

Legal Update

Presented to the
Bergen County Association of School Business Officials
September 28, 2023

Stephen R. Fogarty, Esq.
Fogarty & Hara, Esqs.
21-00 Route 208 South, Fair Lawn, New Jersey 07410
Phone: 201-791-3340 | Fax: 201-791-3432 | Email: sfogarty@fogartyandhara.com

New and Revised Statutes, State Regulations and Guidance

Access to Student Records

- The NJDOE adopted revisions to the regulations governing **access to student records**. Now, when a school district receives an OPRA request for student records from any party, it **must** release those records, *with all personally identifiable information removed*, even without consent from the student or the student's parents (with limited exceptions).
 - Before making any release, the school district must redact the records and make a **reasonable decision that the requestor cannot identify the student**, whether through single or multiple releases, or when added to other reasonably available information. Note that this effectively prohibits anonymous requests (because the school district cannot make that determination).
 - Under the new law, **once the records are redacted, they no longer meet the definition of student records**, as they no longer contain “information related to an individual student.”

Working Class Families' Anti-Hunger Act

- **Expands income-based eligibility** for free breakfast and lunch from the current 185% of the federal poverty level up to 200% of the federal poverty level.
- **Reduces the threshold that requires schools to offer breakfast** from 20% low-income enrollment to 10% low-income enrollment, effectively requiring schools that enroll 10%-20% low-income students to establish school breakfast programs, unless the school applies for and is granted a waiver from the New Jersey Department of Agriculture demonstrating that offering breakfast would cause financial hardship.
- **Establishes a “middle-income family” designation** (a family with an annual household income between 186% and 199% of the federal poverty level) and **requires schools** participating in a school meal program to **offer free meals to students from middle-income families who are not federally eligible** for free or reduced-price meals. **The state will reimburse school districts** for the provision of these additional free meals.

School Security and Mapping Data

- Effective with the 2023-2024 school year, all public and nonpublic schools are required to submit “**critical mapping data**” to law enforcement including:
 - Aerial images of schools
 - Floor plans
 - Suite numbers
 - Building access points
 - Utility shut offs
- This is *in lieu of* providing blueprints and maps (which was previously required).
- **Ongoing requirement:** The law *also* requires the Board of Education to provide *revised* mapping data *any time there is a change* to the critical incident mapping data.

Elimination of edTPA Assessment

- Eliminated (immediately) edTPA and other NJDOE-approved performance-based assessments as a requirement for certification.
- Candidates will be required to complete performance-based assessments selected by, and as part of, their educator preparation programs.
 - Starting with candidates who complete their program in the spring of 2024.

Gun Safety Law

- Concealed carry no longer permissible (with limited exceptions for law enforcement or private security guards) in:
 - A school, college, university or other educational institution, and on any school bus.
 - A childcare facility, including a day care center.
 - A nursery school, preschool, zoo, or summer camp.
 - Government buildings and locations with government meetings.
 - Youth sporting events and recreational facilities, such as public parks, beaches and playgrounds.
 - Entertainment venues, including stadiums, arenas, amusement parks, casinos, racetracks and publicly owned libraries and museums.
- It is **already a crime** of the third degree to knowingly carry any firearm on the grounds of any school or other educational institution **without the written authorization of the “governing officer of the institution.”** This now extends to concealed carry as well.

Information Literacy

- Each school district shall incorporate **instruction on information literacy** in an appropriate place in the curriculum of students in grades kindergarten through 12 as part of the district's implementation of the New Jersey Student Learning Standards. **The school library media specialist shall be included in the development of curriculum concerning information literacy whenever possible.**
- The content of information literacy **shall include** at a minimum:
 - The research process and how information is created and produced;
 - Critical thinking and using information resources;
 - Research methods, including the difference between primary and secondary sources;
 - The difference between facts, points of view, and opinions;
 - Accessing peer-reviewed print and digital library resources;
 - The economic, legal, and social issues surrounding the use of information; and
 - The ethical production of information.

School Ethics Act

- The NJDOE readopted N.J.A.C. 6A:28 with amendments and two significant changes:
 - **Training requirements for Board Members.** The new regulations require that new board members, charter and renaissance trustees complete the first-year training requirement **within ninety days** of being sworn in as board members. This applies to board members sworn into office after March 6, 2023. Failing to do so could lead to censure, suspension, or removal.
 - **Requesting advisory opinions.** Now, any “school official” (board member or administrator) may seek an advisory opinion regarding his or her own conduct **or the proposed conduct of another school official within the district or school.** Board attorneys can also seek it as well, so long as they provide the name of the school official who is the subject of the request.

Holocaust and Genocides

- The Commissioner of Education is required to distribute surveys to all school districts regarding instruction on Holocaust and genocides to determine if each school district is meeting its instruction requirements.
- Each superintendent or designee of each school district must submit its response within **sixty days** of receipt of the survey.
- **Board Policy No. 2260** (Affirmative Action Program for School and Classroom Practices) incorporates the Board's assurance that the Holocaust and other acts of genocide will be included in the curriculum as developmentally appropriate; see also **Policy No. 5750** (Equal Educational Opportunity).

School District Reporting Responsibility

- The chief school administrator shall notify the Board of Examiners when:
 - **Tenured teaching staff members** who are **accused of criminal offenses or unbecoming conduct** **resign, retire, are suspended, or are placed on administrative leave** from their positions;
 - **Nontenured teaching staff members**, including substitute teachers and any certificate holders working in school buildings as volunteers or as employees of a third-party vendor, who are accused of criminal offenses or unbecoming conduct **resign, retire, or are removed** from their positions;
 - A teaching staff member **fails to maintain any license**, certificate, or authorization that is mandated pursuant to this chapter for the holder to serve in a position;
 - The chief school administrator **becomes aware that a teaching staff member has been convicted of a crime or criminal offense while in the school district's employ**; or
 - The chief school administrator receives a report from the Department of Children and Families substantiating allegations of abuse or neglect, or establishing “concerns” regarding a teaching staff member.
- A school district **shall cooperate with the Board of Examiners**, as requested, to assist the Board of Examiners in executing its functions. Cooperation shall include, but not be limited to, providing documents, videos, emails, and investigative notes (that would include *draft* tenure charges).

School District Reporting Responsibility *(Cont.)*

- School districts shall **notify all employees new to the school district** and shall notify **all employees annually** of the following reporting requirements. A certificate holder's failure to comply may be deemed "just cause" pursuant to N.J.A.C. 6A:9B-4.4.
 - All certificate holders shall report to their chief school administrator their **arrest or indictment for any crime or offense within fourteen calendar days of the arrest or indictment**. The reporting certificate holder shall provide the date of arrest or indictment and any charge(s) filed against the certificate holder.
 - Certificate holders arrested or indicted for any crime or offense shall report to their chief school administrator **the disposition of any charge within seven calendar days of disposition**.
 - A certificate holder shall report to their chief school administrator the **suspension or revocation of any other license, certificate, or authorization** issued to the certificate holder by a state or Federal agency or body. Such a report shall be **made within seven calendar days** of the notification date of the suspension or revocation of the license, certificate, or authorization.

Instruction in Lyme Disease and Tick-Borne Illnesses

- **Requires schools** to incorporate curriculum guidelines concerning Lyme Disease and other tick-borne diseases in an appropriate place in the curriculum of students in grades kindergarten through 12 as part of the school district's implementation of the NJSLs in Comprehensive Health and Physical Education. The curriculum will emphasize disease prevention, and include topics such as the biology of various tick species, tick habitats, a list of diseases transmitted by ticks, recommended attire and repellants to help protect an individual from ticks, how to perform tick checks, proper techniques for the removal of ticks, and symptoms an individual may experience after receiving a tick bite.
- **Requires** boards of education to consult resources from multiple nationally-recognized organizations with expertise in Lyme Disease or other tick-borne diseases in fulfilling the requirements of the bill.
- **Requires** the Commissioner of Education to **develop curriculum guidelines** for both Lyme Disease and other tick-borne diseases.
- **Requires** the **Department of Health** to **publish** on the department's Internet website **guidelines** concerning the discovery and removal of ticks on persons.

Tuition for Non-Residents

- **Requires** payment of tuition for certain nonresident public school students. The bill clarifies that any nonresident student in a school district is required to pay tuition as prescribed by the board of education.
- **Requires** each board of education, with the approval of the executive county superintendent, to establish a **uniform tuition amount** for any nonresident student admitted to the schools of a district.
- These provisions **do not apply** to the enrolled children of **teaching staff members** of a school district who are permitted, by contract or local district policy, to enroll their children in the educational program of the school district without payment of tuition.
- This has an impact on districts that have policies allowing enrollment on a tuition-free basis for future residents (especially in choice districts).

Education Certification Fee Holiday

- Waives certain certification and credentialing fees for teachers for one year (July 1, 2023, through June 30, 2024).
- The fiscal year 2024 budget signed into law dedicates \$5 million to implement the fee holiday.
- This includes application fees, renewal fees, and related costs (e.g., , test score service fees, administrative fees).
- Applies to all certificates, including substitute credentials and name changes in the certification system.

Sick Leave Expansion

- Expands the uses of this Title 18A sick leave to the following *in addition to* personal illness or injury. It now allows for staff to use sick leave for:
 - **Diagnosis, care, or treatment of, or recovery from, a mental or physical illness, injury or other adverse health condition, or for preventive medical care.**
 - To **aid or care for a family member** during diagnosis, care, or treatment of, or recovery from, mental or physical illness, injury or other adverse health condition, or during preventive medical care for the family member.
 - Absence necessary due to **the employee or family member being a victim of domestic or sexual violence**, *if* the leave is to allow the employee or family member to obtain medical or other related services, or to prepare for or participate in related legal proceedings.
 - **Death of a family member for up to seven days.**
 - To attend a **school-related conference, meeting, function, or other event for a child.**
 - If the **school or place of care of a child of the employee is closed by order of a public official** or because of a state of emergency declared by the governor, due to an epidemic or other public health emergency.

Sick Leave Expansion (continued)

- Leave for death of a family member **does not replace** any contractual leave. Therefore, if a collective negotiations agreement provides for five days of bereavement leave, the staff member can take up to twelve days off: five contractual days, and seven sick days.
- Sick days can be taken before or after taking any of the employee's contractual days off if the reason for the leave is permitted by the expanded use of sick days.
- If an employee's need to use days is foreseeable, the district may **require no more than seven days advance notice of the request and its expected duration**. The employee shall make a reasonable effort to schedule the use of sick days to not unduly disrupt the operations of the district. If the reasons are not foreseeable, the district may require an employee to give notice of the intention as soon as practical, provided that the district has notified employees of this requirement in advance. **The district may prohibit employees from using foreseeable sick leave on certain dates** and require reasonable documentation if sick leave that is not foreseeable is used during these dates.

Sick Leave Expansion

- What constitutes a family member? There are four general categories
 - First, **obvious family members**: “a child, grandchild, sibling, spouse, domestic partner, civil union partner, parent, or grandparent of an employee.”
 - Second, **in-laws and other relations arising through marriage and similar legal unions**: “the spouse, domestic partner, or civil union partner of a parent or grandparent of the employee,” as well as “a sibling of a spouse, domestic partner, or civil union partner of the employee.”
 - Third, any **other relatives**, which is “any other individual related by blood to the employee” (e.g., a cousin).

Sick Leave Expansion

- Fourth is “any other individual ... whose close association with the employee is the **equivalent of a family relationship.**” What does that mean?
 - **Likely yes:** (a) Someone who is not related by blood, but who has been the employees’ parents’ best friend for fifty years, and who you call “Aunt Marge,” even though she’s not the employee’s aunt; (b) A live-in boyfriend or girlfriend, even if that person is technically not a spouse, civil union partner, or domestic partner;
 - **Possibly:** Someone in a long-term committed relationship, even if the parties do not live together.
 - **Probably not:** (a) individuals such as the employee’s college roommate who he or she sees once or twice a year, or (b) someone with whom the employee’s spouse works, and who spends several (even many) evenings a year with both the employee and his or her spouse at get-togethers.
- There is no official guidance on this currently.

Sick Leave Expansion

- “Blackout dates” – Employers can prohibit employees from using foreseeable sick leave on certain dates.
 - Orientation dates
 - Professional development after the end of the student school year
 - The last day of school
- When leave is unforeseeable, employers **may** require the employee to provide “reasonable documentation” if the leave is on a blackout date.
- Some associations may claim these dates are negotiable, which the Legislature did not address—that is likely to be clarified in litigation before PERC.

Sick Leave Expansion (continued)

- **Verification for Illness or Injury.** Associations may assert that a board can only ask for documentation for personal illness or injury can **only** if the absences are for more than three consecutive days...we disagree. Verification is always possible when one suspects abuse (whether or not boards *choose* to do so is another matter). Reading it otherwise would render N.J.S.A. 18A:30-4(a)—allowing boards to require a physician’s certificate for sick leave—essentially meaningless.
- **Verification for leave other than personal illness or injury:**
 - **Recovery from illness, preventative care, caring for a sick family member** – documentation signed by a health care professional who is treating the employee or the family member of the employee indicating the need for the leave and, if possible, number of days of leave;
 - **Caring for victims of domestic/sexual violence** – medical documentation, a law enforcement agency record or report, court order, documentation that the perpetrator has been convicted of a domestic or sexual violence offense; certification from a Domestic Violence Specialist or representative of a designated domestic violence agency or victim services organization or other documentation or certification provided by a social worker, counselor, member of the clergy, shelter worker, healthcare professional, attorney or other professional, attorney or other professional who has assisted the employee or family member in dealing with the domestic or sexual violence;
 - **School/child care closure** – a copy of the order of the public official/determination by the health authority.

Expanding Medicaid-Funded School Health Services

- Modifies the Special Education Medicaid Initiative (SEMI), which reimburses school district for a *portion* of the costs of certain Medicaid-covered services provided to Medicaid-eligible special education students (e.g., OT, PT, Speech, counseling, nursing services, specialized transportation) so long as they are in the student's IEP and are administered by a SEMI-qualified health care provider.
- This is now **expanded to include behavioral health services covered under Medicaid**, and includes *all students* who are an eligible Medicaid beneficiary, whether the services are in-person or via telehealth, so long as they are provided by a licensed medical practitioner approved as a Medicaid provider (or LEA approved as a Medicaid provider).

Suicide Prevention Training

- Previously, all teaching staff members were required to undergo training in suicide prevention. Now, **any school district employee who was not previously required to do so must undergo training.** It also extends to employees of contracted service providers who have regular contact with students.
- Those trained will have a **duty to warn and protect *under certain circumstances***, and a person who acts in **good faith** and takes **reasonable steps to discharge a duty to warn and protect** will be **immune from civil and criminal liability** in regard to that disclosure.
- Although the law went into effect immediately, **implementation is not required until the NJDOE identifies and makes training programs available to school districts.**

Hiring Retirees

- P.L. 2021, c. 408 (Jan. 2021) allowed school districts to temporarily hire retirees for the 2021-2022 and 2022-2023 school year for those staff members **providing special services** (including but not limited to a speech language specialist or a therapist) for *up to two years* without reenrollment in the TPAF.
- This law extends it to the 2023-2024 school year and **only applies** to teachers whose reemployment *commences* during the 2023-2024 school year.
 - This law was previously extended to 2022-2023 in the summer of 2022 (this is the second such extension)

Social Media Impact Study

- Creates a “Commission on the Effects of Social Media Usage on Adolescents” to study the extent of social media usage in and out of public schools, and to determine the effects that use has on students’ health and academic performance in a final report, which will include:
 - The extent of social media usage both in and out of public schools, including the average amount of time students in various age groups spend each day on electronic devices;
 - The effects that use has on the emotional health of students, including incidents of depression, anxiety, body dysmorphia, harassment, intimidation/bullying, or other disruptive behaviors;
 - The effects that use has on the academic performance of students; and
 - The effects that use has on the physical health of students, including incidents of sleep deprivation, weight loss or gain, or high blood pressure.
- While it imposes no *obligations* on the part of school districts, the report will be interesting and may lead to policy changes or new laws.

Transparency in Election Results Reporting

- This law is designed to improve voter confidence in election results.
- Modifies Title 19, governing election laws requiring the county clerk to list on its website an **unofficial report** detailing the number and types of ballots that have been received and, to the extent possible, the number and types of ballots that have been counted and that remain to be counted.
- **Reporting shall commence by 11:59 p.m.** on the day of each primary and general election and shall be **updated by 9 p.m. every day thereafter** until the certification of the election.
- Although more common in small districts, even in larger districts late-counted mail-in or provisional ballots can determine the outcome of an election.
- It imposes no *obligations* on the part of school districts, but impacts schools.

Extension of Life of School Buses

- Extends the statutorily permitted service life of certain school buses to **twenty years** for:
 - School buses manufactured on or after January 1, 2007 that have a gross vehicle weight that does not exceed 25,000 pounds; and
 - School buses manufactured prior to January 1, 2007 that have been installed with closed crankcase technology and have a gross vehicle weight that does not exceed 25,000 pounds.
- Allows the NJMVC to extend the retirement date of a Type S school bus by one year (and only one extension per bus) upon request by the owner of the Type S school bus, provided that it passes an additional inspection consistent with the enhanced safety inspection program established pursuant to the “School Bus Enhanced Safety Inspection Act.”

Case Law Update

Sexual Harassment Under the LAD

- The Supreme Court reversed the Appellate Division and held that sexual touching of areas of a student's body linked to sexuality happens, by definition, because of sex and establishes liability of sexual harassment under the Law Against Discrimination regardless of the perpetrator's intent.
- For five months when C.V. was a pre-kindergarten student, she was repeatedly sexually assaulted by a 76-year old school bus aide. C.V.'s parents only discovered the abuse when C.V. came home without her underwear one day. The bus aide was indicted and plead guilty to first-degree aggravated sexual assault.
- C.V. and her parents sued the Waterford Township Board of Education and T&L Transportation, for whom the aide worked, for negligence and sex discrimination in a place of public accommodation in violation of the LAD, *N.J.S.A. 10:5-12(f)*. The bus aide admitted in his deposition that he abused at least five children, including his own stepson, over a period of decades. The trial court dismissed the LAD claim on the basis that no reasonable jury could not conclude that any harassment occurred because of C.V.'s sex. The trial court found plaintiffs could not, as a matter of law, prove to a jury that the bus aide's conduct occurred because of C.V.'s sex, or that it would not have occurred but for her sex.

Sexual Harassment Under the LAD

- According to the trial court, the “but for element can’t be satisfied . . . where you have a compulsive sexual predator, a pedophile,” especially one who testified at his deposition that he is a compulsive sexual abuser of boys and girls. The Appellate Division affirmed the trial court, concluding that the LAD does not apply to a “sexual predator’s assault of a student on a school bus where there is no evidence his actions were based solely on the victim’s status as a member of a protected group” and instead indicated that his conduct was fueled by his pedophilia, and not by an intent to discriminate because of C.V.’s gender.
- The Supreme Court held that sexual touching of the areas of the body linked to sexuality happens, by definition, because of sex. The Court further stated that the LAD is not a fault-or intent-based statute. Because the intent of the LAD is to eradicate discrimination, whether intentional or unintentional, plaintiffs need to show that an employer or place of public accommodation “intentionally discriminated [against] or harassed [them], or intended to create a hostile . . . environment.” The perpetrator’s intent is simply not an element of the cause of action.

Notice of Tenure Rights

- Parsells was employed as a full-time tenured teacher when **she requested a transfer to a part-time position with benefits**. The district granted the request, and Parsells began the 2016-2017 school year working part time, until she commenced a maternity leave later that school year.
- When returning from the leave, she expressed her interest in continuing in the part-time position as long as it continued to provide benefits. **The district informed her that the position no longer had benefits, and if she wanted benefits, she would need to teach full-time**. When a full-time position became available, **she declined the offer** and, with permission, extended her maternity leave for the 2017-2018 school year.
- For the 2018-2019 school year, the district informed Parsells that she had no automatic entitlement to a full-time teaching position and that she relinquished her tenure rights when she accepted the part-time position; if a full-time position became available, she would have to apply for it. **Parsells applied for full-time work and was interviewed, but was not selected by the board. The successful candidates were non-tenured applicants who had not previously been employed in the district. Parsells sued the district arguing it violated her tenure rights.**

Notice of Tenure Rights (Cont.)

- The Appellate Division agreed that the **district violated Parsells' tenure rights** and restored her to a full-time position, finding that **she did not waive any rights to her full-time position, and that the Board failed to inform her of the consequences of going part-time before she voluntarily changed jobs**, including the loss of her right to return to full-time job status.
 - The court also imposed a duty on all school districts to provide advance notice to their tenured full-time teachers of the consequences of voluntarily transferring from full-time teaching to part-time teaching.
 - This was an extension of the requirement that school districts provide written notice to non-tenured teachers before they are reassigned to replacement teaching assignments that their time in the position does not count towards tenure.
- Somerville challenged the decision, and the New Jersey Supreme Court held that **Parsells did not knowingly waive her tenured right to a full-time teaching position and affirmed the Appellate Division's decision upholding the Commissioner's award of "full back pay, benefits and emoluments, less mitigation."**
- However, the New Jersey Supreme Court rejected the extension of *Bridgewater-Raritan* and **did not impose a duty on school boards provide full time teachers with advance notice** that if they are considering voluntarily transferring to part-time teaching positions they may not have a right to return to their full time position.

Tort Claim Act (“TCA”) – Child Sexual Abuse

- **Summary:** Court granted leave to consider whether plaintiff, is barred from seeking pain and suffering damages under the Tort Claim Act (“TCA”), N.J.S.A. 59:1.1 to 12.3. Plaintiff is an alleged victim of sexual abuse by a teacher. He has not incurred the requisite amount of medical expenses.
- **Facts:** Plaintiff alleged he was sexually abused by a school teacher employed by the Roselle Board of Education on two occasions in 2004 and 2005. He was sixteen years old at the time the alleged abuse occurred. Plaintiff has stated that he sustained permanent physical and mental injuries from the abuse. Plaintiff has not reached the medical treatment expense “in excess of \$3,600.00.
- **Holding:** The statutory language and the legislature intent are both clear. While the TCA intended to expand a sexual abuse victim available remedies in court, the legislators **did not eliminate the medical threshold required** under the TCA for a child sexual abuse case. The trial court properly granted summary judgment on pain and suffering damages.

Open Public Records Act (“OPRA”)/Family Education Rights and Privacy Act (“FERPA”)

- **Summary:** Plaintiff, L.R. individually and on behalf of her daughter, J.R., is a mother of a disabled student in the Camden County Public Schools who made an Open Public Records Act (“OPRA”) request of Cherry Hill Board of Education and its records’ custodian request all settlement agreements from all lawsuits from 2006-2011, redacting names of any students and their parents leaving only their initials. Defendant redacted all parent and student information including initials. Plaintiff sued asserting an OPRA violation. Defendant argued that the documents were not public records but student records under Family Education Rights and Privacy Act (“FERPA”) and the New Jersey Pupil Records Act (“NJPRRA”).
- **Issue:** The issue on this appeal was whether the defendant should have redacted the personally identifying information altogether as opposed to leaving the initials intact.
- **Holding:** The court decided to affirm and not to second-guess the trial judge’s reasoning which affirmed that the redactions were appropriate.

New Jersey's Equality and Equity in Education Law

N.J.S.A. 18A:36-20

- **Summary:** Petitioners claim the Board discriminated against A.S, by **failing to provide door to door transportation** to and from her out of district placement.
- **Facts:** A.S. was a high school student who attended Sage Alliance due to her education special needs. The Board arranged for Cassidy Transportation to transport A.S. to and from Sage. Cassidy determined that it would be unsafe for this smaller size school bus to stop directly in front of petitioner's home and decided to pick up and drop off A.S at the municipal building located one third of a mile away from the home.
- **Holding:** The Commissioner cannot reconcile why the Board would accept Cassidy's representation that it is so unsafe that a vehicle cannot safely pick up a student in front of her house but it is acceptable for the student to walk down the same hazardous road. **It is the Board's responsibility to provide A.S. with curb-to-curb transportation to and from A.S.'s out of district placement at Sage beginning in the 2023-2024 school year with transportation under N.J.A.C. 6A:27-1.3(a).**

Sick Days for Quarantine

- After a teacher reported to her principal that she had been exposed to COVID-19, the school district recommended that she quarantine for 14 days based on the New Jersey Department of Health guidance and its school nurses' opinion.
- The teacher was unable to work remotely because of in-person only instruction for the 2020-2021 school year, so she requested to use her accumulated sick leave. **The district denied her request to use sick leave on the basis that the teacher was not sick and the quarantine was not due to an illness within her immediate household.**
- The district charged her seven and a half personal days, and a half family illness day, to cover the eight school days that occurred during the quarantine period. The teacher appealed.

Sick Days for Quarantine (Cont.)

- The Commissioner held that the teacher qualified for sick leave.
 - N.J.S.A. 18A:30-1 provides three options that allows an employee to use sick leave: (1) if the employee is absent because of personal disability due to illness or injury; (2) if the employee is **excluded from school by the district's medical authorities** on account of a contagious disease; or (3) if the employee is quarantined for such a disease in his or her immediate household.
 - Here, the employee qualified for sick leave under option (2) because the district recommended that she quarantine. **In other words, the employee does not have to actually have the contagious disease to qualify for sick leave.**
- The Commissioner's decision was affirmed on appeal to the Superior Court of New Jersey, Appellate Division.

Criminal Matter-Employee Accused of Stealing and Reimbursement of Legal Expenses

- **Facts:** Rubet, school secretary, was accused of taking a gift bag belonging to another employee from a locker. After investigation, the Board attorney directed the District to file charges against Rubet. The police were provided with video surveillance, and while charges were filed, *they were ultimately dismissed*. Rubet was defended by a law firm that sent demand letters to the Board seeking reimbursement of \$155,367.27 to defray costs of the defense. The case was sent to an Administrative Law Judge (“ALJ”) who found the NJEA **was entitled to reimbursement** and costs for the defense pursuant to N.J.S.A. 18A:16-6.1. The ALJ found that the criminal charges arose out of Rubet’s performance of her position. The Board appealed.
- **Holding:** The Commissioner found that the **NJEA was not entitled to reimbursement** for Rubet’s legal expenses. N.J.S.A. 18A:16-6.1 provides that an employee **will not** have her legal costs indemnified if the criminal complaint is **filed against the employee “by or on behalf of the board of education.”**

Student Records – Age of Majority

- **Summary:** Petitioner sought release of his 18 year old daughter’s school records from the high school she attended. The daughter graduated and was no longer a student in the District.
- **Facts:** The petitioner sought information regarding if and where his daughter was attending college. According to a court order from a 2018 divorce proceeding, petitioner was granted “equal and unfettered access” to his child’s health and education records. The board denied access because a parent is not entitled to access to student records once the student has reached the age of maturity.
- **Holding:** The ALJ found that **petitioner is not authorized to obtain his 18 year old daughter’s school records.** The Commissioner agreed with the initial decision of the OAL, adopted it as the final decision, and dismissed the petition.

Filling Board Vacancy

- **Facts:** A *pro se* petitioner filed an appeal challenging the Board's decision to appoint Lisa Strutin to a vacant seat on the Allamuchy Board of Education. The vacancy was created when Board member, William Cramer resigned prior to the end of his term. The Board advertised the vacancy and Francis Gavin, petitioner, applied for the position. The Board did not select her. At a subsequent Board meeting, the Board appointed Lisa Strutin, who had lost her bid for re-election, to fill Cramer's unexpired term. Petitioner contended that the Board violated N.J.S.A. 18A:12-15 when it **appointed Strutin to fill the vacancy created by Cramer more than 65 days after Cramer's resignation**. The Board contended that the matter was moot because Strutin was subsequently reelected to a full term, so the vacancy created by Cramer's resignation did not exist when the case was heard.
- **Holding:** The commissioner concurred with the ALJ that **the Board did not have the statutory authority to appoint Strutin to fill the vacancy** created by Cramer's resignation. However, petitioner's requested relief is now moot since the term created by Cramer's resignation expired. Petitioner's motion for summary decision was granted but the requested remedy was dismissed as moot.

Failing to Report HIB

- A parent sought revocation of a teacher's certificate for allegedly **failing to report an incident of HIB**. Frischman was employed by North Brunswick as a teaching staff member for the 21-22 school year. On February 2, 2022, the teacher allowed student I.S. to leave class to use the restroom. The parent contended that while her child was in the restroom, **another student bit him on his buttock**. She also claimed that after leaving the restroom, her child met Frischman in the hallway and reported the incident. The student claimed that the teacher said something to the effect of, "Don't worry, I will handle it. If you don't feel comfortable using this bathroom, you can use the 3rd and 4th grade bathroom." The student told his parent later that evening, and she emailed her child's teachers and the principal.
- Frischman responded to the email that evening and said she had no knowledge of the incident, and allegedly spoke with the parent via telephone the next morning. The parent claimed that during their conversation, Frischman denied that the student reported a HIB, only that students were playing in the bathroom. She also claimed that when she received the parent's email, she forwarded it to the instructional dean. There was apparently video footage of Frischman having a brief conversation with the student in the hallway on the date of the incident (*possibly* corroborating the student's report). **The teacher had already resigned by the time the ALJ heard the case.**
- While the Commissioner concurred with the Administrative Law Judge that **an individual may not compel the revocation of a teacher's certificate**, as the authority to revoke or suspend teaching certificates lies solely with the State Board of Examiners, pursuant to N.J.A.C. 6A:9B-4.5, this case illustrates the potential issues arising out of failing to report an allegation of HIB to the Principal on the same day it occurred.

HIB Not Found - Coach

- A student at Gloucester County Institute of Technology, who was a member of the Paulsboro High School track team, alleged that she was **subject to a hostile environment** when she refused to run the 4x100 relay and went to visit family instead.
- She alleged:
 - she was **pressured** to run specific events,
 - that the coach **said bad things about her to other students** so that the students would be mad at her, and
 - the coach would **get upset** that she dressed and warmed up too slowly.
- The parents reported that **she expressed thoughts of self-harm** as a result of the incidents during track season. The HIB investigator found that the conduct **did not constitute HIB**.
- The determination was upheld by the Administrative Law Judge (“ALJ”) and Commissioner. The ALJ and Commissioner found that there was **no conduct motivated by any actual or perceived characteristic** such as race, color, religion, ancestry, national origin, gender, sexual expression, gender identity, disability, or any other distinguishing characteristic.
- While the decision was upheld, there were **numerous procedural issues**.

Divorced Parents – School Pick Up

- **Facts:** M.P.’s parents entered into a Marriage Settlement Agreement on the dissolution of their marriage which designated “alternate parenting days” which includes pick up and drop off from the high school. The father challenged the Board’s alleged failure to provide information regarding his child’s health. He allegedly acted in an inappropriate and threatening manner behavior at the school while attempting to pick up his child who complained of a headache when it was not his parenting day. The superintendent and the Board took action to restrict petitioner’s access to the school. Parent challenged Board’s alleged failure to provide information regarding his child’s health.
- **Summary/Holding:** The ALJ found and the Commissioner agreed that the decision to bar the parent from the school from the school district was not arbitrary, capricious or unreasonable.

Sending-Receiving District Relationship

- **Summary:** The parties have a longstanding send-receive relationship whereby Little Ferry students attend Ridgefield Park High School on a tuition basis. Historically, the tuition rate that Ridgefield Park charged Little Ferry was lower than the certified tuition rate calculated by the State and based on Ridgefield Park's cost per pupil. For the 2018-2019 school year, the parties executed an agreement that indicated there would be no tuition adjustment. In 2022, Ridgefield Park filed a petition to compel Little Ferry to pay the difference.
- **Holding:** The ALJ found that N.J.A.C. 6A:23A-17.1(f) requires a receiving district to return an overpayment to the sending district, the receiving district is not required to charge the sending district for an underpayment. The ALJ found that Ridgefield Park could have negotiated contract language stating that it may seek to recoup the underpayment but it did not in 2018-2019. The ALJ granted Little Ferry's motion for summary decision and dismissed the petition. The Commissioner concurred.

Student Discipline Challenge Must be Filed within 90 Days

- **Summary:** Petitioner filed an appeal challenging the discipline imposed by the Board on her minor son for making an inappropriate remark in class during freshman year at Verona High School. The appeal was **filed two years after the discipline was imposed because it impacted his ability to join the National Honor Society.**
- **Facts:** Petitioner maintains that the discipline imposed on was based on an incorrect infraction level as detailed in the school's Student Guidebook, and the discipline later impacted his ability to join the National Honor Society.
- **Holding:** The ALJ found there was no issue of material fact in this case and therefore ripe for summary decision. Pursuant to N.J.A.C. 6A:3-1.3(i), petitioners must file a petition no later than the 90th day from receipt, ruling or other action by the district board of education. This action was filed two years after the penalty was assessed. The ALJ concluded that the appeal was **clearly filed out of time** and granted summary decision to the Board, dismissing the petition. The Commissioner concurred with the ALJ.

Tenured Teacher – Absenteeism Due to Alcohol Use Disorder

- **Summary:** Petitioner, formerly a tenured teacher in the respondent Board’s school district, was absent from his teaching duties for a majority of the 2017-2018 school year due to alcohol use disorder. Petitioner alleged that the Board: violated N.J.A.C. 6A:32-6.3 when it required him to undergo a psychiatric evaluation without providing a written statement of reasons or notifying him of his right to a hearing; violated his rights regarding sick; and required him to enter into a Last Chance Agreement (“LCA”) that violated his tenure rights.
- **Holding:** The ALJ found that the Board did not terminate petitioner, as he voluntarily resigned and did not withdraw his resignation before it was accepted by the Board; and the LCA did not violate petitioner’s sick leave rights, as it did not contain any terms addressing sick leave. Accordingly, the ALJ affirmed the Board’s acceptance of petitioner’s resignation and dismissed the petition. The Commissioner concurred with the findings.

Termination of Non-Tenured Teacher

- **Facts:** Petitioner was a non-tenured teacher who was employed by the Board for the 2022-2023 school year pursuant to an employment agreement. The Superintendent in a letter dated September 22, 2022, provided petitioner with a 60-day notice of termination and placed her on administrative leave with pay. **The following day, the Superintendent informed petitioner that due to inappropriate and harassing text messages, she was recommending immediate termination for cause.** She challenged the termination.
- **Holding:** The ALJ found that since petitioner was a non-tenured teacher employed pursuant to an employment agreement, **the petition did not arise out of the New Jersey school laws, and therefore the Commissioner lacks jurisdiction, pursuant to N.J.S.A. 18A:6-9.** The Commissioner generally agreed, but remanded it to the ALJ to determine whether or not she was entitled to compensation for the full term of the contract pursuant to N.J.S.A. 18A:6-30.1 (wrongfully dismissed teacher).

Tenure Charges – Petitioner Reinstated Pending Fitness for Duty Medical Examination

- **Facts:** This matter arises from tenure charges filed by the Board against a staff member. The arbitrator assigned to hear the case ordered reinstatement to her position if she successfully completed a fitness for duty examination. Camillo proposed a choice of doctor, but the Board rejected her proposal and scheduled the exam with its choice of physician. Camillo attended the exam, but filed a notice of appeal.
- **Holding:** The ALJ found that both N.J.S.A. 18A:16-3 and Board Policy 2161 allow the employee to propose a physician of her choice for a fitness for duty exam, and the Board was **required to act in a reasonable manner in reviewing her proposal**. The Board **offered no reason** for rejecting petitioner's choice of physician, which led the ALJ to conclude that the Board's actions were arbitrary, capricious, and unreasonable (and the Commissioner affirmed).

Tenure Charges – Termination

- **Summary:** Cilento appealed the decision of the respondent Board of Education (“Board”) to terminate his employment as a teacher after the State of Board of Examiners suspended his teaching certificates.
- **Facts:** Cilento, formerly a tenured teacher in the respondent Board’s school district, was caught drinking alcohol while on the job in May 2019; the Board brought tenure charges against him, but the arbitrator did not dismiss him (only a three month suspension without pay). The State Board of Examiners thereafter suspended petitioner’s teaching certificates for a period of two years. Once petitioner’s certification was suspended, the Board terminated him from his tenured teaching position consistent with the requirements of N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9B-5.1(c)
- **Holding:** The ALJ concluded that the Board acted appropriately and in accordance with the law when it removed petitioner from his tenured teaching position, because petitioner did not have a valid teaching certificate at the time of the Board’s decision. The law is clear that **a school board cannot permit a teacher to teach without certification**, and as of October 28, 2021, petitioner lost his certification. Accordingly, the ALJ granted the Board’s motion for summary decision and dismissed the petition.

Vocational School Tuition

- **Facts:** Petitioner school district (Deptford) sought an order relieving it of the obligation to pay the tuition and transportation costs for its students to attend the Gloucester County Institute of Technology, which is operated by the Gloucester County Vocational-Technical School District. Petitioner contended that it offers Career and Technical Education programs that are equivalent to those offered at GCIT.
- **Holding:** The ALJ and Commissioner agreed that approved CTE programs are not the equivalent of a vocation school. Deptford is not exempt from paying the tuition and transportation costs for its students who apply and are accepted to attend GCIT under N.J.S.A. 18A:54-20.1 and N.J.A.C. 6A:19-2.3.

Unfitness to Hold Teaching Certificate

- **Summary:** Guerriere, a staff member, received Sandy relief funds after she falsely claimed a home she owned in Brigantine was her primary residence. Guerriere claimed the property as her primary residence and sought and obtained relief funds based upon that claim.
- **Holding:** The Judge immediately revoked Guerriere’s Teacher of Health and Physical Education, Teacher of Handicapped and Teacher of Driver Education certificates, effective immediately. The Commissioner cited to cases indicating that “Teachers...are professional employees to whom the people have entrusted the care and custody of...school children,” that “this heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment,” and that “Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant.”

Tenure Charges - Arbitrator – No Legislative Authority To Demote In Tenure Case

- **Facts:** After falling down the stairs, an assistant principal removed a piece of paper from her purse, got up, walked halfway up the stairs, placed the piece of paper on a stair, and returned to the bottom of the stairs. She reported that she slipped on the paper. After reviewing the surveillance footage and discovering the fraud, the district filed tenure charges. In a tenure arbitration case involving an assistant principal, the arbitrator sustained the charges and demoted her from her assistant principal position to a fourth-grade teacher while suspending her without pay for 180 days.
- **Holding:** The Appellate Division held that arbitrators in tenure cases **do not have the statutory authority to demote an employee**. Arbitrators can only dismiss an employee or reduce salary. As a result, the court reinstated Sanjuan to the assistant principal position and remanded the case for the arbitrator to consider whether there should be any further salary reduction (whether through increment withholdings, a further suspension, or a combination thereof) in light of the inability to demote an employee.
- The Supreme Court of New Jersey granted certification on May 22, 2023. 2023 WL 3631901.

Tenure Charges – No Dismissal

- **Facts:** The Board employed Silberman as a technology teacher for twenty years. In 2015, he was reprimanded for losing his temper with students (became angry and kicked the student's chair). In April 2022, during a lockdown drill, two students from the same class reported that, during or around the time of the lockdown drill, Silberman made **inappropriate physical contact with them**. One student reported that he was forcibly pulled out of his chair, with such force that a bruise was left on the student's arm. He then made the student stand for the rest of the drill. The other student reported that Silberman slapped his hand and pulled his hand off the computer mouse. Fourteen students corroborated the incidents. IAIU investigated and determined that it was not abuse or neglect, but there was some harm. The students did not testify at the hearing.
- **Decision:** The arbitrator found that the only incident that was proven was that he made a student to stand for the duration of the drill—the rest was not supported by witness testimony from students (whose parents apparently did not want them to testify). The arbitrator found that the teacher's action of making the student stand in front of the class during the lockdown drill was unbecoming conduct, but only suspended him without pay for four months (September 1, 2023 through January 2, 2024) and withheld his increment. He did find the 2015 conduct to be prior discipline (albeit mild), and factored that in with Silberman's twenty years of service. These were the only two incidents in the teacher's file.

Open Public Records Act – Prevailing Parties

- **Facts:** Plaintiff sought various public records from the school district on May 15, 2020. The school district advised that due to the COVID-19 shutdown, it could not respond within seven business days but would do so when able to allow for access to the records. Plaintiff filed an Order to Show Cause in Superior Court seeking access to the records. The school district eventually produced records in February and March, 2021.
- **Holding:** The school district acted reasonably, and the trial court correctly determined that the school district did not deny Plaintiff's request for records or otherwise refuse to produce records, which that meant that plaintiff was not a prevailing party under the statute (and thus could not recover attorneys' fees). Much of this depended upon the relation of the seven-business day timeline during COVID.

School Ethics – No Violations/Facebook Posts

- **Facts:** Koenig ran for the Board in 2021 and maintained a Facebook page that she used to advertise and campaign before winning her election. She was sworn in as a board member on January 7, 2022, and three days later, posted on Facebook that the Governor was a “Tyrannical POS,” complaining about masks in schools. Two days later, she posted that teachers should opt out of the NJEA, with the hashtags #unenroll and #riseup. Neither Facebook post had a disclaimer. The CREA filed an unfair practice charge against the Board a few months later, indicating that the Board violated the Workplace Democracy Enhancement Act, while the Complainants filed a complaint with the School Ethics Commission arguing that Koenig violated 24.1(a) and 24.1(e) of the Code of Ethics.
- **Analysis:** Although the ALJ who heard the case found a violation of the Code of Ethics and recommended censure, the SEC instead dismissed the matter. It found that “ while the subject matter of the Facebook posts – opting out of the union and masking in schools – may relate to the business of the Board, there is an insufficient nexus between Respondent’s personal Facebook page and her membership on the Board, such that a reasonable member of the public would not perceive that Respondent is speaking pursuant to her official duties.” Because Koenig’s Facebook page does not identify her as a board member, nor does she advertise or rely upon her board membership when publishing material on her Facebook page, the SEC found that there was “no factual evidence that the statements/posts on her Facebook account were made in her capacity as a member of the Board, or had the appearance of being representative of, or attributable to the Board.”

School Ethics – No Violations/Facebook Posts

- Moreover, the SEC held that just because people know she is a board member “does not result in her private posts becoming in her official capacity.” And while she “may have used her Facebook page to reach constituents in her campaign ... her Facebook page did not make any reference to the Board nor her membership on the same and her posts reflect the same positions on which she previously campaigned and ultimately resulted in her election onto the Board.”
- Interestingly, the SEC did indicate that “Calling the Governor a ‘Tyrannical POS’ and encouraging people to opt out of the NJEA runs counter to the level of decorum expected from a publicly elected school official who is charged with serving New Jersey’s student population.” while the SEC “acknowledges the sanctity of the First Amendment,” it stated that “board members should recognize and refrain from inappropriate communications that have no place in the educational setting.”
- The SEC decided a similar case the same way on the same day, where that board member’s posts included encouraging staff members to form new unions, comparing the treatment of unvaccinated individuals to discrimination experienced by Jewish people, posting a picture of an unmasked child giving a thumbs up and indicated that she does not listen to the Governor, complaining about how gender identity is taught in schools (which included sharing a video from Fox News and sharing a post that stated “this is a sick war on our children!”), among others. *See Ronald Donnerstag et al. v. Merissa Borawski, Central Regional Board of Education, Ocean County, SEC Docket No. C20-22 (School Ethics Commission, August 22, 2023)*

School Ethics – Violations of 24.1(c) and 24.1(e)

- **Facts:** The Board was considering replacing Apple devices in the 1:1 program for students, and the administration presented a “feasibility study” to the Board setting for the recommendation to replace the 2,100 student devices with the MacBook Air 13. Two board members, including Fable, were “frustrated with what they thought was the lack of information from the administration...” about the switch. Fable then:
 - Took it upon herself to email business administrators for the Tenafly, Emerson, Paramus and Ridgewood Boards of Education requesting information on their experiences with Chromebooks as she was **“looking to do an analysis of Apple devices versus Chromebooks.”**
 - Had an employee at her private business request quote for Chromebooks with detailed specifications claiming that the school was “looking to move students over to Chromebooks, as part of a 1:1 program.” After the vendor alerted the Superintendent he told her she could not do that, and the vendor refused to provide a quote. She then emailed saying that she was seeking quotes because she was doing “PERSONAL RESEARCH as a board member,” and then sought price quotes for Chromebooks from two other vendors, **without telling the Board she was doing it, and without approval from the Board, the Finance Committee, the Superintendent, the Board President, or the Board attorney.**
 - She also represented “that the Board was contemplating switching from MacBooks to Chromebooks, despite the fact that the Board was considering no such switch.” Fable claimed that the administration had not given her accurate and detailed information related to the MacBooks and wanted to **“do her own research.”**

School Ethics – Violations of 24.1(c) and 24.1(e)

- **Analysis:** The School Ethics commission found that taking “official action to effectuate policies and plans without consulting those affected by the policies and plans” by contacting other school districts and vendors, as well as “using misrepresentations (either directly or indirectly) and her position on the Board to find a quote for Chromebooks.” without Board approval, violated 24.1(c) and **went beyond policy making, planning, and appraisal**. The SEC found that her “actions far exceeded preliminary internet searches or ‘research,’” and that she instead “conducted a detailed inquiry in which she contacted school vendors and gave the impression that she was doing so on behalf of the Board.”
- The SEC also found her actions constituted **private action that could compromise the Board in violation of 24.1(e)**, because she “falsely implied to vendors, including a District vendor, that the Board was considering purchasing Chromebooks.” The SEC found that while she “was within her right to express disagreement at the Board meeting...it was inappropriate of Respondent to conduct her own private investigation and place the Board at risk.” It also rejected the claim that the administration failed to provide adequate information.
- The Commissioner upheld a **censure** of this board member for violating the Code of Ethics, specifically 24.1(c) and (e).

The End

...Questions?