2018 SCHOOL LAW UPDATE

A Year in Review

PRESENTED TO THE

Bergen County Association of School Business Officials

September 20, 2018

Presented by:
Stephen R. Fogarty, Esq.
Fogarty & Hara, Esqs.
21-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Fax (201) 791-3432
sfogarty@fogartyandhara.com

PART I: RECENT AND RELEVANT LEGISLATION

1. <u>SEHBP AUDIT PROGRAMS</u>: P.L. 2018, c.88 (Aug. 10, 2018)

Supplementing N.J.S.A. 52:14-17.46.1 et seq.

⇒ This law aims to achieve savings in public employer health care costs by requiring the State Health Benefits Commission and the School Employees Health Benefits Commission to establish audit programs ensuring that all persons in SHBP and SEHBP who are eligible for Medicare have Medicare as their primary provider.

⇒ Specifically, the SEHBC is required to establish and contract for a Medicare Primary Assignment and Audit Program, through which it will conduct a continuous review of the SEHBP for the purposes of ensuring that eligible SEHBP participants and dependents are enrolled in Medicare.

⇒ Effective immediately.

2. <u>EXECUTIVE ORDER: STATE HEALTH BENEFITS TASK FORCE</u>

⇒ On July 20, 2018, Governor Murphy signed an Executive Order establishing the State Health Benefits Quality and Value Task Force, which has been tasked with recommending cost-effective strategies for delivering health care to public employees and retirees who receive their health benefits through the SHBP and the SEHBP.

⇒ In the Order, Governor Murphy noted, among other things, that employee and retiree health benefit costs are projected to be approximately *8.4%* of the State's entire 2019 Fiscal Year Budget, or about 3.2 billion dollars.

⇒ The Task Force is composed of at least 16 members, including the State Treasurer or designee, the Commissioner of Banking and Insurance or designee, the State Comptroller or designee, and the Commissioner of Human Services or designee, and 12 public members. The Governor ordered that these 12 public members include six representatives from six different employee organizations, one representative from the New Jersey League of Municipalities, and one representative from the New Jersey School Boards Association.

⇒ Effective immediately.

3. <u>SCHOOL FUNDING REFORM LEGISLATION</u>

⇒ On July 24, 2018 Governor Murphy signed S-2 into effect, which made major changes to the State's school funding formula. The Legislation, which takes effect in the 2019-2020 school year, resulted in the immediate repeal of the enrollment growth aide caps, and will eliminate adjustment aid over a seven-year period, while allowing adjustments to the tax levy cap for certain school districts.

⇒ Under S-2, districts that received adjustment aid and/or in which enrollment declines or increased community wealth were not previously factored into their state aide allocations, would experience reductions of "overfunding" through 2024-2025, as follows:

School Year	**Reduction of "Overfunded Aid"***
2019-2020	13%
2020-2021	23%
2021-2022	37%
2022-2023	55%
2023-2024	76%
2024-2025	100%

* *Applies only to "overfunding," not total State aid*

⇒ Three groups of school districts would be exempt from the reductions:

- County vocational school districts;
- SDA (former Abbott) districts that spend below adequacy and have municipal tax rates that exceed the state average; and
- Non-SDA districts that spend below adequacy by at least 10 percent and have municipal tax rates exceeding the state average by more than 10 percent.

⇒ Additionally, in the case of an SDA district spending above adequacy and whose municipal tax rate exceeds the state average, the total state aid reduction would be limited to the amount by which the district is spending above adequacy multiplied by the percentage above adequacy for the corresponding school year.

⇒ School districts receiving less than what the SFRA calls for would receive an increase in state aid. Each district would receive a proportionate share of the total state aid reduction from "over-funded" districts, and any additional revenue included in the annual appropriations act for the purpose of providing direct state aide to school districts.

⇒ For school years 2019-2020 through 2024-2025, a school district that is spending below adequacy and experiences a reduction in state school aide must increase its general fund tax levy by 2 percent over the prior school year. An SDA district that is taxing below its local share may increase its tax levy in an amount greater than the tax levy growth limitation.

4. <u>PUBLIC-PRIVATE PARTNERSHIPS</u>: P.L. 2018, c.90 (Aug. 14, 2018)

Enacting N.J.S.A. 34:1B-4

⇒ This new law permits school districts and other local and state government entities to enter into Public-Private Partnership Agreements with private entities for the purpose of undertaking certain building and highway infrastructure projects. Financial oversight and approval of such agreements will be through the New Jersey Economic Development Authority.

⇒ The law defines a Public-Private Partnership Agreement as "an agreement entered into by a local government unit and a private entity pursuant to this section for the purpose of permitting a private entity to assume full financial and administrative responsibility for the development, construction, reconstruction, repair, alteration, improvement, extension, operation, and maintenance of a project of, or for the benefit of, the local government unit."

⇒ The law takes effect 180 days following enactment, or approximately February 14, 2019

5. <u>JOINT ELECTION BRACKETING</u>: P.L. 2018, c.20 (May 30, 2018)

Amending N.J.S.A. 19:60-1

⇒ This law permits candidates for a board of education to circulate a nominating petition jointly and to be bracketed together on the ballot.

⇒ Under this law, two or more candidates may sign or circulate, or both sign and circulate, a joint petition of nomination for the same term.

⇒ When two or more candidates also wish to be bracketed together on a ballot, they must first notify the secretary of the board of education in writing prior to the drawing for position on the ballot. The candidates who are bracketed together will share a position on the ballot as a group and have their names printed together in the appropriate location on the ballot.

⇒ The law goes into effect immediately and, thus, is operable for the November 2018 school board election cycle.

6. <u>MEAL DENIAL REPORTING</u>: P.L. 2018, c.27 (May 30, 2018)

Amending N.J.S.A. 18A:33-21

⇒ This law, originally enacted in 2015, requires school districts to contact a student's parent or guardian to provide notice of an arrearage in the student's school breakfast or lunch bill and give the parent/guardian 10 school days to pay the amount due. If full payment is not made within 10 school days, the school district must contact the parent/guardian again to provide notice that the school breakfast/lunch will not be served to the student beginning one week from the second notice unless the school district receives full payment.

⇒ In 2018, the law was amended to require school districts to report, at least biannually to the New Jersey Department of Agriculture, the number of students denied school breakfast/lunch under this law.

⇒ Effective immediately.

7. <u>SUMMER MEALS PROGRAM</u>: P.L. 2017, c.387 (Jan. 16, 2018)

Amending N.J.S.A. 18A:33-23

⇒ School districts are required to notify each student enrolled in the district, and the student's parents or guardians, of the availability of, and the criteria of eligibility for, the summer meals program and the locations in the school district where summer meals are available.

⇒ This notification can be provided by distributing flyers provided by the Department of Agriculture. Notice can also be provided electronically through the usual means in which the district communicates with parents and students electronically.

8. <u>USE OF PHYSICAL RESTRAINTS AND SECLUSION</u>: P.L. 2017, c.291 (Jan. 16, 2018)

Enacting N.J.S.A. 18A:46-13.4

⇒ In January 2018, Public Law 2017, Chapter 291 was signed into law, establishing certain requirements for the use of physical restraint and seclusion with students with disabilities in school districts. The law sets forth criteria to which schools must adhere when employing the use of physical restraints and seclusion techniques on students with disabilities.

⇒ Physical restraint is defined as the use of a personal restriction that immobilizes or reduces the ability of a student to move all or a portion of his or her body.

⇒ Seclusion technique is defined as the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving, but does not include a time out.

⇒ School districts may only use restraint and seclusion techniques in an emergency when the student is exhibiting behavior that *places the student or others in <u>immediate</u> physical danger*.

⇒ In reaction to this law, the N.J. Department of Education published guidance available at https://www.state.nj.us/education/specialed/memos/071018Restraint.pdf.

9. <u>OPERATING A SCHOOL BUS WHILE LICENSE IS SUSPENDED OR REVOKED</u>: P.L. 2017, c. 347 (Jan. 16, 2018)

Amending N.J.S.A. 18A:39-19.1 and enacting N.J.S.A. 2C:40-26.1

⇒ This law makes knowingly operating a school bus while the person's driving privileges are suspended or revoked a fourth-degree crime. Moreover, if the driver is involved in an

accident resulting in bodily injury while the driving privileges are suspended or revoked it becomes a third-degree crime.

⇒ Any driver convicted of either of these offenses is permanently disqualified from employment as a school bus driver in New Jersey.

⇒ Effective August 1, 2018.

10. <u>BAN ON SMOKELESS TOBACCO</u>: P.L. 2017, c.284 (Jan. 16, 2018)

Enacting N.J.S.A. 26:3D-66

⇒ The law bans the use of smokeless tobacco in any area of any building of, or on the grounds of, any public school.

⇒ Every board of education must ensure the placement of a clearly visible sign at each public entrance to every public school building indicating that the use of smokeless tobacco is prohibited therein.

⇒ Effective April 1, 2018.

11. <u>EMAIL ADDRESS ON NOMINATING PETITION</u>: P.L. 2018, c.66 (July 20, 2018)

Amending N.J.S.A. 19:60-7

⇒ The law amends *N.J.S.A.* 19:60-7 to require any candidate seeking election to a board of education to include a functioning e-mail address for the candidate in the candidate's nominating petition.

⇒ The Legislature believes the addition of an e-mail address to nominating petitions will enhance voters' access to candidates, particularly first-time candidates, and will allow voters and organizations to contact candidates' campaigns.

⇒ Effective immediately.

12. <u>TRANSGENDER EQUALITY TASK FORCE</u>: P.L. 2018, c.60 (July 3, 2018)

⇒ This law creates a task force charged with assessing the legal and societal barriers to equality for transgender individuals and providing recommendations to the Governor and the Legislature on how to improve the lives of transgender individuals in a number of areas including education.

⇒ The task force will have six months to submit a report of its recommendations to the Governor and Legislature.

⇒ The recommendations may lead to the enactment of new laws affecting how school districts address issues with transgender students.

⇒ Effective immediately, and expires 30 days following the submission of the task force's written recommendations to the Governor.

13. <u>PASS THE TRASH</u>: P.L. 2018, c.5 (April 11, 2018)

Enacting N.J.S.A. 18A:6-7 et seq.

⇒ The law mandates that school districts and contracted service providers review the employment history of job applicants to ascertain if they have any past allegations or instances of child abuse or sexual misconduct involving students.

⇒ School districts are prohibited from hiring an individual to serve in a position that involves regular contact with students unless the employer conducts a review of the individual's employment history by contacting current and former employers to request information regarding child abuse and sexual misconduct allegations.

⇒ The law only requires an inquiry regarding conduct involving a student or child, it does not implicate sexual harassment or other misconduct regarding an adult such as a co-worker.

⇒ The law does not apply to unpaid workers or volunteers.

⇒ The law also prohibits confidential separation agreements between school districts and employees that would have the effect of suppressing any information related to investigations or findings of sexual misconduct or child abuse by an employee.

⇒ Effective June 1, 2018

⇒ **<u>PASS THE TRASH - APPLICANT RESPONSIBILITIES</u>**

- The applicant must provide a list, including the name, address, telephone number, and other relevant contact information of the applicant's: (1) current employer; (2) all former employers within the last 20 years that were schools; and (3) all former employers within the last 20 years where the applicant was employed in a position that involved direct contact with children.

- The applicant must provide written authorization consenting to and authorizing disclosure of information and records by the listed current and former employers, releasing those employers from liability that might arise from the disclosure.

- Finally, the applicant must provide a written statement as to whether the applicant:

- (a) has been the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a finding that the

allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;

- (b) has ever been disciplined, discharged, non-renewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or

- (c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.

- Applicants who willfully provide false information or fail to disclose the required information are

- Subject to discipline up to and including termination or denial of employment;

- May be in violation of N.J.S.A. 2C:28-3 for written false statements, a fourth-degree crime; and

- May be subject to a civil penalty of not more than $500.

- The school district must make applicants aware of these potential penalties on all applications for employment for positions that involve regular contact with students.

- The forms prepared by the New Jersey Department of Education (available at https://www.state.nj.us/education/educators/crimhist/preemployment/) contain all of the required language to notify prospective applicants.

- A school district has the right to terminate the employment of an individual immediately or rescind an offer of employment if:

- (1) the applicant is offered employment or commences employment with the school district after June 1, 2018; and

- (2) information regarding the applicant's history of sexual misconduct or child abuse is subsequently discovered or obtained by the employer that the employer determines disqualifies the applicant or employee from employment with the school district.

- This termination of employment is not subject to the grievance procedure or tenure proceedings.

⇒ PASS THE TRASH – SCHOOL DISTRICT RESPONSIBILITIES

- The school district must conduct a review of the employment history of the applicant by contacting the employers listed by the applicant and requesting the following information:
- (1) the dates of employment of the applicant;
- (2) a statement as to whether the applicant:
- (a) was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;
- (b) was disciplined, discharged, non-renewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or
- (c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.
- This inquiry may be conducted by telephonic, written, or electronic communications. If done by telephone, the school district must document the results of the review in writing.
- School districts have 20 days to respond to the request for information.
- For out-of-state applicants, the prospective employer must make and document diligent efforts to:
- (1) verify the information provided by the applicant; and
- (2) obtain the information required by *N.J.S.A.* 18A:6-7.7(b).
- If an employer fails to provide the required information within 20 days, the prospective school district may automatically disqualify the applicant.
- A school district may employ or contract with an applicant on a provisional basis, not to exceed 90 days, pending review of the information received under *N.J.S.A.* 18A:6-7.7 if:
- (1) the applicant has provided all of the required information;

- (2) the school district has no knowledge or information pertaining to the applicant that the applicant must disclose under *N.J.S.A.* 18A:6-7.7(a)(3); and

- (3) the school district determines that special or emergent circumstances exist that justify the applicant's temporary employment.

- School districts have discretion whether to hire an applicant who discloses past allegations or involvement with child abuse or sexual misconduct involving a student.

- An applicant is not automatically disqualified from employment by answering "yes" to one of the inquiries.

- After reviewing the applicant's information and finding an affirmative response to one of the statements, the prospective employer must, prior to determining to continue with the applicant's job application process, make further inquiries of the applicant's current or former employer to ascertain additional details regarding the matters disclosed.

- Once the prospective employer has further details regarding the incident or allegations, it may then decide whether to move forward with the application process.

14. <u>WORKPLACE DEMOCRACY ENHANCEMENT ACT</u>: P.L. 2018, c.15 (May 18, 2018)

Amending N.J.S.A. 34:13A-1 et seq.

⇒ This law was designed to ensure that New Jersey's public sector unions have sufficient access to the employees they represent.

⇒ Among other things, the law gives the union the right to meet with newly-hired employees, without loss of pay or leave time of the employees, within 30 calendar days from the date of hire for a minimum of 30 and a maximum of 120 minutes during new employee orientations or at individual or group meetings.

⇒ The employer must also provide the union with the personal contact information of all new and existing employees including each employee's name, job title, worksite location, home address, work telephone numbers, any home or personal cellphone numbers on file with the employer, date of hire, work e-mail address, and personal e-mail address if on file with the employer. This information must be provided within 10 calendar days from the date of hire in Excel form, and the employer must update the information every 120 calendar days.

⇒ The union may meet with individual employees on the employer's premises during the work day to investigate and discuss grievances, workplace-related complaints, and other workplace issues. The union may also conduct worksite meetings during lunch, other non-work breaks, and before/after the workday on the employer's premises to discuss workplace

issues, collective negotiations, the administration of the collective negotiations agreement, and other union business.

⇒ The law gives the union the right to use the employer's e-mail system to communicate with members of the bargaining unit and the use of the employer's facility to conduct meetings so long as the use does not interfere with government operations or are used for political purposes. The employer may charge the union for maintenance, security, and other costs related to the use that would not otherwise be incurred by the employer.

⇒ Upon the union's request, the employer must negotiate over these requirements to memorialize the parties' agreement to implement them. The negotiations must commence within 10 days of the request to negotiate, and any disputes must be resolved through binding arbitration.

⇒ Employers are prohibited from encouraging employees to relinquish membership in the union, discouraging them from joining the union, or encouraging them to revoke the authorization for the deduction of fees to the union.

⇒ The law also requires all full-time and part-time employees who perform negotiations unit work to be included in the bargaining unit. This requirement supersedes any hours threshold in a recognition clause.

⇒ Finally, the law changes the procedures for employees to leave the union. Previously, employees could provide notice to the employer at any time of their desire to no longer have union dues withheld from their paychecks, and the notice would be effective on the following January 1 or July 1. Under the new law, employees must give notice within the 10-day period following their anniversary of hire date, and the notice becomes effective 30 days later.

15. <u>DOMESTIC VIOLENCE POLICIES</u>: P.L. 2017, c. 272 (Jan. 8, 2018)

Enacting N.J.S.A. 11A:2-6a

⇒ This law requires all public employers to adopt a domestic violence policy and distribute it to all employees.

⇒ The New Jersey Civil Service Commission will develop a uniform policy, but employers may modify it to suit their needs so long as the policy includes:

- A declaration encouraging employees who are victims of domestic violence to contact a human resources officer (defined as an employee with a human resources job title or an employee responsible for orienting, training, counseling, and appraising staff) to seek assistance;

- A confidential method to report domestic violence instances to human resources officers;

- A confidentiality policy for human resources officers to adhere to;
- A listing of available resources for domestic violence victims;
- A requirement that the employee's records pertaining to domestic violence be separate from other personnel records;
- An explanation of the New Jersey Security and Financial Empowerment Act; and
- A requirement that the employer develop a plan to identify, respond to, and correct employee performance issues that may be caused by a domestic violence incident.

16. <u>BREASTFEEDING RIGHTS IN THE WORKPLACE</u>: P.L. 2017, c.263 (Jan. 8, 2018)

Amending N.J.S.A. 10:5-12

⇒ This law expands the Law Against Discrimination to include breastfeeding as a protected category.

⇒ Included in the law is a requirement that an employer accommodate an employee who is breastfeeding her infant child with reasonable break time each day and a suitable room or location with privacy (other than a bathroom stall) in close proximity to the work area to express milk for the child, unless doing so would be an undue hardship to the employer's business operations.

17. <u>PARCC TEST IMPACT REDUCED FOR TEACHER EVALUATIONS</u>

⇒ The NJDOE announced on August 31, 2018 that the weight of PARCC tests in annual teacher evaluations would be reduced from 30 percent to five percent for the 2018-2019 school year.

⇒ The change will affect English teachers from fourth through eighth grades, and math teachers from fourth through seventh grades. The reduction fulfills a campaign promise by Governor Murphy to diminish the importance of PARCC tests.

18. <u>STATE SEAL OF BILITERACY</u>: (May 7, 2018)

⇒ In 2015, the Legislature directed the State Board of Education to establish criteria for the award of a State Seal of Biliteracy. In May 2018, the Department of Education adopted the standards.

⇒ A school district may award a State Seal of Biliteracy to any student who fulfills the State graduation requirements and demonstrates proficiency in English language arts and one or more world languages.

⇒ The student must demonstrate proficiency in the world language through a Department-approved, nationally recognized assessment.

⇒ A school district that chooses to award the State Seal of Biliteracy must incorporate the process into its local graduation policy and may pay the costs for the related assessments and transcript insignia. The policy must state whether it will assume the costs or charge a fee to the student.

⇒ If a school district chooses to award the State Seal of Biliteracy, it must (1) provide the Department of Education with information regarding the students who qualify; (2) present each qualifying student with a Department-issued certificate; (3) include a Commissioner-developed insignia on the student's transcript; and (4) maintain appropriate records to identify students who have earned the State Seal of Biliteracy.

19. <u>MANDATORY DAILY RECESS</u>: P.L. 2018, c. 73 (Aug. 10, 2018)

Supplementing Chapter 35 of Title 18A

⇒ This law requires school districts to provide a daily recess period that is at least 20 minutes long in grades kindergarten through 5.

⇒ School districts are not required to provide recess on a school day which is substantially shortened due to a delayed opening or early dismissal.

⇒ The recess period must be held outdoors if feasible.

⇒ The recess period cannot be used to satisfy the physical education course requirements, and the school district shall not deny access to recess for any reason except as a consequence for a violation of the districts code of student conduct, but recess may not be denied more than twice per week.

⇒ If a student is denied recess, the school district must provide restorative justice activities during the recess session. Restorative justice activities means activities designed to improve the socioemotional and behavioral responses of students through the use of more appropriate, and less punitive, interventions thereby establishing a more supportive and inclusive school culture.

⇒ Nothing in the law prohibits a school district from denying recess to a student based on the advice of a medical professional, school nurse, or based on a student's 504 plan.

⇒ On September 10, 2018 the NJDOE issued a memorandum clarifying that the law would not go into effect until the 2019-2020 school year.

20. **<u>SCHOOL SAFETY SPECIALIST ACADEMY</u>:** P.L. 2018, c. 73 (Aug. 1, 2018)

⇒ On July 21, 2017 Governor Christie signed P.L. 2017, c. 162, which established the New Jersey School Safety Specialist Academy within the NJDOE. Through this law, a requirement was imposed on each school to designate an administrator who holds an administrative certificate as the School Safety Specialist.

⇒ On August 1, 2018, Governor Murphy signed into law a new P.L. 2018, c.100, which expands Safety Specialist eligibility. Districts are now permitted to designate either an administrator, *or any other school employee with expertise in school safety and security*, as the district's School Safety Specialist.

⇒ Effective immediately.

21. **<u>CONCUSSIONS AND INTRAMURAL SPORTS</u>:** P.L. 2017, c. 105 (July 13, 2017)

Amending N.J.S.A. 18A:40-41.4

⇒ This law requires school districts to remove a student participating in an intramural sports program immediately from competition or practice when the student sustains or is suspected of sustaining a concussion.

⇒ The student cannot return to the intramural sports program until there is an evaluation by a physician or other licensed healthcare provider trained in the evaluation and management of concussions and the student receives written clearance to return to competition or practice.

⇒ Previously, the law only imposed these requirements where the student participated in an interscholastic sports program or a cheerleading program.

⇒ The law went into effect on October 11, 2017.

22. **<u>COMPUTER SCIENCE COURSES</u>:** P.L. 2017, c. 303 (Jan. 16, 2018)

⇒ Beginning with the 2018-2019 school year, this law requires every public school with students in grades nine through twelve to offer a course in computer science.

⇒ The course must include instruction in computational thinking, computer programming, the appropriate use of the Internet and development of Internet web pages, data security and the prevention of data breaches, ethical matters in computer science, and the global impact of advancements in computer science.

23. <u>COMPUTER SCIENCE ENDORSEMENT</u>: P.L. 2018, c. 81 (Aug 10. 2018)

Supplementing Chapter 26 of Title 18A

⇒ This law directs the State Board of Education to create a computer science endorsement to the instructional certificate.

⇒ The endorsement will authorize the holder to teach computer science in all public schools, and the endorsement will be required to teach computer science in grades 9-12 once the State Board of Education determines that there are sufficient teachers holding the endorsement to make the requirement feasible.

⇒ To obtain the endorsement, the candidate must hold an instructional certificate with at least one other teaching endorsement and provide documentation that the candidate has completed sufficient computer science related coursework in an amount determined by the State Board of Education, up to a maximum of 15 credits.

⇒ A candidate who taught computer science proficiently in two of the four school years preceding the endorsement requirement in grades 9-12 may be granted the endorsement.

24. <u>INSTRUCTION ON THE CONSEQUENCES OF SEXTING</u>: P.L. 2018, c. 80 (Aug. 10, 2018)

Supplementing Chapter 35 of Title 18A

⇒ This law requires that school districts provide instruction on the social, emotional, and legal consequences of distributing and soliciting sexually explicit images through electronic means once during middle school in an appropriate place in the curriculum.

⇒ The Legislature also directed the Commissioner of Education to provide school districts with age-appropriate sample learning activities and resources designed to implement this requirement.

⇒ Effective for the 2019-2020 school year.

PART II: RECENT AND RELEVANT CASE LAW

1. OPEN PUBLIC MEETINGS ACT ("OPMA")

⇒ *Feld v. City of Orange Twp.*, No. A-1589-15T3 (slip op.) (App. Div. 2018)

- In this matter, the Appellate Division determined that a local municipality did not violate OPMA when it did not include a specific resolution on the published agenda.

- This case stemmed from litigation focused on the redevelopment of a business district in Orange Township and the construction of affordable housing by a private developer. An attorney living in town objected to a resolution the City Council adopted that approved a settlement of long outstanding water and sewer bills for two Housing Authority properties. The attorney specifically complained that the City Council did not comply with OPMA with regard to approving the resolution because it did not give notice or an opportunity for the public to be heard on it and did not list it on the agenda for the applicable meeting.

- While the Appellate Division noted the legislative intent behind the public's ability to be present at public meetings and witness government action, it also noted this legislative intent is balanced by the recognition that public bodies must be able to exercise discretion in determining how to perform their tasks. Further, the court indicated that the Act requires publication of the agenda to the extent known, thus, not every action taken during a public meeting that was absent from the agenda renders the action void under the Act. Rather, the absence of a certain action from the agenda is rendered void when it was calculated to mislead the public or the governing body intentionally omitted items from the agenda which it knew would be acted upon.

⇒ *R.D.A. v. Hunterdon Central Regional High School District Board of Education*, A-5011-16T3, 2018 WL 3189493 (App. Div. June 29, 2018)

- Teacher sent email criticizing specific students, discussing student grades, and using abusive language. Email was copied to teacher's wife, two school counselors, and a parent. He was suspended with pay.

- During suspension, board met twice on June 6, 2016 in closed session and without serving teacher Rice notice. Quorum required five members, but only four attended first meeting and three attended second. At June 30 executive-session meeting, attended by all members, board voted to certify tenure charges to Commissioner, who subsequently referred case to an arbitrator.

- While arbitrator's decision was pending, on March 30, 2017, teacher filed action in lieu of prerogative writs, claiming board violated his due process rights, Rice notice rights, and OPMA. Court dismissed action:

- Statute of limitations. An action taken at a meeting that was noncompliant with OPMA may be voided in the Superior Court, but such proceedings must be brought within 45 days after the challenged action became public. *N.J.S.A.* 10:4-15(a). Teacher here sought to void tenure charges because June 6, 2016 meetings were non-compliant, but he did not file in court until March 30, 2017. He explained delay was due to board deliberately concealing existence of the meetings, but record showed he knew of the meetings no later than December 5, 2016, when he obtained relevant documents through an OPRA request. He even mentioned the meetings when examining witnesses during arbitration.

- Due process rights. Tenure Act sets forth six-step procedure for dismissing teacher or reducing his compensation. *N.J.S.A.* 18A:6-11. Court found all six steps satisfied: (1) charges were filed in writing, (2) sworn statement of evidence was submitted by superintendent, (3) teacher responded in writing, (4) majority of board found probable cause, (5) board notified teacher of determination, and (6) board certified the charges to the Commissioner.

- OPMA and Rice. Board did not give public notice or serve teacher with Rice notice for June 6, 2016 meetings. However, court determined that neither was required. First, no action was taken at meetings and thus nothing was voidable under OPMA. Second, June 6 meetings were not within OPMA purview (and thus not within Rice purview) because no quorum of members was present. *N.J.S.A.* 10:4-8(b).

⇒ *Kean Federation of Teachers v. Morell*, 233 N.J. 566 (2018)

- Last year, the Appellate Division held that public entities must issue a Rice Notice any time a matter involving an individual's employment is placed on the public body's agenda, regardless of whether the individual will actually be discussed. This decision led to an enormous expansion in the number of Rice Notices issued by boards of education.

- The Supreme Court reviewed the Appellate Division's decision and reversed on the issue. The Court decided that the Open Public Meetings Act does not require a public body to issue a Rice Notice to all potentially affected employees, regardless of whether the employee will be adversely affected, whenever a personnel matter appears on the public body's agenda for public discussion.

- So long as there is no executive session discussion planned about the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any prospective or current public employee, there is no need for a Rice Notice.

2. OPEN PUBLIC RECORDS ACT ("OPRA")

⇒ *L.R. v. Camden City Public School District, et al*, 452 *N.J. Super.* 56 (App. Div. 2017)

- 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. 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 the New Jersey Pupil Records Act ("NJPRA"). L.R. filed multiple lawsuits.

- 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. Most school districts denied access to these documents as well. Like the independent educational evaluations requested by L.R., these were also considered education records under FERPA and student records under State law. Innisfree also filed multiple lawsuits.

- The Appellate Division took action to consolidate a few of the *L.R.* and *Innisfree* matters and to address those appeals while all similar appeals were stayed. The primary issue in the consolidated appeals related to the intersection between the definition of "education record" set forth in FERPA, and the definition of "student record" found in the NJPRA. FERPA expressly authorizes the disclosure of redacted, or "de-identified" education records without parental consent. Conversely, there exists no corresponding exception within the NJPRA, which prohibits *any* disclosure of student records to unauthorized organizations, agencies or individuals without prior written consent or a valid court order. Notably, the NJPRA does require that, in complying with the NJPRA, individuals must "adhere" to requirements pursuant to OPRA and FERPA. *See N.J.A.C.* 6A:32-7.5(g) ("Section g"). Section g does not, however, expressly incorporate the provisions of FERPA and OPRA into the NJPRA.

- On appeal, the Appellate Division examined the NJPRA's definition of "student record," which includes "*information* related to an individual student," and agreed with the position of the boards that documents relating to students remain "student records" even after personally identifiable information is eliminated. The court rejected Innisfree and L.R.'s efforts to apply FERPA's exceptions to State law.

- The court addressed two ways in which Innisfree and L.R. could obtain the records that were requested, namely by: (1) establishing they are a "bona fide researcher" within the meaning of *N.J.S.A.* 6A:32-7.5(e)(16); or (2) obtaining a court order authorizing access. However, even if Innisfree and/or L.R. succeed in establishing a right to access, no record may be released without advanced parental notice.

- The New Jersey Supreme Court granted certification in this matter, and it is anticipated that a decision will be forthcoming next year.

⇒ *Scheeler v. Atlantic County Municipal Joint Insurance Fund, et al.*, 454 *N.J. Super.* 621 (App. Div. 2018)

- In this Appellate Division decision, the court addressed a number of consolidated cases in which non-New Jersey residents made OPRA requests to various municipalities. The question before the court was whether individuals not residing in New Jersey are permitted to submit requests for government records under OPRA. At the trial level, a number of judges had disagreed over whether non-New Jersey residents were permitted to submit the same.

- On appeal, the Appellate Division closely examined *N.J.S.A.* 47:1A-1 and noted that the statute did state that "government records shall be readily accessible for inspection, copying, or examination by the citizens of the State…." However, the court examined the "Right to Know Law," the predecessor to OPRA, and noted that in several places the legislature replaced the term "citizen" with the term "person" in the new Act. Based upon this, the court reasoned that those changes signaled an intent to broaden rather than to limit public access to public records.

- Therefore, the court held that out-of-state residents are not precluded from making public records requests under the OPRA.

3. RESIDENCY

⇒ *A.T. ex rel. E.T. & J.T. v. Board of Education of Ramsey,* OAL Dkt. No. EDU 3301-15, Initial Decision, *rev'd, Comm'r* (Mar. 19, 2018)

- The school district conducted a residency investigation that revealed that petitioner and her children resided in Mahwah. A consent order entered in family court provided that the children's other parent, who lived in Ramsey, would be the parent of primary residence for the purpose of determining the children's school district. Because the residency officer only observed the children residing in Mahwah the board disenrolled the students.

- The Commissioner held that the students were lawfully enrolled in Ramsey. Because there was a court order that set the school district of attendance in Ramsey, that controlled where the students where to attend school. It was irrelevant that there was no evidence that the students were not residing in Ramsey.

- The law governing this matter can be found at *N.J.A.C.* 6A:22-3.1(a), which provides that "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."

⇒ *T.L. o/b/o B.K. v. Howell Board of Education,* EDU 16020-17 and EDU 0360-17 (on remand), *aff'd Comm'r* (April 5, 2018)

- Petitioner enrolled her child in the Howell School District *in 2014* using the Howell Township mailing address of the property that the family owned. Petitioner was not aware that her home was, apparently, actually located in Brick Township. In *December, 2016* she received a phone call from the board advising that her home was located in Brick Township. The board subsequently took action to disenroll her children from the Howell School District.

- Petitioner appealed the board's determination and the board filed a counterclaim, seeking tuition for the 2014-2015, 2015-2016 and 2016-2017 school years. The ALJ agreed that the family was domiciled in Brick Township, but concluded that an equitable determination was appropriate in this case because petitioner was not aware that her child was enrolled in the wrong school district. Therefore, the ALJ ordered that tuition be assessed only for the period after December 9, 2016, the date upon which petition received notice of the residency error.

- Following a remand to determine the exact tuition cost to be assessed, the Commissioner affirmed the decision.

⇒ *J.G. o/b/o C.C. and E.G. v. Randolph Township Board of Education,* EDU 17578-17 and EDU 17578-17 (on remand) *aff'd as modified* (June 7, 2018)

- Petitioner enrolled her children in Randolph Schools at the beginning of the 2016-17 school year as non-residents. Board policy required that a residence be secured in the district within one month. Upon request, the board granted petitioner an extension of an additional month to find a residence. Subsequently, petitioner rented an apartment effective November 19, 2016 and provided proof of payment receipts through January, 2017. However, petitioner then closed on a house in Mt. Olive and began residing there effective January 7, 2017.

- The board determined that the children were ineligible for attendance at school in Randolph and filed suit seeking repayment of tuition for the 2016-2017 school year.

- The ALJ reviewed the facts and entered an order finding that the students were ineligible for attendance in Randolph from January 7, 2017 through the end of the 2016-2017 school year. The Commissioner agreed, but remanded the matter for calculation of the tuition due and subsequently affirmed as modified.

4. BUS DRIVER SUSPENSIONS

⇒ *Ahad v. N.J. Department of Education*, OAL Dkt. No. EDU 18146-17, Initial Decision (June 28,2018), *adopted*, Comm'r (July 6, 2018)

- At the completion of his morning bus route, the driver dropped off students at the assigned school. Prior to leaving the drop-off point, the driver did not complete a visual inspection of the bus. A school administrator, after discovering a student from the route was not at school, contacted the driver and requested that he inspect the bus. Upon inspecting the bus, the driver found the missing student asleep. The driver returned to school and dropped her off. The student was never left alone on the bus, although the driver was not aware that she was on the bus.

- The law requires school bus drivers to visually inspect their school bus at the end of each route to make certain that no student has been left on the bus. The driver contended that the student was not "left on the bus" because the student was never alone.

- The Commissioner rejected this argument and found that it was clear that the driver did not visually inspect the bus and that a student was left on the bus at the end of the route.

- Therefore, the Commissioner imposed a six-month suspension of the driver's school bus driver endorsement, the first offense penalty for leaving a student on the bus.

- A second offense will lead to a permanent revocation of the driver's school bus driver endorsement.

5. PAY FOR EMPLOYMENT-RELATED INJURY

⇒ *Gordon v. State-Operated School District of Jersey City*, OAL Dkt. No. EDU 1483-18, Initial Decision (July 13, 2018)

- The employee, an administrative analyst, notified the school district that she was diagnosed with carpal tunnel syndrome. She underwent surgery and was absent from work from January 28, 2013 – May 1, 2013. After a second surgery, she was absent from March 12, 2014 – July 7, 2014. The employee contended that she was entitled to full pay during these absences because her injury resulted from her job. The school district claimed she was limited to worker's compensation and could not receive full salary.

- The case turned on whether carpal tunnel syndrome was an "accident arising out of and in the course of" the petitioner's employment.

- *N.J.S.A.* 18A:30-2.1(a) provides for payment of an employee's full salary for up to one year when they are absent from work as a result of injury caused by an accident

arising out of and in the course of employment, without being charged the use of sick leave.

- The ALJ broadly interpreted "accident," holding that the Legislature intended the provision to provide for leave of absence in all cases of injuries and illness arising from employment and subject to worker's compensation. Since the employee received worker's compensation benefits, her condition qualified for full pay for one year which covered her first absence.

- However, since her second absence occurred more than one year from the first, she was not entitled to full pay for the second absence because the period begins either with the date of the injury or first absence resulting from the injury.

- The case is now pending before the Commissioner of Education.

6. MANDATORILY NEGOTIABLE TOPICS, STATUTORY PREEMPTION, LABOR RELATIONS AND COLLECTIVE NEGOTIATIONS

⇒ *Janus v. American Federation of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018)

- The Plaintiff, a government employee in Illinois, did not want to join the union which represented his position. Illinois law required him to pay an agency fee to the union for the proportionate share of union dues attributable to the union's duties as the collective-bargaining representative.

- The Supreme Court struck down the law, finding that laws that require employees to pay fees to the union without their consent violate the First Amendment because an individual cannot be compelled to subsidize the speech of a private speaker—the union—on matters of substantial public concern.

- For fees to be withheld from an employee's pay, the employee must affirmatively consent to the deduction shown by clear and convincing evidence.

⇒ *Parsippany-Troy Hills Educ. Ass'n v. Parsippany-Troy Hills Bd. of Educ.*, No. A-992-16, 2018 WL 3520275 (July 23, 2018)

- The board and the union were involved in heated negotiations regarding a new collective negotiations agreement. As part of a campaign to compel the board to agree to a new contract, the union directed its members to post hundreds of signs on classroom windows and doors. The signs displayed the union's name and above it stated: "I AM PROUD TO BE A TEACHER."

- The union president admitted that the signs were an attempt to build unity. The board directed the union to remove the signs because they were intended or designed to promote a position on a labor relations issue in violation of board policy. The policy provided that "A teaching staff member shall not engage in any activity in the

presence of pupils while on school property, which activity is intended and/or designed to promote, further or assert a position on labor relations issues." The union sued, alleging that the removal order violated its First Amendment rights.

- The court agreed with the position of the board. The court concluded that the board did not violate the right of free speech by ordering the removal of the signs. A public employee's right to free speech is not a license to express one's opinions at any public place and at any time. The government as an "employer" has far broader powers to regulate speech than does the government as "sovereign."

- The issue is whether the employee's speech can be characterized as being expression on a matter of public concern. If it is a matter of public concern, then the public employer can only restrict the speech if it has an adequate justification for treating the employee differently from any other member of the public.

- Reasonable restrictions can apply when they arise from a labor dispute, even when the content of the speech does not specifically refer to the labor dispute negotiations. A classroom is not the place for proselytizing students to advance a teacher's financial interests, nor should the classroom be the teacher's soapbox. Therefore, the board could reasonably have concluded that the signs would risk interfering with the performance of teachers in educating their students.

⇒ *Bellville Education Association v. Bellville Board of Education,* __ A. 3d __, 2018 WL 3421392 (App. Div. July 16, 2018)

- A school district installed cameras with audio and video recording capability in virtually all areas of the schools, allegedly leaving staff without a private place to discuss matters with union officers, and required staff to wear radio frequency identification cards (RFID). The union asserted that the installation of cameras and the carrying of RFID cards were negotiable topics. When the board refused to negotiate the union filed an unfair labor practice charge.

- PERC held that the installation of cameras to protect people and property is a significant government interest that is outside the domain of negotiability, but that the impacts of the surveillance is negotiable. The Appellate Division affirmed.

- With regard to negotiations, the court explained that there must be a good faith negotiations regarding issues like (1) the placement of cameras in faculty lounges; (2) designation of areas without cameras to allow staff to meet with union officers; (3) establishment of notice protocols if data collected from RFID cards or recordings is used to support disciplinary charges; (4) policies for retaining recordings and data;

and (5) procedures for notifying staff if the district planned to make changes to the cameras or RFID cards.

⇒ *Kenny v. Moonachie Board of Education*, OAL Dkt. No. EDU 09284-17 *aff'd Comm'r* (Sept. 27, 2017)

- Teacher was accused of bullying a student with disabilities. An HIB investigation occurred and on January 24, 2017 the teacher was notified that her actions were in violation of the Anti-Bullying Bill of Rights Act. Instead of appealing the decision to the Commissioner as contemplated by the Act, the teacher pursued contractual grievance proceedings through the education association. Once the board denied her grievance in March, 2017, the teacher filed an appeal with the Commissioner.

- In response to the Commissioner appeal, the board filed a motion to dismiss contending that the petitioner failed to file her appeal timely (i.e. within the 90 days permitted by law). The board argued that the timeline began to run at the time the teacher was notified of the board's HIB decision in January, 2017. The teacher contended that the timeline did not begin to run until the board denied the grievance in March, 2017.

- The ALJ granted the board's motion for summary decision and the Commissioner concurred. "Kenny chose to challenge the board's HIB determination through the collective bargaining agreement's grievance process *at her own peril*, as this was not the appeal process clearly specified by the statute. Her pursuit of the grievance procedure did not toll the ninety days in which she was required to perfect an appeal before the Commissioner. Indeed, the Commissioner has held that attempts to resolve a dispute in other forums do not serve to toll the statute of limitations."

7. DUTY TO PROTECT

⇒ *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist., 877 F.3d 136 (3d Cir. 2017).*

- While attending several board meetings the plaintiff repeatedly acted in a threatening and disruptive manner. As a result, the board took action to ban him from attending any future board meetings, and from being present on school grounds at any time, including extracurricular activities.

- In response, petitioner brought a § 1983 action against the school board and individual board members. He alleged that this action constituted impermissible prior restraint on speech protected under the First Amendment.

- The Middle District of Pennsylvania found in favor of the defendants school board and the individual members of the school board, granting their motion for summary judgment. Specifically, the court found that the board and the individual board members were protected in their official capacities based on the concept of qualified immunity, which protects government agents from liability for civil damages insofar

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

- On appeal, the Third Circuit upheld the qualified immunity of the individual board members, but rule that municipalities do not enjoy the protection of qualified immunity from suit damages under Title 1983. Significantly, school boards are not automatically entitled to qualified immunity from lawsuits for damages in matters alleging constitutional violations.

8. DISABILITY RETIREMENT APPLICATION PROCESS

⇒ *In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 and 17:1-7.10*, 454 *N.J. Super.* 386 (App. Div. 2018)

- In 2016, the Department of Treasury, Division of Pensions and Benefits amended and re-adopted *N.J.A.C.* 17:1, which governs the disability retirement application process for various State public retirement systems. The New Jersey Education Association challenged the amendments to *N.J.A.C.* 17:1-6.4, 7.5 and 7.10, claiming the Division exceeded its statutory authority and acted arbitrarily. The NJEA urged the court to invalidate the challenged regulations. The Appellate Division affirmed in part, reversed in part, and modified in part, as follows:

  - *N.J.A.C.* 17:1-6.4 ("separation-from-service rule"): **Upheld**. Applicant must prove he left employment because of the asserted disability—not because, e.g., he lost a necessary license or was removed for cause. NJEA argued that the enabling statute assures benefits to anyone who suffers qualifying disability, regardless of whether it was the cause for leaving employment, but court found legislative intent to the contrary.

  - **And Modified**. However, to correct an oversight inconsistent with the statutory scheme: now, employee who becomes disabled while waiting for reinstatement after a job abolishment or RIF may still apply for benefits.

  - *N.J.A.C.* 17:1-7.10(a)(1) ("documentation amendment"): **Upheld**. Applicant must submit all supporting documentation within six months or his application shall be cancelled and he must reapply. Previously, any application not complete at time of filing was to be cancelled; amendment simply adds six-month grace period.

  - *N.J.A.C.* 17:1-7.10(e) ("certification amendment"): **Upheld**. Applicant must certify he does not suffer from underlying condition related to the disability for which he is seeking benefit. Contrary to NJEA's objection, court determined that amendment merely allows agency to confirm if pre-existing condition is present and does not dictate that benefits shall not be awarded.

- *N.J.A.C.* 17:1-7.10(f) ("one-retirement-application amendment"): **Upheld**. Applicant may not file any other type of retirement application while disability retirement benefits application is pending. Court found a statutory conflict with the NJEA's position that an applicant should be allowed to apply for and collect service retirement allowance while his disability retirement application is pending. Specifically, disability retirement applicant must be a "member," but retiree is instead explicitly a "beneficiary."

- *N.J.A.C.* 17:1-7.10(j) ("notification amendment"): **Upheld**. Disabled member collecting benefits must notify Division if his condition improves enough for him to return to work or if he does, in fact, resume employment. Regulation comports with legislative goal that Division be kept apprised of disability retiree's work activities. It does not improperly ask beneficiary to render medical opinion about his work readiness and does not permit Division to rely upon the notification as medical evidence, but rather helps Division decide whether to order medical evaluation as permitted by statute.

- *N.J.A.C.* 17:1-7.5(c) and (c)(1) ("subsequent-IME amendment"): **Upheld**. Medical review board may schedule independent medical evaluation ("IME") at no cost to applicant if necessary to supplement his application.

- *N.J.A.C.* 17:1-7.5(c)(2) through (c)(4): **Invalidated**. Although, as noted above, medical review board may schedule IME, it may not require applicant to bear cost of a missed appointment—potentially $900 or more—or else risk dismissal of his application. Court found it unreasonable to place "potentially prohibitive financial burdens upon applicants" merely because the Division "unilateral[ly] determin[ed] that the applicant acted negligently."

- *N.J.A.C.* 17:1-7.10(a)(2): **Invalidated**. Division may not charge applicants for cost of certain documents prepared in connection with an IME.

9. TENURE RIGHTS, INCREMENT WITHHOLDINGS, SUSPENSIONS, REVOCATION OF CERTIFICATES AND RIFS

⇒ *Yarborough v. State Operated School District of the City of Newark*, 455 *N.J. Super.* 136 (App. Div. 2018)

- Teacher inflicted corporal punishment on students during the 2013-2014 school year. The following school year, the 2014-2015 school year, the board filed inefficiency charges under TEACHNJ. The inefficiency charges were dismissed because the board had improperly relied upon 2012-2013 (pre TEACHNJ) evaluations when filing the charges.

- Subsequently, the board filed unbecoming conduct charges against the teacher based on the corporal punishment occurring the prior year. The arbitrator imposed a 120 day suspension, and the teacher appealed contending that the Entire Controversy Doctrine required the board to bring the unbecoming conduct tenure charges at the

same time that it brought the inefficiency charges, and its failure to do so precluded the board from subsequently pursing the charges.

- In a published decision, the Appellate Division disagreed with the teacher's arguments and affirmed the arbitrator's award. The Appellate Division held that the entire controversy doctrine did not require the charges be brought together, emphasizing the special procedures that govern inefficiency charges under TEACH NJ. The court explained that "[g]iven the strictures imposed on inefficiency arbitrations, we concluded such proceedings are *not conducive* to the inclusion of other charges, including conduct unbecoming."

⇒ *Zimmerman v. Sussex Cnty. Educ. Serv. Comm'n.*, 453 N.J. Super. 464 (App. Div. 2018)

- 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.

- The Commissioner ruled in favor of the Commission. The Commissioner found that 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.

- On appeal, the Appellate Division *reversed* the Commissioner, explaining that failure to guarantee a minimum number of hours in the contract cannot eliminate the teachers' statutory protection from reduction in compensation.

- The court elaborated that once a teacher achieves tenure, the prohibition on reduction in compensation becomes a mandatory condition of employment and supersedes any omission of a minimum number of hours in an employment contract. Relying solely on their hourly rates to say there was no decrease in compensation is incorrect.

- The New Jersey Supreme Court has since granted certification to review the Appellate Division's decision.

⇒ *State Operated Sch. Dist. of Jersey City v. Harris, Dkt. No. A-4869-15T1, 2018 WL 2122743 (App. Div. 2018).*

- A tenured teacher was served with tenure charges on September 23, 2014 based upon her conduct in: (1) directing her fourth-grade students to stand in front of the class if they were receiving a failing grade, (2) directing her students to line up on either side of the classroom based upon whether they had "light skin" or "dark skin," (3) telling

the students in the first line that unlike the students in the other line they would not pass the fourth grade, and (4) seating her students at tables based upon the grades they were receiving in the class.

- The arbitrator concluded that the teacher demonstrated "exceptionally poor judgment" and caused damage to her student's self-esteem, but her actions did not rise to the level of "intentionally cruel" nor did she have intent to create a racial animus. Based upon this conclusion, the arbitrator imposed a 262-day suspension without pay after which time she was to return to her classroom.

- The District appealed the arbitrator's decision to the Law Division, which upheld the arbitrator's decision. Thereafter the District appealed the Law Division's finding to the Appellate Division.

- The Appellate Division upheld the arbitrator's conclusion and the Law Division's finding, noting that the law requires an extremely deferential standard when reviewing arbitration decisions. The appeals court found that the arbitrator properly exercised his discretion in both issuing a long suspension and returning the teacher to district employment. Moreover, the Appellate Division held that even where an arbitration decision implicates a clear mandate of public policy, the court must apply a "reasonably debatable" standard of review, which requires that the decision be upheld, so long as it is reasonably debatable.

⇒ *Pugliese v. Newark State-Operated Sch. Dist.*, 454 *NJ Super.* 495 (App. Div. 2018)

- A school district filed tenure charges against a teacher who possessed an instructional certificate with an endorsement in Language Arts Literacy, but was assigned to teach middle school social studies. The district filed the tenure charges after the teacher received two consecutive years of poor evaluations asserting inefficiency in lesson design, student engagement, and knowledge of content and pedagogy. Based on these assertions the District successfully prosecuted inefficiency charges against her and terminated her employment.

- On appeal at the Appellate Division, the teacher argued that her assignment to social studies was illegal because she did not possess the appropriate endorsement, which meant she was not "highly qualified" under the No Child Left Behind Act (NCLB) standards.

- The Appellate Division agreed with the teacher, noting that she was not qualified under the NCLB standards and that she was not certified under New Jersey regulations to teach middle school social studies nor was she even eligible for such an endorsement. Based on this, the Appellate Division found that her appointment

was contrary to law and thus, as a matter of law, the District could neither evaluate nor terminate the teacher for inefficiency in the middle school social studies position.

⇒ *Stilwell v. Board of Education of North Brunswick*, OAL Dkt. No. EDU 20522-15, Initial Decision (Aug. 14, 2017), *rev'd, Comm'r* (Nov. 13, 2017)

- The petitioner was hired in 2008 as a custodian. In 2010, petitioner applied for and was given a position identified as "Inventory Control Clerk." This position came with a stipend on top of her base salary as a custodian. Subsequently, the board summarily terminated her in 2015 after she was arrested for falsifying her income to obtain free school lunches for her children. She later pled guilty and was disqualified from public employment.

- She commenced this action claiming that she attained tenure in the clerical position because most of her duties were clerical in nature. The board responded that she was a non-tenured custodian who received a small stipend to perform some additional clerical tasks. The evidence showed that the majority of her responsibilities were clerical in nature, she performed custodial activities infrequently, and her evaluations were for the duties performed as the Inventory Control Clerk.

- The Commissioner held that the petitioner attained clerical tenure. In order to make a determination regarding the nature of a particular position, the Commissioner must analyze the duties performed and the balance of time between the various responsibilities because the duties performed in the position, not the title, control whether tenure can be accrued. The Commissioner noted that the "abilities" portion of the job description for the Inventory Control Clerk position were not the type of abilities essential for the performance of custodial duties, but instead were more common for tasks performed by clerical and secretarial staff.

- The position could not be considered akin to that of a custodian when the skills, abilities, and responsibilities were not comparable or substantially similar. The Commissioner ordered the school district to back pay for the period of time between her termination and guilty plea.

⇒ *In re Tenure Hearing of DeMarco,* No. 320-12/16 (Nov. 20, 2017)

- The respondent, a pre-school teacher, was assigned to teach a class of 16 students, half of whom were special education students. The teacher bragged to other teachers that she would lock students in her classroom's student bathroom to calm them down. While investigating this allegation, the principal learned that the teacher also had referred to her students in a derogatory manner using terms including: "little

assholes," and "little douchebags." She also specifically referred to one student with a dirty diaper as "Stinky Pete."

- The respondent acknowledged placing two students in the bathroom, but claimed she did it to calm the students and contended there was no evidence of harm. She also admitted using improper language about her students when speaking with other teachers, claiming it was a means of venting. Regarding the "Stinky Pete" allegation, she claimed this was one of many nicknames she gave to students based on characters from the movie Toy Story.

- The arbitrator held that the respondent improperly confined students in the bathroom in violation of district policy, placing the students in potentially harmful situations. The potential for harm for the students was substantial because they had behavioral issues, were emotionally distressed when confined, and there were "any number of foreseeable problems [that] could have arisen with children of such a young age confined to that space."

- The arbitrator criticized the teacher's failure to report the confinements. The improper confinement was "serious misconduct" because "[f]oremost in a teacher's responsibility is the need to protect and safeguard their students" and her "lack of judgment is a clear instance of unprofessional conduct." The arbitrator also found that the teacher's derogatory language "would, most likely, not subject her to termination under these circumstances," but demonstrated a "lack of empathy" for her students which contributed to the arbitrator's conclusion that she should not be returned to the classroom.

- The severity of the misconduct, potential harm to her students, and the district's inability to trust her led to the arbitrator concluding termination was the appropriate penalty.

⇒ *Basile v. Board of Education of Fairview*, OAL Dkt. No. EDU 11837-17 (initial decision June 21, 2018) *aff'd Comm'r* (July 26, 2018)

- The petitioner had been employed in Fairview for twenty years as a Speech Language Pathologist, serving under an Educational Services Certificate. In addition to this certificate, the petitioner also held an Instructional Certificate with various endorsements. For the 2017-2018 school year, the board transferred the petitioner to a full-time teaching assignment as a second grade teacher.

- The board did not conduct a reduction in force and employed two non-tenured Speech Language Pathologists. Refusing to consent to the assignment, the petitioner filed an action with the Commissioner challenging the reassignment; she asserted that the board's action violated her tenure rights. The board responded that the

transfer was not a violation of her tenure rights because there was no reduction in compensation or rank.

- The Commissioner found in favor of the teacher, finding that the transfer violated her tenure rights. A board of education only has the managerial discretion to transfer a teaching staff member without consent within the scope of the teacher's certification. Therefore, the transfer from a position under an Educational Services Certificate to a position under an Instructional Certificate violated the tenure laws.

- The Commissioner ordered that the board reinstate her to her tenured position as a Speech Language Pathologist.

⇒ *Donovan v. Pittston Area School District*, 717 *Fed App'x* 121 (3rd Cir. Dec. 5, 2017)

- The school district transferred the plaintiff from one principal position to another principal position. The new position had the same salary and benefits, but different and arguably lesser responsibilities. Viewing the reassignment as a demotion, the plaintiff sued the school district arguing that it violated her procedural due process rights.

- To establish a claim of a violation of her procedural due process rights, the plaintiff had to establish (1) that she had and was deprived of a constitutionally-protected property interest, and (2) that the procedure for the transfer did not provide due process.

- The court dismissed the case, holding that the plaintiff had no constitutionally-protected property interest in remaining in her original principal position. Specifically, she had a right to continued employment, but not to continue in that particular job. Even though it may have been a demotion, since she continued to be employed and did not suffer a reduction in compensation, nothing occurred that implicates her constitutional rights.

⇒ *Mullanaphy v. Board of Education of Marlboro*, OAL Dkt. No. EDU 12092-16, Initial Decision (June 18, 2018), *rev'd Comm'r* (July 26, 2018)

- In February 2015, a fifth grade student fainted during a school concert. The nurse was called and, upon her arrival, found the student sitting in a chair being attended to by the teachers. The nurse brought the student to her office, where she had the student put her legs up and drink water before releasing her back to class unsupervised. The nurse spoke with the student's mother and generally described that the student had become dizzy during the concert, was brought to the nurse's office, and fully recovered.

- Because the nurse did not follow the protocols for fainting students in the Standard Operating Procedures for School Nurses, provided inaccurate information to the

student's mother, failed to document the incident accurately, and unwisely sent the student back to class unsupervised, the board withheld the nurse's increment.

- The nurse filed a complaint with the Commissioner, which was transmitted for an evidentiary hearing. The ALJ concluded that the board had acted arbitrarily in withholding the increment because: there was no qualified opinion in the record to contravene the nurse's course of action, as the superintendent's testimony in the matter was outside his scope of expertise; and the protocols set forth in the District's Health Services Manual were recommendations rather than requirements, as medical care must be based on clinical presentation.

- The Commissioner disagreed, reversed the ALJ's decision and reinstated the withholding of the increment. The Commissioner explained that an increment withholding will be affirmed where (1) the underlying facts were as those who made the evaluation claimed, and (2) if it was reasonable to conclude, based on those facts, that the increment should be withheld.

⇒ *Taipe v. Board of Education of Elizabeth*, OAL Dkt. No. EDU 3908-17, Initial Decision (Aug. 2, 2017), adopted, Comm'r (Sept. 12, 2017)

- The petitioner, a tenured science teacher, was accused of inappropriate contact with two minor students. Upon learning of the accusation, the school district suspended the petitioner *without* pay. However, the school district did not file tenure charges against the petitioner, nor had he been indicted at the time of the unpaid suspension. When this action was challenged, the board claimed that the seriousness of the allegations warranted an unpaid suspension.

- The Commissioner ordered the district to restore the petitioner to the payroll with full back pay. A suspension without pay can only be imposed if the teacher has been indicted for a crime or if the board certifies tenure charges. Since neither potential basis occurred here, there was no basis for an unpaid suspension, regardless of the severity of the allegations against the teacher.

⇒ *In re the Certificates of Eloise Stewart, Dkt. No. 1516-189 aff'd Comm'r* (Feb. 15, 2018)

- Stewart, who held a Teacher of Handicapped certificate and Principal Certificate of Eligibility, applied to the Office of Certification and Induction for a certification as a Supervisor. After being notified that she lacked 6 course credits for certification, including a course in general curriculum development, she responded that a course she had taken at Hampton University, EDU 61, could address the requirement. She provided a copy of an alleged page from the Hampton University Academic Catalog, which she claimed was the course description for EDU 601.

- Comparison was subsequently made to the authentic catalog, and it was determined by the OCI that Stewart had surreptitiously altered the actual EDU 601 course

description and replaced it with the description for EDU 606, an entirely different course. When given the opportunity to explain the discrepancy, Stewart continued to lie and submitted an email she claimed came from the Dean of the School confirming the authenticity of the course descriptions she submitted to the OCI. This email was not actually sent by the Dean.

- The State Board of Examiners filed suit and Stewart continued to deny intentional wrongdoing. The matter was transferred to the OAL as a contested case and the ALJ ordered the revocation of her certificates. This decision was affirmed by the Commissioner.

⇒ *Gueli v. New Jersey State Board of Examiners*, OAL Dkt. No. EDU 06766-17, *aff'd Comm'r* (March 8, 2018)

- Petitioner appealed the State Board of Examiner's determination that she had not met the requirements, as set forth in *N.J.A.C.* 6A:9B-8 *et seq.*, for issuance of a Teacher of Elementary School Certificate of Eligibility. Specifically, petitioner did not achieve the required cumulative grade point average of 2.75 in her undergraduate program.

- Petitioner contended that she qualified for the CE under *N.J.A.C.* 6A:9B-8.3(b)(2)(i). Prior to **September 1, 2016** this provision permitted an applicant with a GPA between 2.50 and 2.75 to satisfy the GPA requirement by exceeding a passing score on the appropriate state test of subject matter by ten percent or more. Critically, Petitioner had initiated her application for certification on August 30, 2016. However, it was not completed until September 29, 2016, the date upon which she submitted the required oath of allegiance.

- Petitioner argued that the regulations in effect until September 1, 2016 governed because her application was marked "received" by the NJDOE on August 30, 2016. The SBE argued that the September 29, 2016 date governed which regulations to apply, because the controlling regulation states that "an application shall be deemed filed with the Office when it *and all required supporting documentation* has been received." Here, the supporting documentation was not completed until September 29.

- The ALJ and Commissioner agreed with the position taken by the SBE.

⇒ *Press v. Manville Board of Education*, EDU 13152-16 *aff'd as modified Comm'r* (May 31, 2018)

- Petitioner served as Director of Special Services/Guidance K-12 from the 2012-2013 school year through the end of the 2015-2016 school year. At that time, the board abolished the Director of Guidance K-12 position pursuant to a RIF, and took action to employ the petitioner as only the Director of Special Services. As a result, the board stopped paying petitioner an additional sum of $8,000. Petitioner filed suit

contending that she had been reassigned and improperly reduced in compensation. The Commissioner ultimately found in favor of the board.

- Petitioner was originally appointed as "Director of Special Services/Guidance, K-12," with a salary of "$126,838, plus $8,000 additional compensation." At the hearing, the petitioner argued that the Director of Special Services/Guidance K-12 position was a single position, and that the RIF resulted in a "decoupling" of the positions and an improper reduction in compensation. The facts presented during the hearing made clear, however, that the Guidance K-12 position was a separate position and an additional assignment, for which the petitioner was paid $8,000.

- The petition was dismissed. Since Petitioner's base salary as Director of Special Services was never reduced, petitioner's tenure rights were not implicated.

10. SCHOOL ETHICS ACT

⇒ *Advisory Opinion 24-17* (September 26, 2017)

- In this opinion, the School Ethics Commission held that a board member must disclose all relatives, as defined in *N.J.S.A.* 18A:12-23, who are employed directly by the board of education and who are employed by a business that has a contractual relationship with the board of education. Additionally, the School Ethics Commission held that when a board member's relative is not directly employed by the board of education, and the relative's employment cannot be impacted by district personnel and that the relative's employment is not in any way tied to contract negotiations with the local union, the board member is not prohibited from participating in any and all issues concerning district personnel, the superintendent or the budget.

- The Commission further advised that under this board member's circumstances, the board member had a conflict of interest in matters involving his sister and had a similar conflict with respect to his sister's employer, and the public could reasonably perceive that the board member was in a position to use his board seat to benefit his sister, either through direct hiring decisions, or indirectly through approving contracts favoring her employer.

⇒ A36-17 (January 3, 2018) and A06-18 (March 28, 2018)

- Both advisory opinions dealt with a newly elected board member who, although eighteen, was still a student in the school district operated by the board. In A36-17, the board inquired into whether the new board member's appointment posed a conflict of interest because he was a current student, and also was the Senior Class President, and a member of the Principal's Advisory Council. In A06-18, the board inquired into whether this new board member's appointment posed a conflict of interest given the fact that his mother was the school nurse and a member of the bargaining unit, his father was the head golf coach and received a stipend for such

position, and his two siblings were also students in the district. A06-18 also inquired into whether the board member could receive student awards and scholarships and participate in board matters involving current high school teachers and other students.

- With respect to whether or not the board member's appointment posed a conflict of interest because he was a current student, the Commission determined that this fact does not, in and of itself, limit a board member's involvement in board activities, restrict him from having access to board documents or materials, or otherwise prohibit him from fulfilling his duties and responsibilities as a board member.

- With respect to whether his family members' connection to the school district posed a conflict of interest, the Commission noted that a board member who is a student has the same obligations as other board members when it comes to voting on matters involving immediate family members or relatives. In this present circumstance, however, the Commission determined that the board member was prohibited from participating in personnel matters regarding individuals supervised by his parents or those that supervise his parents, including the superintendent.

- With respect to whether the board member could receive student awards and scholarships and partake in matters pertaining to high school teachers and other students the Commission addressed such in twofold. The Commission determined that the board member was only a board member while serving and sitting on the board and at all other times was a student. As such, the board member was eligible for senior awards and/or post-graduate scholarships at the high school that would be selected by the high school faculty and/or coaches.

- As to all other inquiries pertaining to whether the board member could participate in board discussions and activities regarding high school teachers and other students, the Commission reiterated its determination that the board member's duality as a student and a board member did not alone conflict him out of board matters pertaining to teachers and other students.

⇒ A07-18 (March 28, 2018)

- This advisory opinion addressed whether a board member was conflicted out of participating in negotiations between the board and the local education agency and participating on the board's finance committee because his wife's cousin was employed in the school district. The Commission concluded that neither a cousin nor a cousin-in-law rises to the definition of "family member" under *N.J.S.A.* 18A:12-24(b), thus there is no presumption of a conflict for the board member on any board activity because his wife's cousin is employed by the board of education.

⇒ *Lewis-Gallagher v. Monroe Twp. Bd. of Educ.*, OAL Dkt. No. EDU 02437-18 (July 12, 2018)

- In this matter, Petitioner alleged that the Monroe Board of Education violated board policies and the School Ethics Act when it appointed a member to fill a board vacancy following the resignation of a former-board member. More specifically, the Petitioner alleged that the board acted improperly by only advertising the special meeting regarding the vacancy in a single newspaper, failing to make special accommodations for members of the public who were unable to attend the regularly scheduled meeting, and failing to conduct a vote for subsequent candidates after the first candidate received a unanimous vote of approval.

- The ALJ assigned to this case disagreed with all three of Petitioner's contentions, instead finding that there was no procedural defect in the board advertising the special meeting in a single newspaper so long as the official vote did not occur in the special meeting but at the previously scheduled regular meeting. The ALJ further determined that the board had no obligation to accommodate the members of the public who could not attend the regularly scheduled board meeting—finding no requirement that a board schedule a vote convenient to every member of the public—and that there is no obligation to continue voting after a unanimous vote.

⇒ *Fischer v. Attorney General of State*, No. A-1736-16T3, 2018 WL 2422468 (App. Div. 2018)

- A long term member of an elementary board of education ran for an unopposed seat for the regional high school board of education. Following his election to the regional high school, the board member received a declaratory judgment by a Superior Court judge authorizing him to hold both elected offices.

- The Attorney General filed an appeal of the declaratory judgment to the Appellate Division. On appeal, the court reversed that decision holding instead that *N.J.S.A.* 19:3-5.2 (approved by the NJ Legislature on September 4, 2007) does not contain language specifically exempting school board members from the prohibition against holding multiple elected positions.

11. NONRENEWAL

⇒ *Richardson v. Gangadin*, No. A-1572-16T3, 2018 WL 3096981 (App. Div. June 25, 2018)

- In this matter, the Appellate Division determined that a board of education must give all superintendents, regardless of contract language, an affirmative, timely declaration of non-renewal in writing.

- Here, the superintendent's contract was a four year contract indicating that at the end of four years if the board did not indicate its intent to renew her contract a renewal was not being offered. However the court noted that public employees and their employers could not agree to contractual terms that violate a specific term or condition of employment set by a law.

- Under the current statutory formula the board was required to provide the superintendent with written notice of nonrenewal before the end of her four year contract.

12. SENDING RECEIVING RELATIONSHIPS

⇒ *Mine Hill Board of Education v. Dover Board of Education*, OAL Dkt. No. EDU 05427-17, *rev'd Comm'r*, Feb. 9, 2018

- Mine Hill sought a limited severance of its sending-receiving relationship with Dover in order to educate Mine Hill's seventh and eighth grade students in the Mine Hill School District. Mine Hill proposed a two year phase out program for these grades, but did not seek any changes to the relationship for ninth through twelfth grades.

- Prior to transmittal of the matter to the OAL, the parties drafted and agreed to a settlement agreement effectuating this partial severance. The ALJ reviewed the agreement and deemed it acceptable. Therefore, the ALJ recommended its approval to the Commissioner, and directed the parties to comply with the terms therein.

- The Commissioner reversed, finding that the statutory criteria for adjudicating the termination of sending-receiving relationships is set forth in *N.J.S.A.* 18A:38-13, and the procedural requirements are identified in *N.J.A.C.* 6A:3-6.1.

  - *N.J.S.A.* 18A:38-13 requires, among other things, that prior to submitting an application seeking to severe a sending-receiving relationship the district seeking to sever the relationship *must* submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts.

  - Additionally, under *N.J.A.C.* 6A:3-6.1(b) there are specific procedures to be followed for the uncontested severance of a sending-receiving relationship, including a requirement that each board notify the public at the next public meeting that the record before the Commissioner will remain open for a period of 20 days in order to allow interested parties to submit written comments to the Commissioner.

- Therefore, the Commissioner declined to permit severance, and instead ordered further proceedings in accordance with the above-cited laws.

13. CONTRACT MODIFICATION NOTICE REQUIREMENTS

⇒ *Wall Township Education Association v. Wall Township Board of Education*, EDU 17516-17, *aff'd Comm'r* (June 1, 2018)

- Pursuant to *N.J.S.A.* 18A:11-11, boards of education are prohibited from renegotiating, extending, amending or otherwise altering the terms of a contract with a superintendent, assistant superintendent or business administrator without providing certain notice to the public regarding the same.

- Here, the board had a contract with its superintendent extending from 2014 through 2019. In light of the amendments to the regulations governing superintendent salary caps, the board and the superintendent negotiated a new contract. At its meeting in September, 2017, the board took action to rescind the old contract and approve the newly renegotiated contract.

- The local education association took exception with this action and contended that the board's actions violated *N.J.S.A.* 18A:11-11. The ALJ and Commissioner disagreed and granted the board's motion for summary decision. *N.J.S.A.* 18A:11-11 applies only to the alterations of an existing contract. Once the board rescinded the old contract, this statutory provision no longer applied and the new contract could be approved.

14. CONSTRUCTION

⇒ *Wallace Bros., Inc. v. E. Brunswick Bd. of Educ.*, A-1432-15T3 (App. Div. Nov. 9, 2017)

- Board contracted with builder for $18 million construction project. Litigation arose when Board refused to pay last installment, claiming builder did not complete "punch list" of outstanding items. Trial court granted summary judgment for builder because Board waited too long to raise concerns and punch list contained only maintenance issues, not construction issues covered under the contract.

- Appellate Division reversed summary judgment, finding factual dispute over whether the builder satisfactorily completed the contract and was due full payment. For example, "closeout documentation" required under contract was missing, Board architect had yet to issue final Certificate of Payment, and $164,000 of punch-list work was incomplete, including items arguably covered under the contract. Contract required "strict and entire conformity" by builder, and Appellate Division remanded case for fact finding on whether builder had fully conformed.

- Petition for certification was denied.

15. NOTICE OF TORT CLAIM

⇒ *Hernandez v. Snyder High Sch.*, 2018 WL 525317 (App. Div. Jan. 24, 2018)

- Plaintiff fell and was injured on school grounds. The next day, on November 21, 2014, she delivered a handwritten note to the school describing the incident. The note was signed and dated but did not include her home address, nature and extent of injuries, estimated damages, or intent to file a claim. On December 12, 2014 she attempted to deliver proper tort claim notice to city hall, but the board did not have an office there.

- Plaintiff subsequently filed suit on June 8, 2015. Law Division granted summary judgment for board and Appellate Division affirmed, finding suit barred for noncompliance with Tort Claims Act. Under TCA, prospective claimant must serve notice on public entity within 90 days of incident, and notice must include claimant's address, description of injury, amount claimed, and certain other facts. Plaintiff's handwritten note was timely but omitted necessary facts to constitute a TCA notice. Subsequent attempt to serve proper notice on board at city hall was ineffective: board's correct address was readily available on official website, whereas plaintiff relied on privately published Yellow Pages. Error did not constitute the exceptional circumstances necessary to extend 90-day deadline.

16. SCHOOL CALENDAR

⇒ *West Morris Regional High School Board of Education v. Morris Regional Education Association*, 2018 WL 4086989 (App. Div. Aug. 28, 2018)

- In this matter, the local education association appealed from a determination by PERC that the start and end date of the school calendar was a non-negotiable managerial prerogative. In an unpublished decision, the Appellate Division affirmed PERC's decision, even though the parties' contract clearly stated that "teachers employed on a [ten] month basis shall be employed from September 1 through June 30." The court agreed that this clause was unenforceable.

- The court explained as follows: "There was nothing arbitrary, capricious or unreasonable about PERC's decision that the contract language at issue implicated the board's managerial prerogative. It is well-established that setting the school calendar is a managerial prerogative."

17. STUDENT MATTERS

⇒ STUDENT SUSPENSIONS

- *R.T. & C.T. ex rel. N.T. v. Board of Education of Wayne*, OAL Dkt. No. EDU 5380-18, Initial Decision (June 6, 2018), *adopted as modified*, Comm'r (July 11, 2018)

    - The school nurse was conducting a drug test of a student when N.T. came to the nurse's office with a complaint of a sore throat. The nurse observed N.T. surreptitiously pass an object to the student being tested. The object was a bottle holding "clean urine." After N.T. was questioned, N.T. admitted to having marijuana in his backpack. A search yielded a mason jar filled with individual packets of marijuana. The police charged N.T. with possession with intent to distribute under 50 grams of marijuana.

    - The board conducted a disciplinary hearing and imposed a long-term suspension for the remainder of the school year, including barring N.T. from school grounds and all school activities. The district provided home instruction to enable N.T. to obtain a diploma. The parents challenge the board's decision.

    - The Commissioner held that the board's decision to impose a long-term suspension was not arbitrary, capricious, or unreasonable. However, the Commissioner noted that the board did not follow the proper procedure to impose a long-term suspension. *The Commissioner explained that the suspension of a general education student shall not be continued beyond the board's second regularly scheduled meeting following the suspension unless the district determines that the suspension should continue.*

    - *Therefore, the board should have revisited the status of the suspension at the board's second regularly scheduled board meeting that followed the disciplinary hearing.* Nevertheless, since that decision was issued after the school year ended, the Commissioner held that there was not relief available to N.T. any longer. The Commissioner concluded that the board's failure to reconsider the suspension as required by the regulations had no impact on the outcome and dismissed the petition.

⇒ STUDENT EXPULSIONS

- *N.C. ex rel. J.C. v. Board of Education of Ocean City*, OAL Dkt. No. EDU 2346-17, Initial Decision, aff'd. as modified, Comm'r (Apr. 4, 2018).

    - The student was found during school in possession of two knives, a choke cord, a substance believed to be marijuana, and drug paraphernalia. The administration recommended expulsion, and the board formally adopted the recommendation after a disciplinary hearing.

    - The parent challenged the board's decision. The Commissioner held that the school district could not expel the student, even though it may not be appropriate

for him to ever return to the general education program, and instead must continue to provide educational services.

- Expulsion may only occur *after* the student serves a prior long-term suspension, *and* the board provides written notice to the student's parents that further engagement of conduct by the student which warrants expulsion shall be a knowing and voluntary waiver of the student's right to a free public education. Since the student had never served a prior long-term suspension, the greatest discipline the board could impose was a long-term suspension.

⇒ TRANSPORTATION

- *R.M. and K.M. o/b/o M.M. v. Franklin Board of Education*, OAL Dkt. No. EDU 14237-16 *aff'd Comm'r* (Nov. 3, 2017)

  - Petitioners challenged the board's decision to assign a school bus stop .9 miles from their home in lieu of allowing bus driver to pick up children in their drive way. Petitioners contended that a previous bus driver picked children up at their home, and did a "K-turn" in their driveway. Petitioners further contended that the approved stop required the children to walk along the shoulder of a narrow and winding county road. The board responded that the assigned stop was appropriate under the board policy governing transportation safety standards.

  - The Commissioner affirmed the ALJ's decision to grant summary decision in the board's favor. Local school districts are given broad discretion to determine appropriate bus routes, and these decisions will not be overturned unless arbitrary, capricious or unreasonable. The ALJ noted here that the prior driver had made a K-turn in violation of district policy, in order to avoid navigating a narrow bridge for which the bus exceeded the weight limit. The ALJ also noted that the board had not only reasonably determined the bus stop to be appropriate under policy, but had conducted an investigation to ensure the safety of the assigned stop and the logistics of rerouting the bus.

- *M.L. and T.L. o/b/o J.L. v. Teaneck Board of Education*, OAL Dkt. No. EDU 13260-17 *aff'd Comm'r* (March 23, 2018)

  - Petitioners filed an appeal seeking to have the board provide bus transportation for their *four year old* son to the Yavneh Academy, a private, religiously affiliated school. The board denied the transportation request because the student did not meet the eligibility requirements to qualify for bus transportation; namely, the student did not meet the age requirement for starting kindergarten in Teaneck.

  - Petitioners filed an appeal claiming that the policy was based on a discriminatory practice, since the private religious school allowed students to enter kindergarten

before turning five. The board filed a motion for summary decision, which was granted.

- The eligibility requirements for a non-public school student to receive transportation from the public school district of residence are set forth in *N.J.A.C.* 6A:27-2.2(d), and include the requirement that non-public school students must meet the same entrance age requirements as public school students in their resident school district. Here, Teaneck's policy made clear that only those pupils who will be five years of age on or before October 1 of the year they enter school will be permitted to enroll in kindergarten.

⇒ STATE CREATED DANGER EXCEPTION

- *Gayemen v. School District of Allentown*, 712 *Fed. App'x* 218 (3rd Cir. 2017)

  - Student was attacked by four other students. Student subsequently filed suit against the school district and the students. With respect to the complaint against the district, the student alleged that the attack was one of many gang-related incidents at the school that the administration was aware of but failed to address adequately. Therefore, the student alleged that the district violated his constitutional right to due process by failing to protect him from the attack.

  - The federal district court granted summary decision in the school district's favor and the student appealed. The Third Circuit affirmed, finding that the plaintiff had not demonstrated that there was any affirmative exercise of authority by the school district that increased his exposure to danger. A school district generally does not have a constitutional obligation to protect against private violence. However, if the plaintiff can prove a state-created danger, there is a constitutional violation. A claim of state-created danger has four elements:

    (1) the harm ultimately caused was foreseeable and fairly direct;

    (2) a state actor acted with a degree of culpability that shocks the conscience;

    (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

    (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

  - Here, the plaintiff could not establish a state-created danger because there was no evidence that a district employee affirmatively used his authority in a way that created danger to the plaintiff or rendered the plaintiff more vulnerable to

danger than had there been no action at all. The school district's inaction could not be the required affirmative act.

⇒ NJSIAA ELIGIBILITY

- *Lombardi v. NJSIAA*, Agency Dkt. No. 73-4/17, *aff'd Comm'r* (Nov. 3, 2017)

  - This matter involves an appeal of the decision by the NJSIAA denying petitioner's request for a waiver of the eight semester rule that would have allowed him to participate in baseball of the 2017 season. The eight semester rule can be waived if the overall objectives of the NJSIAA and its member schools will not be undermined and when a student proves that he/she cannot comply with the rule due to circumstances beyond his control.

  - Here, petitioner played baseball for New Providence for the 2012-2013 through 2014-2015 school years, but was placed on extended home instruction midway through his senior year following a *behavioral* incident the district deemed threatening (took a "selfie" with a gun and told another student he was going to "shoot up the school"). In June, 2016, and after being declassified during 11th grade, the CST reclassified the student and he was given a fifth year of educational services to address his *academic* deficiencies.

  - The student requested that the NJSIAA waive the eight semester rule in order to allow him to participate in baseball during the 2017 season, contending that he required an extra year of athletic eligibility due to circumstances beyond his control. The NJSIAA denied the request and the student appealed. The Commissioner affirmed the NJSIAA's decision.

    a. "The evidence presented…demonstrates that the circumstances that led to the petitioner's ineligibility were not entirely beyond his control. Specifically, the petitioner engaged in multiple threatening behaviors that led to his removal from school… thereby causing him to miss the 2016 baseball season. The NJSIAA does not dispute that the petitioner may have had academic difficulties…however, what led to this petitioner's inability to participate in baseball in 2016 were his disciplinary problems, not his academic problems….the petitioner's actions, i.e. taking the gun 'selfie' and threatening 'to shoot up the school' that led to his removal from school grounds for the spring 2016 semester, were not beyond his control."

⇒ HARASSMENT, INTIMIDATION AND BULLYING

- *Columbia High School Baseball Boosters Inc. v. South Orange-Maplewood Board of Education*, OAL Dkt No. EDU 4046-17, *aff'd Comm'r* (Nov. 13, 2017)

  - The board found that the booster club (i.e. the club itself, and not any one individual) committed an act of HIB when it disinvited one of the baseball players from an end-of-the-year banquet. The act was found to be in retaliation for the student's complaints of HIB against the baseball coaches. To find a violation of the HIB policy, the board found that the booster club was a "volunteer" in the district by virtue of its involvement with the district and the baseball team. The booster club appealed the board's decision to the Commissioner.

  - The Commissioner held that a booster club as an organization cannot be found to violate the Anti-Bullying Bill of Rights Act. Nothing in the Act suggested that the Legislature intended to lump a group of individuals together when there is an allegation of HIB and determine that an organization violated the HIB policy. *Instead, it is appropriate to evaluate the actions of each individual involved.*

  - The Commissioner explained that since the individual booster club members are not exempt from the Act's purview, there must be a case-by-case determination of whether the individual falls into one of the categories to which the Act applies. The board should have determined whether any members of the booster club qualified as a volunteer under the Act and, if so, whether they engaged in prohibited retaliation against the student in violation of the Act.