant:			
Mailing Address:	Telephone: Day: Work:		
What is the best time to contact you (the complainant) and at what phone number?			
Student Information (if you are alleging a vident			
*Child's Name:	Date of Birth:		
*Address of Child's Residence (if any):			
*Name of the School the Child Attends:			
Name of the School District of Residence (if different from the school the child attends):			
Address of the School the Child Attends:			
*Additional Contact Information for Homeless Child or Youth (if available):			
Parent's Name:			
Parent's Address:			
This form must be signed or it cannot be processed and will be returned to you for signature.  The New York State Education Department will only accept formal complaints with ORIGINAL signature. State Complaints that are faxed or emailed will not be accepted.  A copy of the State Complaint must be sent by the complainant to the school district or public agency against whom the complaint is filed at the same time it is sent to New York State Education Department.			
*Complainant Signature:			
Have you sent a copy of this complaint to the superintendent of the school district or public agency that you are alleging violated special education law or regulation?   Yes No September 2012			

### **Complaint Information**

If you have more than one complaint issue, please complete a separate page for each alleged violation of law or regulation relating to the education of students with disabilities.

*Allegation Information  Provide a statement of how you believe the school district or public agency has violated Part B of IDEA or a State
law or regulation relating to the education of students with disabilities. You do not need to know specifically what law or regulation might have been violated. Attach additional pages if necessary. (The complaint must allege a violation that occurred not more than one year prior to the date that the State complaint is received.)
The state of the s
*What are the facts upon which the above allegation statement is based?
If you are alleging a violation with respect to a specific student:
*1. Describe the nature of the problem of the child (how the alleged violation affected the student) and include facts relating to the problem to support this allegation.
*2. Describe a proposed resolution of the problem (what you believe should occur to correct the problem or how the district could resolve the alleged violation) to the extent known and available at this time. Attach additional pages if necessary.
This issue is currently/or has been addressed in a due process impartial hearing.
☐ Yes ☐ No



JACOB S. FELDMAN
FLORENCE T. FRAZER
JAMES H. PYUN\*
LAURA A. FERRUGIARI
CHRISTIE R. JACOBSON
JOSEPH P. LILLY

TIMOTHY M. MAHONEY LAURA M. DILIMETIN ABIGAIL A. HOGLUND-SHEN\*

JONATHAN HEIDELBERGER
OF COUNSEL

"ALSO ADMITTED IN NI

INFO@FFEDLAW.COM

#### Impartial Hearing Process - New York State

### I. <u>Pleadings</u>

- A. Impartial Hearing Demand or Due Process Complaint
  - Either a parent or school district may file a due process complaint with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education ("FAPE") to such student. 8 NYCRR 200.5(i)(1)
    - a. The due process complaint starts the hearing process, and triggers the timelines for the conduct of the hearing, including when to hold the resolution session and when to schedule the hearing itself.
    - A due process complaint <u>must</u> be filed within two years of the date the parent or school district knew, or should have known, about the underlying facts or violation of IDEA. 8 NYCRR 200.5(j)(1)(i).

*Note:* Specific misrepresentations by the other side may extend the two-year statute of limitations. <u>Id.</u>

- c. The scope of the hearing is limited to the issues raised in the due process complaint, or as expanded by the consent of the parties during the course of the hearing. 8 NYCRR 200.5(j)(1)(ii).
- d. The school district may not challenge a parent's decision to withhold consent to the initial provision of special education services. 8 NYCRR 200.5(b)(4).
- 2. A due process complaint must contain the following:
  - a. the name of the student:
  - the address of the residence of the student (or in the case of a homeless student, available contact information for the student);



- c. the name of the school the student is attending;
- d. a description of the nature of the problem of the student relating to the eligibility, classification, or program/placement recommendation, including facts relating to such problem; and
- e. a proposed resolution of the problem to the extent known and available to the party at the time. 8 NYCRR 200.5(i)(1)
- 3. The due process complaint may be amended either:
  - a. On consent of the parties;
  - b. By order of the Impartial Hearing Officer ("IHO"); but
  - c. No later than 5 days before the first day of hearing. 8 NYCRR 200.5(i)(7).

### B. Response to the Complaint

- 1. Within 10 days of receiving the complaint, the opposing party must respond to the complaint. 8 NYCRR 200.5(i)(4).
- 2. If the opposing party is the parent, the response must speak to any and all issues raised in the school's complaint. 8 NYCRR 200.5(i)(4) and (5).
- 3. If the opposing party is the school district, its response should include:
  - an explanation of why the school district proposed or refused to take the action raised in the complaint;
  - b. a description of other options that the CSE considered and the reasons why those options were rejected;
  - c. a description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action; and
  - d. a description of the factors that are relevant to the school district's proposal or refusal. 8 NYCRR 200.5(i)(4).

### C. <u>Insufficiency Motion</u>

- A due process complaint that does not contain the five key components (student name, school, address, a description of the problem and a proposed resolution) may be challenged for insufficiency.
- 2. The opposing party must challenge the sufficiency of any due process complaint, in writing, within 15 days of the receipt of the complaint. 8 NYCRR 200.5(i)(3)
- No party may challenge the sufficiency of a due process complaint for any
  expedited impartial hearings conducted pursuant to part 201 of the Commissioner's
  Regulations. <u>Id.</u>



4. The IHO must issue a written decision on the insufficiency motion within five days. 8 NYCRR 200.5(i)(3)(ii).

#### D. Consolidation

- 1. Multiple hearing requests involving the same party may be joined on motion of either party. 8 NYCRR 200.5(j)(3)(ii)(a).
- 2. The IHO may consolidate two or more complaints based on, but not limited to:
  - a. the potential negative effects on the child's educational interests or well-being which may result from the consolidation;
  - b. any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and
  - c. whether consolidation would:
    - i. impede a party's right to participate in the resolution session process;
    - ii. prevent a party from receiving a reasonable opportunity to present its case at hearing; or
    - iii. prevent the IHO officer from issuing a timely decision. 8 NYCRR 200.5(j)(3)(ii)(a)(4).
- Should any matters be consolidated, the IHO must abide by the timelines of the earliest filed complaint. 8 NYCRR 200.5(j)(3)(ii)(a)(5).

### II. Resolution Session

- A. Resolution Sessions were added to IDEA in the 2004 reauthorization to help parents and school districts resolve their differences by avoiding a drawn out and contentious dispute process. 20 U.S.C. § 1415(f)(B).
  - 1. School districts are required to schedule a Resolution Session with the parents within 15 days of receiving a demand for due process. Contact the parents directly to schedule this Resolution Session.

### 2. Required Parties:

- a. Authorized District Representative: The meeting must include a representative of the district who has decision-making authority on behalf of that district. 34 CFR § 300.510(a)(1)(i). The purpose here is to ensure that there is someone in attendance who can bind the District in any agreement.
- b. Attorneys: The meeting may not include the school district's attorney unless the parent is also accompanied by an attorney. Moreover, and unlike CSE meetings, an attorney for the District should not be invited if the parent is accompanied by a non-attorney advocate.
- c. Other required attendees should include relevant members of the CSE or CPSE who have specific knowledge of the facts identified in the hearing



demand. The parent and the district determine the relevant members of the CSE to attend the meeting. 34 CFR § 300.510(a)(4).

- Agreement in Writing: If the parents and the district reach an agreement at the
  resolution session, the agreement must be in writing and signed by both parties.
  IDEA 2004 § 1415(f)(B)(iii).
- 4. 3-Day Voidability: The resolution agreement may be voided by either party within three business days of its execution, to give both parties the opportunity to reconsider the wisdom of their deal. 20 U.S.C. §1415(f)(B)(iii)(iv).
  - a. Districts should inform parents who sign a resolution agreement that if they do not elect to void the agreement, they should advise the impartial hearing officer of the fact of the agreement on or after the fourth day.
  - b. If the parents do not contact the impartial hearing officer, the District should communicate the fact of the settlement to the hearing officer.
- 5. If either party refuses to cooperate or participate in the resolution session, (refusal to attend):
  - a. If the Parents refuse, after 30 days, the school district may, after documenting its efforts to compel the parents' attendance, request that the IHO dismiss the complaint. 8 NYCRR 200.5(j)(2)(vi)(a).
  - If the District refuses to schedule the resolution session, after 15 days, the parents may request that the matter move immediately to the hearing. 8 NYCRR 200.5(j)(2)(vi)(b).
- 6. Both parties may agree to waive the resolution session.
- B. Mediation versus Resolution Session.
  - 1. Upon receiving the complaint, the school district must advise the parents of the availability of mediation. 8 NYCRR 200.5(j)(1)(iii).
  - 2. Mediation is voluntary on agreement of both parties.

#### III. Hearing Dates

- A. The hearing must begin within 14 days of the expiration of the resolution session period.
  - Either a prehearing conference may be conducted, in which the issues may be discussed, expected evidence identified, and number of witnesses shared, or a formal hearing date must be set. 8 NYCRR 200.5(j)(1)(3)(iii)(b); 8 NYCRR 200.5(j)(1)(3)(xi).
  - 2. The 14 day period starts to run after:
    - a. the 30-day resolution period expires; or
    - b. the IHO receives notice that the parties have jointly waived the resolution period. Id.
    - the 30-day resolution period may be extended if both parties agree that a settlement may be within reach.



 Five days prior to the first formal hearing date, each party must share any and all evidence they wish to present to the hearing officer. 8 NYCRR 200.5(j)(1)(3)(xii).

**Note:** The IHO may prohibit any evidence from entering the record that has not been timely disclosed.

- 4. The hearing must be completed, and a decision issued, within 45 days of the start of the hearing period.
  - a. 30 day extensions may be granted by the IHO for good cause.
- B. An amendment of the due process complaint resets the timeline to the very beginning, requiring a new resolution period. 8 NYCRR 200.5(i)(7)(ii).

### IV. Authority of the Hearing Officer and Conduct of the Hearing

- A. The school district must immediately begin the process of appointing the IHO from the rotational list, no later than two business days after receipt of the complaint. 8 NYCRR 200.5(j)(3)(i)(a).
- B. The IHO shall have the authority to:
  - 1. administer oaths:
  - issue subpoenas:
  - ensure that a written or verbatim transcript is maintained and available for all the parties at district expense.
  - Direct that, should a party require it, interpreters of the deaf, or interpreters
    fluent in the native language of the student's parent, shall be provided at
    district expense.
  - 5. ask questions of witnesses for clarification of the record
  - 6. direct the district to fund an independent educational evaluation;
  - 7. appoint a guardian ad litem in the event the IHO determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected.
  - 8. ensure that the hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved and shall be closed to the public unless the parent requests an open hearing. ); 8 NYCRR 200.5(j)(1)(3)(x).
- C. Overall, the IHO is responsible for managing the impartial hearing process.
- D. Both the parents and school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing. 8 NYCRR 200.5(j)(1)(3)(xii).



- Each party shall have one day to present its evidence, or more should a "full, fair disclosure of the facts" require same. 8 NYCRR 200.5(j)(1)(3)(xiii).
- The IHO may receive any oral, documentary or tangible evidence and may exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious.
- Telephonic testimony may be accepted, provided that such testimony shall be made under oath and shall be subject to cross-examination.
- 4. The IHO may limit examination of a witness by either party whose testimony the IHO determines to be irrelevant, immaterial or unduly repetitious.
- The IHO may limit the number of additional witnesses to avoid unduly repetitious testimony.
- Direct testimony may be offered by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination.
- 7. The parties may submit closing memoranda of law not to exceed 30 pages in length, with typed material in minimum 12-point type (footnotes minimum 10 point type) and not exceeding 6 1/2 by 9 1/2 inches on each page. See 8 NYCRR 200.5(j)(1)(3)(xii)(a-g).
- E. The IHO shall issue a decision within 14 days of the close of the record. 8 NYCRR 200.5(j)(1)(5).

**Note:** However, the IHO may not ratify "so ordered" settlement agreement on the record. <u>Id.</u>

#### 2018 ANNUAL SCHOOL LAW CONFERENCE

**FOCUS SESSION**: Special Education-Advantages and Disadvantages of Selecting Different Administrative Forums

ADMINISTRATIVE FORUM: U.S. Department of Education
Office for Civil Rights ("OCR") Investigations Related to
Disability Based Discrimination/Denial of FAPE

By: Bonnie L. Gorham, Esq. Guercio & Guercio, LLP December 7, 2018

- I. INTRODUCTION: OCR enforces five Federal Civil Rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability and age in programs that receive federal funds from the Department of Education.
  - Discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act ("ADA").
  - These various Civil Rights laws extend to elementary and secondary school systems, as well as to colleges and universities.
  - A student who believes that he or she has been discriminated against on the basis of race, color, national origin, sex, disability or age by an educational institution may file a complaint with OCR.
  - OCR receives complaints from parents, students or advocates and conducts compliance reviews.
  - A complaint must be filed within 180 days of the date of the alleged discrimination, unless the time for filing is extended by OCR under certain circumstances.
  - A student (or the parent(s) of such a student) who believes that he or she has been discriminated against may also file a complaint pursuant to a school district's anti-discrimination policies; however, the student is not required by law to do so and may in the first instance file a complaint with OCR.
  - Once a complaint is filed, OCR may offer to facilitate mediation, called "Early Complaint Resolution", in an effort to resolve a complaint filed under §504. If both parties are agreeable, OCR will work with the parties to facilitate a mutually agreeable resolution.

### II. SCOPE OF OCR'S JURISDICTION OVER DISABILITY DISCRIMINATION COMPLAINTS:

 OCR enforces Section 504 and Title II of the ADA, both of which prohibit discrimination based upon disability.

- Section 504 requires that school districts must provide students with disabilities equal educational opportunities. Included within this mandate is the obligation to provide a Free Appropriate Public Education ("FAPE") to students with disabilities, defined as the provision of "regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining educational setting, evaluation, placement and procedural safeguards". (OCR FAQ about Section 504 and the Education of Children with Disabilities, last modified 9/25/18)
- Under Section 504, school districts have a child find obligation to evaluate students who need or are believed to need special education or related services.
- School districts have an obligation to ensure that Section 504 FAPE services are provided in an educational setting in the least restrictive environment; services are often documented on Section 504 plans (or if the child is receiving services under the Individuals with Disabilities Education Act ("IDEA") through an Individualized Education Program ("IEP")).
- In addition to Section 504, Title II of the ADA also prohibits disability discrimination by public entities, including all public school districts. OCR, along with the U.S. Department of Justice, enforces Title II of the ADA in public school districts.
- The IDEA is another Federal law which addresses the needs of students with disabilities.
  The United States Department of Education Office of Special Education and Rehabilitative
  Services ("OSERS") administers the IDEA. However, OCR is the entity which enforces
  the Section 504 and Title II rights of IDEA classified students, including allegations of
  discrimination against IDEA classified students.

### III. SCHOOL DISTRICT OBLIGATIONS TO RESPOND TO HARASSMENT OF STUDENTS WITH DISABILITIES

- Harassment or bullying of a student which is based upon his or her disability may result in
  a disability-based harassment violation under Section 504 and Title II of the ADA. The
  legal protections under Section 504 and the ADA extend to all students with disabilities,
  including students with disabilities who may not be receiving services under an IEP or 504
  Plan, but have been determined to have a disability.
- When a school has knowledge of or should have knowledge of incidents of bullying based upon a student's disability, the school must take immediate action to investigate the allegations and address them, as appropriate.
- In the event a school's investigation determines that a student was bullied based on
  disability and a hostile environment was created (the conduct was sufficiently serious to
  interfere with or limit the student's ability to participate in or benefit from the services and
  activities offered by the school) the school must take prompt and effective steps reasonably
  calculated to stop the bullying, eliminate the hostile environment and remedy any effects.

- IV. U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES (OSERS): "DEAR COLLEAGUE" GUIDANCE LETTER ON BULLYING OF STUDENTS WITH DISABILITIES UNDER THE IDEA (AUGUST 20, 2013)
  - OSERS issued a Dear Colleague letter on August 20, 2013 to provide an overview of school district responsibilities under the IDEA to address bullying of students with disabilities.
  - Focus of guidance is concern that bullying of a student with a disability may result in denial of a FAPE.
  - Guidance document recognizes that students with disabilities are disproportionately affected by bullying.
  - Factors such as physical characteristics, social skills or intolerant school environments may increase the risk that students with disabilities are bullied.
  - Students with disabilities may have difficulty reporting incidents of bullying due to their disabilities.
  - Bullying of a student with a disability on any basis (whether or not disability related), may
    result in a student not receiving a meaningful educational benefit to which the student is
    entitled.
  - School districts have a responsibility under the IDEA to ensure that bullying of students with disabilities does not result in a denial of FAPE in the least restrictive environment.
  - OSERS cautions that schools, as part of their response to allegations of bullying, should convene the CSE to determine whether, as a result of the bullying, the needs of the student have changed and the IEP must be revised.
  - The CSE must consider the effects of the bullying and determine whether additional or different special education and/or related services are needed to address the student's individual needs in order to provide the student with a FAPE.
  - The guidance cautions that CSEs should attempt to keep the special education student in the current placement unless the student can no longer receive a FAPE in that placement.
- V. U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS ("OCR"): "DEAR COLLEAGUE" GUIDANCE LETTER ON BULLYING OF STUDENTS WITH DISABILITIES (OCTOBER 21, 2014)
  - Guidance letter details school district's responsibilities under Section 504 and Title II of the ADA regarding bullying of Students with Disabilities.

- In the August 2013 guidance, OSERS advised that bullying of a Student with a Disability may constitute a denial of FAPE under the IDEA; this guidance clarifies that for students identified under §504, bullying may lead to a denial of FAPE under §504.
- Guidance letter makes clear the effects of <u>any</u> bullying for Students with Disabilities may result in denial of FAPE under Section 504 that must be remedied.
- Reiterates obligations of school districts to address conduct that may constitute disabilitybased harassment.
- Explains that school districts must also remedy the denial of FAPE resulting from disability-based harassment.
- OCR reminds school districts that bullying of a student on the basis of disability may result in a disability-based harassment violation under 504 and Title II.
- In the event a school knows or "should know" of bullying based on disability, school must undertake immediate investigation to determine what occurred.
- Prompt action is required if school determines that bullying based on disability created a "hostile environment".
- Hostile environment occurs when conduct interfered with or limited the student's ability to participate in or benefit from the services, activities or opportunities offered by the school.
- School must take prompt effective action to end the bullying, eliminate the hostile environment, prevent it from recurring and remedy its effects as appropriate.
- OCR advises that school's investigation into disability-based harassment should include a
  determination as to whether the student's IDEA FAPE services or Section 504 FAPE
  services may have been affected by bullying.
- OCR notes that although bullying which results in a disability-based harassment violation does not always result in denial of FAPE, there is a strong likelihood that it will.
- OCR states that under Section 504, as part of a school's appropriate response to bullying
  on any basis, schools should convene CSE or Section 504 committee to determine whether
  student's needs changed due to effects of bullying and extent to which FAPE was affected.
- OCR recommends that unless it is clear from the investigation that there was no effect on
  the student's receipt of a FAPE "school should, as a best practice, promptly convene the
  IEP team or the Section 504 team to determine whether, and to what extent: (1) the
  student's educational needs have changed; (2) the bullying impacted the student's receipt
  of IDEA FAPE Services or Section 504 Services; and (3) additional or different services,
  if any, are needed and to ensure any needed changes are made promptly".

### VI. OCR'S EVALUATION OF COMPLAINTS THAT INVOLVE BULLYING OF STUDENTS WITH DISABILITIES

- Following receipt of a complaint from a parent of a student with a disability who was allegedly subjected to discrimination and/or bullying, OCR may commence an investigation to determine whether there has been disability-based harassment and/or a violation of the student's right to a FAPE.
- When investigating disability-based harassment, OCR considers several factors, including, but not limited to: was the bullying based on the student's disability; was the bullying sufficiently serious to create a hostile environment; was the school aware of or should the school have been aware of the alleged bullying; did the school fail to take appropriate steps reasonably calculated to end the bullying and to remedy its effects, as appropriate.
- OCR would likely find a violation of Section 504 as a result of disability-based harassment if the above questions are answered in the affirmative.
- If OCR determines there was a disability-based harassment violation under Section 504, OCR may also investigate whether there was a denial of FAPE under Section 504 or the IDEA.
- To determine whether the student was denied a FAPE under Section 504 or the IDEA as a result of bullying, OCR will consider if the school was aware or should have been aware that the effects of the bullying may have affected the student's receipt of a FAPE. If the answer is yes, OCR may investigate to what extent the school met its obligation to convene either the CSE or the 504 committee to review the student's current IEP or 504 plan to determine if changes were necessary due to the effects of bullying.

#### VII. RETALIATION

- OCR also addresses retaliation complaints based upon the exercise of protected rights enforced by OCR.
- Negative actions, such as giving a student a failing grade or preventing a student (or parent
  of a student) from participating in school activities, which are taken against a student or
  person as the result of the exercise of his or her rights under §504 or the ADA, are
  considered a form of unlawful discrimination.
- "Retaliatory acts are prohibited. A recipient [public school district] is prohibited from intimidating, threatening, coercing or discrimination against any individual for the purpose of interfering with any right or privilege secured by Section 504". (OCR FAQ about Section 504 and the Education of Children with Disabilities, last modified 9/25/18).

# UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 20, 2013 Guidance Document



### UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Aug. 20, 2013

### Dear Colleague:

The U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) is committed to working with States to ensure that school districts provide all children with positive, safe, and nurturing school environments in which they can learn, develop, and participate. OSERS is issuing this letter to provide an overview of a school district's responsibilities under the Individuals with Disabilities Education Act (IDEA) to address bullying of students with disabilities.

As discussed in this letter, and consistent with prior Dear Colleague Letters the Department has published, bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied.<sup>2</sup> However, even when situations do not rise to a level that constitutes a denial of FAPE, bullying can undermine a student's ability to achieve his or her full academic potential. Attached to this letter are specific strategies that school districts and schools<sup>3</sup> can implement to effectively prevent and respond to bullying, and resources for obtaining additional information.

Bullying of any student by another student, for any reason, cannot be tolerated in our schools.<sup>4</sup> Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur. Teachers and adults should respond quickly and consistently to bullying behavior and

<sup>&</sup>lt;sup>1</sup> This letter is intended to supplement the July 25, 2000, joint Dear Colleague Letter from OSERS and the Department's Office for Civil Rights (OCR), which addressed disability harassment under Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA), and the IDEA (available at: <a href="http://www.ed.gov/ocr/docs/disabharassltr.html">http://www.ed.gov/ocr/docs/disabharassltr.html</a>).

<sup>&</sup>lt;sup>2</sup> Some bullying of students with disabilities may also constitute discriminatory harassment and trigger additional responsibilities under the civil rights laws that OCR enforces, including Section 504, Title II of the ADA, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. See OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <a href="http://www.ed.gov/ocr/letters/colleague-201010.html">http://www.ed.gov/ocr/letters/colleague-201010.html</a>).

<sup>&</sup>lt;sup>3</sup> In the context of this letter "school" includes public preschools; elementary, middle, and high schools; and public agencies, including the State Educational Agency (SEA), Educational Service Agencies (ESA), Local Educational Agencies (LEA), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. See 34 C.F.R. §300.33.

<sup>&</sup>lt;sup>4</sup> Although the focus of this letter is peer-to-peer bullying, it is important to acknowledge that it is also intolerable for teachers and school staff to be party to school bullying and disability harassment (*i.e.*, being active participants in bullying), or observers to school bullying without taking action to address the behavior. While teacher-student disability harassment also may constitute a denial of FAPE, those issues are beyond the scope of this letter. We recommend that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel, including taking the matter seriously, and promptly addressing any problematic behaviors.

send a message that bullying is not acceptable. Intervening immediately to stop bullying on the spot can help ensure a safer school environment.

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

Addressing and reporting bullying is critical. Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression.<sup>5</sup> Bystanders, or those who only see or hear about bullying, also may be negatively affected as bullying tends to have harmful effects on overall school climate. Bullying can foster fear and disrespect and negatively affect the school experience, norms, and relationships of all students, families, and school personnel.<sup>6</sup> The consequences may result in students changing their patterns of school participation or schools eliminating school activities (e.g., dances, sporting events) where bullying has occurred. Teachers, school personnel, parents, and students should report bullying when they become aware of it.

Students with disabilities are disproportionately affected by bullying.<sup>7</sup> For example, students with learning disabilities, attention deficit or hyperactivity disorder, and autism are more likely to be bullied than their peers.<sup>8</sup> Any number of factors -- physical characteristics, processing and social skills, or intolerant environments -- may increase the risk that students with disabilities will be bullied. Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help. In circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, bullying may also trigger a school's child find obligations under the IDEA. 34 C.F.R. §§300.111, 300.201.

Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a

<sup>&</sup>lt;sup>5</sup> Gini G., & Pozzoli T. (2009). Association between bullying and psychosomatic problems: A meta-analysis. *Pediatrics*, 123(3):1059-1065.

<sup>&</sup>lt;sup>6</sup> O'Brennan, L. M., Bradshaw, C. P., & Sawyer, A. L. (2009). Examining developmental differences in the social-emotional problems among frequent bullies, victim, and bully/victims. Psychology in the Schools, 46(2), 100-115.

<sup>&</sup>lt;sup>7</sup> Swearer, S. M., Wang, C., Maag, J. M., Siebecker, A., B., & Frerichs, L. J. (2012). Understanding the bullying dynamic among students in special and general education. *Journal of School Psychology*, 50, 503-520.

<sup>&</sup>lt;sup>8</sup> Twyman, K. A., Saylor, C. F., Saia, D., Macias, M. M., Taylor, L. A., & Spratt, E. (2010). Bullying and ostracism experiences in children with special health care needs. *Journal of Developmental Behavioral Pediatrics*, 31, 1-8.

denial of FAPE under the IDEA that must be remedied.<sup>9</sup> States and school districts have a responsibility under the IDEA, 20 U.S.C. § 1400, et seq., to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student's individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit.<sup>10</sup>

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying. The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation.

If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted.

As discussed above, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit from the special education and related services provided by the school is a denial of FAPE. A student must feel safe in school in order to fulfill his or her full academic potential. We encourage States and school districts to alert Boards of Education, school administrators, teachers, and staff that bullying can result in a denial of FAPE

<sup>&</sup>lt;sup>9</sup> OCR also has authority to investigate complaints alleging denial of FAPE under Section 504 and Title II. See the July 25, 2000, joint Dear Colleague Letter on Disability Harassment; (available at: <a href="http://www.ed.gov/ocr/docs/disabharassltr.html">http://www.ed.gov/ocr/docs/disabharassltr.html</a>); and OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <a href="http://www.ed.gov/ocr/letters/colleague-201010.html">http://www.ed.gov/ocr/letters/colleague-201010.html</a>).

<sup>10</sup> See Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

### Page 4 - Dear Colleague: Bullying of Students with Disabilities

for students with disabilities. We also encourage States and school districts to reevaluate their policies and practices addressing problematic behaviors, including bullying, in light of the information provided in this letter, as well as in OSERS' July 25, 2000, joint Dear Colleague Letter and OCR's October 26, 2010, Dear Colleague Letter. The enclosure to this letter, "Effective Evidence-based Practices for Preventing and Addressing Bullying," includes practices for use as part of any bullying prevention and intervention program to help ensure that school and classroom settings are positive, safe, and nurturing environments for all children and adults.

We look forward to continuing to work with you to ensure that students with disabilities have access to high-quality services in positive, safe, and respectful school environments.

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Melody Musgrove, Ed. D.

Director

Office of Special Education Programs

Sincerely,

Michael K. Yudin

Acting Assistant Secretary

Enclosure:

Effective Evidence-based Practices for

Preventing and Addressing Bullying

## UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

October 21, 2014 Guidance Document



### UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

October 21, 2014

### Dear Colleague:

While there is broad consensus that bullying is wrong and cannot be tolerated in our schools, the sad reality is that bullying persists in our schools today, and especially so for students with disabilities. In recent years, the Office for Civil Rights (OCR) in the U.S. Department of Education (Department) has received an ever-increasing number of complaints concerning the bullying of students with disabilities and the effects of that bullying on their education, including on the special education and related services to which they are entitled. This troubling trend highlights the importance of OCR's continuing efforts to protect the rights of students with disabilities through the vigorous enforcement of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). It also underscores the need for schools to fully understand their legal obligations to address and prevent disability discrimination in our schools.

Today's guidance follows a long history of guidance issued by the Department in this critical area of disability discrimination. In 2000, OCR and the Office of Special Education and Rehabilitative Services (OSERS) issued joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II.<sup>2</sup> The 2000 guidance also noted the responsibilities of schools under Section 504 and the Individuals with Disabilities Education Act (IDEA) to ensure that students receive a free appropriate public education (FAPE),

These students are bullied or harassed more than their nondisabled peers. See Office of Special Education and Rehabilitative Services (OSERS) 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <a href="http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc">http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc</a>, at page 2 ("Students with disabilities are disproportionately affected by bullying."). That letter explains that, "[b]ullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles." Id. Throughout this guidance, the terms "bullying" and "harassment" are used interchangeably to refer to these types of conduct. See Office for Civil Rights (OCR) 2010 Dear Colleague Letter on Harassment and Bullying, <a href="http://www.ed.gov/ocr/letters/colleague-201010.pdf">http://www.ed.gov/ocr/letters/colleague-201010.pdf</a>, at page 3 ("The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.").

<sup>&</sup>lt;sup>2</sup> OCR-OSERS 2000 Dear Colleague Letter: Prohibited Disability Harassment, http://www.ed.gov/ocr/docs/disabharassltr.html.

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and alerted schools that harassment of a student based on disability may adversely impact the school's provision of FAPE to the student.<sup>3</sup> In 2010, OCR issued a Dear Colleague Letter on Harassment and Bullying that provided further guidance concerning when a school's inappropriate response to bullying or harassment of a student based on disability constitutes a disability-based harassment violation under Section 504 and Title II.<sup>4</sup> In 2013, OSERS issued a Dear Colleague Letter on Bullying of Students with Disabilities that, in turn, provided additional guidance to schools that the bullying of a student with a disability on *any* basis can result in a denial of FAPE under IDEA that must be remedied.<sup>5</sup>

Building on OSERS's 2013 guidance, today's guidance explains that the bullying of a student with a disability on *any* basis can similarly result in a denial of FAPE under Section 504 that must be remedied; it also reiterates schools' obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment. Following an overview of the federal protections for students with disabilities in schools, the guidance elaborates on the elements of a disability-based harassment violation and a FAPE violation, discusses how OCR generally analyzes complaints involving bullying of students with disabilities on each of these bases, and then concludes with a series of hypothetical examples that illustrate varying circumstances when conduct may constitute both a disability-based harassment violation and FAPE violation, a FAPE violation, or neither. Although by no means exhaustive, in the context of this discussion, the guidance also offers some insight into what OCR might require of a school to remedy instances of bullying upon a finding of disability discrimination. OCR urges schools to consider these hypothetical resolution agreement provisions in proactively working to ensure a safe school environment, free from discrimination, for all students.<sup>6</sup>

### I. Overview of Federal Protections for Students with Disabilities in Schools

OCR enforces Section 504 and Title II, both of which prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance. OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including all public schools and school districts as well as all public charter schools and magnet schools. Under Section 504, recipients that operate a public elementary or secondary education program must

<sup>&</sup>lt;sup>3</sup> The terms "school" and "school district" are used interchangeably in this letter and refer to public elementary and secondary schools that receive financial assistance from the Department.

OCR 2010 Dear Colleague Letter on Harassment and Bullying, http://www.ed.gov/ocr/letters/colleague-201010.pdf.

<sup>&</sup>lt;sup>5</sup> OSERS 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <a href="http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc">http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc</a>.

<sup>&</sup>lt;sup>6</sup> This guidance addresses only student-on-student bullying and harassment. Under Section 504 and Title II, students with disabilities are also protected from bullying by teachers, other school employees, and third parties. Such bullying can trigger a school's obligation to address disability-based harassment, remedy a denial of FAPE, or both. See 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. pt. 35. OCR recommends that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel.

<sup>&</sup>lt;sup>7</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.

provide students with disabilities equal educational opportunities. Among other things, this means they must ensure that students with disabilities receive FAPE, defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain requirements concerning educational setting, evaluation, placement, and procedural safeguards. Schools also have an obligation under Section 504 to evaluate students who need or are believed to need special education or related services. Further, schools have an obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. Schools often document these services in written plans, sometimes referred to as Section 504 plans, or, if the child is receiving IDEA FAPE services, through the required individualized education program (IEP).

Title II prohibits disability discrimination by public entities, including all public schools and school districts, as well as all public charter schools and magnet schools, regardless of whether they receive Federal financial assistance.<sup>11</sup> OCR, along with the U.S. Department of Justice (DOJ), enforces Title II in public elementary and secondary schools. Title II is generally construed to provide no less protection than Section 504. Therefore, violations of Section 504, including the failure to provide needed regular or special education and related aids and services to students with disabilities, also constitute violations of Title II.<sup>12</sup>

IDEA is another key Federal law addressing the needs of students with disabilities. OSERS, not OCR or DOJ, administers IDEA.<sup>13</sup> OCR, however, enforces the Section 504 and Title II rights of IDEA-eligible students.<sup>14</sup> Under Part B of IDEA, the Department provides Federal funds to State educational agencies and through them to local educational agencies (school districts), to assist

<sup>&</sup>lt;sup>8</sup> For Section 504 and Title II, the term "disability" means a physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. The Americans with Disabilities Act Amendments Act (Amendments Act), Pub. Law No. 110-325, amended the disability definition for Section 504 and Title II. Most notably, the Amendments Act required that "disability" under these statutes be interpreted broadly. More information about the Amendments Act is available from OCR's website at <a href="http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html">http://www.ed.gov/ocr/docs/dcl-504faq-201109.html</a>.

<sup>&</sup>lt;sup>9</sup> In this letter, the term "Section 504 FAPE services" is used to refer to the regular or special education and related aids and services provided to students with disabilities as specified in 34 C.F.R. § 104.33(b). The term "IDEA FAPE services" is used in this letter to refer to the special education and related services provided to students with disabilities that meet the requirements of 34 C.F.R. pt. 300, as specified in 34 C.F.R. §§ 300.17 (FAPE), 300.39 (special education), and 300.34 (related services).

<sup>&</sup>lt;sup>10</sup> Students with disabilities who are IDEA-eligible also have rights under Section 504 and Title II. The Department's Section 504 regulations provide that implementation of an IEP developed in accordance with IDEA is one means of providing Section 504 FAPE services. 34 C.F.R. § 104.33(b)(2).

<sup>&</sup>lt;sup>11</sup> 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

<sup>&</sup>lt;sup>12</sup> 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II's requirements.

<sup>&</sup>lt;sup>13</sup> For more information about OSERS, please visit <a href="http://www.ed.gov/osers.">http://www.ed.gov/osers.</a>

<sup>&</sup>lt;sup>14</sup> This letter only addresses Federal law; other State or local laws and policies may apply.

school districts in providing FAPE to eligible children with disabilities through the provision of special education and related services. <sup>15</sup> School districts must ensure that IDEA FAPE services in the least restrictive environment are made available to all eligible children with disabilities through a properly developed IEP that provides a meaningful educational benefit to the student. In addition, school districts must locate, identify, and evaluate children suspected of having disabilities who may need special education and related services.

### II. Schools' Obligations to Address Disability-Based Harassment

Bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504 and Title II. As explained in OCR's 2010 Dear Colleague Letter on Harassment and Bullying, when a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.

As explained in Section III, below, for the student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services, a school's investigation should include determining whether

<sup>&</sup>lt;sup>15</sup> 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. IDEA establishes 13 disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 C.F.R. § 300.8(c).

<sup>&</sup>lt;sup>16</sup> These legal protections extend to all students with disabilities, including students who are regarded as having a disability or who have a record of a disability and students with disabilities who are not receiving services under Section 504 or IDEA. In addition to being protected from harassment on the basis of disability, students with disabilities, like all students, are entitled to protection from harassment on the basis of race, color, national origin, sex (including sexual violence), and age under the Federal civil rights laws that OCR enforces. For more information about other types of discriminatory harassment, see OCR's 2010 Dear Colleague Letter referenced in note 4.

<sup>&</sup>lt;sup>17</sup> Schools know or should know about disability-based harassment when, for example, a teacher or other responsible employee of the school witnesses the conduct. For more information about how to determine when knowledge of such conduct will be imputed to schools, refer to the OCR 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, <a href="http://www.ed.gov/ocr/docs/shguide.pdf">http://www.ed.gov/ocr/docs/shguide.pdf</a> at page 13; and OCR 2010 Dear Colleague Letter on Harassment and Bullying, at page 3 and note 11.

<sup>&</sup>lt;sup>18</sup> This is the standard for administrative enforcement of Section 504 and in court cases where plaintiffs are seeking injunctive relief. It is different from the standard in private lawsuits for money damages, which, many courts have held, requires proof of a school's actual knowledge and deliberate indifference. See Long v. Murray Cnty. Sch. Dist., 522 Fed. Appx. 576, 577 & n. 1 (11th Cir. 2013) (applying the test enunciated in Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 643 (1999)).

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that student's receipt of appropriate services may have been affected by the bullying. <sup>19</sup> If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services or Section 504 FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE. <sup>20</sup> Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

### III. Bullying and the Denial of a Free Appropriate Public Education

The bullying on any basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504. The OSERS 2013 Dear Colleague Letter clarified that, under IDEA, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team<sup>21</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide a meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must determine the extent to which additional or different IDEA FAPE services are needed to address the student's individualized needs and then revise the IEP accordingly. Any decisions made by the IEP team must be consistent with the IDEA provisions addressing parental participation and should keep the student with a disability in the original placement or setting (e.g., the same school and classroom) unless the student can no longer receive FAPE in that placement or setting. Under IDEA, schools have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his or her IEP—an obligation that exists whether the student is being bullied based on his or her disability or is being bullied based on other reasons.

Similarly, under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student

<sup>&</sup>lt;sup>19</sup> As stated in OCR 2010 Dear Colleague Letter on Harassment and Bullying at page 2, "The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." When a student with a disability who receives Section 504 FAPE services is being bullied, an appropriate "other factor" is whether that student's receipt of services has been affected by the bullying.

<sup>&</sup>lt;sup>20</sup> When a student with a disability has engaged in misconduct that is caused by his or her disability, the student's own misconduct would not relieve the school of its legal obligation to determine whether that student's civil rights were violated by the bullying conduct of the other student. For example, if a student, for reasons related to his disability, hits another student and other students then call him "crazy" on a daily basis, the school should, of course, address the conduct of the student with a disability. Nonetheless, the school must also consider whether the student with a disability is being bullied on the basis of disability under Section 504 and Title II.

<sup>&</sup>lt;sup>21</sup> The IEP team is the group of persons specified in IDEA that determines the appropriate IDEA FAPE services for an IDEA-eligible student. 34 C.F.R. § 300.321(a).

is being bullied.<sup>22</sup> Accordingly, under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team<sup>23</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed,<sup>24</sup> ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.<sup>25</sup> In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient. By contrast, one low grade for an otherwise straight-A student who shows no other changes in academic progress or behavior will generally not, standing alone, trigger the school's obligation to determine whether the student's needs are still being met. Nonetheless, in addition to addressing the bullying under the school's anti-bullying policies, schools should promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided

<sup>&</sup>lt;sup>22</sup> At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under State law to provide elementary and secondary educational services to students with disabilities; or a student to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(*l*). In addition to the provision of regular or special education and related aids and services pursuant to 34 C.F.R. § 104.33, FAPE protections extend to educational setting, evaluation and placement, and procedural safeguards. 34 C.F.R. §§ 104.34-.36.

<sup>&</sup>lt;sup>23</sup> The Section 504 team is the group of knowledgeable persons that determines the appropriate Section 504 FAPE services for a qualified student with a disability under Section 504.

<sup>&</sup>lt;sup>24</sup> A reevaluation would not be needed unless there is a reason to believe the student's underlying disability or disabilities have changed or the student has an additional disability.

<sup>&</sup>lt;sup>25</sup> OCR would expect that schools address bullying behavior to ensure that the burden does not fall on the student with a disability. Along these lines, and consistent with the OSERS 2013 Dear Colleague Letter, schools should exercise caution when considering a change in placement, or the location of services (including classroom) provided to the student with a disability who is the target of bullying and should keep the student in the original placement unless the student can no longer receive Section 504 FAPE in that placement. OCR also urges schools to allow for parental participation when considering any change in placement or location of services (including classroom). See 34 C.F.R. pt. 104, app. A (discussion of Subpart D).

<sup>&</sup>lt;sup>26</sup> In light of schools' ongoing obligation to ensure that students with disabilities are receiving FAPE, adverse changes in the academic performance or behavior of a student receiving FAPE services could trigger the school's obligation to convene the IEP team or Section 504 team regardless of the school's knowledge of the bullying conduct. See, e.g., Section V, Hypothetical Example B, below. As a best practice, schools should train all staff to report bullying to an administrator or school official who can promptly convene a meeting of knowledgeable people (e.g., the student's Section 504 team or IEP team) to ensure that the student is receiving FAPE and, as necessary, address whether the student's FAPE needs have changed.

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to a student with a disability who has been bullied and who is experiencing any adverse changes in academic performance or behavior.

When bullying results in a disability-based harassment violation, it will not always result in a denial of FAPE. Although all students with disabilities are protected from disability-based harassment, the requirement to provide FAPE applies only to those students with disabilities who need or may need FAPE services because of their disability.<sup>27</sup> This means that if a student is the target of bullying resulting in a disability-based harassment violation, but that student is not eligible to receive IDEA or Section 504 FAPE services, there could be no FAPE violation.

When a student who receives IDEA FAPE services or Section 504 FAPE services has experienced bullying resulting in a disability-based harassment violation, however, there is a strong likelihood that the student was denied FAPE. This is because when bullying is sufficiently serious to create a hostile environment and the school fails to respond appropriately, there is a strong likelihood both that the effects of the bullying included an impact on the student's receipt of FAPE and that the school's failure to remedy the effects of the bullying included its failure to address these FAPE-related concerns.

Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent:

(1) the student's educational needs have changed; (2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly. By doing so, the school will be in the best position to ensure the student's ongoing receipt of FAPE.

### IV. How OCR Analyzes Complaints Involving Bullying of Students with Disabilities

When OCR evaluates complaints involving bullying and students with disabilities, OCR may open an investigation to determine whether there has been a disability-based harassment violation, a FAPE violation, both, or neither, depending on the facts and circumstances of a given complaint.

<sup>&</sup>lt;sup>27</sup> The FAPE requirement to evaluate applies to all students who are known or believed to need special education or related services, regardless of the nature or severity of the disability. 34 C.F.R. §§ 104.33, -.35. For a student who is suspected of having a disability but who is not yet receiving IDEA or Section 504 services, OCR may consider whether the school met its obligation to evaluate the student. 34 C.F.R. § 104.35. For example, if a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student's evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances.

When investigating disability-based harassment, OCR considers several factors, including, but not limited to:

- Was a student with a disability bullied by one or more students based on the student's disability?
- Was the bullying conduct sufficiently serious to create a hostile environment?
- Did the school know or should it have known of the conduct?
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

If the answer to each of these questions is "yes," then OCR would find a disability-based harassment violation under Section 504 and, if the student was receiving IDEA FAPE or Section 504 FAPE services, OCR would have a basis for investigating whether there was also a denial of FAPE under Section 504.

Even if the answers to one or more of these questions is "no," for a student who was receiving IDEA FAPE or Section 504 FAPE services, OCR may still consider whether the bullying resulted in a denial of FAPE under Section 504 that must be remedied.

When investigating whether a student receiving IDEA FAPE or Section 504 FAPE services who was bullied was denied FAPE under Section 504, OCR considers several factors, including, but not limited to:

Did the school know or should it have known that the effects of the bullying may have
affected the student's receipt of IDEA FAPE services or Section 504 FAPE services? For
example, did the school know or should it have known about adverse changes in the student's
academic performance or behavior indicating that the student may not be receiving FAPE?

If the answer is "no," there would be no FAPE violation. <sup>28</sup> If the answer is "yes," OCR would then consider:

 Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?

If the answer is "no," and the student was not receiving FAPE, OCR would find that the school violated its obligation to provide FAPE.

<sup>&</sup>lt;sup>28</sup> Where a student is suspected of having a disability but is not yet receiving IDEA FAPE services or Section 504 FAPE services, OCR could consider whether the student's evaluation was unduly delayed in determining whether there was a denial of FAPE under the circumstances. *See* fn. 27, above.

### V. Hypothetical Examples

The following hypothetical examples illustrate how OCR would analyze a complaint involving allegations of the bullying of a student with a disability who only receives Section 504 FAPE services.

### A. Disability-Based Harassment Violation and FAPE Violation

At the start of the school year, a ten-year-old student with Attention Deficit Hyperactivity Disorder (ADHD) and a speech disability is fully participating in the classroom, interacting with his peers at lunch and recess, and regularly attending speech therapy twice a week. In addition to providing for speech services, the student's Section 504 plan also provides for behavior supports that call for all his teachers and other trained staff to supervise him during transition times, provide constructive feedback, and help him use preventative strategies to anticipate and address problems with peers.

Because of the student's disabilities, he makes impulsive remarks, speaks in a high-pitched voice, and has difficulty reading social cues. Three months into the school year, students in his P.E. class begin to repeatedly taunt him by speaking in an exaggerated, high-pitched tone, calling him names such as "weirdo" and "gay," and setting him up for social embarrassment by directing him to ask other students inappropriate personal questions. The P.E. teacher witnesses the taunting, but neither reports the conduct to the appropriate school official, nor applies the student's behavior supports specified in his 504 plan. Instead, she pulls the student aside and tells him that he needs to start focusing less on what kids have to say and more on getting his head in the game. As the taunting intensifies, the student begins to withdraw from interacting with other kids in P.E. and avoids other students at lunch and recess. As the student continues to withdraw over the course of a few weeks, he misses multiple sessions of speech therapy, but the speech therapist does not report his absences to the Section 504 team or another appropriate school official.

In this example, OCR would find a disability-based harassment violation. The student's peers were making fun of him because of behaviors related to his disability. For OCR's enforcement purposes, the taunting the student experienced, including other students impersonating him and calling him "weirdo" and "gay," was therefore based on his disability. The school knew about the bullying because the P.E. teacher witnessed the conduct. Yet upon witnessing the taunting, the P.E. teacher not only failed to provide the student behavior supports as required in the student's 504 plan, but also failed to report the conduct to an appropriate school official. Had she taken this step, the school could have conducted an investigation and found that the conduct created a hostile environment because it interfered with the student's ability to benefit from the speech therapy services that he

<sup>&</sup>lt;sup>29</sup> OCR would have also investigated whether a school's inappropriate response to the use of the word "gay" in this context constituted a gender-based harassment violation under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106, which prohibits discrimination on the basis of sex. For a discussion of gender-based harassment, see OCR 2010 Dear Colleague Letter on Harassment and Bullying, at pages 7-8.

<sup>&</sup>lt;sup>30</sup> The P.E. teacher in this example is a responsible employee. See fn. 17, above.

should have been receiving and negatively affected his ability to participate fully in P.E., lunch, and recess. The school's failure to appropriately respond to the bullying violated Section 504.

OCR would also find FAPE violations under Section 504. First, when the P.E. teacher failed to implement the behavior supports in the student's Section 504 plan, the school denied the student FAPE under Section 504. In addition, and independent of the failure to provide behavior supports, because the bullying impacted the student's receipt of Section 504 FAPE, the school should have addressed the student's changed needs; by failing to do so, the student was denied Section 504 FAPE. The school should have known about the missed Section 504 services and related changes in behavior. The P.E. teacher knew about the bullying but did nothing to report the student's behavioral changes (e.g., the student's increasing efforts to isolate himself from other students) to the Section 504 team members or other appropriate school official. Similarly, the speech therapist knew that the student was missing speech therapy but did not report this to the 504 team or to an appropriate school official. By failing to address the adverse effects of the bullying on FAPE, the school did not make necessary changes to ensure the student was provided FAPE under Section 504. If, upon concluding its investigation, OCR and the district were to enter into a resolution agreement, OCR could require, for example, that the district (1) ensure that FAPE is provided to the student by convening the Section 504 team to determine if the student needs different or additional services (including compensatory services) and, if so, providing them; (2) offer counseling to the student to remedy the harm that the school allowed to persist; (3) monitor whether bullying persists for the student and take corrective action to ensure the bullying ceases; (4) develop and implement a schoolwide bullying prevention strategy based on positive behavior supports; (5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying based on disability and to respond to issues that arise in the survey; (6) revise the district's anti-bullying policies to develop staff protocols in order to improve the district's response to bullying; (7) train staff and parent volunteers, such as those who monitor lunch and recess or chaperone field trips, on the district's anti-bullying policies, including how to recognize and report instances of bullying on any basis; and (8) provide continuing education to students on the district's anti-bullying policies, including where to get help if a student either witnesses or experiences bullying conduct of any kind.

### B. FAPE Violation, No Disability-Based Harassment Violation

A thirteen-year-old student with depression and Post-Traumatic Stress Disorder (PTSD) who receives counseling as part of her Section 504 services is often mocked by her peers for being poor and living in a homeless shelter. Having maintained an A average for the first half of the academic year, she is now getting Bs and Cs, neglecting to turn in her assignments, and regularly missing counseling sessions. When asked by her counselor why she is no longer attending scheduled sessions, she says that she feels that nothing is helping and that no one cares about her. The student tells the counselor that she no longer wants to attend counseling services and misses her next two scheduled sessions. The counselor informs the principal that the student has missed several counseling sessions and that the student feels the sessions are not helping. Around the same time, the student's teachers inform the principal that she has begun to struggle academically. The

principal asks the teachers and counselor to keep her apprised if the student's academic performance worsens, but does not schedule a Section 504 meeting.

In this example, whether or not the school knew or should have known about the bullying, OCR would not find a disability-based harassment violation under Section 504 because the bullying incidents were based on the student's socio-economic status, not her disability.

Independent of the basis for the bullying and regardless of whether school officials knew or should have known about the bullying, the school district still had an ongoing obligation under Section 504 to ensure that this student with a disability was receiving an education appropriate to her needs. Here, the student's sudden decline in grades, coupled with changes in her behavior (missing counseling sessions), should have indicated to the school that her needs were not being met. In this example, OCR would find that these adverse changes were sufficient to put the school on notice of its obligation to promptly convene the Section 504 team to determine the extent of the FAPE-related problems and to make any necessary changes to her services, or, if necessary, reevaluate her, in order to ensure that she continues to receive FAPE. By failing to do more than keep track of the student's academic performance, the school failed to meet this obligation, which violated Section 504.<sup>31</sup>

#### C. No Disability-Based Harassment Violation, No FAPE Violation

A seven-year-old student with a food allergy to peanuts has a Section 504 plan that provides for meal accommodations, the administration of epinephrine if the student is exposed to peanuts, access to a peanut-free table in the cafeteria, and the prohibition of peanut products in the student's classroom. In advance of the upcoming Halloween party, the teacher reminds the class that candy with peanuts is prohibited in the classroom at all times, including Halloween. That afternoon, while on the bus, a classmate grabs the student's water bottle out of the student's backpack, drinks from it, and says, "I had a peanut butter sandwich for lunch today, and I just finished it." The following day, while having lunch at the peanut-free table in the lunchroom with some friends, a classmate who had been sitting at another table sneaks up behind her and waves an open candy bar with peanuts in front of her face, yelling, "Time to eat peanuts!" Though the candy bar does not touch her, a few other classmates nearby begin chanting, "Time to eat peanuts," and the student leaves the lunchroom crying. When the student goes back to her classroom and tells her teacher what happened at lunch and on the bus, the teacher asks her whether she came into contact with the candy bar and what happened to the water bottle. The student confirms that the candy bar did not touch her and that she never got the water bottle back from the classmate who took it, but says that she is scared to go back into the lunchroom and to ride the bus. The teacher promptly informs the principal of the incidents, and the peers who taunted the student on the bus and in the lunchroom are removed from the lunchroom, interviewed by the assistant principal, and required to meet with the counselor during

<sup>&</sup>lt;sup>31</sup> If OCR and the district were to enter into a resolution agreement in this case, such an agreement could include, for example, any of the provisions specified in Hypothetical Example A, above.

recess to discuss the seriousness of their conduct. That same week, the school holds a Section 504 meeting to address whether any changes were needed to the student's services in light of the bullying. The principal also meets with the school counselor, and they decide that a segment on the bullying of students with disabilities, including students with food allergies, would be added to the counselor's presentation to students on the school's anti-bullying policy scheduled in the next two weeks. Furthermore, in light of the young age of the students, the counselor offers to incorporate a puppet show into the segment to help illustrate principles that might otherwise be too abstract for such a young audience. In the weeks that follow, the student shows no adverse changes in academic performance or behavior, and when asked by her teacher and the school counselor about how she is doing, she indicates that the bullying has stopped.

In this example, based on the school's appropriate response to the incidents of bullying, OCR would not find a disability-based harassment violation under Section 504. The bullying of the student on account of her food allergy to peanuts was based on the student's disability. Moreover, the physically threatening and humiliating conduct directed at her was sufficiently serious to create a hostile environment by limiting her ability to participate in and benefit from the school's education program when she was near the classmates who bullied her in the lunchroom and on the bus. School personnel, however, did not tolerate the conduct and acted quickly to investigate the incidents, address the behavior of the classmates involved in the conduct, ensure that there were no residual effects on the student, and coordinate to promote greater awareness among students about the school's anti-bullying policy. By taking prompt and reasonable steps to address the hostile environment, eliminate its effects, and prevent it from recurring, the school met its obligations under Section 504.

OCR also would not find a FAPE violation under Section 504 on these facts. Once the school became aware that the student feared attending lunch and riding the bus as a result of the bullying she was experiencing, the school was on notice that the effects of the bullying may have affected her receipt of FAPE. This was sufficient to trigger the school's additional obligation to determine whether, and to what extent, the bullying affected the student's access to FAPE and take any actions, including addressing the bullying and providing new or different services, required to ensure the student continued receiving FAPE. By promptly holding a Section 504 meeting to assess whether the school should consider any changes to the student's services in light of the bullying, the school met its independent legal obligation to provide FAPE under Section 504.

#### VI. Conclusion

OCR is committed to working with schools, students, families, community and advocacy organizations, and others to ensure that schools understand and meet their legal obligations under Section 504 and Title II to appropriately address disability-based harassment and to ensure that students with disabilities who are bullied continue to receive FAPE.

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OCR also encourages States and school districts to reevaluate their policies and practices in light of this letter, as well as OCR's and OSERS's prior guidance. If you would like to request technical assistance or file a complaint alleging discrimination, please contact the OCR enforcement office that serves your area. Contact information is posted on OCR's website at: <a href="http://www.ed.gov/ocr/complaintintro.html">http://www.ed.gov/ocr/complaintintro.html</a> or please contact OCR's customer service team at 1-800-421-3481 (TDD 1-800-877-8339).

I look forward to continuing our work together to address and reduce incidents of bullying in our schools so that no student is limited in his or her ability to participate in and benefit from all that our educational programs have to offer.

Sincerely,

/s/

Catherine E. Lhamon Assistant Secretary for Civil Rights Rebecca Sassouni, Esq. PLLC www.rebeccasassounilaw.com

#### DASA Dignity for All Students Act

https://www.nysenate.gov/legislation/laws/EDN/801-A. Modifies Education law section 801 to include instruction in civility

#### Section 801-A

Instruction in civility, citizenship and character education

"The regents shall ensure that the course of instruction in grades kindergarten through twelve includes a component on civility, citizenship and character education. Such component shall instruct students on the principles of honesty, tolerance, personal responsibility, respect for others, with an emphasis on discouraging acts of harassment, bullying, discrimination, observance of laws and rules, courtesy, dignity and other traits which will enhance the quality of their experiences in, and contributions to, the community. Such component shall include instruction of safe, responsible use of the internet and electronic communications. The regents shall determine how to incorporate such component in existing curricula and the commissioner shall promulgate any regulations needed to carry out such determination of the regents. For the purposes of this section, "tolerance," "respect for others" and "dignity" shall include awareness and sensitivity to harassment, bullying, discrimination and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes."

NYCRR Sec. 100.2(kk)(1)(x)

http://www.p12.nysed.gov/dignityact

Passed in 2012 seeking to provide students in NY with a safe and support school environment free from bullying and harassment and discrimination. In 2013 DASA was expanded to include cyber bullying.

Affords all students in public and charter schools an environment free of discrimination and harassment and to foster civility and prevent and prohibit conduct inconsistent with a school's educational mission.

Protects students from bullying by employees and by students on school property and at school functions.

Based on actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. (Applies to access to school facilities, functions, programs, including but not limited to restrooms, changing rooms, locker rooms, filed trips, dress code, grooming and appearance standards, use of names and pronouns, and pronunciation of names.)

Not a private remedy, no damages. Just ensures notification and investigation

Defines harassment and bullying as creation of a hostile environment by conduct, or by threats, intimidation, or abuse, including cyber bullying

Boards of education must adopt policies and procedures intended to create school environments free from harassment, bullying and discrimination

#### These policies must:

- Designate an employee to receive and investigate reports of harassment, bullying, and discrimination;
- Require all school employees who witness or receive reports of harassment, bullying and discrimination to orally notify the designee within one school day and file a witness report within two days;
- Enable students and parents to make oral or written reports of prohibited conduct to teachers, administrators, and other school personnel deemed appropriate;
- Prohibit retaliation against any individual who, in good faith, reports or assists in investigation;
- Take appropriate corrective action when a report is verified;
- Include a strategy to prevent harassment, bullying and discrimination;
- Require school personnel to promptly notify the appropriate law enforcement agency when any harassment, bullying or discrimination constitutes criminal conduct;
- Appoint at least one DASA coordinator who shall be provided with specialized training:
- Develop guidelines to be used in employee training programs that raise awareness and sensitivity;
- District codes of conduct must conform with DASA, and be distributed to all school employees, students, and parents in writing or electronically

District must promptly investigate and take corrective action where investigation verifies the complaint

School districts must meet two reporting requirements

- 1. Annual Report to commissioner of education of all material incidents
- 2. Principal report to superintendent

#### Liability

- DASA does not restrict other remedies but also does not create a new private cause of action or remedy;
- According the NYSED a recent review of DASA oversight and compliance found "there are gaps in school and district compliance with some key DASA requirements"





#### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

#### The Non-Resident "Resident" Student

### The Non-Resident "Resident" Student

2018 Annual School Law Conference Nassau and Suffolk County Academies of Law

December 7, 2018 Touro Law Center, Central Islip, NY

#### Presented by

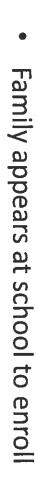
Diana M. Cannino, Esq. Ingerman Smith, LLP 150 Motor Parkway, Suite 400 Hauppauge, NY 11788 (631) 261-8834

Mara N. Harvey, Esq. Lamb & Barnosky, LLP 534 Broadhollow Road, Suite 210 Melville, NY 11747 (631) 694-2300

Christie R. Jacobson, Esq. Frazer & Feldman, LLP 1415 Kellum Place, Suite 201 Garden City, NY 11530 (516) 742-7777

Lawrence J. Tenenbaum, Esq. Jaspan Schlesinger LLP 300 Garden City Plaza Garden City, NY 11530 (516) 746-8000

### THE "OLD WAY"





- proof sends the family home to get more information District reviews enrollment documents and if there is insufficient
- residency is submitted Enrollment is deferred until adequate documentation to support
- and not educated by the district If the family does not deliver documents, the child is not admitted

## THEN WHAT HAPPENED ...

- communities by the Federal Office of Refugee Resettlement. Many unaccompanied alien youth were sent to New York
- status, green cards, visas, social security numbers, etc. numerous school districts objecting to questions about immigration In 2010, the New York State Civil Liberties Union sent letters to
- demographic data. time of registration and urging sensitivity when collecting should avoid asking questions related to immigration status at the SED issued a 2010 guidance memorandum indicating that schools
- SED recommended that school districts not ask for a child's Social process Security number during the student enrollment/registration

- some have deemed crisis proportions. By 2014, the number of unaccompanied alien youth increases to what
- youth apprehended by immigration were released to a sponsor living From January thru July, 2014, approximately 4,200 unaccompanied
- with equal access to public education at the elementary and secondary In May, 2014 the USDOE and the USDOJ issued joint guidance in New York State. regarding state obligations under federal law to provide all children level; irrespective of the parents' actual or perceived immigration

status.





## SEPTEMBER, 2014 SED GUIDANCE

- $\gg$  When HHS places an undocumented child with a sponsor, the and is not required to seek same. sponsor generally does not have legal custody or guardianship
- $\gg$  Thus, the there is no requirement that the sponsor establish custody or control through formal guardianship proceedings.
- Lack of evidence regarding custody and control should not permanent residence and the sponsor has full authority and delay enrollment if the sponsor's home is the child's responsibility for support and custody
- Districts were encouraged to review their policies and ensure compliance

Starting in the fall 2014, the State's Attorney General's Office the State for improper enrollment practices. investigation of several school districts around (OAG) undertook



# **NYS ATTORNEY GENERAL'S INVESTIGATION**

- sign into school each day and return home since there were Locally, there were allegations that a district instructed some not enough classrooms to accommodate them. 33 Hispanic students – many of them recent immigrants – to
- Certain parents claimed they were denied enrollment on several occasions.
- had placed students on a "wait list" for admission. As a result of the investigation, the OAG found that the district

"Schoolhouse doors must be open to every student in our increasingly diverse state regardless of their immigration status." The Attorney General declared that



#### PLYLER v. DOE

Under the landmark U.S. Supreme Court ruling in Plyler v. Doe, 457 U.S. 202 (1982), undocumented children have a constitutional right to receive a free public K-12 education.



- In October, 2014, OAG and SED announced "a review of are being denied their constitutional right to an education." other undocumented students to examine whether students district enrollment procedures for unaccompanied minors and
- The review was to initially focus on districts with the largest America and include: influx of unaccompanied minors from Central and South
- an examination of written enrollment and registration materials,
- publicly-disseminated procedures, and information regarding those
- interviews with district administrators.

### THE NEW WAY

- emergency residency regulations. December, 2014, the Board of Regents adopted
- Unveiling of the "admit first, then ask" previously reserved for homeless students. approach,
- School Attorneys. including that submitted by the New York State School that were made in response to public comment, There were many revisions to the emergency regulations Boards Association and New York State Association of

adopted in their final form and became effective July 1, 2015. In June, 2015, the new residency regulations were

The "admit first, then ask" approach remains.



### THE REGULATIONS

#### Purpose

- Establish requirements for determinations of student residency and age,
- For purposes of eligibility to attend public tuition, and schools in the district without the payment of
- > To ensure the admission of eligible students without undue delay.

### PROVING RESIDENCY

Burden of proof is still on the parents/persons residency through: parental relation/student to establish

Physical presence as an inhabitant of the school district; and

Intent to reside in the district.

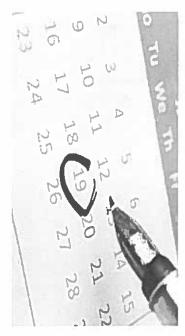
### AVAILABILITY OF DISTRICT'S RESIDENCY **PROCEDURES**

- Enrollment forms
- Enrollment procedures
- Instructions



- Requirements for determination of student residency and age
- appropriate to the district by parents, persons in parental relation or children, as Non-exhaustive list of the forms of documentation that may be submitted
- materials and be provided to all who request enrollment shall be posted on the District's website Must be included in the District's existing enrollment/registration

- The child shall be enrolled and begin attendance on the next school day or as soon as practicable.
- The district may choose not to enroll such child if a of the request for enrollment. determination of non-residency is made on the date



- As soon as practicable but *no later than three business days* after initial enrollment:
- The parents/person in parental relation/child must submit information in support of the child's residency in the district; and
- $\gg$  The board of education or its designee shall review the information necessary to make a residency determination;
- If the documentation/information is submitted on the third business day after initial enrollment, the board or its designee may make the initial enrollment. residency determination no later than the fourth business day after

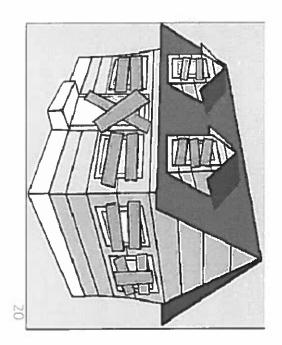
a resident entitled to attend the District's schools. or re-entry into the District, the District may determine, in accordance with law, that a child is not contrary, at the time of the child's initial enrollment notwithstanding any prior determination to the any time during the school year and

#### Summer School:

- ightarrow If eligible to attend summer school if a resident, the child must summer school is in session or as soon as practicable be enrolled on request and begin on the next school day
- ${oldsymbol >}$  Residency determination must be as soon as practicable but not the  $3^{rd}$  day). later than 3 business days (or 4 if information is submitted on
- ightless If not eligible to attend summer school then the child is enrolled admitted during the three/four day period – only on school days determination as above, however, the child is not required to be that fall within the regular session on request and the district must make the residency

# FACTORS FOR DETERMINING RESIDENCY

- have only one legal residence. For purposes of Education Law §3202, a person can
- another is established through action and intent. A residence is not lost until it is abandoned and



- Social security card or number;
- Any information regarding or which would child or the child's parents/persons in parental tend to reveal the immigration status of the relation, including information regarding visas



# Evidence of physical presence in the district:

- ➤ A lease or statement) proof of ownership (deed or mortgage
- A statement by a landlord, owner or tenant from whom they lease or with whom they share property
- >Another statement by a third party relating to the the district; and/or parents/persons in parental relation's physical presence in
- ➤ Other forms of documentation establishing physical presence in the district and/or information

Other forms of documentation (non-exhaustive list)

- ✓ Pay stub
- ✓ Income tax form
- ✓ Utility and other bills
- ✓ Membership documents based upon residency (e.g. library cards)
- ✓ Voter registration documents
- ✓ Official driver's license, learner's permit or non-driver
- ✓ State or other government issued ID

Proof of parental relationship or proof that the child resides with the parent or person in parental relation:

- ➤ Affidavit indicating either: of the parent/person 글. parental relation
- ✓ That they are the parents with whom the child lawfully resides; or
- $\checkmark$  That they are the persons in parental relation to the permanent custody and control (whether through guardianship or otherwise) custody and control and describing how they obtained child, over whom they have total and permanent

resides with the parent or person in parental relation: Proof of parental relationship or proof that the child

➤Other proof such as documentation that the child placed by a federal agency. resides with a sponsor with whom the child has been

➤ The district may *not* require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

### Documentation of Age:

- Birth certificate or record of baptism
- 2. If no "1" then a passport
- If no "1" or "2" then other documentary or recorded evidence in existence two years or more.





### **DENYING ADMISSION**

- Opportunity to submit information
- Timing of Decision
- Who Decides (Board or designee)
- Official Decision
- Written notice
- Appeals



# Issues in Residency Determinations

### **Dual Property Ownership:**

pays taxes in the district, does not necessarily confer one rents or owns a house or property in the district, or outside the school district, only one property can be considered one's legal residence. The mere fact that residence status If a person owns or rents property both within and

# Issues in Residency Determinations

### Pending Home Construction:

family actually resides in the house establish residency. The Petitioner must establish that her Pending home construction, in and of itself, does not

#### Temporary Absence:

return to the district. of a permanent residence where actions reflect intent to Temporary absence does not constitute the abandonment

# Issues in Residency Determinations

#### Factors:

- Continuing ties to the community
- Intent to return
- Tangible efforts to secure in-district residence

### Presumption of Residence with Parent/Guardian:

- guardians A child's residency is presumed to be that of his or her parents or legal
- and control to someone residing within the district. have relinquished total, and presumably permanent, transfer of custody That presumption can be rebutted where it can be shown that parents
- Requires an examination of the totality of the circumstances.
- child's residence remains with the parent continues to support him or her, the presumption is not rebutted and the If a parent continues to exercise custody and control of the child and

### Factors:

- Guardianship Proceedings (can be determinative)
- Power of attorney (insufficient)
- Who makes medical and educational decisions
- Who provides health insurance
- Who provides financial support
- Living with parent/guardian part-time
- Maintaining relationship with parent
- Taking advantage of the District's schools

### Divorced or Separated Parents:

- residence Where a child's parents live apart, the child can have only one legal
- Where the parents are divorced or legally separated, the child's residence is presumed to be that of the primary or residential custodial parent.
- Where a court awards custody to one parent, the child's residence is presumed to be that of the custodial parent.
- day-to-day responsibility for the child, the decision regarding the child's residency ultimately lies with the family. Where parents have been awarded joint custody and the child's time is "essentially divided" between two households and both parents assume

### Divorced or Separated Parents (cont'd):

- intent to remain there determined by the traditional tests of physical presence in the district and the child's time being divided between both households, residency is to be However, when parents claim joint custody but do not produce proof of
- determined by the usual considerations, including physical presence in the district and intent to remain in the district. custodial parent outside the district, the child's residence must be Additionally, the Commissioner has found that where joint custody exists but the child actually spends a substantial majority of his/her time with a
- residence to be that of the non-custodial parent. A parent granted legal custody by the court may designate a child's

### **Emancipated Minors:**

apart from his or her parents in a manner is considered emancipated if s/he is beyond the For purposes of Education Law §3202, a student parents and has no intent to return home. compulsory school age, is living separate and inconsistent with parental custody and control, is not receiving financial support from his or her

### Proof of Emancipation:

- A school district can require proof of emancipation.
- student resides with the parent. The student must rebut the presumption that the
- A district can seek an affidavit or sworn statement from the student in addition to supporting documentation regarding the student's home address.
- A school district cannot require a court order as proof of emancipation (no such proceeding).

### Evidence of Non-residency (partial list):

- Telephone numbers outside the district
- Use of P.O. Box for a mailing address
- Verbal statements from students that they reside outside the district
- Statements from neighbors and others
- Students driven when bus is available

### Surveillance:

been held to sufficient: No rule on the required frequency, but the following have

- Six over three months
- Five "plus"
- Nineteen over five weeks
- Two four days periods during one month

Consider home visits Two surveillances were deemed insufficient

### Surveillance (cont'd):

- Should be conducted on both the claimed residence and the suspected actual residence
- and after school. Consider the time of day — include both before
- state whether they were in school on that date. Report must identify the students/subjects and
- Report must have a conclusion/finding.

### THE NON-RESIDENT "RESIDENT" STUDENT

2018 Annual School Law Conference Nassau and Suffolk Academies of Law

December 7, 2018 Touro Law Center, Central Islip, NY

### Presented by:

Diana M. Cannino, Esq. Ingerman Smith, LLP 150 Motor Parkway, Suite 400 Hauppauge, NY 11788 (631) 261-8834

Mara N. Harvey, Esq. Lamb & Barnosky, LLP 534 Broadhollow Road, Suite 210 Melville, NY 11747 (631) 694-2300 Christie R. Jacobson, Esq. Frazer & Feldman, LLP 1415 Kellum Place, Suite 201 Garden City, NY 11530 (516) 742-7777

Lawrence J. Tenenbaum, Esq. Jaspan Schlesinger LLP 300 Garden City Plaza Garden City, NY 11530 (516) 746-8000

### The Non-Resident "Resident" Student

### **❖ ENTITLEMENT TO ATTEND SCHOOL PURSUANT TO EDUCATION LAW §3202(1)**:

A person over five (5) year and under twenty-one (21) years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.<sup>1</sup>

### **❖ AVAILABILITY OF DISTRICT'S RESIDENCY PROCEDURES:**

Districts must make publically available:

- ✓ Enrollment forms
- ✓ Enrollment procedures
- ✓ Instructions
- ✓ Requirements for determination of student residency and age
- ✓ Non-exhaustive list of the forms of documentation that may be submitted to the district by parents, persons in parental relation or children, as appropriate.<sup>2</sup>

Such information shall be included in the District's existing enrollment/registration materials and be provided to all parents/persons in parental relation/children, as appropriate, who request enrollment in the District, and shall be posted on the District's website.

That information was supposed to have been made available by January 31, 2015, however, the regulations provide that as soon as practicable but no later than July 1, 2015:

- ✓ the district must update the information and materials to comply with the regulations;
- ✓ provide such updated information and materials to all parents, persons in parental relation or children, as appropriate, who request enrollment; and

<sup>&</sup>lt;sup>1</sup> Reg. of the Commissioner of Educ., Sec. 200.5(a)(5) (iii) provides that a student with a disability continues to be eligible for a Free and Appropriate Public Education until the end of the school year in which the student turns 21 or until the receipt of a regular high school diploma. A GED, IEP diploma or skills credential are not considered regular high school diplomas.

<sup>&</sup>lt;sup>2</sup> The Commissioner has long held that a district must be flexible in making residency determinations and "cannot exclude bona fide residents who are unable to produce documents from a prescribed list in an effort to shortcut the case by case analysis necessary to ascertain a particular student's residency." Appeal of Caldera, 35 Educ. Dep't Rep. 386 (1996).

✓ post such information and materials on the district's website, if one exists.

### **TIMING OF ENROLLMENT:**

When a parent/person in parental relation/child, as appropriate, requests enrollment:

- ✓ The child shall be enrolled and begin attendance on the next school day or as soon as practicable;
- ✓ However, the district may choose not to enroll such child if a determination of non-residency is made on the date of the request for enrollment.
- ✓ As soon as practicable but no later than three business days after initial enrollment:
  - the parents/persons in parental relation to the child/child, as appropriate, must submit documentation and/or information in support of the child's residency in the district; and
  - the board of education or its designee shall review the documentation/information necessary to make a residency determination.
  - However, if the documentation/information is submitted on the third business day after initial enrollment, the board or its designee may make the residency determination no later than the fourth business day after initial enrollment.<sup>3</sup>
- ✓ At any time during the school year and notwithstanding any prior determination to the contrary, at the time of the child's initial enrollment or re-entry into the District, the District may determine, in accordance with law, that a child is not a resident entitled to attend the District's schools.

<sup>&</sup>lt;sup>3</sup> The State was criticized, via public comment to the regulations, for imposing additional unfunded mandates on districts (the cost of educating a potential non-resident, even just for a few days; transportation; administrative processing costs, etc.) and potentially authorizing the unlawful gift of public funds. However, SED's position is that a district may make a residency determination quickly (theoretically the same day). SED also acknowledged that there may be times when non-resident children "are enrolled for a short time, resulting in associated costs to school districts)", but believes that "the public interest in ensuring that children who are eligible to attend the public schools in the school district without the payment of tuition pursuant to Education Law 3202 are admitted to school without undue delay, outweighs such associated costs." Memo from Charles A. Szuberla, Jr. on *Proposed Amendment of Section 100.2(y) of the Commissioner's Regulations Relating to Student Enrollment* (April 6, 2015) ("April Comments") at cmt.4; Memo from Charles A. Szuberla, Jr. on *Proposed Amendment of Section 100.2(y) of the Commissioner's Regulations Relating to Student Enrollment* (June 8, 2015) ("June Comments") at cmt. 1. SED maintains the same view with respect to the instability and anxiety that may result from enrolling and dis-enrolling children within a few days' time. April Comments at cmt. 5; June Comments at cmt. 1.

✓ <u>Summer School</u>: In response to a commentator's inquiry on the April regulations, as to whether the three-day residency determination rule applies if registration is over the summer months, SED has stated that "if the child would be eligible to attend summer school if a resident of the district, then the child must be enrolled upon request and begin attendance on the next school day that summer school is in session or as soon as practicable. The district must then make its residency determination as soon as practicable but no later than three business days (or four business days if documentation/information on residency is submitted on the third business day)." If the child is *not* eligible to attend summer school, but is eligible to attend regular session, "then the child must be enrolled upon request and the district must make its residency determination . . . as soon as practicable, not no later than three/four days, etc.) However, the child would be required to be admitted to attendance pending a residency determination within the three/four day period only on those school days, if any, that fall within the regular session."<sup>4</sup>

### **\*** FACTORS FOR DETERMINING RESIDENCY:

- Residency for purposes of Education Law §3202 is based on two factors: physical presence and an intent to remain in the district. See, e.g., Appeal of Anthony S., 32 Educ. Dep't Rep. 93 (1992); Appeal of Bonafante-Ceruti, 31 Educ. Dep't Rep. 38 (1991).
- For purposes of Education Law §3202, a person can have only one legal residence. Appeal of Marshall, 43 Educ. Dep't Rep. 47 (2003).
- A residence is not lost until it is abandoned and another is established through action and intent. Appeal of Lockwood, 42 Educ. Dep't Rep. 25 (2002).

### BURDEN:

The revised regulations were not intended to change or shift the burden of proof of the parent(s), the person(s) in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the district and intent to reside in the district.

### ❖ DOCUMENTATION:<sup>5</sup>

### > What you CANNOT ask for:

<sup>&</sup>lt;sup>4</sup> April Comments at cmt. 16.

<sup>&</sup>lt;sup>5</sup> Many of the documents listed as examples in the regulations have been utilized for many years. However, heretofore the propriety of their use evolved from case law and not through regulation.

Whether on the registration form, in a meeting or via any other form of communication, the district is *not* permitted to ask for any of the following at the time of and/or as a condition of enrollment:

- ✓ Social security card or number;
- ✓ Any information regarding or which would tend to reveal the immigration status of the child, the child's parents/persons in parental relation, including without limitation, copies of or information regarding visas or other documentation indicating immigration status.<sup>6</sup>

### What you CAN ask for:

- ✓ Evidence of the physical presence of the parents/persons in parental relation and the child in the district. This may include:
  - A copy of a residential lease or proof of ownership of a house or condominium, such as a deed or mortgage statement;
  - A statement by a third-party landlord, owner or tenant from whom the parents/persons in parental relation leases or with whom they share property within the district, which may be either sworn or unsworn;<sup>7</sup>
  - Another statement by a third party relating to the parents/persons in parental relation's physical presence in the district; and/or
  - Other forms of documentation and/or information establishing physical presence in the district, which may include, without limitation, those listed below.
- ✓ Proof of parental relationship or proof that the child resides with the parent or person in parental relation:
  - Affidavit of the parent/person in parental relation indicating either:
    - That they are the parents with whom the child lawfully resides; or

<sup>&</sup>lt;sup>6</sup>See, e.g., NYSED's PowerPoint "Enrolling and Serving Recently Arrived Unaccompanied Children" at p.4 citing Guidance from the US Department of Justice Civil Rights Division, wherein NYSED states "Districts may not ask about citizenship or immigration status to establish residency. 'While a school district may choose to include a... state-issued identification or driver's license among the documents that can be used to establish residency, [it] may not require such documentation to establish residency... where such a requirement would unlawfully bar a student whose parents are undocumented from enrolling in school."'}

<sup>7</sup> Commentators on the proposed regulations noted that the regulations appeared to confuse ownership/leasing of property with physical presence and that the regulations appear to preclude a district from requiring anything else showing that a person lives in the property they own/lease. SED's response was that the documents listed are not meant to be non-exclusive and that nothing alters the requirement that residency be established by physical presence and an intent to remain. April Comments supra. n. 12, at cmt. 2; June Comments at cmt. 6.

- That they are the persons in parental relation to the child, over whom they have total and permanent custody and control and describing how they obtained permanent custody and control (whether through guardianship or otherwise).<sup>8</sup>
- Other proof such as documentation that the child resides with a sponsor with whom the child has been placed by a federal agency.
- The district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.
- ✓ Other forms of documentation produced by the child/child's parent(s) or person(s) in parental relation, including without limitation:
  - Pay stub;
  - Income tax form;
  - Utility and other bills;
  - Membership documents (e.g. library cards) based upon residency;
  - Voter registration documents;
  - Official driver's license, learner's permit or non-driver ID;
  - State or other government issued ID;
  - Documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement); or
  - Evidence of custody of the child, including without limitation, judicial custody orders or guardianship papers.

### ✓ <u>Documentation of Age</u>:

Proof of age shall be provided in accordance with Education Law §32189:

- Where a certified transcript of a birth certificate or record of baptism (including a certified transcript of a foreign birth certificate or record of baptism) giving the date of birth is available, no other form of evidence may be used to determine a child's age.
- Where such birth certificate/record of baptism is not available, a passport (including a foreign passport) may be used to determine a child's age; and

<sup>&</sup>lt;sup>8</sup>Commentators on the regulations criticized that the regulations do not require *sworn* statements. SED's response was that nothing in the regulations precludes districts from considering unsworn statements vis-à-vis sworn statements when weighing the evidence regarding a residency determination. April Comments at cmt. 1.

<sup>&</sup>lt;sup>9</sup> The requirements of Education Law §3218 mirror the regulation's requirements, including a prohibition on the submission of an affidavit to prove age. *See also*, June Comments at cmt. 7.

- Where such birth certificate/record of baptism and such passport are not available, the District may consider other documentary or recorded evidence in existence two years or more, except an affidavit of age. This may include but not be limited to:
  - o Official driver's license:
  - State or other government issued identification;
  - School photo identification with date of birth;
  - Consulate identification card;
  - o Hospital or health records;
  - Military dependent identification card;
  - Documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement);
  - Court orders or other court-issued documents;
  - Native American tribal document: or
  - Records from non-profit international aid agencies and voluntary agencies.

If such documentation originates from a foreign country, the District may request verification of such documentary evidence from the appropriate foreign government or agency, consistent with FERPA. However, the student must be enrolled as per the remaining requirements and enrollment cannot be delayed beyond the regulation's requirements while the District attempts to obtain such verification.<sup>10</sup>

### **CASES:**

Although the cases listed herein were decided prior to the issuance of the new regulations, the Commissioner has made it clear that the *standard* for determining residency hasn't changed. Thus, generally speaking, Commissioner's decisions that address the substantive aspects of residency determinations should continue to provide helpful guidance. Below are some examples.

### **Dual Property Ownership:**

 If a person owns or rents property both within and outside the school district, only one property can be considered one's legal residence. The mere fact that one rents or owns a house or property in the district, or pays taxes in the district, does not necessarily confer residence status. <u>Appeal of</u>

<sup>&</sup>lt;sup>10</sup> See, e.g., NYSED's PowerPoint "Enrolling and Serving Recently Arrived Unaccompanied Children" at p.5 citing Guidance from the US Department of Justice Civil Rights Division, wherein NYSED states "Districts may not 'prevent or discourage [a] child from enrolling in or attending school because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate."

<u>Seefried</u>, 46 Educ. Dep't Rep. 311, Decision No. 15,518 (2007); <u>Appeal of Sigsby</u>, 44 Educ. Dep't Rep. 97, Decision No. 15,109 (2004); <u>Appeal of J.V.</u>, 44 Educ. Dep't Rep. 421, Decision No. 15,218 (2005).

 Payment of nonresident tuition where a parent owns property in the district entitles the parent to a reduction in tuition to the extent the parent pays taxes on that property pursuant to Education Law §3202 (3). <u>Appeal of</u> <u>Rosen</u>, 43 Educ. Dep't Rep. 87, Decision No. 14,929 (2003).

### **Pending Home Construction:**

- Pending home construction, in and of itself, does not establish residency. The
  Petitioner must establish that her family actually resides in the house.

  <u>Appeal of G.P.</u> 44 Educ. Dep't Rep. 109, Decision No. 15,096 (2004); <u>Appeal of Student with a Disability</u>, 46 Educ. Dep't Rep. 18, Decision No. 15,427 (2006).
- In Appeal of G.P. the District claimed that Petitioner was not a resident of the District since the Petitioner's home was still under construction and "uninhabitable." However, the Commissioner ruled that the Petitioner established residency within the District. The Commissioner explained that the house did not appear to be "uninhabitable" since, despite the absence of landscaping, the exterior of the house was substantially finished, the first floor interior appeared to be substantially complete (even though there was a stack of lumber on the floor) and there were no surveillance pictures of the second floor where the Petitioner claimed the family was living.
- In Appeal of a Student with a Disability, 46 Educ. Dep't Rep. 18, the Petitioner originally planned to renovate the in-district house by October 24, 2004 but after a structural defect was discovered, it was necessary to demolish and rebuild. After several weather-related delays, the house was not completed until the summer of 2005. The Petitioner contended that the District's tuition assessment for the 2004-2005 school year was unfair because Petitioner intended to reside in the district, but was unable to do so because of circumstances beyond his control. However, the Commissioner found that the District did not act arbitrarily in requiring tuition for the 2004-2005 time period.

### Temporary Absence:

• Temporary absence does not constitute the abandonment of a permanent residence where actions reflect intent to return to the district. <u>Appeal of J.V.</u>, 44 Educ. Dep't Rep. 421, Decision No. 15,218 (2005).

- To determine one's intent as to whether a living arrangement is indeed temporary, the Commissioner must consider evidence regarding the family's continuing ties to the community and their efforts to return. Appeal of J.V; 44 Educ. Dep't. Rep. 421; Appeal of Collins, 44 Educ. Dep't Rep. 74, Decision No. 15,103 (2004); Appeal of Weisberg, 39 Educ. Dep't Rep. 737, Decision No. 14,365 (2000); Appeal of Schwartzburt, 37 Educ. Dep't Rep. 139, Decision No. 13,825 (1997); Appeal of C.F., 44 Educ. Dep't Rep. 109, Decision No. 15,113 (2004).
- See also Appeal of Leontakianakos, 42 Educ. Dep't Rep. 10, Decision No. 14,757 (2002), finding that a person's temporary absence from one's district of residence does not necessarily constitute establishment of a residence in the district where temporarily located or abandonment of one's permanent residence.

### **Evidence of Intent to Return:**

- Where an individual claims that her out-of-district residence is temporary
  and that she desires to return to the district, evidence should be presented of
  efforts to secure a residence in-district. Bare assertions of an intention to
  return to the district, absent evidence demonstrating continuing efforts to
  secure a residence therein, is insufficient to establish a legal residence.
  Appeal of Marshall, 43 Educ. Dep't Rep. 47, Decision No. 14,911 (2003);
  Appeal of Reeves, 41 Educ. Dep't Rep. 388, Decision No. 14,721 (2002).
- In <u>Appeal of J.V.</u> the Petitioner owned a house in the district, but was allowing other individuals to live in that house. Petitioner stated that she was residing outside of the district with her two children on a temporary basis because she was afraid of her former husband and wanted to protect her children by living at a location unknown to him. Petitioner submitted an order of protection, which prohibited her former husband from having any contact with her and required a third party to arrange for her former husband's visitation with the children. 44 Educ. Dep't. Rep. 421.

Petitioner also submitted a number of documents in support of her claim that her permanent residence was within the district, including a driver's license, a tax bill, water bills, utility bills, refuse removal bills, cable bills, and credit card bills, among others. However, many of these documents had little probative value because they dated to a period prior to when respondent began its investigation. Other individuals supported the fact that Petitioner owned a house in the district, but ownership of property in a district alone does not confer residency status.

The Commissioner found that the documents did not adequately establish continuing ties to the community demonstrating that petitioner's absence from the district was temporary. Further, while Petitioner expressed an intent to return to the district by a certain date, she provided no explanation of the change in circumstance that would enable her to do so. The Commissioner explained that the Petitioner's claimed intent to return to the district was insufficient to establish residency, absent evidence of substantial progress toward meeting that objective or at the very least, a concrete and realistic plan to do so. The Petitioner failed to supply sufficient evidence demonstrating substantial progress or a concrete and realistic plan. Thus, the Commissioner concluded that respondent's determination was not arbitrary or capricious.

### Presumption of Residence with Parent/Guardian:11

- A child's residency is presumed to be that of his or her parents or legal guardians. <u>Appeal of I.G.</u>, 43 Educ. Dep't Rep. 445 Decision No. 15,045 (2004); <u>Appeal of T.C.</u>, 43 Educ. Dep't Rep. 44, Decision No. 14,910 (2003).
- That presumption can be <u>rebutted</u> where it can be shown that parents have relinquished <u>total</u>, and <u>presumably permanent</u>, <u>transfer of custody and control</u> to someone residing within the district. <u>Appeal of C.F.</u>, 44 Educ. Dep't Rep. 109, Decision No. 15,113 (2004); <u>Appeal of Maxwell</u>, 42 Educ. Dep't Rep. 134, Decision No. 14,799 (2002); <u>Appeal of Hardick</u>, 41 Educ. Dep't Rep. 300, Decision No. 14,693 (2002); <u>Appeal of D.W.</u>, 43 Educ. Dep't Rep. 113, Decision No. 14,939 (2003).
- Analyzing whether the parents have relinquished total custody and control is done by examining a totality of the circumstances. Catlin v. Sobol, 155 AD2d 24, rev'd on other gnds, 77 NY2d 552 (1991); Appeal of Ambris, 31 Educ. Dep't Rep. 41, Decision No. 12,562 (1991)

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<sup>&</sup>lt;sup>11</sup> A commentator to the proposed regulations suggested that the standard for the transfer of custody be changed to "whether the caretaker has 'primary responsibility with respect to the child's support and wellbeing" since many unaccompanied immigrant children still depend on their natural parents to some extent even though their parents are not their primary caretakers. The commentator also suggested that the existing standard which requires a transfer of "total and permanent custody and control" denotes a legal relationship which is often not present for immigrant children. SED rejected this suggestion and instead confirmed that a "person in parental relation" must demonstrate "total and permanent custody and control" over an enrolling child. SED noted that the standard suggested by the commentators would be contrary to well established case law from both the Commissioner and the courts. Moreover, SED noted that to the extent an alternative standard was being proposed to apply in residency determinations involving unaccompanied immigrant children, that would require that those children be identified as immigrant children. That is contrary to established law which provides that "the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to such students' entitlement to an elementary and secondary public education and school districts are generally prohibited from inquiring about such status...." June Comments at cmt. 9.

• If a parent continues to exercise custody and control of the child and continues to support him or her, the presumption is not rebutted and the child's residence remains with the parent. <u>Appeal of D.E.</u>, 43 Educ. Dep't Rep. 39, Decision No. 14,908 (2003).

### **Examples of Factors to Consider in Evaluating Transfer of Custody and Control:**

### **Guardianship Proceedings:**

While it is not necessary to establish parental custody and control
through a formal guardianship proceeding, it is necessary to demonstrate
that a particular location is a child's permanent residence, and that the
individual exercising control has full authority and responsibility with
respect to the child's support and custody. Appeal of C.F. 44 Educ. Dep't
Rep. 109, Decision No. 15,113 (2004).

### Taking Advantage of the District's Schools:

- Parents may not transfer custody or legal guardianship of their children merely to achieve residence status for the children to take advantage of the local schools. Appeal of D.E., 43 Educ. Dep't Rep. 39, Decision No. 14,908 (2003) See also Appeal of Skugor, 44 Educ. Dep't Rep. 1, Decision No. 15,075 (2004) (purpose was for student to live with Aunt for a year to improve her English and then return to Brazil), and Appeal of C.F., finding that where the sole reason a child is residing with someone other than the parent is to take advantage of the schools of the district, the child has not established residence.
- However, when the court issues letters of guardianship to an adult residing within a given district, the child is presumed to reside in that school district. Appeal of Murphy, 37 Educ. Dep't Rep. 162, Decision No. 13,831 (1997); Appeal of Frank, 36 Educ. Dep't Rep. 110, Decision No. 13,673 (1996); Appeal of a Student with a Disability, 46 Educ. Dep't Rep. 60, Decision No. 15,441 (2006).
- The Commissioner will accept the Court's order of Guardianship as determinative for residency purposes and will not look behind the Court's decision to determine whether the custody transfer is bona fide. Appeal of GMH, 46 Educ. Dep't Rep. 84, Decision No. 15,447 (2006). See also Appeal of D.R., 45 Educ. Dep't Rep. 550, Decision No. 15,412 (2006). This approach recognizes that a change in custody is a serious, life-changing event for all involved based on factors not always apparent in the context of a residency appeal to the Commissioner.

- Nevertheless, the Commissioner in <u>D.R.</u> noted that the holding did not address the situation "where the evidence indicates that the child does not actually reside with the court-appointed guardian in accordance with the court order." Indeed in <u>Appeal of G.G.</u>, Decision No. 16,397 (2012), the Commissioner held that "[e]ven where there is a valid court order awarding guardianship, to determine residency for school purposes there must be proof that the student actually lives in the same household with the guardian in the school district."
- The Commissioner has opined that any objection to the legitimacy of the transfer should be made before the court in a custody proceeding, not in a subsequent appeal to the Commissioner of Education. See <u>Appeal of D.R.</u>, 45 Educ. Dep't Rep. 550, Decision No. 15,412 (2006). <u>See also, In re Bianca B.</u>, 97 A.D.3d 742 (2d Dep't 2012) and <u>In re D.F.</u>, 37 Misc. 3d 1216(A)(NY Fam. Ct. 2012) for examples of districts that have intervened in guardianship proceedings.

### **Surrogates Court:**

 An <u>application</u> before the Surrogate's Court to transfer guardianship is not dispositive where the court has not yet ruled on the petition. <u>Appeal</u> <u>of Boyd</u>, 41 Educ. Dep't Rep. 266, Decision No. 14,682 (2002).

### <u>Power of Attorney</u>:

 Power of Attorney is in and of itself insufficient to transfer permanent custody and control. <u>Appeal of Student with a Disability</u>, 43 Educ. Dep't Rep. 80, Decision No. 14,926 (2003).

### Medical and Educational Decisions:

 Where <u>parents retain control over important issues</u> such as medical and educational decisions, total control is not deemed relinquished. <u>Appeal of Cook</u>, 45 Educ. Dep't Rep. 115, Decision No. 15,276 (2005).

### Medical Insurance:

• When a child lives with someone else, an out-of-district parent providing medical insurance is not dispositive of residence. <u>Appeal of D.H.C.</u>, 43 Educ. Dep't Rep. 468, Decision No. 15,053 (2004). <u>See also Appeal of Hardick</u>, 41 Educ. Dep't Rep. 300, Decision No. 14,693 (2002), finding that it is not necessarily determinative that the child continues to be covered by the parent's health insurance where there is no indication that providing such coverage requires a financial contribution or involves control over medical care. In <u>Hardick</u>, the Petitioner indicated that she

provided her granddaughter with food, shelter, and clothing and exercised control over her granddaughter's activities and behavior. The Commissioner stated that the fact that the child remained on her father's medical insurance did not, in itself, contradict petitioner's statement that she was supporting her granddaughter.

### Provision of Needs:

- Generally, if a parent continues to provide financial support for room, board, clothing and other necessities, custody and control is not deemed relinquished. <u>Catlin v. Sobol</u>, 155 A.D.2d 24, <u>rev'd on other gnds</u>, 77 N.Y.2d 552 (1991)
- When the parents provide a child with almost all of her needs other than housing, a total relinquishment of custody and control has not been established. <u>Appeal of James Riccinto</u>, 46 Educ. Dep't Rep. 39, Decision No. 15,435 (2006).

### Living with Non-Parent for Limited Period of Time:

- If a parent does not give up total and permanent control of the child, a determination of non-residency will be respected.
- The Commissioner determined that when the record shows that a child is living with an individual only until the child is 18 years, a total and permanent relinquishment of custody and control has not been established. Appeal of Ellison, 46 Educ. Dep't Rep. 47, Decision No. 15,437 (2006).
- In Appeal of Cook, 45 Educ. Dep't Rep. 115, Decision No. 15,276 (2005), the Commissioner upheld the District's determination that the child was not a district resident based on the fact that the Petitioner, a non-parent, stated in his Petition that after the child in question visited him for summer vacation and learned of the improved academic and athletic opportunity, the child's father agreed to the transfer of custody to the Petitioner. The Commissioner concluded that even if there were an actual transfer of custody and control, it was for educational purposes, which is insufficient to confer residency.

### Family Circumstances and Maintaining Relationship with Parents:

 A student may establish residence apart from his/her parents for other bona fide reasons, such as family conflict or the hardships of single parenting. <u>Appeal of Palmieri</u>, 45 Educ. Dep't Rep. 174, Decision No. 15,293 (2005). The mere fact that a child continues to maintain a relationship with a parent who has otherwise relinquished custody and control of the child is not determinative in resolving the question of the child's residence. Appeal of Taylor and Wilson, 43 Educ. Dep't Rep. 89, Decision No. 14,930, (2003); Appeal of G. Rea, Decision No. 16,271 (2011).

• In <u>Appeal of Taylor and Wilson</u>, the Petitioners demonstrated that they sought a custody transfer to the child's grandmother in order to provide the child with a stable and nurturing home, which the child's mother had been unable to do because of her long work hours and enrollment in nursing school. In addition, the grandmother had assumed full financial responsibility for the child's needs. While petitioners may have expressed their desire to have the child attend respondent's schools, petitioners established that the change of guardianship was independently motivated by the mother's inability to properly care for her son. Under these circumstances, the fact that the mother continued to maintain a relationship with her son and had attended school conferences was not inconsistent with petitioners' claim that the child resided with his grandmother. 43 Educ. Dep't. Rep. 89.

### **Emancipated Minors:**

For purposes of establishing residency under Education Law §3202, a student is considered emancipated if s/he is beyond the compulsory school age, is living separate and apart from his or her parents in a manner inconsistent with parental custody and control, is not receiving financial support from his or her parents and has no intent to return home. Appeal of Kehoe, 37 Educ. Dep't. Rep. 14, Decision No. 13,792 (1997).

### Compulsory School Age:

All children must remain in attendance until the last day of the school year (July 1 – June 30) in which they reach the age of 16. N.Y. Educ. Law §3205(1)(c); In re Kiesha BB, 30 A.D.3d 704 (3d Dep't 2006). However, a school board may require minors from ages 16 through 17 who are not employed, to attend school until the last day of the school year in which they become 17 years of age. Educ. Law §3205(3).

### **Proof of Emancipation:**

 A district can require proof of emancipation supporting the student's age, means of support and an explanation of the circumstances surrounding the emancipation, including a description of the student's relationship with his or her parents.

- The student needs to establish emancipation, which rebuts the presumption that the student resides with the parent. <u>See Appeal of Swezey</u>, 39 Educ. Dep't Rep. 81, Decision No. 14,180 (1999); <u>Appeal of Humphrey</u>, 43 Educ. Dep't Rep. 117, Decision No. 14,940 (2003).
- A district can seek an affidavit or sworn statement from the student in addition to supporting documentation regarding the student's home address (i.e., a statement from the person with whom the student is living, rent receipts, pay stubs, letter from the Department of Social Services, driver's license, etc.)
- Inasmuch as there is no formal proceeding establishing emancipation in New York, a district cannot require a court order as proof of emancipation.
- A student who is 18 must state he is emancipated and/or evidence in the record must support such a claim. Otherwise, the student's residence is presumed to be that of his parents for purposes of Education Law §3202(1). Appeal of Taylor, 43 Educ. Dep't Rep. 430, Decision No. 15,042 (2004). In Taylor the petitioner was 18 years old and attempted to establish residency by moving in with a friend. The petitioner did not claim that he was emancipated and he admitted that he still lived with his parents from time to time and that his mail was being sent to their address. As such, the Commissioner ruled that petitioner failed to rebut the presumption that he lived with his parents.
- In Appeal of Kehoe, 37 Educ. Dep't Rep. 14, Decision No. 13,792 (1997), a student who was over the compulsory age tried to establish that he was an emancipated minor and resident of the district. His mother moved to North Carolina and he had an uneasy relationship with his father whereby he would avoid being present at his father's house when he previously resided with his father. The Commissioner found that in applying the factors to this case, the weight of the evidence supported the District's determination that the student was not a resident of the District. Neither the father nor the mother claimed to have relinquished custody and control over the student and both the father and mother provided significant financial support in the form of health insurance, automobile insurance, clothing and spending money. Additionally, there was no evidence that the father and son's relationship was so severe that they could not live under one roof and there was no indication that the student intended to remain a resident in the district beyond his graduation. The Commissioner explained that it was apparent that the student was living apart from his parents in order to take advantage of the schools in the district.

### **Divorced or Separated Parents:**

Where a child's parents live apart, the child can have only one legal residence. Appeal of Franklin-Boyd, 45 Educ. Dep't Rep. 33, Decision No. 15,251 (2005); Appeal of T.K., 43 Educ. Dep't Rep 103, 14,935 (2003).

Where the parents are divorced or legally separated, the child's residence is presumed to be that of the primary or residential custodial parent. Appeal of Plesko, 37 Educ. Dep't Rep. 238, Decision No. 13,850 (1997); Appeal of Juracka, 31 Educ. Dep't Rep. 282, Decision No. 12,643 (1992).

Where a court awards custody to one parent, the child's residence is presumed to be that of the custodial parent. Appeal of DiFalco, 43 Educ. Dep't Rep. 17, Decision No. 14,903 (2003); Appeal of O'Brien, 35 Educ. Dep't Rep. 46; Decision No. 13,460 (1995); Appeal of Juracka, 31 Educ. Dep't Rep. 282. However, the presumption is rebuttable. Appeal of Plesko, 37 Educ. Dep't. Rep. 238.

### **Ioint Custody:**

- In cases where parents have been awarded joint custody and the child's time is "essentially divided" between two households and both parents assume day-to-day responsibility for the child, the decision regarding the child's residency ultimately lies with the family. Appeal of Franklin-Boyd, 45 Educ. Dep't. Rep. 33; Appeal of T.K.; 43 Educ. Dep't. Rep. 103; Appeal of Williams, 42 Educ. Dep't Rep. 8, Decision No. 14,756 (2002).
- However, when parents claim joint custody but do not produce proof of the child's time being divided between both households, residency is to be determined by the traditional tests of physical presence in the district and intent to remain there. <u>Appeal of Rousseau</u>, 45 Educ. Dep't Rep. 567, Decision No. 15,418 (2006).
- Additionally, in <u>Appeal of Williams</u>, the Commissioner found that where joint custody exists but the child actually spends a substantial majority of his/her time with a custodial parent outside the district, the child's residence must be determined by the usual considerations, including physical presence in the district and intent to remain in the district. 42 Educ. Dep't. Rep. 8.
- A parent granted legal custody by the court may designate a child's residence to be that of the non-custodial parent. <u>Appeal of Petrie</u>, 37 Educ. Dep't Rep. 200, Decision No. 13,841 (1997). Absent such a designation, a child could rebut the presumption that his or her residence is that of the custodial parent by establishing his or her status as an

emancipated minor. <u>Id</u>. Although it is preferable for the divorce decree to be modified, it is not required. <u>Appeal of Barron</u>, 31 Educ. Dep't Rep. 1, Decision No. 12,545 (1991). However, there must be compelling evidence that the custodial parent consents to the child's legal residence being that of the non-custodial parent. <u>Id</u>.

If the child does not live with his/her custodial parent, but the custodial parent has not designated the child's residence to be elsewhere, the district must consider several factors when making the residency determination, including the extent of time the child actually lives in the district and the intent of the family members to have the child reside in the district. Appeal of Forde, 29 Educ. Dep't Rep. 359, Decision No. 12,319 (1990).

### **Evidence of Non-Residency**:

The following are examples of evidence that may indicate non-residency and warrant further investigation. They are not dispositive of non-residency. This list is not meant to be exhaustive.

- Telephone number that is an exchange outside the district. Appeal of Short, 43 Educ. Dep't Rep. 137, Decision No. 14,945 (2003).
- P.O. Box mailing address. <u>Appeal of Bonfante-Ceruti</u>, 31 Educ. Dep't Rep. 38, Decision No. 12,561 (1991).
- Mailing address outside of the district. <u>Appeal of Kerrick and Agee</u>, 45 Educ. Dep't Rep. 331, Decision No. 15,338 (2005).
- Statements from students that they do not reside where their parents claim. <u>Appeal of Harkless</u>, 40 Educ. Dep't Rep. 602, Decision No. 14,566 (2001).
- Statements from neighbors that the family does not reside where parents claim. <u>Appeal of J.V.</u>, 44 Educ. Dep't Rep. 421, Decision No. 15,218 (2005); <u>Appeal of Mauldin</u>, 46 Educ. Dep't Rep. 241, Decision No. 15,494 (2006).
- Admissions that the sole basis for students residing with non-parental guardians is to take advantage of the schools in the district. <u>Appeal of Cuesta</u>, 42 Educ. Dep't Rep. 6, Decision No. 14,755 (2002).
- Parents driving children to and from school rather than availing themselves of bus pick-up. <u>Appeal of Smith</u>, 45 Educ. Dep't Rep. 18, Decision No. 15,245 (2005).

 Proof that children reside with non-parental guardian only on school days and reside with parents outside of the district on the weekends. <u>Appeal of Johnson</u>, 34 Educ. Dep't Rep. 59, Decision No. 13,233 (1994).

### Surveillance:

Surveillance is not necessarily solely conclusive of residency. <u>Appeal of Klipper</u>, 43 Educ. Dep't Rep. 95, Decision No. 14,932 (2003). Rather, it is an important component to consider when viewing the totality of circumstances. <u>Appeal of G.D.</u>, 43 Educ. Dep't Rep. 30, Decision No. 14,905 (2003).

### **Surveillance at Beginning of School Year:**

 Surveillance undertaken for the first few days of the new school year is not dispositive. <u>Appeal of Seger</u>, 42 Educ. Dep't Rep. 266, Decision No. 14,849 (2003)

### Surveillance on Both Residences:

• Surveillance should be conducted on both 'residences' (in-district and out-of-district). See, e.g., Appeal of Smith, 44 Educ. Dep't Rep. 66, Decision No. 15,100 (2004). Appeal was sustained where there were four occasions during a two week period and a fifth surveillance after commencement of an appeal to the Commissioner and "[o]n no occasion did the investigator observe the [in-district] address, the address at which petitioner maintains she has continuously resided." As such, the Commissioner found that the surveillances were not inconsistent with petitioner's explanation that the children spent two to three nights per week at the out-of-district residence. See also Appeal of Mendez, 44 Educ. Dep't Rep. 6, Decision No. 15,077 (2004).

### Number of Times and Time of Day Surveillance is Conducted:

While there is no definitive number of times/time of day surveillance must be conducted the following cases provide some guidance:

- Appeal of St. Villien, 44 Educ. Dep't Rep. 69, Decision No. 15,101 (2004).
  The Commissioner held for the district where on six occasions over a
  three month period, during early morning hours before school neither the
  parent nor the child was observed leaving in-district residence and yet
  the child was in school on time on those days.
- Appeal of Santiago, 42 Educ. Dep't Rep. 101, Decision No. 14,787 (2002). Surveillance of out-of-district address on five "plus a number of

occasions" along with other indicia deemed sufficient to deny entry to district.

- Appeal of G.P., 44 Educ. Dep't Rep. 52, Decision No. 15,096 (2004). The
  Commissioner held for the parents where there were nineteen days of
  surveillance between March 11 and April 20; the investigator arrived at
  home between 5:15 a.m. and 6:30 a.m. but never remained at the
  residence long enough to see whether anyone might leave for work or
  school. The Commissioner found that the surveillance was done too early
  as the family was likely still sleeping.
- Appeal of Nelson, 44 Educ. Dep't Rep. 20, Decision No. 15,082 (2004).
  The Commissioner held for the district where there was surveillance both of in-district and out-of-district locations over two four-day periods during one month. On seven mornings the investigator observed the child being driven to school from the mother's out-of-district home or the bus stop. On eight evenings, the investigator observed the child being driven to his mother's out-of-district home after church activities.
- Two surveillances were insufficient. <u>Appeal of Mendez</u>, 44 Educ. Dep't Rep. 6.
- The Commissioner held for the district where on thirteen occasions in October and November an out-of-district parent was seen driving the child to school. <u>Appeal of J.M.</u>, 43 Educ. Dep't Rep. 125, Decision No. 14,942 (2003).
- Appeal of Duncan, 43 Educ. Dep't Rep. 121, Decision No. 14,941 (2003). The Commissioner found for the district where there was compelling evidence that the Petitioner and his son did not reside in the school district. On the approximately two dozen occasions over the course of four months where surveillance was conducted at the out-of-district address, Petitioner's son was consistently observed leaving the home in the morning, usually with the Petitioner. Further, the investigator testified at the hearing that although he conducted surveillance on a number of occasions at the in-District address, he never observed the child at that location.

### **Ouality of Surveillance:**

Appeal of Craig, 44 Educ. Dep't Rep. 8, Decision No. 15,078 (2004).
 Computer searches conducted by private investigators hired by the district provided an abundance of conflicting information regarding petitioner's residence, and failed to confirm where petitioner resided.
 The Commissioner also explained that the investigator's observations

were unconvincing because there was no indication that the investigator positively identified the females observed as the petitioner or her daughter on the two observation dates. This was important because the petitioner explained that she loaned her vehicle (which is registered to her husband,) to her husband's niece who resides at the out-of-district residence with the husband. Further the district did not provide information on the number and length of the evening observations purportedly made by the investigator, so it was impossible to evaluate the significance, if any, of his failure to observe the vehicle at the indistrict residence.

### Surveillance Report:

- Appeal of J.M., 42 Educ. Dep't Rep. 80, Decision No. 14,783 (2002):
  - ✓ The surveillance report must identify the people observed, i.e. it is insufficient to merely state "adult female" or "child".
  - ✓ Formal surveillance report must state, for example, that the child was transported by the parent from a point outside of the district and dropped off at school. Stating "in the direction of" and "towards" are not acceptable.
  - ✓ Surveillance report must also indicate that "based on his investigation he has concluded that parent and child live outside the district."
  - Appeal of Monteiro, 35 Educ. Dep't Rep. 346, Decision No. 13,565 (1996). Surveillance report should report whether child attended school on each day of surveillance.

### Parental Failure to Rebut Surveillance:

- Appeal of Metze, 42 Educ. Dep't Rep. 40, Decision No. 14,768 (2002). Although the District's evidence was not "overwhelming" its determination was upheld since the parent offered no proof. In this case surveillance was conducted on four separate occasions in September and October and showed the parent driving from an out-of-district address. The Commissioner held that "[a]lthough parent maintains that she spends some nights at her boyfriend's out-of-district house, this explanation is inadequate in the absence of any other proof.
- Appeal of General, 43 Educ. Dep't Rep. 146, Decision No. 14,948 (2003). Surveillance found that the parent drove the child to school

two times from an out-of-district address; an unidentified man dropped the child off at school and then drove back to an out-of-district address; a school bus dropped the child off at an in-district residence with in-laws; and two cars were registered outside of the district. Neither car was ever seen at in-district address. The Commissioner held for the Respondent, acknowledging that it was a close case, but the Petitioner did not meet her burden. Specifically, the Commissioner pointed out that the various pieces of mail Petitioner submitted were not persuasive evidence that she actually resides in-district, the two differing accounts from her in-laws regarding the amount of rent she allegedly pays at the in-district residence undermined her credibility, and neither of her automobile registrations lists the in-district residence, with one registration actually listing the out-of-district address respondent contended she lived in. Petitioner offered no explanation for this registration.

- Appeal of Razzano, 38 Educ. Dep't Rep. 782, Decision No. 14,142 (1999). Surveillance was conducted on approximately 35 occasions over a four month period and petitioner failed to provide any reasonable explanation for her complete absence from her residence. The Commissioner held for the district.
- Appeal of Lockwood, 42 Educ. Dep't Rep. 25, Decision No. 14,763 (2002). Surveillance was conducted on twelve occasions from October 30 to January 27. The child was never seen at the in-district address and no activity was observed at that address. The parent offered no explanation for her absence. The Commissioner held for the district.

### Failure To Submit Proof:

In <u>Appeal of Bell</u>, 41 Educ. Dep't Rep. 93, Decision No. 14,625 (2001), the Commissioner explained that other than petitioner's bare statements that she and her children have been living with friends within respondent's district, petitioner offered no evidence in support of her position. She did not identify these friends or their addresses or the dates that she and her children lived at each address, nor did petitioner present affidavits by the friends attesting to her living arrangement or any other documentary evidence to support her claim that she was still residing in the district. In contrast, respondent offered significant evidence of petitioner's residence outside the district, based upon statements made by petitioner and her children about living at addresses outside the district and visual observations. Petitioner did not contest respondent's assertions, or provide any explanation for the observations. If petitioner was temporarily living outside respondent's

district with the intent to return, she offered no proof of such intention, such as evidence of an active search for a residence within the district, continuing ties to the district, or a lease or other agreement establishing a new residence within the district. As such, the Commissioner explained that the failure of individuals to submit proof constitutes a failure to establish residency in accordance with the administrative procedures in 8 NYCRR §100.2 (y). See also Appeal of Vairo, 42 Educ. Dep't Rep. 64, Decision No. 14,777 (2002) (conclusory allegations, standing alone, are insufficient to rebut or refute district's proof/findings).

### **Use of an In-District Mailing Address:**

• Appeal of Burgos, 56 Ed Dept Rep, Decision No. 16,791 (2016). The Commissioner has held that documentary evidence indicating the use of an in-district mailing address is not dispositive where contrary surveillance exists and petitioner provides no explanation for the surveillance submitted by the District. Appeal of Gomes, 53 Ed Dept Rep, Decision No. 16,534 (2013); Appeal of Stewart, 47 Ed Dept Rep 92, Decision No. 15,637 (2007). The Commissioner found that this is especially true when the in-district residence is owned by the petitioner's parent. Appeal of Gomes, 53 Ed Dept Rep, Decision No. 16,534 (2013).

### **ENROLLMENT AND VACCINATIONS:**

- ➤ Districts are still required to comply with Public Health Law §2164(7)¹² (regarding vaccinations) and other applicable Public Heath Law provisions, including orders issued by a state or local health department pursuant to such laws/regulations, that impact a student's admission to or attendance in school.
- ➤ Districts are not required to immediately permit the attendance of an enrolled student lawfully excluded from school temporarily pursuant to Education Law §906 because of a communicable or infectious disease that imposes a significant risk of infection to others, or an enrolled students whose parent(s) or person(s) in parental relation have not submitted proof of immunization within the periods required by Public Health Law §2164(7)(a).¹³

 $<sup>^{12}</sup>$  SED notes that it "is not the agency with regulatory authority for implementation of Public Health Law §2164(7), which governs school authority to gather proof of immunization." Response to Comments April Comments at cmt. 13.

<sup>&</sup>lt;sup>13</sup> N.Y. Pub. Health Law §2164 (7) provides: (a) No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B,

### **❖ ENROLLMENT AND DISCIPLINARY ACTION**

> The new regulations shall not be construed to require the immediate attendance of an enrolled student who is suspended from instruction for disciplinary reasons pursuant to Education Law §3214.

### **STUDENT VISAS**

- ➤ Subsequent to September 11, 2001, it was determined that several of the terrorists were in the United States on student visas but had not been attending school. Accordingly, Congress passed several laws which amended various immigration laws regarding visas. The Patriot Act changed the enforcement of non-immigrant status and visa rules and implemented a Student and Exchange Visitor Information System ("SEVIS"). USA Patriot Act of 2001, Pub. L. No. 107, §56. 115 stat. 272.
- The new residency regulations are not intended to interfere with recordkeeping and reporting requirements Districts must follow when participating in the federal Student and Exchange Visitor Program (SEVP) in grades 9-12 pursuant to federal law/regulation regarding nonimmigrant alien students who identify themselves as having or seeking nonimmigrant student visa status (F-1 or M-1). They are also not intended to relieve nonimmigrant alien students who have or seek an F-1 or M-1 visa from fulfilling their obligations under federal law/regulations related to enrolling in grades 9-12 in SEVP schools.

### **Applicable Types of Visas:**

### F1Visa:

- i. The F1 Visa is issued to non-immigrants for academic studies.
- ii. The F1 Visa applies only to secondary schools. Persons holding F1 Visas cannot attend public elementary or middle schools.
- iii. Students with F1 Visas may come to the U.S. to live with U.S. citizen relatives while attending public schools. F1 students can attend a <u>secondary</u> school for a maximum period of twelve months and must pay the full unsubsidized per capita tuition.
- iv. The student may be sponsored by an individual or a business, so long as the tuition is not paid from public funds.

pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib) and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization. (b) A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

- v. School districts may not waive payments for F1 students.
- vi. The SEVIS requires public schools to trace F1 non-immigrants if they are accepted into their enrollment. Schools are not required to accept non-immigrant students (F1 status) and take on this responsibility.
- vii. More information available from the U.S. Dept. of State, available at:

http://travel.state.gov/visa/temp/types/types\_1269.html[

### 11 Visa:

The [1 visa is issued for secondary exchange programs.

<u>B1 and B2 Visas</u>: These visas are for temporary visitors for business or pleasure, respectively. <u>B1 and B2 visitors are prohibited from attending schools and school district cannot admit persons holding such Visas.</u>

### Visas and the Two Part Test:

In Appeal of Plata, 40 Educ. Dep't Rep 552 (2001), the Commissioner concluded that the State did not include any consideration of federal immigration status in Education Law §3202(1), for purposes of establishing a nonimmigrant child's residence in a school district, and a school district may not impose an irrebutable presumption that the holder of a nonimmigrant visa cannot be a resident of the school district. Instead, the child's status should be determined in accordance with the traditional two-part test for residency. The fact of the nonimmigrant visa and assurances made by the nonimmigrant at the time the visa was issued are factors that may be taken into consideration, together with other factors relevant to residency, in making the residency determination. The nonimmigrant should be afforded the opportunity to show that he or she currently meets the traditional two-part test of physical presence as an inhabitant within the district and an intent to reside in the district. In fact, the Commissioner found in that case that there was sufficient intent to remain despite a nonimmigrant visa.

### Incarcerated Students:

School districts are required, pursuant to Education Law and Commissioner's Regulations, to provide educational services to youths under the age of 21 who do not have a high school diploma and who are incarcerated in county correctional facilities or youth shelters located within the district. Educ. Law §3202(7); 8 NYCRR pt. 118.

- The instruction must be provided under a plan approved by the Commissioner and within the time limits of funds allocated by the Commissioner for such purposes. Districts may contract with a BOCES or another district for the provision of services. *Id.* pt. 118.
- The district where the child resided at the time he/she was taken into custody is responsible for the cost of the instructional services, although State Aid is available. Educ. Law §3202(7)(b); (35).

### **❖ DENYING ADMISSION:**

The Board of Education or its designee is responsible for issuing final residency determinations pursuant to 8 NYCRR §100.2 (y).

### > Decision by Someone Other than the Board or Its Designee:

A decision by a school official other than by the Board or its designee, that a child is not entitled to attend the schools of the district, shall include notification of the procedure to obtain review of the decision within the District.

### > Opportunity to Submit Information:

Prior to making a determination of entitlement to attend the schools of the district, the Board or its designee shall afford the child's parent/person in parental relation to the child or the child, as appropriate, the opportunity to submit information concerning the child's right to attend school in the District. See, Appeal of McSween, 42 Educ. Dep't Rep. 59 (2002).

There is no requirement for a formal evidentiary hearing or that the individual be represented by counsel. <u>See</u>, *e.g.*, <u>Appeal of Rosen</u>, 43 Educ. Dep't Rep. 87 (2003). However, a school board may choose to conduct a hearing to determine residency. <u>See</u>, *e.g.*, <u>Appeal of Johnson</u>, 45 Educ. Dep't Rep. 576 (2006). Moreover, school districts are bound by the procedures set forth within their policies and, thus, such policies must be reviewed and followed when a residency determination is conducted. <u>See</u>, *e.g.*, <u>Appeal of Dashe</u>, 31 Educ. Dep't Rep. 195, Decision No. 12,617 (1991).

### Written\_Notice

When the Board or its designee determines that a child is not entitled to attend
the District's schools because the child is not a resident of the District, the Board
or its designee shall, within two (2) business days, provide written notice of its
determination to the child's parent/person in parental relation to the child, or to
the child, as appropriate.

- Such written notice shall state:
  - ✓ That the child is not entitled to attend the District's schools:
  - ✓ The *specific* basis<sup>14</sup> for the determination that the child is not a resident of the school, including but not limited to a description of the documentary or other evidence upon which such determination is based;
  - ✓ The date as of which the child will be excluded from the District's schools;
    and
  - ✓ That the determination of the Board may be appealed to the Commissioner of Education in accordance with Education Law section 310, within 30 days of the date of the determination, and that the instructions, forms and procedures for taking such an appeal, including translated versions of such instructions, forms and procedures, may be obtained from the Office of Counsel at <a href="www.counsel.nysed.gov">www.counsel.nysed.gov</a>, or by mail addressed to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234 or by calling the Appeals Coordinator at 518-474-8927.¹¹⁵

### > Appeals:

### Exhaustion of Administrative Remedies:

 In Appeal of Moultrie, Decision No. 12,987, the Commissioner dismissed a petition due to the petitioner's failure to exhaust his administrative remedies. As a prerequisite to appeal pursuant to Education Law §310, a petitioner must exhaust administrative remedies when there is a legal mandate or applicable provision of law requiring exhaustion. Appeal of a Child with a Handicapping Condition, 32 Educ. Dep't Rep. 83 (1992); see also, Appeal of Elkins, 27 Educ. Dep't Rep. 99 (1987). Pursuant to the Commissioner's regulations, the board of education or its designee shall determine whether a child is entitled to attend the schools of the district. Any decision by a school official, other than the board or its designee, that the child is not entitled to attend the schools of the district, shall include notification of the procedures to obtain review of the decision within the school district. In Appeal of Moultrie, a letter from a supervisor clearly advised the petitioner of the District's procedures for review by the Superintendent and the Board of Education. The Commissioner explained that in light of the Commissioner's regulations, petitioner was required to avail himself of these procedures. Based on his failure to do so, the Commissioner was compelled to dismiss the appeal. Decision No. 12,987.

<sup>&</sup>lt;sup>14</sup> The requirement that the articulated basis be "specific" is new to the regulations.

<sup>&</sup>lt;sup>15</sup> The new regulations note the availability of translated instructions, forms and procedures.

- There is no mechanism in the law whereby decisions of the student residency officer are automatically permitted to be appealed to, *e.g.*, the superintendent or the board of education.
- A school board that designates the authority to make residency determinations has no obligation to hear appeals regarding the designee's determinations. <u>Appeal of Sobel</u>, 43 Educ. Dep't Rep. 93 (2003).

### Commissioner's Appeal:

Once all administrative remedies are exhausted, an individual may bring an appeal to the Commissioner of Education pursuant to Education Law §310. A person bringing an Education Law §310 appeal to the Commissioner may apply for a stay of the District's determination. If granted, the student is permitted to remain in school during the pendency of the appeal. Otherwise, they are not so permitted.

➢ A Commissioner's decision may be appealed to State Court via a CPLR Article 78 proceeding or a party may seek to "reopen" a Commissioner's decision if the decision was rendered under a misapprehension as to facts or there is new and material evidence which was not available at the time the original decision was made. The Commissioner may also reopen a prior decision where, in the Commissioner's judgment, the interests of justice will be served thereby. 8 NYCRR §276.8.

### > Reapplication:

Even if it is determined that an individual is not a district resident, the individual always has the right to reapply to the district for admission at any time should circumstances change. Appeal of C.F., 44 Educ. Dep't Rep. 109

### Burden of Proof Where there is Allegedly a Change in Residence:

The party alleging a change in residence bears the burden of proof. Appeal of Virginia L., 32 Educ. Dep't Rep. 132, Decision No. 12,782 (1992); Appeal of Linda Altman, 33 Educ. Dep't Rep. 654, Decision No. 13,183 (1992).

### > Standards:

 <u>Arbitrary and Capricious</u>: A residency determination will not be set aside unless it is arbitrary and capricious. <u>Appeal of Russell-Otero</u>, 49 Educ. Dep't Rep. 123, Decision No. 15,975 (2009). • Totality of the Circumstances: A residency determination should only be made after looking at the totality of circumstances. Appeal of Virginia L., 32 Educ. Dep't Rep. 132; See. e.g., Appeal of Newby, 42 Educ. Dep't Rep. 107, Decision No. 14,790 (2002), wherein the Commissioner stated "Although none of these factors in isolation is dispositive of residency... on the record of this appeal, I do not find respondent's determination arbitrary, capricious or unreasonable. Therefore, respondent's determination will not be set aside."

### Mistake:

In residency cases, a mistake by a school district in allowing non-resident students to attend its schools does not vest any legal right in such students to continued attendance on a tuition-free basis. <u>Appeal of Normandin</u>, 43 Educ. Dep't Rep. 153, Decision No. 14,950 (2003).

### > Charging for Non-Resident Students:

### Accepting Non-Residents on a Tuition-Paying Basis

- A school district may accept non-residents on a tuition-paying basis. Education Law §§1709(3), (13), 3202(2); 8 NYCRR pt. 174.
- School districts that admit non-resident students may not exclude students with disabilities or charge non-resident students with disabilities a higher tuition rate, as such actions would violate section 504 of the Rehabilitation Act and the ADA 29 U.S.C. §794 (1978); 42 U.S.C. §12132 (1990).

In <u>Appeal of Student with a Disability</u>, 46 Educ. Dep't Rep. 18, the Commissioner explained that even though the actual cost of educating a student with a disability may be higher than that of educating a non-disabled student, to charge a higher tuition for the former student would constitute discrimination solely on the basis of his or her disability (see Letter from the Assistant Secretary for Civil Rights, United States Dept. of Educ., Office for Civil Rights, (Aug. 10, 1994); <u>Appeal of Taylor</u>, 43 Educ. Dep't Rep. 1, Decision No. 14,897 (2004)).

### Allowing Non Resident Students to Attend on a Tuition-Free Basis

A school district may adopt a policy which allows children of a non-resident, who is a teacher within the district, to attend the district's schools on a tuition-free basis. <u>Board of Educ. v New Paltz United Teachers</u>, 57 A.D.2d 583 (2d Dep't. 1977), <u>aff'd 44 N.Y.2d 890 (1978)</u>.

 A school district may adopt a policy which permits students who move out of the district during their senior year to complete their senior year in the district on a tuition-free basis so long as there is a rational basis for the policy and it is not arbitrary, capricious or unreasonable. <u>Appeal of</u> <u>Rvan</u>, 20 Educ. Dep't Rep. 545, Decision No. 10,513 (1981).

### Special Education Services to Parentally Placed Students

- Education Law §3602-c addresses the provision of special education to students with disabilities enrolled in nonpublic elementary and secondary schools by their parents. Pursuant to that law, students with disabilities who have been unilaterally placed in nonpublic schools are entitled to receive special education services through an individualized education services program (IESP) from the school district in which the private school is located (the DOL). The DOL may then recover its costs from the District of Residence (DOR).
- Disputes over residency claims between the DOR and DOL are governed by 8 NYCRR §177.2 Pursuant to that regulation, if the DOR disputes that a student is a legal resident, the school must make a residency determination in accordance with 8 NYCRR §100.2 (y) and, in doing so, provide the district of location with the opportunity to submit evidence of the student's residency and consider that evidence in making its residency determination. If the DOR determines that the student is not a resident it shall, within two business days, provide notice of same to the DOL and the DOL may seek review of that determination in accordance with 8 NYCRR §100.2(y) and appeal the determination to the Commissioner via an Education Law §310 appeal.

### > Recovery of Tuition:

A school district may seek payment for tuition from a nonresident student enrolled in its schools under false pretenses and such an action may be based on Education Law §3202 or on a cause of action for fraud. Board of Educ. v. Gaffney, 233 A.D.2d 357 (2d Dep't 1996) (citing Board of Educ. v. Marsiglia, 182 A.D.2d 662 (2d Dep't 1992)).

### **❖ HOMELESS STUDENTS AND UNACCOMPANIED YOUTH**<sup>16</sup>:

### Unaccompanied Youth (applies to foreign and domestic youth):

- An unaccompanied youth is a child who is both a homeless child and not in the physical custody of a parent or legal guardian. The term does not include a child living with someone other than a parent or guardian solely to take advantage of the District's schools. 8 NYCRR §100.2(x)(1)(vi); Appeal of D.R., 48 Educ. Dep't Rep. 60 (2008).
- Examples of unaccompanied youth may include: Students living in runaway shelters, abandoned buildings, cars, on the streets, or in other inadequate housing; students who have been denied housing by their families; and unwed mothers who live in a home for unwed mothers and have no other housing available.
- The term "unaccompanied youth" does not automatically include a child who leaves his/her parents' home. In <u>Appeal of G.D. and T.D.</u>, 45 Educ. Dep't Rep. 191 (2005).
- The District's local liaison should follow the same procedures for homeless children (see below) when placing unaccompanied youth. 8 NYCRR §100.2 (x)(7)(iii).

### Homeless Youth (Generally)

- Determinations must be made in accordance with Commissioner's Regulation 100.2 (x).<sup>17</sup>
- Homelessness is governed by the McKinney-Vento Act and the Commissioner's Regulation, 8 NYCRR §100.2(x).

<u>Definition</u>: A homeless child is a child or youth who does not have a fixed, regular and adequate nighttime residence or whose primary nighttime location is in a public or private shelter designed to provide temporary living accommodations, or a place not designed for, or ordinarily used as,

<sup>&</sup>lt;sup>16</sup> For additional information regarding the education of homeless students see <a href="https://www.nysteachs.org">www.nysteachs.org</a>; and <a href="https://www.nysteachs.org">www.nysteachs.org</a>; and <a href="https://www.nysteachs.org/media/INF-SED-REV-OA Jun04.doc">www.nysteachs.org/media/INF-SED-REV-OA Jun04.doc</a>.

<sup>&</sup>lt;sup>17</sup> Districts that receive federal funding as part of the State's consolidated application are required to administer the McKinney-Vento Residency/Enrollment Questionnaire and include that Questionnaire in the District's registration packet. SED recommends placing the Questionnaire in the registration packet as the first page, to eliminate enrollment delays. Response to Comments, *supra* n. 12 at cmt. 17.

regular sleeping accommodations for human beings. 8 NYCRR §100.2(x)(1)(iii). This definition includes children and youth who are:

- ✓ Sharing the housing of another person due to loss of housing, economic hardship, or a similar reason; Id. at (a)(1)<sup>18</sup>
- ✓ Living in motels, hotels, trailer parks or camping grounds due to lack of alternative adequate accommodations; *Id.* at (a)(2)
- ✓ Living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations or similar settings; Id. at (b)(2)
- ✓ Living in emergency or transitional shelters. *Id.* at (a)(3)
- ✓ Abandoned in hospitals; Id. at (a)(4)
- ✓ A migratory child who qualifies as homeless, as defined by the ESEA, as modified by ESSA. *Id.* at (a)(5).<sup>19</sup>

### • Foster Care:

Children who are in foster care, or who are awaiting foster care placement, do not fall under the definition of a homeless child. 8 NYCRR §100.2(x)(1)(iii)(c)

### • Subsidized Apartments:

Children who live with a parent in an apartment subsidized by a federal program that provides rental assistance grants and does not require that grant recipients leave their home when the grant expires have an adequate fixed regular nighttime residence. Appeal of D.R., 43 Educ. Dep't Rep. 133, Decision No. 14,944 (2003).

### Month-to-Month Rental:

<sup>18</sup> Districts should be careful to consider whether the sharing of housing is truly due to economic hardship or other necessity. *See, e.g.,* Appeal of E.M.E., Decision No. 16, 538 (2013) (no economic hardship where parent lived in sister's home in order to pay son's private college tuition on her annual salary which had recently been reduced from \$180,000 to \$140,000); Appeal of A.N.Z., Decision No. 16,537 (2013); Appeal of D.S., Decision No. 16,503 (2013); Appeal of K.J., Decision No. 16,536 (2013); Appeal of C.D., Decision No. 16,402 (2012); Appeal of a Student with a Disability, Decision No. 16,557 (2013) (mere fact that a student may choose to leave one parent's house and live with another does not render that student homeless).

<sup>&</sup>lt;sup>19</sup> Students displaced by extreme weather events may be considered homeless, depending on the circumstances. However, care must be taken to ensure that the living arrangements are truly temporary or transitional. See SED Memo from Chuck Szuberla on "Extreme Weather Events: Hurricane Sandy/Nor'easter and Transportation for Nonpublic, Homeless and Charter School Students " (Nov. 21, 2012) available at <a href="http://www.p12.nysed.gov/docs/extreme-weather-events.pdf">http://www.p12.nysed.gov/docs/extreme-weather-events.pdf</a>. See also, e.g., Appeal of T.B., Decision No. 16, 521 (2013); Appeal of G.S. and M.S., Decision No. 16,388 (2012).

Rental housing on a month-to-month basis does not automatically qualify the housing as temporary or transitional, and the renter homeless, absent evidence of a need to vacate such premises. Appeal of M.W., 46 Educ. Dep't Rep. 151, Decision No. 15,471 (2006).

### • Eviction:

The mere expectation of eviction does not automatically make the housing temporary or transitional. <u>Appeal of S.B.</u>, 48 Educ. Dep't Rep. 36, Decision No. 15,786 (2008).

### Trailer Parks and Camping Areas:

Students living with their families in trailer parks and camping areas should only be considered homeless if they lack adequate living accommodations. Those living in trailer parks and camping areas designed for long-term stays in fixed, regular and adequate accommodations should not be considered homeless.

### Choice of district:

The designator shall have the right to designate one of the following as the school district within which a homeless child shall be entitled to attend upon instruction:

- the school district of current location;
- the school district of origin; or
- a school district participating in a regional placement plan. 8
   NYCRR 100.2(x)(2)(i)(a)-(c).

### Choice of school:

The designator shall also have the right designate one of the following as the school where a homeless child seeks to attend for instruction:

- The school of origin; or
- Any school that nonhomeless children and youth who live in the attendance area in which the child or youth is actually living are eligible to attend, including a preschool.

### > Enrollment:

 Homeless children must be immediately enrolled in the school selected, regardless of whether the child lacks records normally required for enrollment, such as previous academic records, medical records, proof of residency or other documentation. 8 NYCRR §100.2(x)(4)(ii). (See also supra. n. 1.)

- The designation of the homeless student's placement shall be made on forms specified by the commissioner, and shall include the name of the child, the name of the parent or person in parental relation to the child, the name and location of the temporary housing arrangement, the name of the school district of origin, the name of the school district where the child's records are located, the complete address where the family was located at the time circumstances arose which caused such child to become homeless and any other information required by the commissioner. Educ. Law § 3209(2)(d).
- All school districts, temporary housing facilities operated or approved by a local social services district, and residential facilities for runaway and homeless youth shall make such forms available. Id.
- Where the homeless child is located in a temporary housing facility operated or approved by a local social services district, or a residential facility for runaway and homeless youth, the director of the facility or a person designated by the social services district, shall, within two business days, assist the designator in completing the designation forms and enrolling the homeless child in the designated school district. Id.
- Upon receipt of the designation form, the designated school district shall immediately:
  - ✓ Review the form to assure completeness;
  - ✓ admit the homeless child<sup>20</sup>:
  - ✓ Determine whether the designation made by the designator is "consistent with the best interests" of the homeless child or youth using the standards set forth in Regulation §100.2(x)(4).
  - ✓ treat the homeless child as a resident for all purposes;
  - ✓ make a written request to the school district where the child's records are located for a copy of such records;
  - ✓ if the student needs to obtain immunizations or medical records, immediately refer the parent or guardian to the local educational agency liaison who will assist in obtaining such immunizations or records; 8 NYCRR §100.2(x)(4)(v);
  - ✓ arrange for transportation and free meals; and
  - ✓ forward the designation form to the school district of origin.

<sup>&</sup>lt;sup>20</sup> "Districts must ensure that homeless students "are not segregated in a separate school or program within a school based on their status as homeless." NYSED's PowerPoint, *supra*. n. 7, at p.7.

 Within five days of receipt of a request for records, the school district shall forward, in a manner consistent with state and federal law, a complete copy of the homeless child's records including, but not limited to, proof of age, academic records, evaluations, immunization records, and guardianship papers, if applicable. *Id.* at (2)(f).

### Dispute Resolution:

- A school district must establish procedures, in accordance with 42 U.S.C. section 11432(g)(3)(E), for the prompt resolution of disputes regarding school selection or enrollment of a homeless child or youth including, but not limited to, disputes regarding transportation and/or a child's or youth's status as a homeless child or unaccompanied youth. 8 NYCRR §100.2(x)(7)(ii)(a).
- The school district must provide a written explanation, including a statement regarding the right to appeal pursuant to 42 U.S.C. section 11432(g)(3)(E)(ii), the name, post office address and telephone number of the local educational agency liaison and the form petition for commencing an appeal to the commissioner pursuant to Education Law, section 310 of a final determination regarding enrollment, school selection and/or transportation, to the homeless child's or youth's parent or guardian, if the school district declines to either enroll and/or transport such child or youth to the school of origin or a school requested by the parent or guardian. *Id.* at (b).<sup>21</sup>
- The district must enroll homeless students in the school requested by the parent while resolving any dispute regarding school section or enrollment. 42 USC §11432(g)(3)(E).

### Local educational agency liaison.

### Each school district shall:

- designate an appropriate staff person, who may also be a coordinator for other Federal programs, as a local educational agency liaison for homeless children and youth to carry out the following duties described in 42 U.S.C. §11432(g)(6); 8 NYCRR §100.2(x)(7)(iii)(a).
- in the case of an unaccompanied youth, ensure that the local educational agency liaison assists in placement or enrollment

<sup>&</sup>lt;sup>21</sup> Sample forms for filing an Appeal to the Commissioner Involving Homeless Children and Youth are available at: <a href="http://www.counsel.nvsed.gov/appeals/homelessForms">http://www.counsel.nvsed.gov/appeals/homelessForms</a>.

decisions, including coordination with the committee on special education for students with disabilities pursuant to section 200.4, considers the views of such unaccompanied youth, and provides notice to such youth of the right to appeal pursuant to 42 U.S.C. section 11432(g)(3)(E)(ii) and provides the form petition for commencing an appeal to the Commissioner pursuant to Education Law, section 310 of a final determination regarding enrollment, school selection and/or transportation; *Id.* at (iii)(b).

- require the local educational agency liaison to assist the homeless child's or youth's parent or guardian or the unaccompanied youth in commencing an appeal to the commissioner pursuant to Education Law, section 310 of a final determination regarding enrollment, school selection and/or transportation by: 8 NYCRR §100.2(x)(7)(iii)(c)(1)-(8)
  - providing the parent or guardian or unaccompanied youth with the form petition;
  - assisting the parent or guardian or unaccompanied youth in completing the form petition;
  - arranging for the copying of the form petition and supporting documents for the parent or guardian or unaccompanied youth, without cost to the parent or guardian or unaccompanied youth;
  - accepting service of the form petition and supporting papers on behalf of any school district employee or officer named as a party or the school district if it is named as a party or arranging for service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf the school district;
  - providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgment verifying that the LEA liaison has received the form petition and supporting documents and will either accept service of these documents on behalf of the school district employee or officer or school district or effect service by mail by mailing the form petition and supporting documents to any school district employee or officer named as a party and, if the school district is named as a party, to a person in the office of superintendent who has been designated by the board of education to accept service on behalf of the school district;

- transmitting on behalf of the parent or guardian or unaccompanied youth, within five days after the service of, the form petition or any pleading or paper to the Office of Counsel, Education Department, State Education Building, Albany, NY 12234;
- providing the parent or guardian or unaccompanied youth with a signed and dated acknowledgement verifying that the LEA liaison has received the form petition and supporting documents and will transmit these documents on behalf of the parent, guardian or unaccompanied youth to the Office of Counsel, Education Department, State Education Building, Albany, NY 12234; and
- accepting service of any subsequent pleadings or papers, including any correspondence related to the appeal, if the parent or guardian or unaccompanied youth so elects related to the appeal on behalf of the parent or guardian or unaccompanied youth and making such correspondence available to the parent or guardian or unaccompanied youth.

### **Best Interests Determination:**

In determining a homeless child's best interest, a LEA shall:

- presume that keeping the homeless child or youth in the school of origin
  is in the child's or youth's best interest, except when doing so is contrary
  to the request of the child's parent or guardian, or in the case of an
  unaccompanied youth, the youth;
- consider student-centered factors, including but not limited to factors related to the impact of mobility on achievement, education, the health and safety of the homeless child, giving priority to the request of the child's or youth's parent or guardian or the youth in the case of an unaccompanied youth;
- if after considering student-centered factors and conducting a best interest school placement determination, the LEA determines that it is not in the homeless child's best interest to attend the school of origin or the school designated by the designator, the LEA must provide a written explanation of the reasons for its determination, in a manner and form understandable to such parent, guardian, or unaccompanied youth. The information must also include information regarding the right to a timely appeal as set forth above.

 The homeless child or youth must be enrolled in the school in which enrollment is sought by the designator during the pendency of all available appeals.

### Transportation of Homeless Students:

- A social services district must provide for the transportation of each homeless child who is eligible for benefits pursuant to Social Services Law §350-j and are placed in temporary housing arrangements outside their designated school district of attendance. Educ. Law §3209(4)(a).
- The state Office of Children and Family Services must provide transportation for homeless students in a residential program for runaway and homeless youth located outside the designated district. Educ. Law §3209 *Id.* at (4)(b).
- The social services district or Office of Children and Family Services may contract with a school district or BOCES to provide such transportation services. Educ. Law §3209 *ld.* at (4)(a)-(b).
- The designated school district must provide transportation services to homeless students who are not eligible for transportation from the social services district of the Office of Children and Family Services. Educ. Law §3209(4)(c)-(e).
- Where a homeless child designates the school district of current location as the district the child will attend, such school district shall provide transportation to such child on the same basis as a resident student. Educ. Law §3209(4)(d).
- <u>Mile Limit</u>: The transportation provided by a designated school district shall not be in excess of fifty miles each way except where the commissioner certifies that transportation in excess of fifty miles is in the best interest of the child. Educ. Law §3209(4)(c).
- <u>State Aid</u>: A school district may receive state aid to offset expenditures incurred by the district for the transportation of homeless students under certain circumstances. Educ. Law §3209(4)(c).





### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

### "Drilling" Into Construction Issues in the School Setting

## Issues in the School Setting "Drilling" into Construction

### -2018 Annual School Law Conference-December 7, 2018

Presented by:

Mary Anne Sadowski, Esq. Carrie Anne Tondo, Esq.

150 Motor Parkway, Suite 400 Hauppauge, New York 11788

550 Mamaroneck Avenue, Suite 209 Harrison, New York 10528

(631) 261-8834

msadowski@ingermansmith.com ctondo@ingermansmith.com

INGERMAN SMITH LLP

Christopher Mestecky, Esq. Christopher Shishko, Esq.

77 Conklin Street Farmingdale, New York 11735

24 Century Hill Drive, Suite 101 Latham, New York 1211

(516) 694-3000

cshishko@guerciolaw.com



GUERCIO &
GUERCIO, LLP

# INTRODUCTION

- **Embarking on a Construction Project**
- Design of the Project
- Bidding the Project
- Building the Project
- Post-Construction

# **Embarking on a Construction Project**

- Determining Project Scope
- Funding Issues
- Bond Referendum, Capital Funds or Capital Reserve?
- Engaging the Services of a Design Professional
- Deciding Whether to Utilize the Services of a Construction Manager
- Compliance with SEQRA
- Engaging the services of an environmental consultant

## Designing the Project

- Submission of plans and specifications to the New York State Education Department
- Phases of Design
- Inclusion of contract documents in plans and specifications
- The "pre-emptive approach"
- Key provisions to include in contract documents

### **Design of the Project**

Contract Provisions
-The Preemptive Approach-

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- The use of AIA documents
- General Conditions
- Owner's Right to Carry Out the Work
- Termination
- Bonding Requirements
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## Designing the Project

- Multiple prime or single prime contractor project?
- Prevailing wage issues
- Requiring the submission of qualifications with bid
- Alternates/allowances
- Compliance with SED filing requirements: What to do about the delay in approvals in Facilities Planning
- Plan well in advance (Old Army adage: "PPPPPPP")
- Third party review

## Designing the Project

# Developing the Specifications for the Project

- Parties wishing to bid on a contract must base their bids on the bid documents
- These documents include, not only details about the job itself, such as required supplies, measure of performance, plans and drawings, contract terms and time frame, but also requirements for the bidders, including bonds, financial information, identification of subcontractors and suppliers, experience questionnaires and bid security
- to support or defend against a claim The specifications form the basis of the contract and may later be used
- Failure to comply with the requirements of the specifications may result in rejection of the bid
- Once a public bid has been advertised, the bid specifications can be modified only by notifying all bidders of the change prior to receipt of

## **Bidding the Project**

- Legal requirements for competitive bidding
- Competitive bidding is required by statute on the majority of public works contracts
- N.Y. Gen. Municipal Law § 103 provides that any public works contract, let by a municipality or division of a municipality, which exceeds \$35,000, must be awarded to the lowest responsible bidder furnishing the required security following advertisement for sealed bids
- Generally, to be awarded a public contract, a bid must be (1) low; (2) responsible; and (3) responsive
- A public contract governed by a competitive bidding statute must be awarded to the lowest responsible bidder furnishing the required security, not necessarily the lowest monetary bidder
- This requirement helps ensure that contracts are awarded only to contractors the public owner believes to be capable of satisfactorily performing the work within the specified time for the agreed-upon price

## **Bidding the Project**

- Information given to bidders
- Opening, review and award of Bids
- Submission of complete bid by bidder
- Responsiveness vs. responsibility
- Technical v. material variances
- Bidder qualifications
- Due process requirements

## **Bidding the Project**

# Opening, review and award of Bids

- Negotiation and modification of bid
- Review of bonding requirements and approval of bonds
- Compliance with insurance requirements
- Legal challenges to awards

# **Building the Project**

### Payment to Contractors

- Certified Payroll Requirements
- Labor Law section 220(3-a)
- Waiver of Liens

### **Public Improvement Liens**

- Maintaining a lien log
- Notice to Contractors
- Contractual Provisions
- Withholding requirement

### Changes in the Work

- Change Order Process
- Approval of Change Orders
- Allowances
- Owner Requests, Changes in the Field, Unforeseen Conditions

# Getting a non-performing Contractor to perform

## Building the Project : Change Orders

### Change Orders:

- prepared, in existence at the time of making of the contract, and with reference to which both parties acted" or "something necessarily required in the performance of the contract which could not be anticipated" Extra work or extras have been defined as work which "was not embraced within the plans and specifications originally
- Agreement by all parties required
- Calculating the additional cost
- SED approval with required certifications (including deduct change orders)
- Board delegation of authorization for changes in the work

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK
Office of Fradisc Purring, 59 Westington America, Roses 1000 Education Budging Armac, Aburry, NY 12224
Tel. (1919)-114-3000
T

### CHANGE ORDER CERTIFICATION Must be ethicked to back of Change Order

Instructions: T	This CERTIFICATION is required for all change orders submitted to SED Change Fill out all three parts completely.	Change Order Number:
Part One - General Information	rnation	i
	Provide separate Change Orders for each Project Number	
SED Project Number		
	District DEC Codes Region of the Code Code Code Code Code Code Code Cod	
District & Building Name		
Type of Project	Reconstruction /Alleration 🔲 Addition & Alteration 🔲 New Balatrop 📗	Other
Project Description		
Architect / Engineer firm		
	filmé	4007844
Contact Person		
	name caso	pen-e s seams provid
Construction Manager firm	m	
	FB040	address
ContactPerson		
	name date	phone number & e-med
District Contact Person		
	rame & little	phone number & e-mad

### Part Two

Provide the following information for each individual item in the change order:
(Number each item if there is more than one and provide additional sheets as necessary.)

- Requested By (Who initiated the change request)
  Relationship to Project Scope (How is this change related to the original project scope)
  Basis of Need (Describe why the change is needed)
  Description of Work (Provide a detailed description of the work or services provided in the change order. Provide text, a drawing or both as necessary to demonstrate code compliance and the individual cost of each item.)

### CHANGE ORDER CERTIFICATION

Part Three

### The scope of the change order must relate to the project scope previously Change order requirements: approved.

- Dollar amounts applied from allowances toward costs associated with the
- If the cost of this change order is not within the approved amount as currently established on the SA-4, please provide a Form FP-FI, Request for Revision of changes must be provided.

Financial Information, with documentation showing the additional authorization of

of education, the architect/engineer, and the contractor Each change order shall be signed by the president of the board

The following statements are true and correct to the best of my knowledge and belief: Certification of the Superintendent of Schools (District Superintendent if a BOCES project)

The revised total cost is within the authorized appropriation for this project.

original contract documents, the school district's attorney has been contacted to assure conformance with the Opinion of the State Comptroller No. 60-505 \ Where any work of this change order requires a type or kind of work that is not included in the

Signature and printed name of the School Superintendent or Debics Superintendent if a BOCES project

### Certification of the Architect or Engineer

The following statements are true and correct to the best of my knowledge and belief:

approved contract documents. \ Work required by this change order is in accordance with applicable sections of the

\ Work required by this change order is in accordance with applicable provisions of the NYS Any plan, sketch, or attachment referenced in this change order is included herein.

Uniform Fire Prevention and Building Code, State Education Department's building standards,

licensed by the State of New York. \ Work required by this change order was designed by an architect or engineer who is currently and NYS Department of Labor's Code Rule 56.

designed by an architect or engineer who is currently licensed by the State of New York and who is appropriately certified as an asbestos designer by the NYS Department of Labor at the time he/she designed the asbestos- related project. Work required by this change order that involves asbestos-containing building material (ACBM) was

Architectural I Engineering Firm Name

Signature and justiced comes of the Architect or Enginee

### Construction Change Directives and **Building the Project:** Allowances

# **Construction Change Directives**

- Requires only agreement by School District and architect/engineer
- "Do the work, fight about whether additional money due later"

### Use of Allowances

### Building the Project: Change Orders and Liability

Who is liable for the change?

- Contractor?
- Architect/engineer?
- Construction Manager?
- Owner?

## Building the Project: How to address Non-Performance Issues

- Notice of deficiency vs. termination
- Required notice of deficiencies in the work
- Role of the School District, Architect and Construction Manager
- Getting the Contractor to perform
- Set up meetings
- Protecting the District's rights
- Documentation

### Contract balance

- Are there enough funds available to complete the project?
- Reconcile project funds

# Non-Performance by the Contractor

- Takeover of the Work without Terminating the Contractor
- Proper Notice to the Contractor
- Follow-up with Notice Informing Contractor that the Work has been Carried out by the Owner
- Engaging the New Contractor
- To bid or not to bid...
- Back-charging the Contractor

# Non-Performance by Contractor

- Termination
- Read the Performance Bond Carefully
- Pre-termination Conference with the Surety
- Notice to Contractor and Surety
- Termination Resolution
- Take Over Agreement vs. Tender Agreement
- Contract Balance

Accounting of Project Funds

- Cost for Incomplete/Deficient Work
- Public Improvement Liens
- Department of Labor Withholdings
- Liquidated Damages
- Professional Service costs
- Other Costs

# **Building the Project: Post Construction Issues**

Completion of required paperwork to insure the receipt of building aid

### AHERA

- **Submission of Closeout Documents**
- Warranties/Guarantees
- Training
- Operations/Maintenance Manuals

### -Discussion -





### 2018 School Law Conference December 7, 2018 Touro Law Center 225 Eastview Drive, Central Islip

### Drugs and Alcohol in the Workplace

### DRUGS AND ALCOHOL IN THE WORKPLACE

### Presented by:

Joseph Lilly, Esq., Frazer & Feldman, LLP John P. Sheahan, Esq., Guercio & Guercio, LLP Michael G. Vigliotta, Esq., The Law Offices of Thomas M. Volz, PLLC

Moderator:

Douglas E. Libby, Esq., Lamb and Barnosky, LLP

Annual School Law Conference
December 7, 2018
Nassau and Suffolk Academics of Law
Education Law Committees
of the Suffolk and Nassau County Bar Associations

### I. Drug and Alcohol Testing of Public Employees

### A. Reasonable Suspicion Standard

Random drug and/or alcohol testing of employees is governed by the Fourth Amendment of the United States Constitution, which prohibits unreasonable searches and seizures. See Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617–18 (1989) (Collection and testing of urine intrudes upon reasonable expectations of privacy and is deemed a search under the Fourth Amendment.). Absent an overriding governmental interest that presents "special needs" (see: infra), a public employer requires reasonable suspicion of impairment to compel an employee to take a drug or alcohol test. Id.

The Court of Appeals has held that reasonable suspicion is required in order for a school district to compel an employee to submit to a drug test. Patchogue-Medford Congress of Teachers v. Bd. of Educ., 70 N.Y.2d 57 (1987) (establishing the reasonable standard under State Constitution). As the Court recognized, a school district has "a legitimate interest in seeing that its employees are physically fit and that their performance is not impaired by illegal drug use...." Id. at 69-70. Accordingly, if a school district has reasonable suspicion that the particular employees are impaired by drugs or alcohol, the school district may compel the employees to submit to a drug test. See id.

Reasonable suspicion has been defined as "that quantum of evidence sufficient to support a belief that the individual used drugs." Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264, 1272 (S.D.N.Y. 1989) (citing Terry v. Ohio, 392 U.S. 1 (1968)). The Second Circuit has explained that a search is unreasonable "when an employer's suspicion of wrongdoing is not supported by objective facts and those rational inferences that may be drawn from them." See Coppinger v. Metro-North Commuter Railroad, 861 F.2d 33, 35 (2d Cir. 1988).

In Coppinger, supra, a public employee was discharged after the employer discovered liquor bottles in employees' lockers, saw the employee, with others, sitting at a table in the locker room with cups, thereafter ordered blood and urinalysis tests to determine whether the employees were using alcohol, and discovered that the employee had been using drugs. See id. at 34. Remanding for a determination on the merits, the Second Circuit noted:

In his complaint appellant asserts that, prior to the time he was required to provide blood and urine samples, Metro-North had no "reasonable or particularized" suspicion that he had violated the company's anti-drug regulations. It is undisputed that a supervisor found plaintiff sitting at a table in a locker room with several other employees and that there were cups on the table, which defendant further claims contained alcoholic beverages. Defendant also asserts that plaintiff exhibited signs of intoxication, which plaintiff denies. If defendant establishes these facts in the future, the search

would appear to have been justifiable. If not, plaintiff could reasonably argue that it was unlawful.

Id. at 36-37 (citing Ybarra v. Illinois, 444 U.S. 85 (1979)).

The Court of Appeals found that the standard was met where, in addition to an anonymous letter stating that the employee was abusing alcohol, the employee had physical manifestations of substance abuse the day the employee was tested, a long record of excessive absences, prior substance abuse problems, and a reputation for showing up at work under the influence. See Wilson v. City of White Plains, 95 N.Y.2d 783, 785 (2000).

### B. "Special Needs" Exception

In Skinner, the Supreme Court found the government interest in regulating railroad safety presented "special needs" that overrode employees' interest to be free from a search in the form of a drug test without reasonable suspicion of impairment. The Court found the following factors relevant: (1) the discretion of the employer under regulations; (2) the government's safety interests; (3) the diminished expectation of privacy of employees in the industry. Id. at 634. In Von Raab, the Supreme Court found "special governmental needs" overrode employee privacy expectations in the context of employees in the Customs Service that carry firearms, are involved in drug interdiction, and/or handle classified material. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 660–61, 109 S. Ct. 1384, 1388, 103 L. Ed. 2d 685 (1989).

Courts have applied the "special needs" exception to the "reasonable suspicion" rule, which permits a public employer to unilaterally impose random drug and/or alcohol testing of its employees performing "safety-sensitive" functions. See Skinner, 489 U.S. at 628; see also Laverpool v. N.Y. City Transit Auth., 835 F. Supp. 1440, 1454 (E.D.N.Y. 1993), aff'd, 41 F.3d 1501 (2d Cir. 1994).

The Supreme Court has enunciated the standard that public employees who "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" such that they "can cause great human loss before any signs of impairment become noticeable to supervisors or others" hold positions that contain a safety-sensitive function. *Skinner*, *supra*. at 628 (giving examples of employees "who have routine access to dangerous nuclear power facilities" and those who operate and/or maintain mass transportation, such as railroads).

Types of Positions found to include safety-sensitive functions:

- Heavy equipment operators See generally, AFSCME, 717 F.3d at 878; see also Middlebrooks v. Wayne County, 521 N.W.2d 774 (Mich. 1994).
- Customs employees carrying firearms/involved in drug interdiction Von Raab, 489 U.S. 656 (1989).

- Drivers with Commercial Licenses Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007); Int'l Bhd. Of Teamsters v. Dep't of Transp., 932 F.2d 1292 (9th Cir. 1991); Keaveney v. Town of Brookline, 937 F. Regular drivers See e.g., Boesche v. Raleigh-Durham Airport Auth., 432 S.E.2d 137, 141 (1993); but see Bannister v. Board of County Comm'rs of Leavenworth County, Kans., 829 F.Supp. 1249, 1253 (D. Kan. 1993) (administrative employee who only occasionally drove could not be tested); AFL-CIO v. Sullivan, 744 F.Supp. 294, 301 (D.D.C. 1990) (employees who drove only infrequently could not be tested).
- Mechanics English v. Talladega County Bd. of Educ., 938 F. Supp. 775 (N.D. Ala. 1996) (school bus mechanic). Supp. 975 (D. Mass. 1996).
- Teachers Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 368-69 (6th Cir. 1998).
- Custodian Aubrey v. Sch. Bd. of Lafayette Parish, 148 F.3d 559, 561, 564-65 (5th Cir. 1998).
- Pre-employment drug testing for Substitute Teacher Friedenberg v. School Board of Palm Beach County, 257 F.Supp.3d 1295 (2017)
- Public Works Crew Leader *Bryant v. City of Monroe*, 593 F. App'x 291, 297 (5th Cir. 2014) (job duties included driving of a truck and other City vehicles, transporting coworkers, operating heavy grounds-keeping equipment, handling pesticides, and working in high-risk areas such as highway medians.

#### Positions found not to contain safety-sensitive functions:

- Maintenance custodian In Bolden v. Se. Pennsylvania Transp. Auth., 953 F.2d 807, 823 (3d Cir. 1991), cert. den'd 504 U.S. 943 (1992).
- Candidates for state office *Chandler v. Miller*, 520 U.S. 305, 305, 117 S. Ct. 1295, 1296–97, 137 L. Ed. 2d 513 (1997).
- Teachers Am. Fed'n of Teachers-W. Virginia, AFL-CIO v. Kanawha Cty. Bd. of Educ., 592 F. Supp. 2d 883, 886 (S.D.W. Va. 2009).
- Solid Waste Coordinator Voss v. City of Key W., 24 F. Supp. 3d 1219, 1227 (S.D. Fla. 2014).
- Library Page- Lanier v. City of Woodburn, 518 F.3d 1147 (2008).

#### C. Education Law Section 913

Section 913 of the Education Law allows the Board to order an employee to submit to a medical examination by a physician or other health care provider of his/her choice or the director of school health services in order to determine his/her physical or mental capacity to perform his/her duties. See Educ. Law § 913. In Patchogue-Medford Congress of Teachers, supra, the Court of Appeals stated that a school district may require an employee to "submit" to a urinalysis test for drug abuse where the reasonable suspicion standard is met, noting the school district's

interest in seeing that its employees are fit and that drug abuse does not impair their ability to deal with students, and further noting that teachers are generally required to submit to an examination to determine their physical and mental fitness to perform their duties under Education Law § 913. 70 N.Y.2d at 69. Given the authority of a school board to direct a medical examination under Section 913, the Court noted:

[Teachers] therefore have a diminished expectation of privacy with respect to State inquiries into their physical fitness to perform as teachers, and it is not unreasonable to require teachers to submit to further testing when school authorities have reason to suspect that they are currently unfit for teaching duties (*Id.*).

While Education Law § 913 does not specifically authorize drug-testing and refers only to medical examinations, there is legal support for having drug-testing done as part of a Section 913 medical examination to examine an employee's fitness to perform his/her duties.

On August 24, 2018, Governor Cuomo signed into law a bill passed by the State Legislature to enhance the State's requirements relating to pre-employment and random drug and alcohol testing of school bus drivers and the prohibition on drug and alcohol use prior to operating a school bus. (Ch. 207 of the Laws of 2018). The new legislation takes effect 120 days from enactment, or as of December 24, 2018.

# D. §509-I of the Vehicle and Traffic

Under current Federal and State laws, school bus drivers are subject to alcohol and drug testing in certain circumstances, including pre-employment and random drug and alcohol testing post-employment. See: 49 C.F.R. §382.301(4) (must test pre-employment); 49 C.F.R. §382.303(a)(1) (must test after a bus accident with a fatality); 49 C.F.R. '382.307(a), (b) (must test if there is reasonable suspicion), 49 C.F.R. §382.305 (must have some random testing as mandated by regulation). However, the current law does not require testing for drivers of buses that carry less than 16 passengers. The newly enacted legislation amends §509-g of the Vehicle and Traffic Law to require that *all* drivers are subject to pre-employment and random drug and alcohol testing, in accordance with the requirements prescribed in Federal regulations, regardless of the school bus size and commercial driver's license endorsement.

In addition, the newly enacted legislation amends §509-I of the Vehicle and Traffic Law to increase the prohibited time for the consumption of a controlled substance or alcohol prior to operating a school bus from six to eight hours. The legislation also amends §3623-a(6) of the Education Law to ensure that costs relating to pre-employment and random drug and alcohol testing are eligible for State Transportation Aid.

### E. Drug-Free Workplace Act of 1988

Entities receiving grants from the federal government are covered by the Drug-Free Workplace Act of 1988. Specifically, employees identified as a direct or indirect charge on the grant are covered. Covered entities must: (1) Publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy; (2) Establish a drug-free awareness program to make employees aware of a) the dangers of drug abuse in the workplace; b) the policy of maintaining a drug-free workplace; c) any available drug counseling, rehabilitation, and employee assistance programs; and d) the penalties that may be imposed upon employees for drug abuse violations; (3) Notify employees that as a condition of employment on a Federal contract or grant, the employee must a) abide by the terms of the policy statement; and b) notify the employer, within five (5) calendar days, if he or she is convicted of a criminal drug violation in the workplace; (4) Notify the granting agency within ten (10) days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace; (5) Impose a penalty on—or require satisfactory participation in a drug abuse assistance or rehabilitation program by—any employee who is convicted of a reportable workplace drug conviction; and (6) Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act. (https://webapps.dol.gov/elaws/asp/drugfree/require.htm, last visited 11/27/18).

# II. Duty to Negotiate Drug and Alcohol Testing

## A. Mandatory Subject of Bargaining

In Arlington Central School District, the Public Employment Relations Board ("PERB") determined that a balance of interests between the privacy, reputation and job security interests of employees and the managerial interests of a public employer in its mission and the safety concerns weighed in favor of requiring negotiations over the decision to compel drug testing based on an employee's prior off-duty drug use, absent evidence that off-duty use of drugs impaired an employee's ability to perform job duties safely. 25 PERB ¶ 3001 (1992). In Arlington, a part-time school bus driver was ordered by the District to undergo urinalysis drug testing, based on a non-employee's assertion that she witnessed the bus driver ingest cocaine off-duty on three occasions. PERB found that the employer lacked a reasonable suspicion of on-the-job impairment, and therefore found the urinalysis testing to be a subject of mandatory bargaining. Id.

PERB has found that drug-testing procedures and the consequences of those procedures are mandatory subjects of negotiation. *County of Nassau*, 27 PERB ¶ 3054 (1994).

In County of Erie and Erie County Medical Center, PERB noted that as to bus drivers "the only mission-related, managerial interest asserted by the District in justification of its decision to test drivers is the safe transportation of its students." PERB stated the school district, as an employer, had no interest in the employee's off-duty use of any drug except and to the extent that her alleged use impaired her ability to drive a bus safely. 39 PERB ¶ 3036. Even for safety-

sensitive positions in the transportation field where random drug testing may pass Constitutional muster, PERB has held an employer's managerial interest in safety is insufficient to justify suspicionless drug testing. New York City Transit Authority, 25 PERB ¶ 4628.

#### B. Non-Mandatory Subject of Bargaining

PERB has held that drug testing is not a mandatory subject of bargaining where there existed a reasonable suspicion of on-the-job impairment, and the position was "safety-sensitive," drug testing was not found to be a mandatory subject. City of Utica, 25 PERB ¶ 4641. Moreover, pre-employment drug testing is not a mandatory subject of bargaining. Id. However, the procedures for pre-employment testing are subject to negotiations on demand. Id.

Further, to the extent it applies, the Omnibus Transportation Act ("Act") preempts the duty to bargain. Pursuant to the Act and its implementing regulations, all persons who operate (i.e., drive) a commercial motor vehicle (CMV) with a gross vehicle weight rating (GVWR) of 26,001 or more pounds; or is designed to transport 16 or more occupants (to include the driver); or is of any size and is used in the transport of hazardous materials that require the vehicle to be placarded, must be included in an alcohol misuse and controlled substances use program. 49 U.S.C. §§ 31136 and 31306; 49 C.F.R. Parts 40, 172, 382, 384, 391, 392, and 395. The program includes, among other things, randomly testing a minimum percentage of the District's average number of bus drivers per year – ten percent (10%) for alcohol and fifty percent (50%) for drugs. 48 C.F.R. § 382.305. These percentages may vary according to the Federal Highway Authority. Note, recent changes to State law have increased the scope of drug testing programs for school bus drivers. (see, supra).

# III. Drug and Alcohol Use and Discipline

### A. Discipline for Refusing a Drug test

Once the reasonable suspicion standard for requiring an employee to submit to a drug test has been met, the employee may be disciplined for refusing the test. See, e.g., Perez v. Ward, 69 N.Y.2d 840 (1987); Keys v. Schembri, 255 A.D.2d 359 (1st Dep't 1996) (corrections officer could be disciplined for refusing to submit to drug test where there was reasonable suspicion to warrant urinalysis testing).

In *Perez v. Ward*, 69 N.Y.2d 840 (1987), the Court of Appeals upheld the termination of a police officer following a Section 75 hearing for refusing to submit to a drug test in connection with reported drug use. The Court held the police department had reasonable suspicion to compel the test based upon a statement by a reliable informant that he had seen the employee using drugs. The police officer was subject to discipline because he refused to submit to the drug test after reasonable suspicion was established.

In *Myszczenko v. City of Poughkeepsie*, 239 A.D.2d 584 (2d Dep't 1997), the Second Department upheld a Section 75 penalty of termination for misconduct where a city parking lot attendant was observed drinking while on duty in the parking lot and thereafter refused to undergo a breathalyzer test as directed by his supervisor.

## B. Discipline for Off-Duty Drug Use

Employees may be disciplined for off-duty misconduct where there is a sufficient nexus between the off-duty conduct and the public employment. See, e.g., Logan v. New Paltz, 129 A.D.2d 935, 936 (3d Dep't 1987) (upholding discipline of village superintendent of public works for abusive conduct in after-hours phone call to fellow employee); Zazycki v. City of Albany, 94 A.D.2d 925, 926 (3d Dep't 1983). The employee's off-duty misconduct must adversely affect the employer in that there must be a clear and harmful connection or nexus to the employee's job. See Local 342 v. Town of Huntington, 236 N.Y.L.J. 109 (Sup. Ct., Suffolk County, 2006), aff'd, 52 A.D.3d 720 (2d Dep't 2008). In making a determination as to whether an employee should be disciplined for non-work-related acts in light of the general rule restricting discipline to work-related actions, a hearing officer must weigh the nature of the employee's employment against the alleged off-duty misconduct before deciding if the employee should be disciplined. See id.

The more sensitive the position held, the more likely it is that an employee may be disciplined for off-duty conduct. See id. Sensitive positions of high responsibility include, for example, teachers, treasurers, and public safety officers. See id.

For example, termination is typically upheld in cases involving police officers, firefighters, and other law enforcement or patrol officers testing positive for drugs, regardless of whether drugs were used while they were on duty. See, e.g., Seeley v. City of New York, 269 A.D.2d 205 (1st Dep't 2000); McGovern v. Safir, 266 A.D.2d 107 (1st Dep't 1999); Garnes v. New York State Police, 156 A.D.2d 907 (3d Dep't 1989). In such cases, the positive drug test was found to support findings that the employees possessed and ingested drugs. See, e.g., Seeley, supra.

Teachers who are impaired at work may be disciplined for misconduct. See *Matter of Bd. of Educ. of Harrison Central School Dist.*, 22 Ed. Dept. Rep. 184 (1982) (three-month suspension for in-class intoxication on one occasion where teacher's success in treating alcoholism was acknowledged by the Commissioner). Teachers may be disciplined for conduct unbecoming for driving while intoxicated. *Appeal of Bd. of Educ. of Warsaw Central School Dist.*, 34 Ed. Dept. Rep. 226 (1994) (two-year suspension where alcoholism did not mitigate penalty); *Appeal of Bd. of Educ. of City School Dist. of City of Canandaigua*, 25 Ed. Dept. Rep. 387 (1986) (one-year suspension where alcoholism mitigated penalty).

In Shenendehowa Central School District v. CSEA, the Court of Appeals found a bus driver's positive drug test for marijuana was a serious offense, but upheld an arbitrator's finding

that termination was too severe of a penalty because the school district's "zero tolerance" policy was inconsistent with progressive discipline stated in the collective bargaining agreement. See Shenendehowa Central School Dist. Bd. of Educ. v. CSEA, 90 A.D.3d 1114, 1116 (3d Dep't 2011), aff'd, 20 N.Y.3d 1026 (2013); see also Shenendehowa, 90 A.D.3d at 1118–19 (Kavanagh, J., dissenting).

## IV. Discipline of the Alcoholic or Drug Addicted Employee

#### A. Disability Discrimination:

- 1. Americans with Disabilities Act (ADA)
  - a. The ADA bars employer discrimination on the basis of a disability. "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112.
  - b. The employee has the initial burden of proving a *prima facie* discrimination case by showing (1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his [actual or perceived] disability. McMillan v. City of N.Y., 711 F.3d 120, 125 (2d Cir. 2013).
  - c. Under the ADA, there are three definitions of disability: actual (a physical or mental impairment that substantially limits one or more of the major life activities), record (there is a record of such impairment), or perceived (being regarded as having such an impairment). 42 U.S.C. §12102(1).
    - (1) Actual disability: The EEOC defines major life activities as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.... The EEOC defines substantially limited as (1) unable to perform a major life activity that the average person in the general population can perform or (2) significantly restricted as to the condition, manner or duration under which an individual can

- perform a particular major life activity as compared to the average person in his/her performance of that same life activity. <u>Temple v. Bd. of Educ. of the City of New York</u>, 322 F. Supp. 2d 277, 280 (E.D.N.Y. 2004) (citing 29 C.F.R. §§1630.2(i) and (j); other citations and quotations omitted).
- (2) Record disability: The definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting citing impairment. Levine v. Smithtown Cent.

  Sch. Dist., 565 F. Supp. 2d 407, 425-26 (E.D.N.Y. 2008) (citing 29 C.F.R. pt. 1630 App., §1630.2(k), other citations and quotations omitted).
- (3) Perceived disability: A plaintiff must show that: (1) [he or] she had an impairment that was not substantially limiting, but was treated as though the impairment was substantially limiting; (2) [he or] she had an impairment that was substantially limiting only because of the attitudes of others toward the impairment; or (3) that [he or] she had no impairment at all, but was regarded by his employer as having a substantially limiting impairment. Almond v. Westchester Cty. Dep't of Corr., 425 F. Supp. 2d 394, 399 (S.D.N.Y. 2006) (citing 29 C.F.R. §1630.2(1)(1)-(3)).
- d. Actual, record, or perceived alcohol abuse or recovering/recovered or perceived drug addiction can be a disability under the ADA. However, in the context of drug and alcohol addiction, the ADA specifically provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, or whose current use of alcohol prevents the individual from performing the duties of the job in question. . . . It also provides, however, that the exclusion for current drug users does not extend to an individual who has successfully completed, or is in the process of completing, a supervised drug rehabilitation program and who is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use. The

import of these provisions ... is that drug addiction, like alcoholism, is recognized as a disease that can be disabling, but that current drug use disqualifies a person from protection under the ADA. Robertson v. Amtrak/Nat'l R.R. Passenger Corp., 400 F. Supp. 2d 612, 622-23 (S.D.N.Y. 2005) (internal brackets, citations, and quotations omitted).

### e. Adverse Employment Action

- (1) To constitute an adverse employment action in violation of [ADA] ... there must be a materially adverse change in working conditions. Whitlow v. Visiting Nurse Ass'n of W. New York, 420 F. Supp. 2d 92, 108 (W.D.N.Y. 2005), aff'd, 186 F. App'x 36 (2d Cir. 2006) (citations and quotations omitted).
- (2) Examples of materially adverse employment actions include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation. *Id.* at 109 (citations omitted).
- (3) If an employer requires an employee to undergo a dependency treatment program and it affects the terms of his or her employment (e.g., he or she loses the ability to earn overtime as a result), this can be an adverse employment action under ADA. See, e.g., Makinen v. City of New York, 53 F. Supp. 3d 676, 692 (S.D.N.Y. 2014).
- (4) If the employer denies an employee tenure, this can be considered an adverse employer action. Extending an employment relationship by one year by itself may not qualify as an adverse employment action. But when coupled with the denial of tenure, it is assuredly an adverse employment action. Tolbert v. Smith, 790 F.3d 427, 436 (2d Cir. 2015).
- 2. New York's Human Rights Law (HRL), Executive Law §290, et seq.
  - a. The HRL bars employer discrimination on the basis of age, creed, race, color, sex, sexual orientation, national origin, marital status, disability, military status, domestic violence victim status, criminal or arrest record, or

predisposing genetic characteristics. See <a href="https://ag.ny.gov/civil-rights/new-york-state-human-rights-law">https://ag.ny.gov/civil-rights/new-york-state-human-rights-law</a> (last accessed November 26, 2018); see also Executive Law §296.

- (1) Like the ADA, the HRL also bars employer discrimination on the basis of a disability.
- (2) The HRL also applies to unpaid interns under Executive Law §296-c.
- b. Under the HRL, there are three definitions of disability: actual (a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques), record (there is a record of such impairment), or perceived (being regarded as having such an impairment). Note also all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. Executive Law §292(21).
- c. Like the ADA, alcoholism or recovering/perceived drug addiction can be disabilities within the meaning of the HRL. See, e.g., Riddick v. City of New York, 4 A.D.3d 242 (1st Dep't 2004) (alcoholism); Doe v. Roe, Inc., 160 A.D.2d 255 (1st Dep't 1990) (perceived drug use).
- d. The HRL mirrors the ADA's provisions for discrimination claims (though there are some differences between the HRL and the ADA; the HRL's definition of "person with a disability" is broader than the ADA's in that a plaintiff is not required to show that a disability substantially limits a major life activity, see Peters v. Baldwin Union Free School Dist., 320 F.3d 164, 169 (2d Cir. 2003)), and HRL disability claims are governed by the same legal standards as ADA claims. See Executive Law §296; Rodal v. Anesthesia Grp. of Onondaga, 369 F.3d 113, 117 n.1 (2d Cir. 2004).
- e. An employer may fire or discipline an employee who is an alcoholic if the

termination or discipline was motivated by legitimate nondiscriminatory reasons, or if the employee is abusing alcohol in a manner that affects the employee's ability to perform the duties of his job in a satisfactory manner. See, e.g., Robertson, 400 F. Supp. 2d 612; Matter of Hickman v. Poughkeepsie City Sch. Dist., 237 A.D.2d 289 (2d Dep't 1997); McEniry, 84 N.Y.2d 554.

- f. An employer may fire or discipline an individual who is currently using drugs illegally; such an individual is not protected by the HRL. 9 N.Y.C.R.R. §466.11(h) But note, the HRL does protect an individual who is a recovered/recovering . . . drug addict that is not currently using drugs. *Id.*
- g. The regulations provide clarification regarding the employer's duty to provide reasonable accommodations. See 9 N.Y.C.R.R. §466.11.
  - (1) 9 N.Y.C.R.R. §466.11(a)(1): The term reasonable accommodation means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.
  - (2) 9 N.Y.C.R.R. §466.11(h) provides specifics about drug addiction and alcoholism:
    - (a) (1) Alcoholism and drug addiction are diseases. However, an individual who is currently using drugs illegally . . . is not protected in this regard by the Human Rights Law. The law does protect an individual who is a recovered/recovering alcoholic or drug addict.
    - (b) (2) Adjustments to the work schedule, where needed to allow

- for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance. (emphasis added)
- (c) (3) The recovered/recovering alcoholic or drug addict should be expected to perform job tasks just as anyone else with similar skills, experience and background.
- (d) (4) Where the employer has knowledge of the current illegal use of drugs, the employee is not entitled by law to accommodation, and may be terminated.
- (3) 9 N.Y.C.R.R. §466.11(h)(5) Employers are encouraged, where the employer knows of current illegal use of drugs, or where job performance of an alcoholic or drug addict deteriorates to below acceptable standards, to utilize the practice of leave of absence and required attendance at a rehabilitation program, along with a last chance agreement requiring acceptable performance and attendance upon return. If an employee denies the problem and refuses the leave, treatment and last chance agreement, the employee may be terminated or disciplined for the documented performance problems.
  - (a) But see: 9 N.Y.C.R.R. §466.11(g):
    - i) Under HRL, the employer may discipline employees for intoxication or impairment on the job.
    - ii) A reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat:
      - a) Direct threat means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.
      - b) Some jobs may have a bona fide

classification as safety sensitive, such as, for example . . . persons who work with children. Heightened consideration of direct threat is to be encouraged in bona fide safety sensitive jobs. (emphasis added)

- B. Employer's Use of Medical or Psychological Examinations and Drug Tests for Fitness for Employment
  - 1. A board of education may require any district employee to submit to a medical examination to determine the employee's ability to perform their duties.

    See Education Law §913.
  - A psychological evaluation is permissible under this statute as well. See, e.g., Seraydar v. Three Village Cent. School Dist. 90 A.D.3d 936 (2d Dep't 2011).
  - 3. The District can implement drug testing to determine whether the employee in question is using illegal drugs.
    - a. Note: a test to determine the illegal use of drugs is not to be considered a medical test. 9 N.Y.C.R.R. §466.11(h)(6)(l).
    - b. Medical conditions or history revealed by drug tests (except for the use of illegal drugs) must be kept confidential and may not be used in any way to the disadvantage of the . . . employee. 9 N.Y.C.R.R. §466.11(h)(6)(iv).
    - c. Under 29 U.S.C. §705(20)(C)(ii)(III), the employer may drug test to determine whether a recovered/recovering drug addict is currently using drugs.

### V. District/Employer Perspectives in Discrimination Cases

#### A. Alcoholism

- 1. Employee Perspective:
  - a. The employee may argue that the District has discriminated against him or her due to his or her status as an alcoholic, former alcoholic, or perceived alcoholic under the ADA, the HRL, or Section 504.
    - (1) ADA
      - (a) His or her employer is subject to the ADA;

- (b) He or she is disabled within the meaning of the ADA (he is an alcoholic or perceived as an alcoholic, and the alcoholism substantially limits major life activities or is perceived to substantially limit major life activities);
- (c) He or she is otherwise qualified to perform the essential functions of his or her job; and
- (d) He or she has suffered adverse employment action (e.g., discipline or termination) because of his or her actual or perceived status as an alcoholic.

### (2) HRL

- (a) Same argument framework as the ADA, but with a broader definition of disability (his or her status as an alcoholic does not have to substantially limit a major life activity; it merely has to impair a normal bodily function, see Executive Law §292(21)).
- b. The employee claims that the District's adverse action is really a pretext for another form of discrimination, such as racial or age-based discrimination, under the HRL.

#### 2. Employer Perspective:

- a. Pre-Litigation Stage
  - (1) Prior to disciplining the employee, the school board may wish to exercise its option under Education Law §913 to have the employee in question undergo a medical or psychological evaluation to evaluate his or her fitness for service, which may clarify whether the employee's current alcohol use interferes with his or her ability to satisfactorily complete job duties.
  - (2) If the employee argues that the medical exam is an adverse employment action, the District could argue that undergoing the medical exam does not materially alter the terms and conditions of the employee's employment. See Whitlow, 420 F. Supp. 2d at 108.
  - (3) The employer must make sure that it does a thorough investigation

regarding the basis for disciplinary action.

# b. Litigation Stage

### (1) Discrimination Defense

### (a) ADA

- i) If the employee argues that the employer discriminated against him or her on the basis of an actual or perceived disability, the employer can argue that the perception of the employee's disability did not rise to the level of the ADA's definition of disability.
- ii) The employee was not otherwise qualified to do his or her job functions at the time the employee was disciplined and/or fired.
- disability, he or she constitutes a direct threat to themselves or others and is thereby unqualified for the position. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. Makinen, 53 F. Supp. 3d at 694 (citing 42 U.S.C. § 12113(b); 9 N.Y.C.R.R. §466.11(g)(2)).
- iv) The employee's current use of alcohol prevents him or her from satisfactorily completing his or her job duties, and thus, disqualifies him or her from protections under ADA. See Robertson, 400 F. Supp. 2d at 622-23.

## (b) HRL

- i) Due to the similarities between the ADA and the HRL, the employer can make many of the same arguments as it does under the ADA.
- ii) EXCEPTION: HRL has a broader definition of

disability than does the ADA. See Executive Law §292(21)).

(2) Pretextual Discrimination Defense: The reasons for firing the employee were legitimate and other employees would have been treated the same had they also had such problematic conduct. See Bennett, 92 A.D.3d 29.

### B. Drug Addition

## 1. Employee Perspective:

- a. The employee claims that the employer has discriminated against him or her due to his or her status as a recovering drug addict or perceived drug addiction under the ADA, the HRL, or Section 504.
  - (1) ADA
    - (a) Employer is subject to the ADA;
    - (b) Employee is disabled within the meaning of the ADA (employee is a recovering drug addict or perceived as a drug addict, and this substantially limits major life activities or is perceived to substantially limit major life activities);
    - (c) Employee is otherwise qualified to perform the essential functions of his or her job; and
    - (d) Employee has suffered adverse employment action (e.g., discipline or termination) because of his or her actual or perceived status as a drug addict.

### (2) HRL

(a) The employee could use the same argument framework as the ADA, but with a broader definition of disability (his or her status as a recovering drug addict does not have to substantially limit a major life activity; it merely has to impair a normal bodily function, see Executive Law §292(21)).

### 2. District/Employer Perspective:

a. Pre-Litigation Stage:

- (1) Prior to disciplining the employee, a school board may wish to exercise its option under Education Law §913 to have the employee in question undergo a medical or psychological evaluation to evaluate his or her fitness for service.
- (2) The District can implement drug testing to determine whether the employee is using illegal drugs. For teachers and bus drivers, it may drug test if it has a reasonable suspicion to do so. See Patchogue-Medford Congress of Teachers, 70 N.Y.2d at 69 (teachers subject to reasonable suspicion drug testing); 49 C.F.R. 382.307(a), (b) (bus drivers subject to reasonable suspicion drug testing, but see bus drivers are subject to drug testing requirements at other times, such as random drug testing, 49 C.F.R. 382.305).
- (3) Under 29 U.S.C. §705(20)(C)(ii)(III), the employer may drug test to determine whether a recovered/recovering drug addict is currently using drugs.
- (4) If the employee is in the process of recovering from drug addiction and is not currently using illegal drugs, then the employer would need to make reasonable accommodations for that process. See 9 N.Y.C.R.R. §466.11(h)(5).

#### b. Litigation Stage:

- (1) ADA Defenses
  - (a) Employee's illegal drug use at the time he was fired or disciplined disqualifies him or her from protections under ADA. See Robertson, 400 F. Supp. 2d at 622B23.
  - (b) Because of the employee's disability, he or she constitutes a direct threat to themselves or others and is thereby unqualified for the position. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. Makinen, 53 F. Supp. 3d at 694 (citing 42 U.S.C. § 12113(b); 9 N.Y.C.R.R. §466.11(g)(2)).

(c) Employee was not otherwise qualified to do his or her job functions at the time the employee was disciplined and/or fired.

### (d) HRL Defenses

- Due to the similarities between the ADA and the HRL, the District can make many of the same arguments as it does under the ADA
- ii) EXCEPTION: HRL has a broader definition of disability than does the ADA. See Executive Law §292(21)).

# VI. The Legalization of Marijuana and Its Effect on the Workplace

# A. Medical Marijuana in New York

- 1. New York Compassionate Care Act
  - a. Approved July 5, 2014, the Compassionate Care Act amended the public health law, the tax law, the state finance law, the general business law, the penal law, and the criminal procedure law in relation to medical use of marijuana.
  - b. Title V-a of the Public Health Law was created as part of the Compassionate Care Act and generally authorizes the lawful use of medical marijuana.
  - c. Public Health Law (PHL) §3362:
    - (1) Authorizes the possession by a "certified patient" or "designated caregiver" of up to a thirty-day supply of a medical marijuana dosage as determined by a practitioner. Authorizes thirty-day refill supplies to be possessed during the last seven days of any thirty-day period. PHL §3362(1).
      - (a) "Certified patient" is defined as: "a patient who is a resident

- of New York state or receiving care and treatment in New York state as determined by the commissioner in regulation, and is certified under section thirty-three hundred sixty-one of [Title V-a of the Public Health Law]." PHL §3360(3).
- (b) "Designated caregiver" is defined as: "the individual designated by a certified patient in a registry application. A certified patient may designate up to two designated caregivers." PHL §3360(5). Designated caregivers who hold a registry identification card can lawfully possess, acquire, deliver, transfer, transport and/or administer medical marijuana. PHL §3362(1).
- (c) A person possessing medical marijuana must possess a "registry identification card" at all times. PHL §3362(2)(b).
  - i) "Registry identification card" is defined as: "a document that identifies a certified patient or designated caregiver, as provided under section thirty-three hundred sixty-three of [Title V-a of the Public Health Law]." PHL §3360(11).
  - ii) The process for obtaining and maintaining registry identification cards is set forth in PHL §3363. The statute provides that a confidential list of who has been issued a registry identification card will be maintained by the N.Y.S. Department of Health. The Department of Health "shall verify to law enforcement personnel in an appropriate case whether a registry identification card is valid." PHL §3360(13) & (14).
  - iii) Possession of medical marijuana is unlawful "if it is smoked, consumed, vaporized, or grown in a public place, regardless of the form of medical marijuana stated in the patient's certification. PHL §3362(2)(a).

- d. Public Health Law §3369 provides, in pertinent part:
  - (a) "Certified patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marijuana, or for any other action or conduct in accordance with this title." PHL §3369(1).
  - (b) "Non-discrimination. Being a certified patient shall be deemed to be having a "disability" under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding." PHL §3369(2).

# e. School Districts as "Designated Caregivers"

- (a) Sections 1004.3 and 1004.4 of the Regulations of the Department of Health has been amended to authorize an entity to serve as a designated caregiver.
- (b) In order to be so designated, a public school must submit to the Department of Health:

- the facility's full name, address, operating certificate or license number where appropriate, email address, and printed name, title, and signature of an authorized facility representative;
- ii) if the facility has a registry identification card, the registry identification number;
- iii) a statement that the facility agrees to secure and ensure proper handling of all approved medical marijuana products; and
- iv) an acknowledgement that a false statement in the application is punishable under section 210.45 of the Penal Law. 8 NYCRR 1004.4(b)(2).
- (c) In order for a division or component of a public school to be so designated, the public school must submit to the Department of Health:
  - the parent facility's full name, address, operating certificate or license number where appropriate, email address, and printed name, title and signature of an authorized representative of the parent facility and of an authorized representative of the division, department, component, floor or other unit;
  - ii) if the parent facility, division, department, component, floor or other unit has a registry identification card, the registry identification number;
  - iii) a statement that the parent facility, and the division, department, component, floor or other unit, agree to secure and ensure proper handling of all approved medical marijuana products; and
  - iv) an acknowledgement that a false statement in the application is punishable under section 210.45 of the

# Penal Law. 8 NYCRR 1004.4(b)(3).

## B. Legal Status of Marijuana Outside of New York

- 1. Currently 10 states have legalized recreational marijuana, including Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. The details of these laws vary, with some states only decriminalizing the use of marijuana while other states decriminalized the use and also legalizing retail sales. See GOVERNING, State Marijuana Laws in 2018 Map, available at: <a href="http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html">http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html</a>).
- 2. Multiple other states, have also legalized the use of medical marijuana, including virtually all of the Northeast United States. *Id.*

# C. Federal Controlled Substances Act:

- Enacted in 1970, the Controlled Substances Act classifies controlled substances into five categories (Schedules I through V) and generally prohibits the importation, manufacture, distribution, possession and improper use of controlled substances.
   21 USC 801 et. seq.
- 2. The Controlled Substances Act permits federally registered physicians to prescribe substances listed in all schedules but "Schedule I" substances. *Id*.
- In order for a controlled substance to be classified as a Schedule I substance, it must meet the following criteria:
  - a. The drug or other substance has a high potential for abuse.
  - b. The drug or other substance has no currently accepted medical use in treatment in the United States.
  - c. There is a lack of accepted safety for use of the drug or other substance

#### under medical supervision. 21 U.S.C. §812(b)

- 4. The United States Drug Enforcement Administration currently has "marijuana (cannabis)" listed as a Schedule I substance. U.S. Drug Enforcement Administration, Drug Scheduling (available at: <a href="https://www.dea.gov/drug-scheduling">https://www.dea.gov/drug-scheduling</a>).
- 5. Section 801 of the Controlled Substances Act lists the "congressional findings and declarations" and specifically determines that the Controlled Substances Act is intended to apply to inter-state and intra-state use of controlled substances. Section 801(6) states: "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."
- D. Federal Consolidated and Further Continuing Appropriations Act:
  - 1. This Act prohibits the Department of Justice from using funds available through the Act to prevent states with medical marijuana laws from "implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Pub. Law No. 113-235, §538, 128 Stat. 2130, 2217 (2015).
  - 2. Coats v. Dish Network, Colorado Sup. Court. Case No. 13SC394, 350 P.3d 849 (2015): Coats is a quadriplegic who was employed by Dish Network as a telephone customer service representative. Coats, who had been prescribed medical marijuana to treat muscle spasms, tested positive for "THC," a component of medical marijuana. After informing Dish Network that he was "a registered medical marijuana patient and planned to continue using medical marijuana," Dish Network fired Coats for violating the company's drug policy.

Coats sued Dish Network, claiming that Dish Network violated a Colorado statute which states, in part: "[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premise of the employer during nonworking hours ...." Coats claimed that use of medical marijuana is a lawful activity under Colorado law and, therefore, Dish Network violated the Colorado

statute when terminating him. Dish Network argued that use of marijuana for any purpose violates federal law and, therefore, was permitted to terminate Coats.

The Supreme Court of Colorado declined to adopt a narrow interpretation of the term "lawful activity" and found that conduct which violates either state or federal law is not protected by the Colorado Statute. The Court upheld the termination of Coats.

## E. Potential Legalization of Recreational Marijuana in New York

- 1. New York Labor Law §201-d
  - a. Section 201-d(2) states, in pertinent part:
  - (1) Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of ...
  - (2) an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;
  - (3) an individual's legal recreational activities outside work hours, off to the employer's premises and without use of the employer's equipment or other property.
  - b. "Recreational activities" is defined as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including, but not limited to, sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." Labor Law §201-d(1)(b).

#### c. Section 201-d(4) provides:

Notwithstanding the provisions of subdivision three of this section, an employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate,

- (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.
- 2. Proposed Legislation: Marijuana Regulation and Taxation Act, Senate Bill No. S03040, Assembly Bill No. A03506-C. Among other things, the Act would amend the penal law to legalize "possessing, using, being under the influence, displaying, purchasing, obtaining, or transporting up to two points of marijuana and four and one-half ounces of concentrated cannabis." The Act would also legalize the "personal cultivation of marijuana" and establish a licensing requirement for engaging in the sale of marijuana. Penal law statutes concerning the criminal sale of marijuana would be considered "unlicensed sale of marijuana." The entire Bill is available at:

https://assembly.state.ny.us/leg/?default\_fld=&leg\_video=&bn=S03040&term=2 017&Summary=Y&Text=Y

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