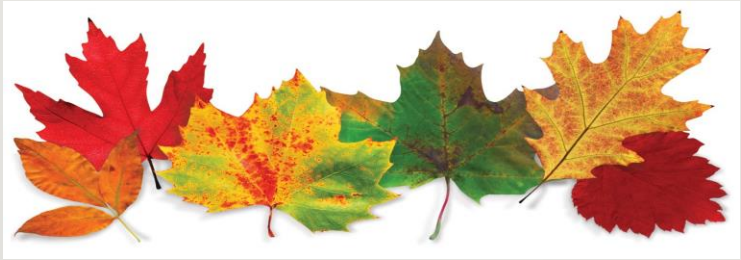
LONG ISLAND ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT



LEGAL UPDATE FOR ADMINISTRATORS

PRESENTED BY:

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LEGAL DEVELOPMENTS

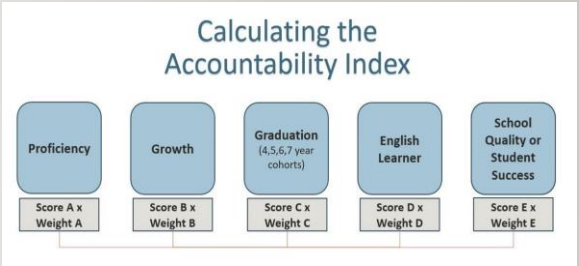
- Significant Developments from
  - The Courts
  - Commissioner of Education
  - State and Federal Guidance
  - The Legislature (statutes)
  - The Board of Regents (regulations)

3 EVERY STUDENT SUCCEEDS ACT ("ESSA")

4 ESSA IMPLEMENTATION IN NEW YORK STATE

- Implementation of ESSA underway in New York State.
- State Plan approved by USDOE on January 12, 2018.
- New State legislation has been enacted to implement ESSA requirements and emergency regulations adopted by Regents in June and September 2018. It is anticipated that Regents will adopt permanent regulations in December 2018 following an additional public comment period.
- Implementation highlights include: amended State accountability regulations; new foster care legislation; phase-in of financial transparency requirements.

5 NEW STATE ACCOUNTABILITY SYSTEM



- In June and September 2018, the New York State Board of Regents adopted emergency regulations to implement new State accountability rules.
- System uses multiple measures, including traditional measures such as composite performance and graduation rates, and new measures such as chronic absenteeism.
- The lowest performing schools in the State will be identified for Comprehensive Support and Improvement ("CSI") and schools with subgroups that are among the lowest performing in the State will be identified for Targeted Support and Improvement ("TSI"). Districts with one or more CSI and/or TSI schools will be identified as a Target District.
- Any school that is not identified as a CSI or TSI school will be considered to be a school in Good Standing and schools in Good Standing that are determined to be high performing or rapidly improving will be designated as Recognition Schools.

6 TESTING AND OPT OUTS

- ESSA continues the mandate, established by NCLB, that requires states, for accountability purposes, to measure the achievement of students on ELA and Math State assessments based on not less than 95% of all students and 95% of students in each subgroup.
- ESSA further requires states to take actions against schools with low test participation rates, with the precise actions to be prescribed by each state.
- The initial emergency regulations adopted by the Regents in June 2018, included a provision that would have permitted the Commissioner, following an NYSED audit, to require a school district to set aside a portion of its Title I funds to use on activities to increase student participation on assessments. The proposed participation rate regulations generated over 1,400 public comments.

7 TESTING AND OPT OUTS

- Revised emergency regulations enacted by the Regents, effective September 18, 2018.
- Revised regulations provide for a continuum of interventions for participation rates below 95% beginning with the 2017-18 and 2018-19 results: District conducts a self-assessment and develops a participation rate improvement plan > District conducts a participation rate audit and develops updated plan > District partners with BOCES/tech. assistance center to conduct participation rate audit and to develop updated plan > NYSED conducts a participation rate audit and school may be required by Commissioner to address audit recommendations.
- Amended regulations remove the provision that could have required districts to set aside a portion of their Title I funds to improve participation rates after years of low participation.
- An additional criterion was added to further limit the requirement of a participation rate improvement plan to those instances in which an accountability group has a weighted average achievement index that is below the State average (Level 1 or 2).

SCHOOL DISTRICT REPORT CARD

- Section 100.2(m) of the Commissioner's regulations is amended to require that each school district post the report card on the district's website, and if a district does not maintain a website, the district shall provide the information to the public in another manner as determined by the district.
- Required content of school report card is expanded to include data on measures of school quality, climate and safety (e.g. rate of suspensions, incidents of bullying/harassment and chronic absenteeism), preschool and accelerated coursework programs, levels of educator qualifications, and disaggregated per-pupil expenditures of federal, state and local funds.
- Report card must include data on the per-pupil expenditures of federal, state and local funds, disaggregated by source of funds and for each school district and school in the State.

9 FOSTER CARE

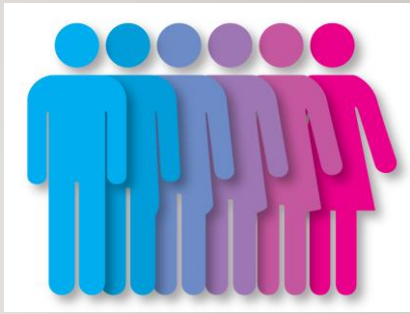
- In April, the Education Law was amended to add a new §3244 and to amend §3202 to incorporate into State law ESSA's requirement to ensure educational stability for foster care children (Ch. 56 of the Laws of 2018, Part CC). Changes terminology to comport with ESSA.
- Legislation includes presumption to stay in "school of origin".
- Use of best interest determination.
- Immediate enrollment.
- Transportation.
- NYSED Guidance and Toolkit issued August 21, 2018. Available online at: http://www.p12.nysed.gov/sss/documents/FosterCareTransportationGuidance.pdf

OTHER ESSA IMPLEMENTATION

- Section 100.2(ff) of the Commissioner's regulations has been amended to require each school district to designate one or more employees to serve as a transition liaison with personnel at residential facilities operated by or under contract with various State and local agencies (e.g. the Office of Children Family Services, the Department of Corrections and Community Supervision, local department of social services) for the purpose of facilitating a student's effective transition into, between and out of such facilities.
- STAY TUNED FOR CONTINUING AND UPDATED IMPLENTATION ACTIONS!

STUDENT ISSUES

RIGHTS OF TRANSGENDER STUDENTS



- Gulf widens between Federal and State officials.
- USDOE (OCR) confirmed on 2/12/18 that it would no longer investigate complaints that schools have violated civil rights of transgender students by denying them access to bathrooms that match their gender identity.
- Obama administration had considered transgender students to be protected under Title IX which prohibits discrimination in educational programs and activities on the basis of "sex."

RIGHTS OF TRANSGENDER STUDENTS

- USDOE: It is not USDOE's job to determine whether the Title IX's prohibition against "sex" discrimination encompasses "gender identity".
- Commissioner Elia condemned the USDOE approach in a public statement.
- On 2/28/18, Commissioner & AG sent letter to districts reminding them that the State's Dignity for All Students Act ("DASA") prohibits discrimination on the basis of gender (which by definition expressly includes gender identity and expression).

14 NEW STATE REGULATIONS

- On May 8, 2018, the Board of Regents adopted an emergency amendment to the Commissioner's regulations governing the reporting requirements under DASA to clarify the responsibilities of district administrators and staff, particularly with respect to transgender students. In September 2018, adopted as a permanent rule.
- The amendment adds a new subparagraph to the regulations to incorporate a definition of "report of harassment, bullying and/or discrimination" to include, but not be limited to, specific illustrative examples that include complaints regarding access to facilities (e.g. restrooms and locker rooms), grooming or appearance and use of names and pronouns. Changes reiterate NYS's commitment to protecting transgender students from harassment, bullying and/or discrimination.

STUDENT DISCIPLINE

- In *Appeal of D.B. and A.B.*, Decision No. 17,395 (May 29, 2018) the Commissioner upheld the permanent suspension of a student for making a terrorist threat. Student sent a bomb threat using another student's email account and then followed up a week later with another email, sent from a generic email account, threatening a massacre at the school. Threat characterized by the principal as "horrifying" and by a police officer as the most serious threat he'd seen in his 16 years of law enforcement.
- Hearing officer not persuaded by the opinions of two expert witnesses who testified o/b/o the student.
- Commissioner concurred with hearing officer's findings and concluded that the student had engaged in a pattern of misconduct that escalated into the terrorist threat.

APPEAL OF D.B. AND A.B.

- Commissioner: "Tragically school shootings are far from theoretical events; our nation is beset by an epidemic of such shootings. Armed assailants continue to commit mass murders in public schools. Simply put, the district had no choice but to treat this situation seriously, and it is imperative that school officials retain the ability to protect their students and staff."
- "The student's conduct evinced an alarming disregard for the safety of others, and that respondent [school district] justifiably deemed permanent suspension necessary under such circumstances to safeguard the well-being of its students."

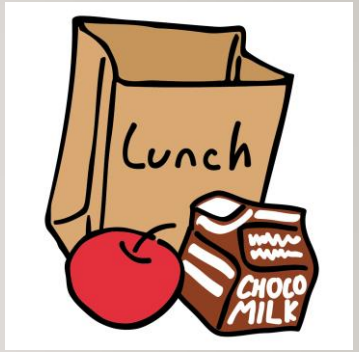
WHEN IS A SUSPENSION PERMANENT?

- In *Appeal of a Student with a Disability*, Decision No. 17,408 (June 11, 2018), the Commissioner addressed the issue of when a suspension is considered to be permanent.
- A high school senior was suspended from October through the end of the school year for possession of drugs, drug paraphernalia and bows and arrows and for using a vaping device on school grounds.
- Commissioner: "The mere suspension of a student through his or her senior year of high school does not transform a suspension, ipso facto, into a permanent suspension."
- 8-month suspension upheld as not excessive under the circumstances.

18 NEW RESIDENCY GUIDANCE

- On July 19, 2018, the New York State Education Department ("NYSED") issued new Residency Guidance after becoming aware of public concerns and inquiries indicating that some school districts have instituted a practice of "mandatory re-registration" wherein **all** parents and guardians are required to "re-register" students prior to the start of school in September, regardless of whether a question exists as to residency status.
- The Guidance indicates that such "mandatory re-registration" is contrary to the Commissioner's regulations, which only require registration upon a student's "initial enrollment" or "re-entry" into a school district.
- Reminds districts that the process for enrollment and registration – including determinations as to residency – is established in §100.2(y) of the Commissioner's regulations and that process must be followed. "Fiscal stewardship can be achieved by following … §100.2(y)".

PROHIBITION AGAINST MEAL SHAMING



- Chapter 56 of the Laws of 2018, signed into law on April 12, 2018, amended the Education Law to add a new §908 requiring all public school districts participating in the National School Lunch Program or School Breakfast Program, and which require students to pay for breakfast and/or lunch meals, to develop a plan to ensure that students whose parents/guardians have unpaid school meal fees are not shamed or treated differently from students whose parents/guardians do not owe outstanding fees.
- Under the new law, school districts were required to submit a plan to the Commissioner of Education (the "Commissioner") by July 1, 2018, and then adopt and post the plan on the school district's website.
- Emergency implementing regulations adopted by the Regents on September 18, 2018.

20 LABOR RELATIONS AND EMPLOYMENT ISSUES

CHANGES TO THE TAYLOR LAW

- Amended effective April 12, 2018 by a State Budget Bill (Ch. 59 of the Laws of 2018, Part RRR).
- Appeared to be a proactive approach to assist public sector labor unions in the event that the U.S. Supreme Court were to overrule its 1977 decision (*Abood*) and find Agency Fees to be unconstitutional (*Janus* case then pending).
- An Agency Fee is a fee that a non-member of a union is assessed to recover the costs of "collective bargaining, contract administration and grievance adjustment purposes". These non-member fees may not be used for ideological or political purposes. Agency fee provisions are embedded in the Taylor Law.

22 CHANGES TO THE TAYLOR LAW

- Amendments to Taylor Law:
  - Limit the duty the union has to its non-members to only "negotiation or enforcement of the terms of the agreement with the public employer." Civil Service Law §209-a.
  - Union will not have to represent non-members at disciplinary proceedings or other statutory/administrative proceedings to enforce a right.
  - Union will be permitted to refuse to represent a non-member at any stage of a disciplinary matter, grievance or arbitration process, including during disciplinary interviews or questioning.

CHANGES TO THE TAYLOR LAW

- The amendments also grant new rights to unions to make it easier for unions to collect dues, allow their collection earlier, and make it more cumbersome for members to withdraw their dues consent. Among other things, school districts must allow union representatives to meet with new employees during working hours.

JANUS DECISION

- On June 27, 2018, the United States Supreme Court, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* ("*Janus*"), held that public sector labor unions may no longer collect fees for the cost of collective bargaining (agency fees) from employees who have chosen not to join the union. By a 5-4 majority, the Court declared that a union's extraction of agency fees from non-union member employees violates the free speech rights of those employees, in violation of the First Amendment, by compelling them to subsidize private speech on matters of substantial public concern. In so holding, the Court expressly overruled its long-standing decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) ("*Abood*").

IMMEDIATE IMPACT OF *JANUS*

- By virtue of the *Janus* decision, public sector unions are no longer entitled to the compulsory collection of agency fees, and public sector employers are no longer authorized to automatically deduct such fees from the paychecks of non-member employees.
- The Court's decision effectively and immediately renders unenforceable that portion of the Taylor Law requiring public-sector employers to deduct, and unions to collect, agency fees from the salaries of non-member employees (*i.e.*, those workers who have not signed union membership cards), as well as any provisions in collective bargaining agreements which require the collection of agency fees.

IMPLEMENTATION OF *JANUS* DECISION

- The *Janus* decision makes it clear that in order to make a payroll deduction for union purposes on behalf of an employee, the employee must affirmatively consent or "opt-in" for the deduction to take place.
- In New York, the collection of union dues is governed by the Taylor Law, which requires dues deductions to be made "upon presentation of dues deduction authorization cards signed by individual employees." *See* N.Y. Civ. Serv. Law § 208(1)(b).
- If an employer already has dues deduction authorization cards on file for employees, no further information from these employees is needed and dues deductions should continue uninterrupted.

OTHER POST-*JANUS* ISSUES

- The recent legislative amendments added language to the Taylor Law which provides that in order for an employee to revoke membership in the union (and the payment of union dues), the employee must continue to do so in writing, but such withdrawal must be in accordance with the terms of the employee's signed authorization card. The courts have not yet addressed whether the recent legislative amendments would sustain a legal challenge under the *Janus* decision.
- A class action lawsuit has been filed seeking repayment of agency fees previously paid. *Pellegrino v. New York State United Teachers, et. al.* Among other things, lawsuit seeks a declaration that two of the recently enacted Taylor Law amendments are unconstitutional (requiring a public employer to disclosure to the union an employee's home address and limiting an employee's revocation of consent to deduction). Case is currently pending in the U.S. District Court, Eastern District of New York.

ESSA IMPLEMENTATION AND COLLECTIVE BARGAINING ISSUES

- New State regulations include various provisions relating to the assignment of staff for schools in various stages of designation status, and professional development requirements, that implicate collective bargaining issues.
- A CSI school must limit incoming teacher transfers to teachers rated Effective or Highly Effective under APPR in the preceding year, subject to collective bargaining as required by the Taylor Law; successor CB agreements to authorize such transfers.
- CB issues also implicated in the case of a school district that is creating a new school to replace a closed and restructured SURR/CSI school .
- "Job-embedded professional development" required for teachers and leaders in CSI and TSI schools.

29 SEXUAL HARASSMENT PREVENTION

- On April 12, 2018, Governor Cuomo signs into law a New York State Budget Bill (Ch.57 of the Laws of 2018, Subparts B - F) which includes, in his words, "the nation's most aggressive anti-sexual harassment agenda."

NEW LEGAL REQUIREMENTS - NY LABOR LAW §201-G

- By **October 9, 2018,** all New York employers must adopt a sexual harassment prevention policy and provide it to employees.
- Policy must be **equal to or exceed** the standards in the model policy to be created by the New York State Department of Labor ("DOL") in consultation with the New York State Division on Human Rights ("DHR").
- In late August DOL issued a draft model policy, complaint form, training and FAQs. Public comment accepted until September 12, 2018, final documents pending. Materials available online at: https://www.ny.gov/programs/combating-sexual-harassment-workplace

SEXUAL HARASSMENT POLICY

- The policy must include:
  - statement prohibiting sexual harassment;
  - examples of prohibited conduct;
  - state and federal laws on sexual harassment;
  - a standard complaint form;
  - procedure for investigating complaints;
  - employee rights of redress and all available forums;
  - clear statement that sexual harassment is a form of misconduct subject to sanctions against perpetrators and/or supervisors/managers who knowingly allow the behavior to continue;
  - clear statement that retaliation is unlawful.

SEXUAL HARASSMENT TRAINING

- All employers are required to create a prevention training program that equals or exceeds the model created by DOL and DHR. Training must be "interactive."
- Training of **all** employees must be provided annually starting October 9, 2018. DOL materials released in August 2018 indicate that training for first year must be completed by January 1, 2019. Per DOL, new employees must receive training within 30 days of hire.
- Program must include:
  - An explanation of sexual harassment consistent with guidance issued by the NYSDOL;
  - Examples of prohibited conduct;
  - State and federal laws on sexual harassment;
  - Employees rights of redress and all available forums; and
  - Information addressing conduct by supervisors and any additional responsibilities for such supervisors.

SETTLEMENT AGREEMENTS

- Effective **July 11, 2018**, settlements, stipulations or agreements resolving sexual harassment claims *cannot require confidentiality* **unless** the condition of confidentiality is the victim's preference.
- Such person shall have 21 days to consider such a condition, and 7 days following execution to revoke the agreement.
  - Civil Practice Law and Rules §5003-B

34 REIMBURSEMENT OF PUBLIC ENTITY BY EMPLOYEE

- Any **District or BOCES employee** found **personally liable** for intentional wrongdoing in a final judgment relating to sexual harassment *must* reimburse the BOCES/District for their proportionate share of the judgment within 90 days of payment of such award.
  - NY Public Officers Law §18-A

TITLE VII AND SEXUAL ORIENTATION

- In *Zarda v. Altitude Express*, 883 F.3d 100 (2018), the Second Circuit Court of Appeals (with jurisdiction over NY) held that sexual orientation discrimination, which is predicated on assumptions about how persons of a certain sex can or should be, is a subset of sex discrimination and, as a result, is prohibited by Title VII.
- USDOJ and EEOC at odds about whether Title VII's prohibition on discrimination in employment on the basis of "sex" covers gender identity and sexual orientation.
- Remember NYS Human Rights Law expressly prohibits discrimination on the basis of sex *and* sexual orientation. NYSDHR regulations ban discrimination and harassment against transgender individuals and NYSDHR will process gender identity complaints.

TRANSFER OF TEACHERS BY SUPERINTENDENT/RECEIVER

- In *Appeal of Williams*, Decision No. 17,298 (December 22, 2017), a superintendent/receiver, authorized pursuant to Education Law §211-f to oversee a "struggling school" challenged a board resolution and related policies that placed a moratorium on involuntary teacher transfers made by the superintendent/receiver at the school.
- After board passed moratorium, Receiver transferred 6 teachers, told board she was superseding the "no transfer" resolution.
- 2 teachers disregarded Receiver's transfer directive (and were supported by the board, which wrote letters telling them to ignore the directive).

TRANSFER OF TEACHERS BY SUPERINTENDENT/RECEIVER

- Commissioner: Moratorium violated Education Law §2508, which gives superintendents in small city school districts authority to transfer teachers and to report the transfer to the Board for its "consideration and action."
  - Authority is absolute in absence of a contrary contractual provision or malice/bad faith.
  - "C and A" = Board has authority to deliberate and act after it receives notice; but can't circumvent Superintendent's authority to transfer in the first instance.
- Commissioner: Board's letter advising teachers to disregard the transfer unlawfully interfered with Superintendent's powers as Receiver to supersede board's decision pursuant to Education Law §211-f. Transfers were directly linked to school intervention plan.

DISCIPLINE OF TENURED TEACHERS

- *Matter of Bolt v. NYCDOE, Matter of Beatty v. City of NY, Matter of Williams v. City of NY, January 9, 2018* – New York State Court of Appeals reversed 3 decisions of the Appellate Division, 1st Department, finding that the Appellate Division exceeded its authority when it determined that termination - imposed by the hearing officers in 3020-a proceedings - was not an appropriate penalty.
- Standard: Courts must generally uphold penalties imposed in an administrative disciplinary process unless the penalty imposed "shocks the conscience".

39 DISCIPLINE OF TENURED TEACHERS

- In reversing the Appellate Court, the Court of Appeals found penalty of termination did not "shock the conscience" where:
  - *Bolt:* Teacher with an 11-year unblemished record encouraged her 5th graders to cheat on a statewide exam.
  - *Beatty:* Teacher lied in her written reports of delivering services in the field that she never delivered; behavior undermined trust.
  - *Williams:* Physical Education teacher with 13 years of service asked 8th grade female students if they had "eligible" older sisters and, if so, could he have a physical description of them and their telephone numbers.
- Court: The Appellate Court erred by re-weighing the record evidence, ignoring the arbitrators' credibility findings and substituting its own judgment for that of the hearing officers.

CHARTER SCHOOL TEACHERS

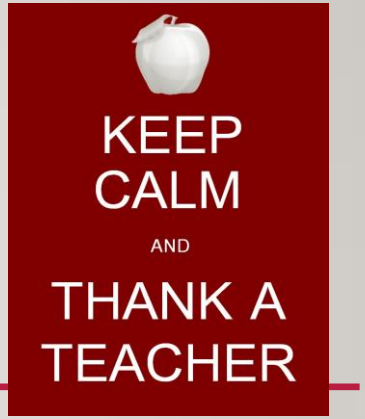
SUCCESS ACADEMY CHARTER SCHOOLS

- Earlier this year, NYSED filed a lawsuit to block a new regulation approved by SUNY in October 2017 that allows SUNY-authorized charter schools to certify teachers who complete the equivalent of one month of classroom instruction and practice teaching for 40 hours - compared to at least 100 hours under the State's certification route.
- Unlike State-certified teachers, these teachers are not required to earn a master's degree or take all of the State's certification exams.

CHARTER SCHOOL TEACHERS

- NYSED argued SUNY's rules would allow "inexperienced and unqualified individuals" to teach in some of the 185 charter schools overseen by SUNY and would "negatively impact" student learning.
- NYSUT and UFT agreed and filed a separate lawsuit which was joined with NYSED's.
- On June 19, 2018, Supreme Court, Albany County overturned the new rules finding that while SUNY's Board of Trustees are free to require more of the teachers they hire they must meet the minimum standards set by NYSED and the Board of Regents which set educational policy in the State.

UNCERTIFIED SUBSTITUTES



- Regents previously adopted rules allowing uncertified teachers to teach for more than the previously permitted 40 days in extreme circumstances where an urgent need exists.
  - Additional 50 days if certify no certified candidates found after good faith recruitment efforts.
  - Additional extension to end of school year under specific circumstances.
  - Rules providing for additional time sunset on June 30, 2018. A proposal to extend for two more years, to June 30, 2020, was discussed by the Regents in May 2018 but was tabled for further discussion **without** action. Unknown whether the Regents will take up again.

APPR REQUIREMENTS FOR 2018-19

- Section 3012-d and Subpart 30-3 of the Rules of the Board of Regents mandate APPR evaluations for classroom teachers and building principals based on two categories : Student Performance and Teacher Observations/ Principal School Visits. Overall APPR rating determined by Scoring Matrix.
- 2018-2019 is the final year of a four-year "Transition Period" wherein an alternate Transition APPR rating is calculated by excluding any measures based on the State's 3-8 ELA and/or Math assessments. During the Transition Period, only the Transition APPR rating is to be used for employment purposes and TIPs/PIPs.
- Various legislative proposals have been introduced to permanently eliminate the use of the State's 3-8 tests in teacher/principal evaluations. APPR system also under review by SED and the Board of Regents. Stay tuned!

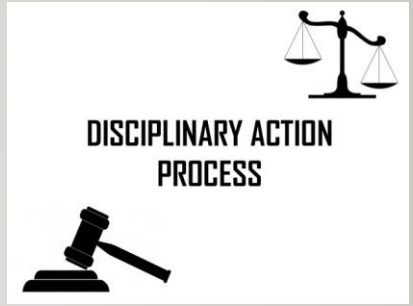
APPR AND 

- Ch. 56 of the Laws of 2015 amended the Education Law to generally require a four-year probationary period for persons appointed on or after July 1, 2015.
- In order to be eligible for tenure at the expiration of the probationary period, a classroom teacher or building principal must have received APPR ratings of E or HE in at least 3 of the 4 preceding school years; if rated I in the final year not eligible for tenure, in such case the probationary period *may* be extended.
- For most, 2018-2019 will be the first time these new tenure eligibility rules will be applied.

45 DRUG AND ALCOHOL TESTING OF BUS DRIVERS

- On August 24, 2018 new legislation was enacted 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.
- Amends §509-g of the Vehicle and Traffic Law ("VTL") 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 school bus size and commercial driver's license endorsement (previously, those driving buses with less than 16 passengers exempt from testing).
- Amends §509-l of the VTL 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. 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.

CIVIL SERVICE – LABOR CLASS EMPLOYEES



- On September 7, 2018, new legislation was enacted to provide Labor Class Civil Service employees the same Section 75 rights as those in the Non-Competitive Class (including written notice of charges and a hearing prior to disciplinary action). Previously, members of the Labor Class were not afforded Section 75 protections.
- The law takes effect immediately and applies to any employee who has completed at least 5 years of continuous service in the Non-Competitive or Labor Class on or after the effective date of September 7, 2018.

47 SCHOOL DISTRICT ELECTIONS

48 ELECTIONS - IMPROPER ADVOCACY

- Remember the *Phillips v. Maurer* rule: District personnel/resources/facilities cannot be used to exhort a vote in favor of the budget or a particular candidate. Public funds may only be used to present objective, factual information.
- In *Appeal of Herloski,* Dec. No. 17,361 (March 26, 2018), a resident challenged the placement by School Principals of signs on school property stating "Supporting our Public Schools" and "ACT for Education".
- A social media account associated with the district said more signs were available for purchase and provided contact info for the district's public relations coordinator.

IMPROPER ADVOCACY

- Commissioner: Social media posting suggested the district was responsible for signs.
- Proper for signs to provide neutral info, but not partisan.
- Rejected Superintendent's argument that the "Principals did it"; Board and Superintendent are responsible for their oversight.
- No evidence that the improper activity changed the election results; so, election not overturned, but districts need to avoid *even the appearance of impropriety.*

IMPROPER ADVOCACY

- In *Appeal of Herloski*, petitioner also challenged the district's budget newsletter as constituting impermissible advocacy.
- Newsletter included the following phrases: "a fiscally prudent spending plan"; "outstanding educational programs"; "a budget that is fiscally responsible"; "cutting edge" and "outdated New York State Foundation Aid formula".
- Commissioner found that these statements did not constitute improper advocacy, although they do "present close questions" particularly the references to "fiscally prudent" and "fiscally responsible", and she cautioned district to ensure that newsletters are strictly objective and factual.

ELECTIONS - IMPROPER ADVOCACY

- In *Appeal of Flippen*, Decision No. 17,296 (December 21, 2017), petitioners challenged school district's second bond vote after first vote failed, claiming, among other things, improper advocacy by district.
- Commissioner concluded the claims had no merit, but addressed each of the challenged actions.

52 ELECTIONS – IMPROPER ADVOCACY

- District postcard that said "Please support our children" and "Help support our children" with 2 dates for informational meetings and the vote –does not specifically advocate a "yes" vote, but district should be careful in future to ensure mailings are strictly objective.
- Use of color photos of facilities in a four-page district brochure – factual and objective information of building conditions.
- District robo-calls – only reminded voters to vote; did not say how to vote.

ELECTIONS -IMPROPER ADVOCACY

- Board member comments at basketball game – board member allegedly interjected himself into a 2-way conversation a board member is permitted to express views as an individual in his/her private capacity, not using district resources.
- Principal's remark to parents who were touring school to observe their students' learning process and asked about facilities that, if they were concerned about facilities, they could support capital improvement plan – not improper advocacy, as it expressed the ability to opt to support the plan, and, at the time the comment was made, the district had not yet decided to submit the plan for second vote.

54 STATE AID, BUDGETING AND FINANCIAL MATTERS

SCHOOL-LEVEL FUNDING REPORTS

- Enacted State budget (Ch. 59 of the Laws of 2018, Part CCC, §4) adds a new §3614 to the Education Law requiring that school districts annually report to SED and DOB the amount budgeted per pupil in each school building.
- Reporting requirement has a 3-year phase in:
  - 2018-2019 SY – districts with at least 4 schools that receive at least 50% of total revenue from State aid;
  - 2019-2020 SY – districts with at least 4 schools, regardless of State aid;
  - 2020-2021 SY – all districts.
- Reports must be made publicly available and posted on the school district website.

56 SCHOOL-LEVEL FUNDING REPORTS

- SED and DOB will have authority to decide whether the info was provided in a timely and sufficient manner.
- If a district is found to have not complied, it has 30 days to cure; if not cured, the CFO in the municipality where the district is "most located" can intervene; in cities, the city comptroller or the CFO will be authorized to gather info and submit on behalf of district.
- If non-compliant, increases in State aid are at risk.

SCHOOL-LEVEL FUNDING REPORTS

- Reports must follow SED/DOB-created format, include "uniform decision rules re: allocation of centralized spending to individual schools from all funding sources", and include demographic data, per-pupil funding and each school's source of funds.
- Guidance, forms and FAQs issued by DOB in July and August 2018. Available on DOB's website at https://www.budget.ny.gov/schoolFunding/index.html

STATE AID 180-DAY REQUIREMENT

- In December 2017, following consultation with stakeholders, the Regents proposed amendments to the Commissioner's regulations concerning the 180-day instructional requirement to receive State Aid commencing with the 2018-2019 school year. Emergency regulations adopted in April and June 2018. On September 18, 2018, the Regents approved the adoption of the amendments as a permanent rule.
- Purpose "to provide school districts with flexibility in meeting the 180-day requirement in order to receive State aid … for actual instructional time provided to students."

STATE AID
180-DAY REQUIREMENT – NEW RULES

- Section 175.5 of the regulations (as amended):
  - Replace the Daily Minimum Hours requirement with an Annual Aggregate Minimum Hours requirement of the same length.
    - 2.5 hours X 180 = 450 hours for half-day K.
    - 5 hours X 180 = 900 hours for grades K-6.
    - 5.5 hours X 180 = 990 hours for grades 7-12.
  - Aggregate annual hours must still be provided over 180 school days under Education Law §3604.

STATE AID 180-DAY REQUIREMENT

- Up to 4 days worth of Superintendent's Conference hours may be used as full or partial days toward the minimum aggregate annual requirement.
  - Permanent rule clarifies that parent-teacher conference days are a valid use of Superintendent conference days.
  - Permanent rule has no limitation on how many Superintendent's conference days can be used in the last 2 weeks of August (initial proposal limited to 2).
  - Permanent rule clarified that the number of hours that can be credited toward annual instructional time for superintendent's conference days shall be the average scheduled hours for a school day based on the school calendar (e.g. 5 hrs for elementary, 5.5 for secondary).

STATE AID 180-DAY REQUIREMENT

- SED Guidance: "The term 'session' refers to the period during which instruction is provided. However, such daily sessions may include supervised study periods, supervised cooperative work study, release time for college study or school-to-work programs, and as well as traditional classroom instructional activities."
- SED has *never* included lunch, recess, or passing time in the hours counted toward "actual instructional or supervised study."

CHARITABLE FUNDS

- Chapter 59 of the Laws of 2018 (Part LL), signed into law on April 12, 2018, amended several provisions of the Education Law and the Real Property Tax Law ("RPTL") to allow school districts to accept unrestricted charitable donations for public educational purposes and grant donors a corresponding tax credit of up to 95% of the donation as against the real property taxes imposed on the donor's real property. School districts authorized to establish a charitable fund by board resolution.
- Amendments reportedly a response to 2017 federal tax reform legislation which significantly limits state and local tax deductions ("SALT") for federal income tax purposes beginning with the 2018 tax year ($10,000 limit).
- NYS joined several other states in a federal lawsuit challenging Congress' decision to limit SALT deductions as being unconstitutional. Lawsuit will likely take years to resolve.

IRS REGULATIONS

- On August 23, 2018 the Internal Revenue Service "IRS" released proposed regulations regarding charitable contributions and corresponding state and local tax credits.
- The proposed regulations clarify that the IRS does **not** consider charitable donations which result in a tax credit to the donor to be deductible if the donation was made with the expectation of a substantial benefit in return. The proposed regulations would consider a tax credit to be a substantial benefit if the value of the credit exceeds 15 percent of the contribution.
- **Bottom Line** - IRS regulations effectively eliminate the federal tax benefit of making a charitable contribution and receiving a corresponding tax credit.

UNEMPLOYMENT INSURANCE

- In *Matter of Papapietro v. Rochester City School Dist.*, 156 A.D. 3d 1048 (3d Dept. December 7, 2017) the court reversed a determination of the Unemployment Insurance Appeal Board ("UIAB") which denied a per diem substitute teacher UI during a mid-year holiday recess, on the grounds that the claimant had a reasonable assurance of continued employment. UIAB had "long held" that an employer need not give any notice to an employee regarding employment following a recess or vacation.
- The Third Department disagreed with the UIAB's interpretation of Labor Law §590(10) and ruled that employers must provide "notice to an employee regarding the provision of services immediately following a recess or vacation" or the employee will be eligible for unemployment benefits during such period.

REIMBURSEMENT FOR HEALTH SERVICES

- In *Appeal of Bd. of Educ. of New Hyde Park-Garden City Park UFSD,* Decision No. 17,397 (May 30, 2018), the Commissioner overruled prior decisions and adopted a new timeline for the commencement of appeals seeking reimbursement for health services incurred on behalf of non-public school students pursuant to Education Law §912 (which requires a school district to provide health and welfare services to non-resident students who attend a non-public school within its boundaries and permits the providing district to charge the students' district of residence such costs).
- **New Rule** – Any appeal seeking reimbursement for health services for the 2018-2019 school year and beyond must be commenced within 30 days of the conclusion of the school year in which the costs were incurred.

SCHOOL CROSSING GUARDS

- On August 24, 2018, new legislation amended General Municipal Law §208-a to permit school districts to contribute financially towards the cost of employing school crossing guards within their community.
- School district contribution is authorized only when it will result in an increase in the number of school crossing guards employed by the municipality or police department. Crossing guards remain employees of the municipality and shall not considered to be employees of the school district.

THANK YOU FOR LISTENING!