2017 SCHOOL LAW UPDATE

A Year in Review

PRESENTED TO THE

Bergen County Association of School Business Officials

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PART I: RECENT AND RELEVANT LEGISLATION

1. <u>SECURE SCHOOLS FOR ALL CHILDREN'S ACT</u>: P.L. 2016, c.49 (Sept. 6, 2016)

Enacting N.J.S.A. 18A:58-37.8 *to* 37.14

⇒ This law establishes a State aid program for the provision of security services, equipment, or technology to help ensure a safe and secure school environment for students attending non-public schools, and imposes a number of requirements on the public school district in which a non-public school is located. The State provided $75 per non-public school student for the 2016-2017 school year, and the law requires this amount to increase annually based on the consumer price index.

⇒ The board of education must adopt policies and procedures to provide non-public schools with security services, equipment, and technology within the limits of funds appropriated by the State.

⇒ Before November 5 of each year, each school district must inform the Commissioner of Education of the estimated cost of providing security services, equipment, and technology for the next school year as well as the number of students attending non-public schools located in the district as of the last school day in October.

⇒ The superintendent of schools must confer annually with the chief school administrator of the each non-public school in the district to:

- Advise the non-public school of the limit of funds available under the act;
- Agree upon the security services, equipment, and technology to be provided with the State funds;
- Agree on the date when the board of education will meet to approve how the security services, equipment, or technology will be provided to the non-public school.

⇒ The act provides school districts and their employees immunity from liability in the provision of security services, equipment, and technology under the act, with the exception of acts that are willful misconduct or grossly negligent.

2. <u>USE OF ELECTRONIC FUNDS TRANSFER TECHNOLOGY</u>: P.L. 2016, c.29 (April 1, 2017)

Enacting N.J.S.A. 40A:5-16.5

⇒ This statute permits boards of education to adopt policies for payment of claims through the use of electronic funds transfer technologies instead of payment through checks or warrants.

⇒ The policy adopted by a board of education must list the forms of standard electronic funds transfer technologies that may be used.

⇒ Additionally, the policy must designate the chief financial officer, i.e., the official designated by the board of education as responsible for the proper administration of finances of the school district, as being responsible for the oversight and administration of the disbursement policy and associated systems.

⇒ The chief financial officer shall document and implement internal controls sufficient to ensure safe and proper use of the system and mitigate the potential for fraud and abuse.

3. **REIMBURSEMENT FOR LEAD TESTING**: P.L. 2017, c.86 (May 11, 2017)

⇒ This bill provides financial relief to school districts that performed lead testing on or after January 1, 2016, but prior to the date that the Department of Education published the lead testing program requirements. In order to receive reimbursement, however, the testing conducted must meet or exceed the program requirements subsequently established.

⇒ Reimbursement request forms and information on the Department's testing requirements are available at http://www.nj.gov/education/lead/.

4. **REGIONAL BOARD MEMBERSHIP APPORTIONMENT**: P.L. 2017, c.45 (May 1, 2017)

Revising Chapter 13 of Title 18A

⇒ Permits newly-created and enlarging school districts to determine the apportionment methodology for their boards on a basis other than population. Currently, most regional boards have nine members, with at least one member from each constituent district. The remaining seats are allocated amongst the districts based on population. This bills allows the districts to select an alternative method for apportioning the remaining seats.

⇒ With Commissioner approval, the alternative apportionment proposed by the newly-created or enlarging school district will be included in the consultation study conducted pursuant to *N.J.S.A.* 18A:13-34. If, after the study, the Commissioner determines that it is advisable to create or enlarge the regional district, and the voters approve the proposal, the board will be elected in accordance with the alternative apportionment method. The alternative apportionment method shall continue in effect until the next federal census.

5. **SUPERINTENDENT SALARY CAPS**: (May 1, 2017)

Amending N.J.A.C. 6A:23A-1 through 15

⇒ In 2008, the New Jersey Legislature enacted the Accountability Regulations to address, among other things, school district fiscal accountability. In 2010, the Accountability Regulations were revised to impose superintendent salary caps. Effective May 1, 2017 the Accountability Regulations were revised to modify the superintendent salary caps.

⇒ The Revised Commissioner Regulations adjust the definition of "Maximum Salary Amount" for superintendents as follows:

749 students or less	$147,794
750 to 2,999 students	$169,689
3,000 students or more	$191,584
More than 10,000 students	Commissioner may grant a waiver of the MSA

⇒ The Revised Regulations also allow, for the first time, salary cap adjustments for superintendents accepting a new contract in the same district in which they already serve. Such superintendents are eligible for annual 2% salary increases for each year of the next contract.

- The Revised Regulations also provide that upon the expiration of a contract in effect on July 1, 2016, a superintendent reappointed for a subsequent term with the same school district may receive the two percent retention increases referenced above.

- Notably, if the contract in effect on July 1, 2016 is *not* the superintendent's initial contract with that school district, the Revised Regulations allow the superintendent to open the contract to: (1) increase the salary; and (2) include the retention stipend. However, a superintendent whose initial contract is opened to increase the salary is *not* entitled to receive the retention stipends during the length of the re-opened contract period.

6. <u>BOARD MEMBER SWEARING IN PENDING BACKGROUND CHECKS</u>

⇒ There presently exists a conflict in the law with respect to April elections and the completion of criminal background checks. Pursuant to *N.J.S.A.* 18A:12-1.2, board members are required *within 30 days of election*, to undergo a criminal history background check. However, unlike November elections, where the reorganization meeting occurs in January, State law requires that the April reorganization occur almost immediately. More specifically, *N.J.S.A.* 18A:10-3 requires that the reorganization meeting occur "on any day of the first or second week following the April school election."

⇒ Recently, the New Jersey Criminal History Review Unit acknowledged this conflict and issued a memorandum clarifying that board members elected for the first time in April will be permitted to take office at the reorganization meeting pending the completion of their background checks. The Unit advised that these board members will have 30 days from the date the election results are certified to complete their background checks.

7. <u>SCHOOL NURSE CERTIFICATIONS</u>: P.L. 2017, c.70 (May 11, 2017)

⇒ In July of 2013, the State board adopted amendments to the certification requirements for nurses, which reduced credit requirements for a school nurse endorsement from 30 to 21 semester hour credits, and reduced credit requirements for a non-instructional school nurse endorsement from 21 to 15 semester hour credits. The amendments also eliminated the

requirement that a candidate for a school nurse endorsement complete a minimum of 6 credits in a college-supervised school nurse practicum.

⇒ When this bill was introduced, the House proposed to codify the previous (pre-2013) State board certification requirements, including: (1) the 30/21 semester hour requirement; and (2) the college-supervised school nurse practicum experience. The Senate subsequently revised the bill. While the Senate accepted the nurse practicum experience requirement proposed by the House, it revised the bill to maintain the current 21/15 credit requirement.

⇒ The Senate also revised the bill to specify that "the fundamentals of substance abuse and dependency" will be one of the areas required to be studied in order to receive an endorsement.

8. **HOMELESS STUDENTS RESIDING IN HOMELESS SHELTERS**: P.L. 2017, c.83 (May 11, 2017)

Amending N.J.S.A. 18A:7B-12 *et seq.*

⇒ This bill requires the State of New Jersey to assume fiscal responsibility for the tuition of any homeless child residing in a homeless shelter located outside of the district of residence for more than one year. Previously, *N.J.S.A.* 18A:7B-12 *et seq.* required the State to assume financial responsibility only for homeless children residing outside their district of residence in a domestic violence shelter or transitional living facility.

⇒ In accordance with the McKinney-Vento Homeless Assistance Act of 1987, the New Jersey Office of Administrative Law has routinely held that if a homeless family continues to reside in a particular school district outside their district of residence for more than one year, the family is considered to be domiciled in that new district. This has resulted in an excessive burden on towns in which homeless shelters are located. Therefore, this bill was passed to alleviate that burden.

⇒ Effective at the start of the 2017-2018 school year.

9. **MILITARY UNIFORMS AT GRADUATION**: P.L. 2017, c.84 (May 11, 2017)

⇒ This bill permits eligible students who are members of the United States Armed Forces to wear military uniforms at high school graduation, provided that the student "has completed basic training for, and is an active member of, a branch of the United States Armed Forces."

⇒ The act takes effect "on the first day of the third month next following the date of enactment." While this language is less than clear, the act should be interpreted to take effect for graduation 2018.

10. **FINANCING SCHOOL SECURITY IMPROVEMENTS**: P.L. 2016, c.100 (Jan. 9, 2017)

Amending N.J.S.A. 18A:7F-41

⇒ This bill authorizes a school district to use its emergency reserve fund to finance "school security improvements."

⇒ The original version of the bill did not include a definition of the term "school security improvements," but the Senate revised the bill to define the term as follows:

> "school security improvements" means school security improvements, including improvements to school facilities, which are limited to safety and security measures involving building monitoring and communication technology designed to address school crime and the safety of students, staff, and visitors to school facilities. School security improvements may include, but need not be limited to: security cameras to monitor the school; an electronic notification system that automatically notifies parents in case of a school-wide emergency; an automatic door locking system for access control; and a badge system for school employees.

⇒ The new law also permits school boards to withdraw such funds *without approval from the Commissioner*, when the withdrawal is included in the original budget certified for taxes to finance school security improvements.

11. **CLASS THREE SECURITY GUARDS**: P.L. 2016, c.68 (Nov. 30, 2016)

Amending N.J.S.A. 40A:14-146 *et seq.*

⇒ The purpose of this law is to create a third category of special law enforcement officers, known as "Class Three Officers." Class Three Officers are comprised of *retired* law enforcement officials authorized to provide security to public and nonpublic schools and county colleges. The purpose of this legislation was to establish an affordable option for municipalities to provide security in schools. While School Resource Officers, who are *active* members of the local police force, often represent the preferred option for school security personnel, the employment of SROs can be difficult for many school boards to fund.

⇒ In order to be eligible to serve as a Class Three Officer, the following requirements must be satisfied:

- Be a retired police officer less than 65 years old;
- Have served as a duly qualified, fully-trained, full-time municipal or county police officer, or as a member of the state police;
- Have separated from that prior service in good standing within three years of appointment as a Class Three Officer (or within five years during first year following enactment);

- By physically capable of performing the functions of the position;
- Possess an N.J. Police Training Commission Basic Police Officer Certification or an N.J. State Police Academy Certification and complete the training course for safe schools resource officers (SROs); and
- Be hired in a part-time capacity

⇒ Effective as of June 1, 2017.

12. **SCHOOL SECURITY DRILLS**: P.L. 2016, c.80 (Dec. 5, 2016)

Amending N.J.S.A. 18A:41-1 *et seq.*

⇒ This bill revised the requirements governing school district security drills to require, among other things, that all full-time *employees* receive *annual* school safety and security training. Presently, such training has to be provided only to teaching staff members and must be provided only at the time of hiring. Under these revisions, the training must be "conducted collaboratively" by the district and emergency responders, including law enforcement, fire and emergency responders.

⇒ In addition, schools are now required to ensure that a law enforcement officer is present for at least one school security drill each school year.

⇒ These revisions also expand the definition of "school security drill," to include bomb threats.

⇒ Finally, the revisions provide that an *actual* fire or school security emergency will be considered a "drill" for purposes of satisfying the requirements under *N.J.S.A.* 18A:41-1.

⇒ This bill implements recommendations #6 and #22 from the July, 2015 report of the New Jersey School Security Task Force, and it is effective for the 2017-2018 school year.

13. **NEW SCHOOL CONSTRUCTION**: P.L. 2016, c.79 (Dec. 5, 2016)

Enacting N.J.S.A. 18A:7G-5.2

⇒ This bill implements recommendation #11, architectural design for new construction, and recommendation #12, hardening school perimeters and building entryways, of the July, 2015 report of the New Jersey School Security Task Force.

⇒ The architectural design for new construction must include, *wherever possible*:

- A building site with adequate space to accommodate bus and vehicular traffic separately and permit additional space for the proper evaluation of occupants;
- Bus drop-off/pick-up areas that are separated from other vehicular drop-off/pick-up areas.

- Pedestrian routes that are separate from vehicular routes, with any crossings of the two minimized to the extent possible.

⇒ Among others, the following requirements shall also be in place:

- The number of anterior doors will be kept to a minimum, and emergency exit doors will have, to the extent possible, exterior door hardware eliminated.

- There shall be a single public entrance for use during the school day, which shall be equipped with a security vestibule with interior doors that must be released by school security or other staff. Consideration should be given to bullet resistant glass.

- The principal's office shall have a secondary exit, and all interior door locks on spaces that will serve as safe havens during lockdowns shall have keyless locking mechanisms.

- New building will have access control systems allowing for remote locking and unlocking, and will be designed to keep public areas separated and secured from all other areas.

⇒ In the case of new school construction undertaken by a district, and in the case of existing school building, the following are a few examples of the new requirements:

- Require security personnel to be in uniform, and clearly mark the school's main entrance.

- Make driveways one way, and place bollards along roadway to prevent vehicular access to walls, windows, doors.

- Limit number of doors for access by staff.

- Maintain a parking decal or tag system for all staff and students who park on campus.

- Adopt a policy to clearly indicate that propping open a door is prohibited.

⇒ This act is effective immediately.

14. **<u>SENDING DISTRICT VOTING RIGHTS</u>**: P.L. 2017, c.140 (July 21, 2017)

Amending N.J.S.A. 18A:38-8.1

⇒ This new law expands the topics that can be voted on by sending-district board representatives, effective immediately.

⇒ Representatives are now permitted to vote on:

- Any matter directly involving sending district pupils or programs and services used by them;

- Approval of the annual receiving district budget;

- Any collectively-negotiated agreement involving employees who provide services used by sending district pupils;

- Any individual employee contracts not covered by a collectively-negotiated agreement, if those employees provide or oversee programs or services used by sending district pupils; and

- Any matter concerning governance of the receiving board, including, but not limited to, the selection of board president and vice-president, approval of board bylaws, and the employment of professionals or consultants such as attorneys, architects, engineers, or others who provides services to the receiving district board of education.

15. <u>BOARD CANDIDATE CRIMINAL BACKGROUND</u>: P.L., c. 219 (Aug. 7, 2017)

Amending N.J.S.A. 19:60-6

⇒ This law requires each school board candidate to file with his or her nominating petition a specific affirmation that he or she has not been convicted of any of the crimes that disqualify an individual from membership on a board of education or a charter school board of trustees.

⇒ According to its sponsors, the bill was inspired by a situation in which an individual attempted to run for the school board after previously serving six months in a federal prison for a crime that would have disqualified him from holding office if elected.

⇒ Effective July 1, 2018

16. <u>SCHOOL SECURITY SURVEILLANCE</u>: P.L. 2017, c.119 (July 21, 2017)

Enacting N.J.S.A. 18A:41-9

⇒ Requires that if a school building is equipped with video surveillance equipment that is capable of wirelessly streaming live video to a remote location, the board must enter into a memorandum of understanding with local law enforcement authorities giving them the ability to activate the equipment and view live-streaming videos.

⇒ The memorandum of understanding shall include, but need not be limited to, the following: (1) the designation of individuals who shall be authorized to view live streaming video; (2) the circumstances under which the designated individuals would view live streaming video; and (3) a detailed plan for preventing and detecting unauthorized access to live streaming video.

⇒ The law's provisions only apply to those buildings already equipped with video surveillance equipment, and expressly clarifies that "[n]othing in this section shall be construed as to require the installation of video surveillance equipment capable of streaming live video wirelessly to a remote site."

17. INSTALLATION OF CARBON MONOXIDE DETECTORS

Enacting N.J.A.C. 5:23-6.1, et al

⇒ No later than September 3, 2017, school districts are now required to install carbon monoxide detectors in all buildings, including schools, where there is a fuel-burning appliance or an attached garage.

⇒ A fuel-burning appliance "means a device or apparatus which is designed to utilize natural gas, manufactured gas, mixed gas, liquefied petroleum products, solid fuel, oil or any gas as a fuel for heating, cooling, hot water, cooking, generating light or power or for aesthetics."

⇒ Implementing regulations were adopted by the Department of Community Affairs on June 5, 2017.

PART II: RECENT AND RELEVANT CASE LAW

1. OPEN PUBLIC MEETINGS ACT ("OPMA")

⇒ *Kean Federation of Teachers v. Bd. of Trustees of Kean Univ.*, 227 *N.J.* 192 (2016)

- In this case, the court interpreted OPMA to require each public body to provide *Rice* notice whenever it intends to act on a matter that could adversely affect an employee's rights *regardless of whether the public body discusses or states an intention to discuss the matter in closed session.* Breaking with established legal precedent, the Court held that an employee's notice rights are triggered whenever his/her name or position is placed on a board agenda *for action*, regardless of whether or not there is an intent by the board *to discuss* the matter. The Court stated as follows:

  > We now hold that a public body is required to send out a *Rice notice any time it has placed on its agenda* any matters involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific...employee.

- The Court explained its decision by noting that its new approach is necessary in order to ensure that board members have the opportunity and flexibility to discuss and deliberate should they determine during a meeting that such discussion or deliberation is necessary. The court held as follows:

  > The notice requirement in *Rice* is predicated on the presumption that members of public bodies discuss personnel matters that come before them, question the underlying basis for the course of action recommended by the staff, and deliberate before reaching an ultimate decision…the record shows that not sending out a *Rice* notice stifles the board's deliberative process and inhibits the robust discussion by individual board members…This protocol provides the board with the flexibility to discuss matters in executive session when necessary.

- The Court also addressed the responsibility of local boards to make all minutes "promptly available" for review by the public. Although the Court declined to impose the requested 45 day timeline, as such a bright light rule would unnecessarily "invite[] continuous judicial involvement," it also emphasized that waiting two or three months to release minutes would *not* comply with OPMA's mandate. The Court explained that boards must affirmatively act to ensure that minutes are made promptly available, and that "[t]he approval of meeting minutes cannot be treated as a mere ministerial function, or worse yet, a technical annoyance."

- The New Jersey Supreme Court has granted certification.

2. OPEN PUBLIC RECORDS ACT ("OPRA")

⇒ Access to Student Records Under OPRA

- *L.R. o/b/o J.R. and L.R. individually*

  - An individual by the name of "L.R." filed OPRA requests with numerous school districts demanding access to copies of requests for Independent Educational Evaluations and the responses of the districts. In requesting these documents, L.R. directed the local boards to disclose the initials of all students discussed therein. Many school districts denied L.R.'s request on the basis that the documents were exempt from disclosure because they were education records" under the Family Educational Rights and Privacy Act ("FERPA") and "student records" as defined under State law.

  - In response, L.R. filed numerous orders to show cause against the boards and their respective custodians of record, claiming that: (1) redacted education records and student records may be disclosed under OPRA; and (2) student initials may be disclosed because student initials are not "personally identifiable information."

  - The trial level decisions in these matters have varied. For instance, in Somerset County, the court ruled that the documents were *per se* exempt and could not be disclosed in any form. By comparison, in Morris County, the court ruled that the documents could be disclosed, but that the student initials must be redacted.

- *The Innisfree Foundation*

  - Following the L.R. cases, an alleged non-profit organization by the name of "The Innisfree Foundation" began submitting OPRA requests to school districts seeking copies of special education settlement agreements. These documents, like the independent educational evaluations requested by L.R., are also education records under FERPA and student records under State law. Unlike L.R., however, Innisfree directed local boards to redact all personally identifiable information, including student initials.

  - The majority of boards have denied Innisfree's request on the basis that these records remain exempt from disclosure, irrespective of redactions, absent written parental consent or a court order. In response, and comparable to L.R., Innisfree has also filed numerous orders to show cause demanding access to these records. While many, but not all, trial courts have ordered boards of education to disclose the redacted records, there has been no consistency among the decisions.

  - Recently, the Bergen County Superior Court granted a stay of the matter *Innisfree Foundation v. Wyckoff Publics Schools et. al*, a lawsuit involving 41 Bergen County school districts, pending the decision of the Appellate Division in the related cases discussed below.

- To date, numerous L.R. and Innisfree cases have been appealed to the New Jersey Appellate Division. Earlier this year, a scheduling conference was convened, and the Appellate Division selected a few of these cases for oral argument, with the understanding that the remaining cases would be held in abeyance. Oral argument was held in these matters on September 18, 2017.

⇒ *Paff v. Galloway, 229 N.J. 340 (2017)*

- In *Paff*, the New Jersey Supreme Court reviewed OPRA's definition of "government record" and held as a matter of first impression that specifically identifiable information contained in an electronic form, or otherwise stored electronically by a public agency, is subject to public access. There, the Court reviewed a request for specific information contained in emails, where the requestor did not seek access to the emails themselves, and instead requested only the sender, recipient, date and subject line imbedded within the emails. The township had denied the request on the grounds that compiling the information would have required the custodian of records to create a new government record, and OPRA does not require a public agency to create new records in response to an OPRA request.

- The Supreme Court reversed the decision of the Appellate Division, which had found in favor of the township, and held that the data must be produced because the information *itself* was considered a government record under OPRA. In reaching this conclusion, the Court noted that OPRA was passed in 2001 to reflect "the profound changes in communication and storage of information in recent times," and emphasized that the definition of government record specifically includes "information stored or maintained electronically." *See N.J.S.A.* 47:1A-1.1. The Court summarized as follows:

> A document is nothing more than a compilation of information – discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record…We reject the Appellate Division's statement that 'OPRA only allows requests for records, not requests for information'…That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

- In reconciling this opinion with the language of OPRA and prior judicial guidance, it is critical to recognize that the Court's holding extends only to the disclosure of specifically identifiable information that is already maintained or stored electronically by a public agency. The Court did not, as may be claimed by some requestors, interpret OPRA to require the creation of new documents, or the

disclosure of information responsive to a general inquiry or vague document request. To the contrary, the Court emphasized as follows:

> A records request must be well defined so that the custodian knows precisely what records are sought. The request should not require the records custodian to undertake a subjective analysis to understand the nature of the request. Seeking particular information [already stored by a public agency] is permissible; expecting the custodian to do research is not.

- Additionally, in rendering this analysis the Court also acknowledged that OPRA allows for a service-fee charge when the request for a record requires "a substantial amount of manipulation or programming of information technology" *N.J.S.A.* 47:1A-5(d). Therefore, this opinion should not be interpreted as requiring public agencies to automatically extract and produce all data responsive to a request. A public agency must review the request and determine the factors involved in extracting or otherwise converting the information. If this process will be time consuming or expensive, the agency may assess a reasonable fee.

- Finally, the Supreme Court remanded the matter back to the Superior Court to determine whether any of OPRA's enumerated exemptions require the redaction of information contained in the requested data fields. The Court acknowledged the township's valid concerns regarding the disclosure of the information, including the release of citizens' email addresses, and ordered the Superior Court to render an analysis regarding the need for redaction.

⇒ *Grieco v. Borough of Haddon Heights*, 449 *N.J.Super.* 513 (Law Div. Oct. 19, 2015), approved for publication on April 24, 2017.

- In this case, the court held that an OPRA requestor was not entitled to counsel fees in the absence of pre-suit efforts at resolution. Here, plaintiff sent a request for certain records from November 1, 2014 through April 1, 2015. The borough responded, within the timeframe allotted under OPRA, and produced the 2015 documents. The borough inadvertently neglected to produce the 2014 documents. Exactly two weeks later, and without communicating with the borough or asking why the 2014 documents were not produced, the plaintiff filed suit. As soon as the borough received a copy of the complaint, and became aware of the missing 2014 documents, it produced them immediately. Plaintiff refused to withdraw the complaint, however, and maintained the action in order to seek attorney's fees.

- The court rejected the request for attorney's fees, summarizing in relevant part as follows:

> It would not serve the purposes of OPRA to award attorney's fees in this case. OPRA envisions cooperation between requestors and government agencies. The very language of the statute contemplates cooperation between the two…It is clear from the

> record that…plaintiff made no attempt to cooperate or work with defendants in order to acquire the 2014 records…Defendants were unaware, due to a simple oversight, that their reply to the OPRA request was not fully responsive. Allowing attorney's fees in this case would be *antithetical* to the "cooperative balance OPRA strives to attain" (emphasis added).

⇒ *Scheeler v. N.J. Dep't of Educ.*, A-3125-14T3, 2017 WL 218259 (App. Div. Jan. 19, 2017)

- Board lawfully redacted home *street* addresses from documents produced to requestor under OPRA's Privacy Interest Exemption, *N.J.S.A.* 47:1A-1.1, which provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectations of privacy."

- The court also distinguished access to financial disclosure statements filed in accordance with the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, from the financial disclosure statements requested in *Walsh v. Township of Middletown*, GRC Complaint No. 2008-26 (Nov. 18, 2009), which had been filed in accordance with the Local Government Ethics Law, *N.J.S.A.* 40A:9-22.1. In *Walsh*, the Government Records Council held that the custodian unlawfully redacted home addresses contained in financial disclosure statements, because the Local Government Ethics Law *expressly requires* that home addresses be included in these statements. Where there exists no similar provision in the School Ethics Act, boards of education may lawfully redact the home addresses listed on financial disclosure statements.

⇒ *Wolosky v. Sparta Bd. of Educ.*, A-4536-14T2, 2017 WL 127793 (App. Div. Jan 13, 2017)

- Board lawfully redacted student initials contained in its legal invoices in accordance with OPRA's Privacy Interest Exemption. The court balanced the requestor's interest in reviewing unredacted legal invoices against the students' privacy interests, as the disclosure of their initials could reveal information about the students' special education classifications and the extent of legal involvement in their educations.

- The court concluded that the students had significant interests in maintaining the confidentiality of the information, and found the information that was disclosed would allow plaintiff to determine how much work was spent on each legal matter.

⇒ *Wolosky v. Somerset Cnty.*, A-1024-15T4, 2017 WL 1179852 (App. Div. Mar. 30, 2017)

- Somerset County lawfully redacted the home addresses, email address and telephone numbers contained in copies of OPRA requests submitted to the county. On May 18, 2015 plaintiff submitted an OPRA request seeking copies of all OPRA requests "received by the county from persons other than plaintiff." In response, the county produced copies of 54 OPRA requests, and provided the names of the OPRA

requestors but redacted their home addresses, email addresses and telephone numbers pursuant to the Privacy Interest Exemption.

- The county asserted that citizens do not waive their privacy interests in their email and home addresses when they file OPRA requests. The court agreed, and held that the requestors' interests "in not being contacted by plaintiff or others to whom [plaintiff] might disclose the information" outweighed plaintiff's interest in obtaining the email and home addresses.

- Notably, the court also rejected plaintiff's argument that persons who submit OPRA requests have no reasonable expectation of privacy because the county's OPRA request form stated that information in the request "may be subject to disclosure under OPRA." The form simply said it *may* be subject to disclosure, not that it *would* be subject to disclosure, and individuals submitting requests could have reasonably assumed that personal information in the request would not be subject to disclosure.

⇒ *Collingswood Bd. of Educ. v. McLoughlin*, A-2475-14T1, 2016 WL 6134926 (App. Div. Oct. 21, 2016)

- In this case, the court held that public agencies are not entitled to file a Declaratory Judgement Action ("DJA") in response to an OPRA request. Instead, public agencies are required to make the "difficult decision" as to whether something is a government record. Here, the media filed a request for a copy of an investigatory report related to allegations of racial bias against a staff member. The board filed a DJA seeking guidance from the court, explaining that releasing the document may expose it to potential litigation and damages from the employee, and a failure to release the report could expose it to the same risk from the media requestors.

- The trial court endorsed the DJA and the media defendants appealed, arguing that the "trial court's endorsement of a custodian's DJA action as compatible with a requestor's rights under OPRA…is error." The Appellate Division reversed the trial court's decision and expressly held that public agencies are prohibited from filing DJA complaints in lieu of promptly deciding an OPRA request.

⇒ *In re New Jersey Firemen's Assoc. Obligation to Provide Relief Applications under OPRA*, _____*A.3d* ____, 2017 WL 3298221 (Aug. 3, 2017)

- Weeks after being identified as a public agency, the New Jersey Firemen's Association received its first OPRA request, which it denied in writing. After efforts to resolve the matter amicably failed, the Association filed a DJA and proposed order to show cause to establish its obligation to disclose certain records. The requestor opposed the DJA, arguing that under OPRA the right to institute proceedings relating to OPRA lies solely with requestors. The trial court accepted the DJA, and held that OPRA's Privacy Interest Exemption barred disclosure of the requested information.

- The requestor appealed, and the Appellate Division reversed, holding as it did in *Collingswood*, that under Section 6 of OPRA, only requestors are entitled to seek

legal review of OPRA decisions. The Appellate Division also found that the requested records had been improperly withheld and remanded the matter for a determination of attorney's fees.

- The Supreme Court granted the Association's petition for certification. On appeal, the Association argued that the DJA was appropriate, and that although the language of OPRA itself only grants requestors the right to legal review, OPRA does not expressly or even impliedly prohibit a public agency from filing a complaint under the Declaratory Judgment Act. In its brief, the Association warned that under the Appellate Division's interpretation of OPRA, public agencies are "sitting duck[s] left with no alternative but to wait to be sued and potentially hit with substantial prevailing party fees."

- The Court held that a public agency is not permitted to file a DJA *after denying a request*, but expressly left open the question of whether a public agency is legally permitted to file a pre-denial action (note that *Collingswood is unpublished*). The Court reviewed the relationship between the Declaratory Judgment Act and Section 6 of OPRA, and explained, in relevant part, as follows:

> The Association's denial of access extinguished the controversy because the Association had determined its legal obligation with regard to the [records]. At that point, it was not appropriate for the Association to rely on the DJA because the controversy had reached a stage at which [the requestor] could seek a coercive remedy by way of section 6 of OPRA…*We do not reach the question* of whether a public entity may file a pre-denial declaratory judgment action when confronted with an unsettled question that has not been litigated before and that implicates OPRA's privacy prong.
>
> [(Emphasis added)].

3. RESIDENCY

⇒ *I.J. v. Bd. of Educ. of the Twp. of Hamilton*, No. A-4619-13, 2016 WL 299323 (App. Div. Jan. 26, 2016)

- The student's mother resided in Trenton and his father resided in Hamilton Township with his cousin. The parents' custody agreement had given the father residential custody of the student on weekdays during the school year. Therefore, the child was enrolled in the Hamilton Township School District.

- Unbeknownst to the district, in September, 2012 the father went to prison and the child began residing primarily with the mother. A residency investigation in 2013 revealed that no staff members had seen the student's father during the school year and surveillance showed the student leaving from and returning to the mother's home in Trenton. The student was disenrolled and the mother appealed.

- The ALJ and Commissioner determined that the student was not entitled to a free public education in Hamilton Township, despite the fact that Hamilton Township remained the "domicile" of the incarcerated parent. The student did not reside for a majority of the school year with the cousin following the father's incarceration, and there was no evidence the cousin supported the student during the period of incarceration as if he was her own child.

⇒ *Bd. of Educ. of Highland Park v. NJDOE*, OAL Dkt. No. EDU 13316-14 (May 20, 2016) *aff'd Comm'r* (Jan. 15, 2016)

- H.L. was a student classified as multiply disabled and was placed by the Department of Children and Families in a group home. She turned 21 at the end of the 2014-2015 school year. Highland Park asserted is was not H.L.'s district of residence and therefore was not financially responsible for her educational program for the 2013-2014 and 2014-2015 school years.

- The ALJ and Commissioner held that Highland Park was liable for her education. The district of residence for students placed residentially by State agencies is the present district of residence of the parent or guardian with whom the child lived prior to the most recent placement by the State agency. The present district in which her parents resided was Highland Park, making it liable for the cost of her education. There is no authority to impose the cost on the district where the group home's business office was located or the district where she last resided with her parents.

⇒ *K.H. o/b/o A.H. and V.H. v. Butler Bd. of Educ.*, EDU 14258-16 *rejected Comm'r* (March 2, 2017)

- The Administrative Law Judge incorrectly concluded that A.H. and V.H. were not entitled to a free public education in the Butler School District. The ALJ concluded that because the children resided for less than half the year with their father in Butler, and by extension for more than half the year with their mother in Bloomingdale, they were considered domiciled with their mother in Bloomingdale. The tribunal failed, however, to take into consideration the consent order entered into by the parents in the context of their divorce litigation, wherein they agreed that the children would continue to attend school in Butler.

- *N.J.A.C.* 6A:22-3.1 provides as follows: "When a student's parents or guardians are domiciled within different school districts **and there is no court order or written agreement between the parents designating the school district of attendance**, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.

- In accordance with *N.J.A.C.* 6A:22-3.1, the children were entitled to attend school in Butler despite residing in Bloomingdale for the majority school, because there was a

written agreement between the parents designating the school district of attendance. Therefore, the ALJ's decision was rejected.

4. WORK HOURS

⇒ *In re Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Assoc.*, 227 *N.J.* 192 (2016)

- In this decision, the Court clarified its prior holding in *Borough of Keyport v. International Union of Operating Engineers*, 222 *N.J.* 314 (2015), and held that hours of work are *always* a negotiable topic for school districts. Therefore, a school district may not unilaterally impose furlough days on teaching staff members, even in times of economic and budgetary crisis.

- On March 17, 2010 during a time of declared "fiscal emergency," the State notified the board that State education funding to the district would be reduced by 58% for the upcoming school year. The board took significant action to balance its budget, including cutting educational programs, freezing salaries and laying off 13 individuals. These efforts were insufficient and the board requested, on numerous occasions, that the local association agree to re-open negotiations. When the association refused, the board met and approved a plan to impose a three day involuntary, uncompensated furlough on all teachers.

- The association filed an unfair practice charge, and while this charge was pending the Appellate Division issued its decision in *Keyport*. The *Keyport* decision, which was subsequently upheld by the Supreme Court, held that the Borough of Keyport was permitted to unilaterally alter employees' rate of pay and work days. In accordance with *Keyport*, PERC granted Robbinsville's summary judgment motion, and the Appellate Division affirmed.

- The Supreme Court reversed the decision of the Appellate Division, and distinguished *Keyport*. The actions of the borough in *Keyport* were authorized by a then-existing Civil Services Commission emergency regulation, which expressly permitted temporary layoffs due to economic climate. There was, however, no such emergency exception contained in the Employer-Employees Relation Act. Therefore, the board was not permitted to unilaterally revise the employees' work days.

5. PUBLIC CONTRACT'S LAW

⇒ *AAA School, LLC v. Passaic Cnty. Educ. Services Comm.*, OAL Dkt. No. EDU 9967-15 (May 23, 2016), *aff'd Comm'r* (June 30, 2016)

- This case is one in a series of petitions filed by AAA School alleging that the Commission improperly denied it a contract after it submitted bids for transportation services that required a sixteen-passenger yellow school bus. In this matter, AAA School claims that it was the lowest bidder and had the appropriate vehicle (seven-passenger minivans) for the routes. AAA School argued that the 16-passenger bus

bid requirements were against the law, and that the taxpayers of each district should determine the form of transportation to be provided by the Commission.

- After a hearing, the ALJ found that the Commission's decision to require 16-passenger yellow school buses was not arbitrary, capricious or unreasonable. The ALJ found that the 16 passenger yellow school buses are the safest form of transportation, and in the discretion of the district, is the school bus of choice.

6. EDUCATIONAL FACILITIES CONSTRUCTION AND FINANCING ACT

⇒ *In re Application of the Bd. of Educ. of the Borough of Freehold*, OAL Dkt. No. EDU 8980-15 (Dec. 15, 2015), *aff'd Comm'r* (Aug. 4, 2016)

- Pursuant to the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A:7G-12 ("EFCFA"), the board filed an application seeking to compel the Commissioner to direct the issuance of schools bonds in the amount of $32,902,400 for a capital improvement project in order to fulfill the borough's mandate to provide a thorough and efficient public education to students. The EFCFA directs that a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice in a three year period may apply to the Commissioner for approval to issue school bonds for the local share of the project.

- In the case of *In re Upper Freehold Reg'l Sch. Dist.*, 86 *N.J.* 265 (1981), the New Jersey Supreme Court authorized the issuance of bonds for a capital project, noting that the school had an obligation to provide a thorough and efficient education to its students. This obligation could not be achieved due to the deteriorating conditions at the high school, including sagging roof planks, water leakage onto ceiling tiles, short-circuited electrical systems, slippery floors, and danger from shattering glass. Against the backdrop of *Upper Freehold*, the Legislature enacted the EFCFA to help school districts finance construction projects when necessary to ensure that children are educated in facilities that are safe, healthy and conducive to learning.

- Here, the court approved the board's request noting that the board "presented evidence not just of severe overcrowding which has resulted in hundreds of unhoused students – which overcrowding is anticipated to continue – but also has shown the effect the overcrowding has had on the ability of the students to access their education. Classes have been limited; instruction has been curtailed. The board is in a corrective-action plan for bilingual students not meeting English proficiency, and the middle school is a focus district because of the disparity between special-needs students and general-education students."

7. MANDATORILY NEGOTIABLE TOPICS, STATUTORY PREEMPTION AND LABOR RELATIONS

⇒ *Hillsborough Twp. Bd. of Educ. v. Hillsborough Twp. Educ. Assoc.*, A-3765-15T2, 2017 WL 1089114 (App. Div. March 2, 2017)

- In this unpublished decision, the Appellate Division affirmed PERC's finding that *N.J.S.A.* 18A:6-8.5(c), Requirements for Receipt of Employee Tuition Assistance, Additional Compensation, preempts arbitration. In *Hillsborough*, a Reading Specialist, a Preschool Assistant and an Instructional Aid submitted forms for a "Second Language Acquisition" course, and the Instructional Aid also submitted a form for a "Teaching English as a Second Language course." Another Instructional Assistant submitted a form for a "Clinical Seminar in Special Education." Each of these requests was denied by the superintendent, as these courses did not relate to any of the employees' current or future job responsibilities. The association filed a grievance, and when it was denied, submitted a Request for Submission to a Panel of Arbitrators. The board filed a Petition for Scope of Negotiations Determination and PERC found that arbitration was preempted.

- In accordance with *In re Local 195*, 88 *N.J.* 393, (1982), a subject is negotiable when, among other things, "the subject has not been fully or partially preempted by statute or regulation." A subject is considered preempted, and therefore non-negotiable, when a statute or regulation "speaks in the imperative and leaves nothing to the discretion of the public employer." Phrased differently, "when legislation or a regulation establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted."

- The court held that *N.J.S.A.* 18A:6-8.5(c) preempts arbitration because it sets an "express, specific, and comprehensive condition for tuition assistance and speaks in the imperative." Interestingly, the court acknowledged that determining whether a particular employee's proposed course is related to that employee's current or future job responsibilities may impose issues of fact, but concluded that "the need to determine the issue of fact *does not give discretion to the superintendent*."

⇒ *West Morris Reg'l High Sch. Bd. of Educ. and West Morris Reg'l Educ. Assoc.*, PERC No. 2017-29, 43 *NJPER* ¶68 (Dec. 22, 2016)

- The start and end date of a school year is not mandatorily negotiable. Here, the board filed a scope of negotiations petition, seeking a determination that it had no duty to negotiate over the removal of the following italicized contract language: "teachers employed on a 10 month basis *shall be employed from September 1 through June 30*."

- PERC issued a decision in the board's favor and concluded that this language is not mandatorily negotiable. *N.J.S.A.* 18A:36-2 expressly states that "the board of

education shall determine annually the dates between which the schools of the district shall be open."

⇒ *Wayne Twp. Bd. of Educ. and Wayne Educ. Assoc.*, PERC No. 2017-48, 43 *NJPER* ¶95 (Feb. 23, 2017)

- Board had an obligation to negotiate over compensation for assigning staff to administer state-mandated standardized tests. Here, and pursuant to the parties' collective negotiations agreement, teachers were only required to teach five teaching periods each day, but could be assigned one daily "special assignment period." Following the administration of PARCC, the union filed a grievance seeking additional pay for those high school teachers who allegedly taught more than five teaching periods on account of the testing. The association took the position that the PARCC administration constituted a teaching position. The grievance was denied, as the position that PARCC administration qualified as a "special assignment."

- The board subsequently sought to restrain arbitration, but the request was denied by PERC. While it is well settled that "assignments to duties associated with standardized testing are not negotiable," grievances seeking additional compensation for alleged violations of teaching load agreements or practices are legally arbitrable. In sum, the board had a duty to arbitrate over whether the assignment constituted a teaching period or a special assignment period within the meaning of the contract.

⇒ *Readington Twp. Bd. of Educ. v. Readington Twp. Admin. Assoc.*, PERC No. 2017-18, 43 *NJPER* ¶40 (Sept. 22, 2016)

- PERC granted petition to restrain a request for arbitration that was filed after the board stopped paying 100 percent of the union members' dental premiums. In this matter, the board exercised its managerial prerogative to terminate its participation in the School Employee Health Benefits Program ("SEHBP"), and moved to a private health insurance carrier. In accordance with Chapter 78, *N.J.S.A.* 52:14-17.28c, the board began requiring the employees to contribute to the cost of their dental insurance. The association sought arbitration, claiming that the board violated the CNA, which required the board to pay 100% of employees' dental coverage.

- Pursuant to *N.J.S.A.* 52:14-17.28c, employees are *expressly required* to contribute to the cost of dental coverage *unless* the employer is a participant in the SEHBP. Therefore, once the board moved to a private health insurance carrier the union members were required to contribute to the cost of their dental insurance, regardless of the parties' written contract language. *N.J.S.A.* 52:14-17.28c preempted the contract language.

⇒ *In re Twp. of Bernegat*, PERC No. 2017-74, 43 *NJPER* ¶10 (June 29, 2017)

- Here, a PERC majority granted a municipal employer's request for the binding arbitration of a grievance disputing a unilateral change in health insurance carriers by the municipal employer. However, it restrained arbitration, to the extent that the

parties' collective negotiations agreement provided an opt-out or waiver payment in excess of the maximum set under state law. The PERC majority also restrained arbitration to the extent that any increase in employee Chapter 78 contributions was based upon the inclusion of the cost of dental and/or vision coverage. Otherwise, the PERC majority denied the requested restraint.

- Under PERC case law, the PERC majority noted that the decision of municipalities and counties to permit waivers and the amount of consideration are not negotiable under *N.J.S.A.* 40A:10-17.1 and *N.J.S.A.* 52:14-17.31a. Accordingly, any opt-out payment exceeding the statutory maximum (the lower of 25% of the employer's premium cost or $5,000) was unenforceable and not arbitrable.

8. COLLECTIVE NEGOTIATIONS

⇒ *In re Cnty. of Atlantic*, consolidated with *In re Matter of Twp. of Bridgewater*, ___*A.3d* ___, 2017 WL 3272102 (Aug. 2, 2017)

- County of Atlantic: Atlantic County and various public safety unions were parties to collective negotiations agreements that expired December 31, 2010. Shortly before expiration, the county notified the PBA that it was suspending salary guide movement and not paying anniversary date-based step increases after contract expiration, and prior to the successor agreements being ratified. In the past, once an employee reached his or her anniversary date, they were given a step increase. The unions filed unfair practice charges against Atlantic County alleging violations of the New Jersey Employer-Employee Relations Act. The hearing examiner found in the unions' favor, concluding that Atlantic County acted unfairly in unilaterally changing the terms and conditions of employment. On review, the Public Employment Relations Commission ("PERC") reached the opposite conclusion, finding that in light of economic conditions and legislative changes since the recession, the dynamic status quo doctrine, which would have required the continuance of the step increment system, was impractical and burdensome

- Township of Bridgewater: Subsequently, Bridgewater Township informed PBA Local 174 that it too would cease the salary step increments once the current CNA expired. PBA Local 174 filed for grievance arbitration. PERC, citing its Atlantic County decision, found for Bridgewater Township. Because the dynamic status quo doctrine had been abandoned, PERC found that salary step increases beyond the contract's expiration were not a term and condition of employment that mandated negotiation or arbitration.

- In a consolidated appeal, the Appellate Division reversed PERC's decision, concluding that PERC had adopted the dynamic status quo doctrine for public safety unions decades ago and could not simply abandon it now "as an act of mere policymaking." In a narrowly written opinion, the Supreme Court affirmed on other

grounds, entirely unrelated to those reviewed by the Appellate Division, namely the actual contract language relevant to each matter.

- The Court explained as follows: "[w]e need not determine whether, as a general rule, an employer must maintain the status quo while negotiating a successor agreement. In these cases, the governing contract language requires that the terms and conditions of the respective agreements, including the salary step increases, remain in place until a new CNA is reached. Therefore, the judgment of the Appellate Division is affirmed on other grounds." Critically, the court noted that its decision *does not govern future negotiations*.

> We note that the Appellate Division based its conclusion on the dynamic status quo doctrine, finding that it is "neither a regulation nor a policy statement" that PERC can simply discard in advantageous circumstances. *Given our reliance on contract principles, we need not reach that issue*. *Our decision today does not govern future negotiations*, other than to suggest that parties would be wise to include explicit language indicating whether a salary guide will continue beyond the contract's expiration date. (Emphasis added).

9. DUTY TO PROTECT

⇒ *Bridges v. Scranton Sch. Dist.*, No. 14-4565, 2016 WL 953003 (3rd Cir. Mar. 14, 2016)

- The issue in this case is whether a student can sue a school district for violating the Fourteenth Amendment and Title VI of the Civil Rights Act for harassment, bullying, and racism a student faced from other students and a teacher. More specifically, the issue in this matter was whether public schools have a "duty of care" to protect an African-American student who was physically bullied and harassed by students and teachers during first and second grade.

- The court dismissed the claim, finding that public schools do not have a duty under the Fourteenth Amendment to protect students from other students. With regard to the teacher's conduct, there was similarly no duty because the teacher's conduct did not "shock the conscience." There also was no evidence the school district created a racially hostile environment in violation of Title VI.

⇒ *Child M. v. Fennes and Cedar Hill Prep School*, A-0873-15T2, 2016 WL 4473253 (August 25, 2016)

- In this case, the Appellate Division held that a school district was not liable for failing to report to a subsequent employer a former employee's past history of inappropriate physical contact with students, where the new employer did not inquire into his employment history. However, the board was liable for failure to report the behavior to DYFS and the State

- From September 1, 1998 to June 30, 2010, defendant was employed as a tenured teacher. During these years, the district was aware that defendant engaged in inappropriate physical contact with female students. In response, the defendant received *several* warnings from his supervisors, his increment was withheld, and there were three reports filed with DYFS.

- On March 12, 2010 the defendant was suspended from his position after three **new** complaints were filed by students. The board did *not* report this new information to DYFS, or file tenure charges against the teacher. Instead, the district entered into an agreement and release, through which the defendant resigned and agreed not to seek reemployment in the district. The district agreed that "upon direct inquiry from any future employment" they would provide a neutral recommendation, including his dates of employment, but that "no further information would be provided." On August 13, 2010 the defendant applied to Cedar Hill Prep School, but did not include any references from the district. The prep school contacted the district only to verify the employment, but did not ask any additional questions.

- In September, 2010 the defendant began teaching at the prep school and on October 19, 2010 he sexually abused Student M. Student M's parents filed suit against the district claiming that the district had a duty to Child M to report the three new complaints to DYFS and to report the defendant to the State Board of Bard Examiners. Parents also argued that the district had a duty to warn potential employers about the defendant's conduct.

- The court found that the district violated its duty to report the defendant to DYFS, as required by *N.J.S.A.* 9:6-8.10, and violated its duty to notify the Board of Examiners pursuant to *N.J.A.C.* 6A:9-17.4. "In any event, based on the [district's] actual knowledge, it should have perceived the risk of harm to any female student. For these reasons, we find that [the district] had a duty to take active steps to lessen the risk of harm to the female children by reporting [the defendant] to the Division and the Board of Examiners…the facts of this case afford a reasonable basis for a jury to conclude that it was more likely than not that [the district's] conduct was a cause of Child M.'s injury."

- However, the court found that the district did not have a duty to report the defendant's conduct to potential employers. While an employer may be held liable for the negligent misrepresentation of a former employee's work history, here the prep school never requested information about the defendant's nature or character.

⇒ *Doe v. Hopewell Valley Reg'l Sch. Dist. Bd. of Educ.*, A-0142-15T1, 2017 WL 1842855 (App. Div. May 8, 2017)

- A former math teacher habitually sexually abused a male student, Doe, between sixth and eleventh grade. This abuse would often occur outside of school – normally at the student or teacher's home, however on occasion Doe was sexually abused by the teacher on school overnight trips. Later in life, the student got married and had a

family. However the marriage subsequently fell apart, allegedly as a result of the sexual abuse suffered by Doe in his adolescence.

- Doe filed suit against the district, arguing that there were warning signs with regard to the teacher's behavior, including evaluations noting the teacher was overly involved with some students, and that the district created an environment in which sexual abuse could easily occur. Doe also claimed the district was responsible because it was acting "in loco parentis," in the "household" when the abuse took place, thereby making it a "passive abuser." Doe relied upon an ostensibly similar case, in which a boarding school had been deemed a passive abuser.

- The case proceeded to a jury trial, where the jury issued a verdict finding the school district not liable for damages arising out of the sexual abuse allegations. Doe filed a motion for a new trial, which was denied, and then appealed the matter to the Appellate Division. The Appellate Division affirmed the trial level decision. With regard to negligence claims, the court stressed the importance of a school district to act consistently with standards and procedures intended to prevent sexual abuse, and found that the school district had acted in accordance with standards and practices of the time. As to the "in loco parentis" argument, the Appellate Division distinguished a public school district from a boarding school, and held that the school did not act in loco parentis as required to be found a passive abuser.

10. VICARIOUS LIABILITY AND *RESPONDEAT SUPERIOR*

⇒ *Moody v. Atlantic Cty. Bd. of Educ.*, ,___*F.3d* ___, 2017 WL 3881957 (3rd Cir. Sept. 6, 2017

- Female substitute custodian brought action against school board alleging hostile work environment, sexual harassment and retaliation in violation of Title XII and the NJLAD. Namely, the substitute custodian claimed that she had been sexually harassed by the custodial foreman, who had been delegated authority by the board to select the hours and location of work for each substitute. The district court granted summary judgment in the board's favor, finding that the alleged harasser was not the custodian's "supervisor."

- The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment, however, under federal law and in certain limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment. Liability is predicated upon the idea that a supervisor is able to take an employment action only because he or she is the employer's agent. Phrased differently, "when a *supervisor* takes a tangible employment action against a subordinate, the employer is vicariously liable because the injury could not have been inflicted absent the agency relation."

- An employee is considered a supervisor for purposes of *respondeat superior* liability pursuant to Title VII if he or she is "empowered by the employer to take tangible employment actions." Here, the Third Circuit concluded that the foreman was more

than just a "mere scheduler." The foreman had the ability to assign the substitute custodian work hours, which meant that by extension he had the power to impact her earnings, and this was sufficient to qualify him as her supervisor.

11. PSYCHIATRIC EXAMINATIONS

⇒ *Stewart v. Bd. of Educ. of New Brunswick*, OAL Dkt. No. EDU 01186-16, *aff'd Comm'r* (Aug. 26, 2016)

- Petitioner challenged the board's request that she undergo a psychiatric evaluation. The board contended that petitioner displayed erratic and unusual behavior which began during the 2015-2016 school year, as well as physical changes, which justified the request to undergo a psychiatric examination. Some of the alleged behavior included hiding under a desk as she claimed demons were chasing her, showing a colleague a tattoo located on her back, and wild mood swings.

- During a hearing, petitioner admitted to losing weight but asserted that the concerns regarding her behavior were subjective and unrelated to her performance, for which she received a proficient rating on her evaluation.

- The ALJ and Commissioner found in petitioner's favor. The board failed to meet its burden of proving that petitioner's behavior was a harmful, significant deviation from normal mental health affecting her ability to teach, discipline, or associate with children. Notably, the board alleged a number of alleged improper behaviors, but relied on uncorroborated hearsay evidence. To establish the required deviation from normal mental health, the board was required to do more than simply have the principal testify regarding what other people told him regarding petitioner's behavior.

12. TORT CLAIMS ACT

⇒ *Patrick by Lint v. City of Elizabeth and Elizabeth Bd. of Educ.*, 449 *N.J. Super.* 565 (App. Div. 2017)

- An eight-year-old was crossing the street with several other children at an intersection roughly a block away from school. One car stopped to allow the children to cross. Shortly thereafter, an unidentified car passed the stopped car, striking a crossing child in the process. There was a "watch for children" sign posted on the street on which the cars were driving.

- The mother filed suit, and the Law Division granted summary judgment in favor of the board. This decision was upheld by the Appellate Division on appeal. A public entity, such as a school district, is immune from liability, unless there is a separate statute imposing liability. Generally, a public entity will only be liable if an injury results from a dangerous condition that the public entity knew, or reasonably should have known, existed. Moreover, the school district was not liable as it was unable to

effectively control the conditions or warn as to dangers on property that the district did not own.

⇒ *McKinney v. Mathew*, No. A-5108-13, 2016 WL 11090935 (App. Div. June 29, 2016)

- A seventeen-year-old student was seriously injured when he attempted to cross the street in the middle of the block (rather than at the crosswalk) in front of his high school before school and was struck by a car. The student and his mother sued the school district claiming it owed him a duty of supervision and breached the duty by not supervising him while crossing the street to enter school property. The Law Division granted the district's motion for a directed verdict. On appeal, this was affirmed by the Appellate Division.

- Although school officials have a duty to exercise care for the safety of students entrusted to them and are liable for injuries which occur from failure to discharge that duty, the court concluded that the school did not have a duty to supervise the student because imposing such a duty with respect to high school students was not fair. The student was "clearly of an age when he had been informed of the risk associated with [crossing the street outside of a crosswalk]." The court also highlighted the timing of the accident, thirty minutes before school began, and noted that the student had not yet been "entrusted" to the school's care.

13. SUSPENSION OF CERTIFICATION

⇒ *In re the Suspension of the Certificate of Chae Hyuk IM*, OAL Dkt. No. EDU 1019-14, *modified Comm'r* (April 6, 2017)

- Pursuant to *N.J.S.A.* 18A:28-8, the board sought an order suspending the teacher's teaching certificate for a period of one year. *N.J.S.A.* 18A:28-8 provides that the Commissioner may suspended "for not more than one year" the certificate of any teaching staff members who fails to give 60 days' written notice of intent to resign from his/her position.

- The teacher, *Chae Hyuk IM*, is now employed as a Special Agent with the FBI. As relevant to this matter, the teacher requested and was approved for a one year leave of absence to enable him to pursue FBI training. Unfortunately for the teacher, he failed the required physical fitness test prior to the start of the school year, and informed the board that he would be starting the year as usual.

- Subsequently, the teacher was unexpectedly offered opportunities to enter later training classes, contingent upon passing the fitness test. The teacher elected *not* to take the September fitness test, which would have afforded him the opportunity to join the FBI immediately, and instead started the 2014-2015 school year in his teaching position. Once he felt "ready," he retook the physical fitness test in October, 2014 and passed it. As a result, he was accepted to begin FBI training on October 19, 2014. On October 17, 2014 he resubmitted his request for a one year leave of

absence, which was denied by the board because the school year was already in session and he was teaching four high school chemistry classes. The teacher responded by submitting his resignation dated October 15, 2014.

- Based on these facts, the ALJ concluded that a sixth month suspension of the teaching certificate was warranted. The Commissioner *rejected* this recommendation and imposed the full one year suspension available under *N.J.S.A.* 18A:28-8, noting that "[a]ll of respondent's decisions in connection with his effort to secure a position with the FBI were made for [his] own personal gain, and with his own best interests in mind – without consideration of his professional obligation to the board and to his students." The Commissioner emphasized the fact that the teacher elected not to take the September, 2014 fitness test, which would have afforded the board an opportunity to find a new teacher before the school year started. Selfishly, the teacher decided to take the October fitness test and resign without any notice.

14. TENURE RIGHTS

⇒ *Calvanico v. Bd. of Educ. of Carlstadt-East Rutherford Reg'l Sch. Dist.*, OAL Dkt. No. EDU 17631-15, *aff'd Comm'r* (Dec. 21, 2016)

- Petitioner, who had been employed in the district since 1986, served as the Supervisor of Guidance and Special Education from 2006 to 2009. After she acquired tenure, the position was eliminated and she was reassigned to serve as the Pupil Personnel Services/Testing Coordinator. In 2015, the board created a new position, with expanded duties, under the Supervisor of Guidance Title. Among other things, the new position required both a Supervisor endorsement and a Director of School Counseling Services endorsement.

- Petitioner claimed that the board violated her tenure rights when it selected another candidate for the new position. The ALJ dismissed the petition, finding that the re-established, district-wide position was not substantially similar to the petitioner's prior position. The ALJ also concluded that the board did not act arbitrarily or capriciously when requiring a Director certificate for the new position. The Commissioner affirmed.

⇒ *Zimmerman v. Sussex Cnty. Educ. Serv. Comm'n.*, OAL Dkt. No. EDU 0430-15, *aff'd Comm'r* (Oct. 4, 2016)

- Two part-time tenured teachers employed on an hourly basis alleged their tenure rights were violated when the Commission reduced their hours for the 2014-15 school year from their 2013-14 levels while other non-tenured or less senior part-time teachers were employed in positions within the scope of their certifications and endorsements. One teacher saw her income decrease from $36,838.74 to $10,331.13, while the other saw a decrease from $27,668.81 to $19,603.42. The terms of the teachers' contracts did not include a guaranteed number of hours per week.

- In the absence of a guarantee of a minimum number of hours for part-time teachers, a reduction in hours does not equate to a reduction of compensation which triggers tenure rights. Here, the teachers' contracts only guaranteed an hourly compensation rate, not a minimum number of hours. Therefore, the Commission had the authority to reduce the number of hours without violating tenure rights.

⇒ *Kollar v. Bd. of Educ. of Town of Harrison*, A-5203-14T2, 2017 WL 3013367 (App. Div. July 17, 2017)

- Petitioner worked as an athletic trainer for the board beginning in 2007. However, he did not obtain an athletic trainer's certificate until 2013, even though it had always been required as a condition of employment. Later that year, petitioner's contract was not renewed.

- In response, the teacher alleged that she was entitled to tenure. When the board denied her request, she filed suit with the Commissioner of Education, arguing that (1) the board failed to require proof of a certificate when it posted the job opening in 2007 or when it hired her, (2) she thought her certificate from the National Athletic Trainers Association was a sufficient certificate, and (3) her years of service when she was qualified should count towards the prerequisite years of service for tenure. The Commissioner rejected her arguments and the Appellate Division affirmed.

15. RESIGNATION

⇒ *Goetz v. Bd. of Educ. of Twp. of Freehold*, OAL Dkt. No. EDU 7546-16, *aff'd Comm'r* (March 2, 2017)

- A teacher who had *resigned* from his position, claimed that he had been terminated as part of a reduction in force in violation his tenure and seniority rights. The Commission granted the board's motion for summary decision because the employee had relinquished his tenure and seniority rights when he resigned from the district.

- The teacher was hired on March 14, 2005 to serve as Technology Education teacher. On December 15, 2013 he met with his principal and was informed that his position was to be abolished for the 2014-2015 school year. Therefore, he was encouraged to look for employment elsewhere. He was able to secure new employment, and he tendered his resignation on March 19, 2014, to be effective May 16, 2014. The board took action to accept the resignation, subsequent to which the teacher's circumstances changed and he was unable to take the new position.

- The teacher contended that he then approached the administration "to rescind his resignation," and was told to submit an email requesting that his resignation be extended until June 30, 2014. He subsequently submitted an email stating "I would like to request that my resignation slated for May 16 be extended to June 30." The board approved the request to extend his resignation. Notably, the teacher never

requested that his resignation be rescinded, and the board never took action to rescind the resignation.

- In granting the board's motion the ALJ explained, and the Commissioner agreed, that "previous administrative decisions have made clear that an employee's tenure rights are extinguished upon his resignation." Moreover, it is equally well settled in New Jersey that "when a teacher submits a voluntary and unconditional letter of resignation, which is accepted by the board, the individual has *no automatic right* to rescind the resignation." Accordingly, summary decision was granted because "Petitioner cannot invoke tenure rights that no longer exist."

16. SCHOOL ETHICS ACT

⇒ *Cheng v. Rodas, West New York Bd. of Educ.*, C58-14 (September 22, 2015)

- In this case, the School Ethics Commission held that a board president does not have the authority to issue unilateral *Rice* notice to the business administrator or any other "school employee." The Commission *rejected* the Respondent's reliance on *Persi v. Woska*, which authorizes a board president to issue unilateral *Rice* notice to a superintendent. The Commission expressly found that *Persi* is limited to *Rice* notice to a superintendent, and does not extend to any other employee. Therefore, the board member violated *N.J.S.A.* 18A:12-24.1(e).

- The Commission explained as follows:

> [The Respondent] argued that because the board president has the authority to unilaterally issue a *Rice* notice to a superintendent, it must follow that he has the power to issue a *Rice* notice to the BA, a school employee. Under this theory, the board president should then have the authority to issue a notice to any principal, teacher, coach, nurse, or custodian – any employee of his choosing. The Commission is concerned that extending this unilateral authority to a board president to interfere with the employment of a BA or a custodian is the grant of unbridled power ripe for abuse…It is the Commission's considered determination that the entire board must be consulted as it was when the employee was hired.

⇒ *Lowell v. Smallwood*, A-1306-15T2, 2017 WL 2223992 (App. Div. May 22, 2017)

- The Appellate Division upheld a School Ethics Commission (SEC) decision that two board members violated the School Ethics Act, and rejected the board member's argument that the SEC had improperly relied

upon hearsay evidence not supported by a "residuum of legal and competent evidence."

- In this matter, another board member filed a complaint with the SEC asserting violations of the Act by the two defendant board members. The defendants filed an answer denying violations of the Act but chose not to testify during the hearing. The complaining member was the only witness. She testified extensively regarding the defendants' conduct, and through her testimony several documents were submitted into evidence.

- The SEC issued a decision containing extensive findings of fact, and concluded that the complaining board member had offered credible and consistent testimony. Appellant appealed, arguing that there was insufficient evidence on the record to support the SEC's conclusion, and that the SEC improperly relief upon hearsay evidence. The court rejected this argument, explaining that the SEC properly relied upon hearsay evidence, because under the residuum rule the hearsay was supported by legally competent evidence.