

# Legal Update

Presented to the  
Bergen County Association of School Business Officials

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# Recent Legislation

## Leave for Infectious Disease

L. 2020, c. 9

- During the COVID-19 emergency, employer **cannot terminate or penalize** an employee for requesting or using leave supported by an NJ-licensed **physician's recommendation** stating that the employee has or likely has an infectious disease.
- After leave, employer **cannot refuse to reinstate** employee and **cannot reduce** his or her seniority, status, benefits, or pay or otherwise impair the terms and conditions of employment.

## OPRA Response Deadlines

L. 2020, c. 10

- During a state of emergency, records custodian need make only a **reasonable effort** to furnish requested records within seven days.
- Records must be transmitted to requestor **as soon as possible** after normal seven-day deadline, **as the circumstances permit**.

# Virtual Public Meetings

L. 2020, c. 11

- During state of emergency, **public entities may meet virtually**.
- Public entities may also provide **electronic notice** of meetings, but business conducted at the meeting must be limited, as far as practical, to **matters necessary for continuing operation** that relate to the emergency.

# Remote Meetings—In General

N.J.A.C. 5:39-1

- Department of Community Affairs promulgated emergency regulations affecting public bodies' authority to hold remote meetings.
- While government guidelines are in effect that limit size of public gatherings, if public body **reasonably expects** its meeting to exceed that size, the body must:
  1. hold meeting at **another location** with adequate capacity, or
  2. hold meeting **both in-person and remote**
- In-person meeting **cannot proceed** if room capacity **does not permit any member of the public to attend**.
- Body can continue **broadcasting audio or video** and taking **remote public comment** as normal, subject to above rules.

# Remote Meetings—Procedures

N.J.A.C. 5:39-1

- Remote meeting must use technology **routinely used in academic, business, and professional settings**, accessible by public at no cost, with capacity consistent with **reasonable expectations** for public meetings of the type but no fewer than 50 public attendees.
- Technology may be audio-only, video with audio, or live-streaming, but **telephonic conference line must always be available** for public access and comment.
- Meeting that includes **sworn testimony** must be broadcast by video as well as audio, and any **documents** normally shown to public must be made visible on video broadcast or, for documents normally made available in hard copy, must be made available in advance.
- Public must be allowed to make **audio or video comment** (as the platform allows). Comments must be submitted in advance by a reasonable deadline. Body, at its discretion, may accept **text-based comment** during meeting. Comments received in advance must be **read aloud and addressed** during meeting, up to **reasonable time limit** that body may impose.
- Communications technology must allow for body to **mute the public** and for public to mute themselves. Telephone conference line must have **queueing function** for public comment.
- Body must adopt resolution setting **procedures for public comment** consistent with the above, as well as standards of conduct for public when commenting. Procedures must be **announced at beginning of meeting**.

# Remote Meetings—Public Notice

N.J.A.C. 5:39-1

- Public notice of meeting must include **instructions for accessing** the platform, means for **making comment**, and location of any **relevant documents**.
- In addition to adequate notice, body must provide **electronic notice** posted to website, with the same content posted to **main door of building** where meetings normally held.
- If body uses electronic notice in lieu of adequate notice during a declared emergency, the meeting may include discussion and action on only matters:
  1. necessary for government's **continuing operation** and **relating to the emergency**, and
  2. requiring decision during the meeting due to **imminent time constraints**.
- If body **expects a series of advertised meetings to be held remotely**, annual notice announcing meetings must be revised seven days before next meeting, indicating which will be remote and providing access instructions, means for making comment, and location of documents.

# Remote Meetings—Takeaways

N.J.A.C. 5:39-1

- Boards cannot hold meeting where only members and administrators are present—**public must be allowed to attend**.
  - If capacity limits would bar *any* member of public, meeting must be fully remote.
  - Under current 25-person gathering limit, likely most or all meetings must be remote because few will have fewer than 25 persons.
- Merely **live-streaming a meeting is not enough**.
  - Public must be allowed to join and participate.
  - Access granted to public must be same as access granted to board members—i.e., if board has video capability, so too must public.
- Procedures for **public comment** are substantially changed:
  - Board must facilitate “**dialogue**” with public commenter permitted by the platform.
  - Comments must be accepted by **email and writing** no matter how remote meeting is conducted, by a reasonable deadline.
  - Unstated in regulations but good practice: to avoid First Amendment issue, boards should not  **censor, edit, or modify** comments (except by summarizing duplicates, as allowed in regulations). E.g., cannot choose to read only favorable comments. Board may therefore wish to **explicitly disclaim responsibility** for all comments it reads.

# Remote Meetings—Issues

N.J.A.C. 5:39-1

- Regulations were hastily promulgated by DCA on **emergency basis without public comment**, leaving several potential **legal and practical issues**.
- Regulations were **effective immediately** when issued September 24, but contain provisions that a board cannot immediately implement because of mutual dependencies (“chicken and egg”)—i.e.:
  - boards must **pass resolution** outlining procedures for public comment, requiring discussion and action at a public meeting, but
  - board must **give notice of such procedures in advance** of meeting.
- Boards cannot accept telephone calls for public comment and **must make meeting accessible by, e.g., Google Meet**, implicitly requiring that:
  - Chromebook must be placed at podium, so in-person attendees can make comments audible to remote attendees.
  - In-person attendees must use their own electronic devices to listen to comments made by remote attendees.
- Ability for public to submit written comments, and requirement that **boards read such comments aloud**, may be completely unwieldy—e.g., 60 comments at three minutes per comment would take three hours, plus whatever time requested by in-person commenters.

# Virtual Instruction and Payment

L. 2020, c. 27

- During health emergency that requires school closing for **more than three consecutive school days**, district may use **virtual instruction** and count it toward 180-day requirement.
- **Special education and related services** may be provided to special-education students virtually “**to the greatest extent practicable.**”
- Districts **must pay staff** if schools closed due to health emergency, whether staff are working or not.
- Districts **must pay vendors** (e.g., transportation companies) if schools closed due to health emergency, less costs not expended because service is not being performed (e.g., fuel and tolls).
- As with vendors, districts must continue to fund **shared-services agreements** with other districts, educational services commissions, county special services school districts, jointure commissions, etc.

# Bridge Year Pilot Program

L. 2020, c. 41

- Students graduating in 2021 or 2022 may pursue “bridge year,” **remaining in high school under an individual learning plan** with minimum credit load:
  - Fall: 9–12 credits at host high school, respective county’s college, or combination.
  - Spring: 9–12 credits at county college.
- **Can participate in spring sports** but not in any NJSIAA-sanctioned fall or winter sport.
- District must designate a **bridge year liaison** as central point of contact for interested students.

# Health Benefits Reform (“Ch. 44”)

L. 2020, c. 44

- SEHBP will design and offer **New Jersey Educators’ Health Plan** (“NJEHP”). Beginning 2021, SEHBP will additionally design and offer **Garden State Health Plan** (“GSHP”).
- All other SEHBP plans eliminated except **Direct10** and **Direct15**.
- NJEHP or GSHP mandatory for employees starting after July 1, 2020 and optional for others, but **employees transferring between participating districts may opt to remain in D10/D15**.
- Contributions to NJEHP and GSHP based on **percentage of employee’s base salary** (see next slide), unlike Chapter 78’s percent-of-premium model.
- Non-SEHBP districts **must offer a lookalike plan**.
- Contributions **not collectively negotiable** until 2028.

# Chapter 44 Contributions

L. 2020, c. 44

Base Salary	Single	w/ Child	w/ Spouse	Family
\$40k or less	1.7%	2.2%	2.8%	3.3%
\$40,001–\$50k	1.9%	2.5%	3.3%	3.9%
\$50,001–\$60k	2.2%	2.8%	3.9%	4.4%
\$60,001–\$70k	2.5%	3.0%	4.4%	5.0%
\$70,001–\$80k	2.8%	3.3%	5.0%	5.5%
\$80,001–\$90k	3.0%	3.6%	5.5%	6.0%
\$90,001–\$100k	3.3%	3.9%	6.0%	6.6%
\$100,001–\$125k	3.6%	4.4%	6.6%	7.2%

- Contributions for **new plans** are calculated as percentage of **base salary** (unlike under Chapter 78, calculated as percentage of premium).
- Employee contributes **lesser of** either:
  - percent of salary, as calculated above, or
  - percent of premium, as calculated under Chapter 78.

# Contributions by Highly Paid Staff

L. 2020, c. 44

- Per Ch. 44, § 2, “[w]hen the base salary or retirement allowance is **more than \$125,000**, the percent to be contributed shall be **the same as for . . . \$125,000.**”
- For most employees on NJEHP, choice between paying lesser of Ch. 44 or Ch. 78 will favor the former, but some **highly paid staff may benefit from Ch. 78 cap** (see chart).

**Rates for NJEHP Coverage, 2021**

PLAN/COVERAGE DESCRIPTION	EMPLOYEE SINGLE COST	DEPENDENT COST	TOTAL
NEW JERSEY EDUCATORS HEALTH PLAN #098 — PPO Plan with \$10 Primary Care Copayment/\$15 Specialist Care Copayment			
Single	\$788.87		\$788.87
Member & Spouse/Partner	\$792.42	\$785.32	\$1,577.74
Family	\$793.71	\$1,462.45	\$2,256.16
Parent & Child	\$790.44	\$676.86	\$1,467.30

**Example Scenarios, NJEHP Family Plan (\$27,074 / year)**

Salary	Ch. 44 (% of salary)	Ch. 78 (% of premium)
\$50k	3.9% = <b>\$1,950</b>	12% = \$3,249
\$75k	5.5% = <b>\$4,125</b>	23% = \$6,227
\$100k	6.6% = <b>\$6,600</b>	32% = \$8,664
\$125k	7.2% = <b>\$9,000</b>	35% = \$9,476
\$150k	7.2% = \$10,800	35% = <b>\$9,476</b>
\$175k	7.2% = \$12,600	35% = <b>\$9,476</b>

# Electronic Nominating Petitions

L. 2020, c. 55

- Implements requirements to **collect petition signatures via online form** and to **submit petitions online** pursuant to Executive Orders 105 and 123 for duration of COVID-19 emergency.
- Specifically includes **board of education** candidates.

# Families First Coronavirus Response Act: Background

- Provides an array of leave options for **circumstances related to COVID**.
- Employee may be entitled to paid leave at either **full pay** (up to \$511/day) or **partial pay** ( $\frac{2}{3}$  *per diem* rate, up to \$200/day), depending on reason for the leave.
- Leaves are pursuant to one of two laws:
  - **Emergency Paid Sick Leave Act (“EPSLA”)**, providing up to two weeks.
  - **Emergency Family and Medical Leave Expansion Act (“EFMLEA”)**, providing up to 12 weeks as part of employee’s FMLA entitlement (but potentially available for some employees not eligible for FMLA leave).
- Expires **December 31, 2020**.

# Families First Coronavirus Response Act: Reasons for Leave

1. Employee is subject to a federal/state/local **quarantine or isolation order** related to COVID-19. *Maximum two weeks at full pay up to \$511/day.*
2. Employee has been advised by healthcare professional to **self-quarantine** related to COVID-19. *Maximum two weeks at full pay up to \$511/day.*
3. Employee is **experiencing COVID-19 symptoms** and seeking medical diagnosis. *Maximum two weeks at full pay up to \$511/day.*
4. Employee is **caring for child** whose school or place of care is closed or whose care provider is unavailable for reasons related to COVID-19. *Maximum two weeks at  $\frac{2}{3}$  per diem rate up to \$200/day.\**
5. Employee is experiencing some **substantially similar condition** as specified by Health and Human Services. *Maximum two weeks at  $\frac{2}{3}$  per diem rate up to \$200/day.*

\* Also eligible for Extended FMLA leave up to 12 weeks, the first two unpaid and the remaining 10 at the same rate.

## Families First Coronavirus Response Act: Important Definitions

- **“Child care provider”**: Individual who receives compensation for providing child care services on a regular basis. Compensation not necessary if provider is employee’s friend or relative.
- **“Place of care”**: Physical location in which care is provided for child while employee works (e.g., daycare facility, preschool, before- or after-school program).
- **“Child”**: Child younger than 18, or older but incapable of self-care due to disability.
- **“Subject to a quarantine order”**: Includes not only explicit orders, but also when federal/state/local government has advised to shelter in place, stay at home, or quarantine, rendering employee unable to work.
- **“Telework”**: Work permitted by employer from home or otherwise away from regular workplace.

## Families First Coronavirus Response Act: Caring for Child

- For childcare leave to qualify under FFCRA:
  1. Employee must be **unable to work or telework** because of “genuine need” to care for child (i.e., employee could work but for having to care for child).
  2. Child’s **school or place of care is closed** or **care provider is unavailable** for COVID-19-related reasons.
  3. There is **no other suitable person available** to care for child during period of leave (typically co-parent, co-guardian, or usual childcare provider).
- When making request, employee must provide:
  - **name of child** being cared for,
  - **name of school**, place of care, or provider that closed or became unavailable, and
  - statement representing that **no other suitable person is available** during period of requested leave.

## Families First Coronavirus Response Act: Hybrid Instruction

- Previous federal guidance was unclear about leave eligibility for parents with children in remote-learning environments—i.e., school offering *only* remote learning was unambiguously considered “closed,” but:
  - school with in-person attendance for only some days each week?
  - school with in-person attendance every day, but only half day?
- Per [Department of Labor FAQ](#) update of August 27, school with hybrid model is considered “closed” as to particular student on **days he or she is not permitted to attend in person**, even if open for other students. FFCRA leave is available subject to usual rules:
  - leave is needed to actually care for child, and
  - no other suitable person is available.
- School is *not* “closed” if parent **elects remote instruction option when in-person instruction is offered**. FFCRA leave is unavailable unless some other independent basis applies (e.g., child is not attending because he or she is under quarantine order).

## Recent Case Law

## Leave for Union Officers

*Rozenblit v. Lyles*

- **Facts:** Jersey City CNA permitted union president and his/her designee to devote all time to union business and required board to grant office and parking facilities. They were paid at full salary and benefits with no reimbursement by union to board.
- **Decision:** Practice **violated school laws and public policy**. Because the two officials reported to work on school property, they were not “absent” to justify paid leave. Moreover, officials **did not report to the board or its agent** and were **not subject to administrative oversight**. There is no statutory authority permitting district to use **public funds** to pay labor leaders who **devote entire workday to service of another organization**.

*Currently on appeal before New Jersey Supreme Court.*

461 N.J. Super. 20 (App. Div. 2019)

## Tenure in Multiple Positions

*Melnyk v. Delsea Regional BOE*

- **Facts:** Special-education teacher additionally taught in afterschool alternative-education program for 11 years, holding appropriate certification as required by policy. District replaced her in afterschool program with a nontenured teacher, and she sued claiming violation of her tenure rights.
- **Decision:** Commissioner and Appellate Division found afterschool program to be extracurricular and not entitled to tenure accrual. Supreme Court disagreed, reasoning that **district could not avoid tenure protections by arbitrarily labeling program “extracurricular”** when it required instructional certificate, fulfilled constitutionally mandated education requirements, etc. Moreover, disallowing the already-tenured teacher to acquire tenure in another position because it did not require a different certification would effectively impose a **new and additional step** for tenure acquisition, not supported by law.

241 N.J. 31 (2020)

# Tenure Acquisition

*Mirda v. Union County Educational Services Commission BOE*

- Facts: Educational services commission employed bedside tutors for students confined to hospital. Tutors were hourly employees, performing instruction but allowed to accept other employment as well. Petitioner held an instructional certificate and worked consistent ten-month schedule with hours comparable to a full-time teacher. She sued seeking tenure credit as bedside tutor.
- Decision: Commissioner found, and Appellate Division agreed, that bedside tutor position was non-tenurable. Although tutor held certificate and served for necessary duration, **she was within statutory exception for substitute employees**, acting “in place of” normal classroom teacher, akin to home instructor. (*See* N.J.S.A. 18A:16-1.1.)

2019 WL 6835987 (App. Div. Dec. 16, 2019)

# Disqualification from Employment

*Santeramo v. NJ Department of Education, Office of Student Protection*

- Facts: Employee was arrested for drunk driving and pleaded guilty to third-degree crime of assault by auto while intoxicated. State disqualified him from further employment pursuant to criminal background statute. He contested the disqualification, arguing that third-degree crime was better characterized as a non-disqualifying fourth-degree crime because he did not have intent to cause injury.
- Decision: Commissioner upheld the disqualification. Employee **voluntarily accepted plea deal for crime that was listed under the statute**. His subsequent argument about intent was irrelevant because, as part of guilty plea, he necessarily admitted to whatever state of mind was sufficient for conviction. And regardless, conviction under the statute required only recklessness, not affirmative intent to cause injury.

EDU 13088-19 (Nov. 4, 2019), *adopted* Comm’r (Dec. 17, 2019)

## Vested Rights

*Barila v. Cliffside Park BOE*

- Facts: CNA permitted teachers to receive up to \$25,000 for accumulated sick leave upon retirement or resignation. Through bargaining, parties agreed to decrease cap to \$15,000 in exchange for other concessions. Teachers who had accumulated more than \$15,000 under prior CNAs sued, contending they were grandfathered.
- Decision: Appellate Division held that teachers' entitlement to >\$15,000 payout had already vested and union could not bargain it away. Supreme Court reversed, relying on contractual language that right to sick leave did not vest until teacher actually ceased employment. Because employees had no right to payout in any amount before that time, **parties could mutually agree to change terms** both prospectively and retrospectively.

241 N.J. 595 (2020)

## Age Discrimination

*Zois v. Kean University*

- Facts: Professor in his 70s was unable to use computers effectively—he did not upload documents or information, use technology in classroom, or respond to student emails. University reassigned him to professional development and non-teaching assignments to improve his skills and replaced him with younger teacher, prompting discrimination claim.
- Decision: Reassignment was **not an adverse action** because it was temporary and **not accompanied by reduction in salary or benefits**. Moreover, university could show **legitimate, non-discriminatory reason** for reassignment, because employment contract required professor to be accessible through electronic communications. Employer can thus **require some degree of technological competency**, and employee's failure can warrant adverse action.

2020 WL 54572 (App. Div. Jan. 6, 2020)

# Restricting Parent Communications

*M.V. v. Hasbrouck Heights BOE*

- Facts: Parents sent an “extraordinary” number of emails to school staff, often harassing and abusive, causing district to temporarily block their emails and to enact filters such that they could email only board members and certain administrators. Other channels, such as telephone, remained available as normal. Parents filed complaint alleging that email protocol violated affirmative action policy.
- Decision: ALJ found and Commissioner agreed that complaint **did not allege any actual violation of policy**: there was no evidence or claim that email protocol was discriminatory against parents based on, e.g., their race. Rather, parents were simply angry that their emails were being rejected. Under the circumstances, filtering the emails was within board’s prerogative to ensure orderly operation of schools.

EDU-14566-19 (Dec. 19, 2019), *adopted Comm’r* (Jan. 23, 2020)

# Notice of Unilateral Placement

*J.F. v. Byram BOE*

- Facts: Child attending an out-of-district placement moved to Byram, and Byram proposed that it could meet his IEP through in-district programming. Child’s parents disagreed and continued his placement without notifying Byram or warning that they would seek reimbursement. Parents filed for due process.
- Decision: ALJ and District Court denied parents’ due-process petition and Third Circuit affirmed, deciding that Byram had met IDEA by **immediately convening transfer meeting** and offering **in-district programming comparable to the placement**. No reimbursement was appropriate because parents gave no written notice before unilateral placement, and because they behaved unreasonably in numerous ways such as formulating an IEP at previous district even though they knew they were moving, refusing to consider any placement other than their preference, and declining invitations to visit school—i.e., they **refused to participate in collaborative process in good faith**.

812 Fed.Appx. 79 (3d Cir. 2020)

# Students' First Amendment Rights

*Levy v. Mahanoy Area School District*

- Facts: Sophomore cheerleader, upset that she made only JV team while a freshman made varsity team, posted Snapchat story while off-campus on a Saturday with captions "F\*\*k school f\*\*k softball f\*\*k cheer f\*\*k everything" and "Love how me and [another student] get told we need a year of jv before we make varsity but that's doesn't matter to anyone else?" Based on school rule that student-athletes not "tarnish" school's reputation, and on code of conduct cheerleader had signed, coaches removed her from team. She sued on First Amendment grounds.
- Decision: Third Circuit found that cheerleader **did not waive 1A rights when she agreed to team rules**, and her speech was wrongly punished. Any in-school disruption caused by the off-campus speech was result of only "**others' choices and reactions**." Court made analogy to "a student who advocated a controversial position on a placard in a public park one Saturday," who clearly could not be disciplined. (Court explicitly declined to consider hypothetical issue of off-campus speech that is harassing or threatening, which may be subject to a different standard.)

964 F.3d 170 (3d Cir. 2020)

# Off-Campus HIB

*J.C. v. Ramapo Indian Hills Regional BOE*

- Facts: At private home outside school hours, petitioner student exposed himself and pulled down classmate's pants while another student held him down. Photo of the incident circulated in school, causing other students to harass both petitioner and victim, and victim suffered emotional harm and required counseling. Board made finding of HIB motivated by victim's gender, reasoning that disrobing victim was inherently sexual.
- Decision: ALJ upheld board's finding and Commissioner agreed. Finding could not be called arbitrary, capricious, or unreasonable when it was **supported by credible evidence** that incident occurred as described, and board made reasonable inference that act was sexual in nature and **based on victim's gender**. The fact that incident occurred off-campus was irrelevant under the circumstances: discipline may be imposed for off-campus conduct only upon certain findings of a nexus to the school, but board here **did not impose any discipline** because student had left the district.

EDU-12064-19 (May 20, 2020), *adopted Comm'r* (Aug. 20, 2020)

## Work-Related Injury

*Gordon v. Jersey City School District*

- Facts: Employee underwent surgery for carpal tunnel syndrome and was absent for three months on full salary, pursuant to workman's compensation law. She underwent another surgery more than a year later, absent for another three months but at 70-percent salary. Employee claimed total duration was less than 12 months and so entire period should have been at full salary.
- Decision: Per statute, employee may be eligible for full salary for **no longer than one calendar year**. First absence began in January 2013, entitling her to full pay only through end of year. Second leave did not begin until March 2014 and was traceable to same injury as the previous leave, so was not within the statutory period mandating payment of full salary.

EDU 01483-18 (July 16, 2018), *affirmed* Comm'r (Oct. 3, 2019)

## Reporting an Arrest

*IMO Maria and Lawrence BOE*

- Facts: Teacher was subject to tenure charges for failing to report two arrests, for drug possession and assault. Arbitrator permitted only increment withholding. District subsequently learned that teacher had history of drug abuse and that she had failed drug test while on probation. District filed new charges, which teacher opposed under entire-controversy doctrine (i.e., all relevant events must be litigated simultaneously or are waived).
- Decision: Arbitrator dismissed the charges, noting that district had possessed docket sheet detailing teacher's offenses at the time of the original tenure charges and so knew the full details at that time. **Entire-controversy doctrine prohibited district from attempting to punish same offenses in new charges**, though doctrine would not prevent new charges if district were to discover previously unknown information.

Docket No. 54-2/20, Dr. Andrée Y. McKissick, Arbitrator (Apr. 18, 2020)

## Dismissal for Psychiatric Reasons

*IMO Rodriguez and Newark BOE*

- **Facts:** In 2013, teacher was required to undergo psychiatric evaluation before returning to work. In 2017 episode, she mentioned having a permit to carry a gun, made derogatory statements about Muslims and unwed mothers, and yelled incoherently, prompting another evaluation, which found she was unlikely to improve even with medication. She was placed on leave and required to attend follow-ups, which she missed twice. She attempted to return to work and to students' homes for appointments, causing district to file tenure charges.
- **Decision:** Arbitrator noted incident where teacher had tried to enter apartment building to provide home instruction while she was on leave, and claimed to doorman that she "doesn't have to show ID because she has her PhD and finished school all the way." In another incident, she emailed 504 officer with senseless rambling about the Constitution and Brexit. Her defenses to tenure charges were incoherent and wild. Arbitrator concluded that teacher's **failure to undergo treatment and attend necessary follow-ups left district with no choice but dismissal.**

Docket No. 119-5/19, Deborah M. Gaines, Arbitrator (Nov. 25, 2019)

## Harassment of Subordinates

*IMO Podesta and Dumont BOE*

- **Facts:** Principal consistently harassed his vice principal, making physical contact with her, buying gifts, professing his love, expressing jealousy when she interacted with another principal, and retaliating when he perceived she was "insubordinate and disloyal." He referred to other principal by numerous vulgarities and ordered vice principal not to speak his name "unless you're talking about what a piece of crap he is." On one occasion, he obsessed for weeks over vice principal laughing over the phone with other principal and went on hour-long rant about what he viewed as irreparable damage to their working relationship. Board filed charges.
- **Decision:** Arbitrator remarked about principal's "intemperate and ugly language" and his habit of "presur[ring]" vice principal and "chastis[ing]" her for continue to work with that Principal, as her job duties required." Whether principal's motives were romantic, sexual, etc., **the behavior was harassing, was unlawful and contrary to policy, and warranted discharge.**

Docket No. 38-2/20, Ruth Moscovitch, Arbitrator (June 23, 2020)

## Failure to Supervise Students

*IMO Cinquina and Perth Amboy BOE*

- Facts: Teacher was consistently neglectful, such as by knowingly allowing ninth graders to engage in game that led to students openly kissing, girls performing lap dances, and one boy touching a classmate's breast. He admitted to allowing game but denied any unwholesome "dares" had occurred or that, if they were, he was not aware. This was contrary to one student's testimony that teacher was present during lap dances and simply asked students to turn down the "club music" they were playing. Faced with tenure charges, teacher claimed discrimination on basis of disability (PTSD).
- Decision: Arbitrator found that teacher had **continuing unwillingness to abide by supervisory structures, accept responsibilities, and adhere to fundamental standards of conduct**. He had **stunning disregard** for standards of professionalism. Dismissal was warranted based on his **inability to exercise the restraint and sound judgment essential for educators**.

Docket No. 272-11/18, Jacqueline F. Drucker, Arbitrator (Mar. 31, 2020)

## Injury to Students

*IMO Peschi and Linwood BOE*

- Facts: In lunchroom, sixth-grader was rocking backwards in chair, and teacher "lifted her right foot to initiate contact with the chair." He fell and hit his head. She apparently said "that's what happens when you lean back in your chair" and neglected to help him, administer first aid, or later inquire about his condition. She later said it "was a joke gone bad" and that it was an accident. She was tried criminally and acquitted, but district brought tenure charges.
- Decision: Arbitrator sustained charges. Teacher demonstrated a **lack of candor** about the incident and did not convince arbitrator that she "has the awareness, or even the capacity, if again angered and forced to 'yell at' children in a disciplinary setting, to **control her violent impulses**."

Docket No. 76-4/17, Earl R. Pfeffer, Arbitrator (June 1, 2020)

## Mitigation of Backpay Loss

*Ciripompa v. Bound Brook BOE*

- Facts: In lengthy proceedings, teacher accused of many inappropriate acts was reinstated and granted backpay from period of his unpaid suspension. While suspended, he had earned \$70,000 from unemployment benefits and substitute bus driving during school year and summer, more than the \$64,000 he would have earned from continued work. District argued that awarding him backpay was therefore inappropriate.
- Decision: Commissioner agreed with ALJ's order to deduct teacher's earnings from the backpay he would otherwise be entitled to collect. Under applicable statutes, unemployment benefits constituted "**sums received**" and driving salary constituted "**substituted employment**" (occurring during hours he normally would have been at school). Even ignoring the driving that occurred during summer, teacher's earnings still exceeded his backpay and **completely mitigated** his financial losses—he was "**entitled to be made whole by the Board, but he is not entitled to be made more than whole.**"

Docket Nos. 5-1/15, 89-5/17, *adopted* Comm'r (July 8, 2019)

## Imposing Fine for Tardiness

*Ferreiro v. Elizabeth BOE*

- Facts: District docked \$1,000 from tenured social worker's salary for 13 instances of tardiness in two months, consistent with CNA allowing district to withhold quarter of daily pay for each tardy day after five. Social worker argued that the withholding was "major discipline," constituting an unlawful reduction in compensation under the school laws, and not "minor discipline" such as a letter of reprimand.
- Decision: ALJ determined and Commissioner agreed that docking pay was lawfully negotiated and executed. Law permits parties to bargain for **minor discipline such as fines and suspensions** for union members without constituting "reduction in compensation" and triggering their tenure protections.

Docket No. 9-1/19, *adopted* Comm'r (July 22, 2019)

## Board Action on Filling a Vacancy

*Venedam v. Marlboro BOE*

- **Facts:** Board interviewed candidates for vacant seat and deliberated in executive session about which to select, as permitted by law and policy. No candidate was deemed qualified, though, so no public vote was taken; rather, motion was passed to re-advertise vacancy. Taxpayer disputed board's actions for failure to take public vote as required.
- **Decision:** ALJ determined and Commissioner agreed that board's actions were compliant. Law and policy do require public vote to approve candidate so that "**the public can see the decision making process,**" but no candidate was actually approved. Commissioner disagreed with ALJ's other determinations, however, and held that taxpayer has standing (New Jersey has **liberal standing requirements**, especially in taxpayer suits) and it was not fatal for petitioner to join the respondent board's members individually rather than the board as an entity (*pro se* petitioner's **clear intent was to name board**, and Office of Controversies and Disputes adjusted the caption accordingly).

Docket No. 58-3/19, *adopted in part* Comm'r (Sep. 19, 2019)

## Secretarial Tenure

*Saylor v. West New York BOE*

- **Facts:** Secretary worked two years in business office before promotion to confidential secretary for assistant superintendent. When assistant superintendent became full superintendent, secretary followed her. She was terminated for unbecoming conduct several years later and claimed a violation of her tenure rights.
- **Decision:** ALJ and Commissioner agreed that secretary had not accrued tenure. Her business office position was potentially tenurable, as it was "secretarial or clerical," but she did not remain long enough before promotion. Her subsequent **confidential positions were not secretarial or clerical**, and thus not tenurable, because they included such skilled and discretionary tasks as drafting agendas, coordinating professional development, overseeing the district's Read Across America program, and renewing contracts.

Docket No. 219-8/18, *adopted* Comm'r (Sep. 26, 2019)

# Health Benefits and Tenure Charges

*Gomes v. Elizabeth BOE*

- **Facts:** In June 2017, board removed tenured secretary from health insurance after she was absent for more than 180 days in 2016–17, pursuant to CNA provision that board need pay premiums for only employees averaging at least 20 hours per week. Separately, in early 2018, board brought successful tenure charges against secretary. ALJ found that removing secretary from insurance had been improper because the tenure charges to dismiss her should have been completed first. She was therefore entitled to reimbursement of \$40,000 for COBRA premiums.
- **Decision:** Commissioner rejected ALJ’s decision, agreeing with board’s position that health benefits were not statutory “compensation” that can be withheld only upon filing of tenure charges, but rather are **governed by the CNA**. Under CNA here, secretary stopped being entitled when she stopped averaging sufficient hours, and there was **no additional procedure or mechanism mandated under the CNA** for board to cease paying her benefits.

Docket No. 214-9/17, *rejected* Comm’r (Sep. 19, 2019)

# Necessity of HIB Investigation

*K.P. o/b/o I.M. v. Saddle Brook BOE*

- **Facts:** Parent sent email to administrators claiming another student had called her daughter “ugly and a bad dancer.” She demanded HIB investigation, insisting “NO APOLOGY IS ACCEPTABLE. ONLY HIB.” District did not conduct HIB investigation after concluding that even if allegation were true, it would not constitute HIB.
- **Decision:** ALJ and Commissioner sided with district. Parent did not allege and district did not suspect that name-calling was based on an **actual or perceived characteristic**, a necessary factor under HIB statute.

Docket No. 17-1/19, *adopted* Comm’r (Sep. 5, 2019)

# HIB Procedural Protections

*DeFalco v. Hamilton BOE*

- Facts: In presence of other students, teacher told classified student to visit child study team or guidance office if he was unwilling or unable to perform work. She admitted to making the statement, and board did not provide her full evidentiary hearing or opportunity to cross-examine witnesses before concluding that it constituted HIB.
- Decision: ALJ determined and Commissioner agreed that board was within its discretion to find HIB. Due process does not require the procedural protections demanded by teacher, especially because his admission to making the statement was sufficient evidence on its own to support HIB finding.

Docket No. 9-1/18, *adopted Comm'r* (July 26, 2019)

# Evidence in Tenure Charges

*IMO Fetty and Camden County Technical Schools*

- Facts: Board filed tenure charges to demote principal after his alleged repeated verbal abuse of staff members. In charges, board “reserved its right” to assert additional evidence if later discovered, and included several statements from anonymous employees substantiating principal’s misconduct. Principal claimed charges were formally deficient because evidence was incomplete.
- Decision: Arbitrator found that statements from anonymous employees were not sufficiently **specific or reliable** as required for tenure charge evidence. A board must present “all evidence” in its possession. Board here attempted to remedy the procedural errors by amending its charges to omit the “reservation of rights” and identify the anonymous witnesses, but arbitrator nonetheless dismissed the charges, explaining that **producing all evidence from the outset was a strict statutory requirement** and that, as to witness statements, they still were **unsworn and thus not appropriate as evidence**.

Docket No. 173-7/19, *Arnold H. Zudick, Arbitrator* (Sep. 3, 2019)

# Demotion as a Remedy

*IMO Fetty and Camden County Technical Schools*

- Facts: Board re-filed case described in previous slide, attempting to demote principal to vice principal for his verbal abuse of subordinates. Principal argued that tenure charges were an inappropriate mechanism to effectuate a demotion, which is an “internal personnel decision” not subject to the tenure-charge process according to the law.
- Decision: Arbitrator agreed with teacher that tenure charges are not the appropriate forum for board seeking to demote an employee. Per statutes, tenure charges are the means by which to determine whether a teacher’s acts “**warrant dismissal or a reduction in salary.**” Board here sought neither of those outcomes. Arbitrator therefore dismissed charges: “this forum, through its enabling statute and the applicable regulations, is available only in those instances in which a board of education has found that **evidence exists that warrants one of two actions: dismissal or reduction in compensation.**”

Docket No. 302-11/19, Jacquelin F. Drucker, Arbitrator (Mar. 23, 2020)

# Last-Chance Agreements and Tenure

*Sterlacci v. Woodbridge BOE*

- Facts: Teacher suspected of drug use agreed to a last-chance agreement wherein she would undergo random drug tests, with a positive result constituting just cause for termination. She did, in fact, test positive, and board terminated her. She filed petition arguing that last-chance agreement did not excuse board from filing tenure charges because it did not explicitly waive her tenure rights. Board argued that agreement implicitly waived tenure rights because board would have had no reason to enter such agreement otherwise.
- Decision: ALJ and Commissioner sided with teacher. Agreement indicated only that test failure “would constitute ‘just cause,’ per se, for the termination of her tenured employment with the Board,” but such statement “**does not provide the Board with the ability to bypass petitioner’s tenure rights, nor does it indicate that petitioner would be forced to resign from her position.**” Agreement also purported that it would remain in teacher’s file as potential evidence of progressive discipline “in any future proceedings,” showing that board contemplated there might be need for such proceedings.

Docket No. 145-6/19, *adopted* Comm’r (Dec. 3, 2019)