

WPSBA ED LAW 2022

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BOARD OF EDUCATION MEETINGS – WHAT YOU SHOULD KNOW

Presented by:

Candace Gomez,
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PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The Open Meetings Law does not require a public body to permit the public to speak at its meetings.
 - The Open Meetings Law is silent regarding the ability of members of the public to speak.
 - Courts and the Commissioner of Education have recognized that the Open Meetings Law does not require any level of public participation, commentary or input at meetings of public bodies. See e.g. *Appeal of Hockswender*, Decision 16,400 (2012).

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The Open Meetings Law provides the public with the right to:
 - attend meetings of public bodies, except executive sessions that are validly convened for one or more of the topics authorized in Section 105 of the Openings Meeting Law;
 - observe the performance of public officials;
 - listen to the deliberations and decisions that go into the making of public policy; and
 - photograph, broadcast, webcast, video record or otherwise record meetings as long as the equipment used to do so is not disruptive or obtrusive.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- Although not required by law to permit the public to speak at its meetings, most Boards of Education have a policy that grants the public the right to speak at its meetings.
 - The Commissioner of Education has encouraged allowing citizens to speak on matters under consideration. *Appeal of Wittneben*, Decision No. 12,671 (1992); *Appeal of Hockswender*, Decision 16,400 (2012).
- When a public body does permit the public to speak at its meetings, it may place reasonable rules that are viewpoint neutral. Any content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- Under US Supreme Court decisions, the extent to which a public entity can restrict speech on its property depends in part on the nature of the forum involved.
 - Courts have recognized three different types of fora: the traditional public forum, the “limited” public forum, and the non-public forum
 - In a traditional public forum, like a street or park, a governmental entity may enforce a content-based restriction on speech only if its is narrowly drawn to effectuate a compelling state interest.
 - A “limited” public forum is public property that is a non-public forum that has been opened for use by the public as a place for expressive activity on a limited basis (e.g. specified times, certain topics). Any restriction on speech in these settings must be viewpoint neutral.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- Can public participation at Board of Education meetings be limited to residents?
 - Yes – according to the Commissioner of Education. *Matter of Martin*, Decision No. 12,861 (1992).
 - No – according to the Committee On Open Government; rather, all members of the public should be treated equally. See e.g. OML-AO-3364, OML-AO-4141, OML-AO-4292, OML-AO-5210, OML-AO-5296, OML AO 5607.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

Restrictions that the Committee On Open Government has recognized as valid:

- Speakers may be limited to a certain amount of time. OML-AO-4810
- Commentary that is “abusive, threatening, profane, or in any other way illegal,” may be prohibited. OML-AO-5552.
- May limit repetitive comments in support of opinions expressed previously, as well as those that would be offensive to reasonable people of ordinary sensibilities. OML-AO-5296

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

Valid restrictions - continued:

- The United States District Court, Eastern District of New York determined that prohibiting the reading of evaluations completed by students and prohibiting the student evaluators from being identified while allowing general comments about the issues raised in the evaluations was permissible in the “limited public forum” See *Schuloff v. Murphy*, 1997 WL588876 (E.D.N.Y. Sept. 17, 1997)
 - a public CUNY Board of Trustees meeting
 - the restriction effectuated a compelling governmental interest – protection of student privacy
 - Restriction did not seek to restrain discussion of “the shortcomings” of a law school professor.
 - The existence of FERPA was seen as establishing a compelling interest in student privacy.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

Valid restrictions - continued:

- Following the prior federal decision, the COOG has also recognized restricting commentary from a parent speaking about another student was a reasonable restriction. OML-AO-3405.
- Public comments may be limited to matters involving the business or operations of the public body and require a brief written summary of the subject intended to be discussed. OML-AO-4044
- A rule that requires petitions, resolutions and other communications be made in writing and submitted to the public body's clerk at a set time in advance of a meeting is acceptable; however, requiring that such submissions be signed is not. OML-AO-5607

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

■ Impermissible Restrictions

- A federal court invalidated a rule prohibiting “speech which contains any ‘charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee.’” *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996)
 - In the Court’s view this rule allowed expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance)
 - The COOG has summarized this and other similar federal court decisions as holding that if a public body permits positive comments regarding a particular topic, the door is open all the way, and it must accept critical comments as well. See OML-AO-5552; OML-AO-4691.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The requirement to be viewpoint neutral not only applies to the wording or content of a policy but also to how it is enforced.
 - Example: “The Board will not permit in public session discussion involving individual district personnel.”
 - Wording is viewpoint neutral.
 - How many Boards have stopped positive statements regarding a staff member?
 - Cannot stop negative statements about a staff member if you do not stop positive statements.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- What is disruptive?
- When public comments were limited to topics on the agenda, incessantly raising non-agenda items at a Town Board meeting was found to support convictions for disorderly conduct and trespass. *People v. Albra*, 13 Misc.3d 64 (Sup Ct., App. Term, 9th and 10th J.D. 2006)
 - Warned by Town Supervisor if did not address topics on agenda, he would be asked to leave meeting
 - Provoked Town Board into heated discussions – disrupting the meeting
 - Asked to leave meeting by Town Supervisor and Police Officer – refused to leave
 - There was a dissent that believed the speech was protected and disruption was in fact perpetuated by the Town Supervisor

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- When individual addressing the Common Council did not speak on impermissible topic (public comments were expressly permitted on non-agenda items), and was not alleged to have violated the Rules of Decorum – charge of disorderly conduct was dismissed by the Court. *People v. Sandow*, 68 Misc.3d 685 (City Ct., Dutchess Cty. 2019)
 - Court found - no basis to stop speech critical of members of the Council before allotted time expired
 - Council's Rules of Decorum prohibits shouting, clapping, being unruly, distracting, defaming anyone, intimidating anyone, making personal affronts, lodging threats of violence, using profanity, or behavior that disrupts the orderly conduct of the meeting
 - Court stated appropriate remedy would have been to wait until individual exhausted her three (3) minutes to speak on non-agenda items, for the Chair to instruct her to cease speaking, warn her that she may be required to leave the Chamber if the violation continued, and only if defendant persisted, could she then be removed.

AGENDA SETTING

- Check your Board Policy Book to determine if your Board has a policy as to process for placing items on an agenda
- Typically, agenda setting is the responsibility of the Superintendent and Board president. Many districts will include the Board vice-president
- Communication with Board officers and/or Superintendent prior to an agenda setting meeting can result in items placed on the agenda from other Board members
- You have a right to add items to be discussed at the meeting, but you will need to follow the process pursuant to Robert's Rules of Order. Be considerate of fellow Board members – surprise discussions, without opportunity to prepare, may not be appreciated by your colleagues

EXECUTIVE SESSION

- Boards can enter into executive session to discuss limited topics without public participation
- Your Board must notice a Board meeting, open a public meeting, and then make a motion to enter executive session delineating the reason(s) why the Board is contemplating executive session
- There can be no action taken in executive session, other than a vote on probable cause relating to Section 3020-a charges
- Minutes are not required for executive session topics, other than for votes on 3020-a charges

PERMISSIBLE TOPICS FOR EXECUTIVE SESSION

- Matters that would jeopardize public safety if disclosed
- Discussions of pending or threatened litigation
- Collective bargaining information
- The details of medical, financial, credit, or employment history of a particular person or corporation
- Matters leading to the appointment, promotion, demotion, discipline, suspension, termination or removal of a particular person or corporation
- Discussion of proposed purchase, sale or lease of real property

BOARD GATHERINGS NOT SUBJECT TO THE OPEN MEETINGS LAW

- Social gatherings where District business is not discussed
- Board retreats
 - The OML exception is limited to gatherings “for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations” OML-AO-4762
 - Board goal setting would be considered Board business and must be discussed in open session
 - Discussions of Board self-evaluations may be subject to the OML, if the evaluations focus on Board members’ duties and responsibilities, as opposed to how well members are working together



QUESTIONS ?



CURRICULUM CONTENT AND PARENTAL PROTESTS

Presented by:

David S. Shaw,
Melissa Knapp &
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INTRODUCTION

DURING THE TIME OF THE COVID-19 PANDEMIC IN MANY SCHOOL COMMUNITIES THERE HAS BEEN TENSION BETWEEN GROUPS OF PARENTS OVER ISSUES WELL BEYOND WHETHER OR NOT STUDENTS SHOULD BE MASKED. THE CONTROVERSY OVER CURRICULUM CONTENT THAT WAS IGNITED BY LOCAL SCHOOL BOARDS' DIVERSITY, EQUITY AND INCLUSION INITIATIVES WILL UNDOUBTEDLY PERSIST WELL BEYOND THE DECLARED END OF THE PANDEMIC.

THIS PRESENTATION WILL ANALYZE THE LEGAL CONTOURS OF CURRICULUM CONTROL IN NEW YORK AS INFORMED BY FEDERAL CONSTITUTIONAL LAW.

CONTROL OF EDUCATION IN NEW YORK STATE

- ❖ The right to education in New York State is derived from the New York State Constitution at Article XI(1)
- ❖ The State Constitution, at Article XI(2) establishes the oversight of the education system of the University of the State of New York (of which every school district and BOCES is a component).
- ❖ The Education Law provides for the empowerment of the Board of Regents as a governance authority pursuant to Education Law §§101 & 207, with the power to legislate policy and the Commissioner of Education who serves as the Chief Executive Officer of the State Education Department and the Board of Regents, pursuant to Education Law §305.
- ❖ Students are subject to compulsory education between the ages of 6-16 and a right to an education at state/local expense between the ages of 5-21.

CURRICULAR REQUIREMENTS

- ❖ The mandated courses of study are set forth in the Education Law at §3204(3) and the local discretion is vested in the board of education pursuant to Education Law 1709(3).
- ❖ The syllabus for the courses of study must be compliant with the State's Learning Standards set forth at 8 NYCRR §100.(1)(t).
- ❖ If local curriculum is not compliant with the State Learning Standards state aid will be at risk 8 NYCRR § 3.35.

LOCAL INSTRUCTIONAL MATERIALS

EDUCATION LAW §701 VESTS THE DECISION MAKING OVER TEXTBOOKS IN THE BOARD OF EDUCATION, AS RECOMMENDED BY THE SUPERINTENDENT OF SCHOOLS.

The Authority to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean: (i) any book, or a book substitute, which shall include hard covered or paperback books, work books, or manuals and instructional materials in an electronic format.

CURRICULUM DEVELOPMENT

- ❖ There is no mandate that a particular curriculum be approved by the Board of Education and typically is prepared by teachers under the supervision of school administrators.
- ❖ Lesson plans developed to implement the curriculum are typically an individual teacher's choice (although educational materials prepared for work are the intellectual property of the school district (*Shaul v. Cherry Valley-Springfield CSD*, 363 F.3d 177 [2d. Cir. 2004])).
- ❖ Comprehensive lesson plans are considered by the Commissioner of Education and the courts to be essential to effective instruction *Meyer v. Bd. of Educ.* 182 A.D.2d 873 (3rd Dept. 1992).

THE BOUNDARIES OF TEACHER ACADEMIC FREEDOM

***Harris v. Mechanicville District*, 45 N.Y.2d 279 (1978)**

- ❖ A New York high school teacher was the subject of parental complaints regarding how he instructed from the novel *Catcher in the Rye*. The teacher agreed not to include the book in future classes and then, without consulting with administration, did so again. The teacher had also walked-out from a conference with administrators.
- ❖ The Court determined that discipline under these circumstances was warranted, but not termination from employment. A penalty between a letter of reprimand and a one year suspension without pay was suggested by the court upon remand.

GATEKEEPING THE CURRICULAR MATERIALS

- ❖ Should the Board of Education approve all curriculum?
- ❖ Textbook Selection is a matter within the authority of the Board of Education (Education Law §1709[4])
- ❖ The Superintendent of Schools is required to recommend courses for students and textbooks for each course of study. (Education Law §1711)
- ❖ A Textbook may not be replaced within five years of its adoption for use by the Board of Education except by a supermajority vote of 3/4th of the seats on the board voting in favor of the replacement book.

IS THERE A CONSTITUTIONAL RIGHT AT ISSUE REGARDING COURSE AND SCHOOL LIBRARY CONTENT ?

- ❖ Does the First Amendment of the U.S. Constitution that protects free speech extend to the right to receive information contained in books within the school libraries?
- ❖ *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).
- ❖ *Bicknell v. Vergennes Union High Sch. Bd. of Directors*, 638 F.2d 438 (2nd Cir. 1980).

BOARD OF EDUCATION V. PICO, ET AL., 457 U.S. 853 (1982)

- ❖ Some members of the BOE attended a conference and were made aware of some controversial books several of which were in their secondary school libraries. In response, they created a book review committee to review said books. The committee recommended that most remain in the library, one can be checked out with parental permission, and could not agree as to what should happen with two of the books.
- ❖ The Board ultimately directed that all of the books be removed from the library, characterizing them as “anti-America, anti-Christian, anti-Semitic, and just plain filthy.”
- ❖ Litigation ensued with the Plaintiffs claiming that the removal of the books violated their First Amendment rights.

PICO CONTINUED...

- ❖ This case dealt with the issue of removing library books that were previously shelved in the school libraries, not decision making with respect to either curriculum or the acquisition of books.
- ❖ The Court acknowledged the right of a local school district to establish and apply their curriculum in such a way as to transmit community values, there being a substantial community interest in “promoting respect for authority and traditional values, be they social, moral or political.”
- ❖ Local educational decision making, the Court opined had to “comport with the transcendent imperatives of the First Amendment.”

PICO CONTINUED...

- ❖ The Court recognized that First Amendment speech rights included both the right of the sender to disseminate ideas and the right of the reader to receive the same.
- ❖ The Court drew a distinction between the content of curricular information imparted in the classrooms from the resources that would be available to students on a voluntary basis when accessing books from the school library.
- ❖ The Court opined that: “Our Constitution does not permit the official suppression of ideas”...a finding of a denial of Constitutional Rights would depend upon the intent behind the book removal.

PICO CONTINUED...

- ❖ The Constitutionally permissible basis for the removal of library books from library shelves was stated as: “A determination regarding educational suitability” and not merely the viewpoints of Board members about a controversial matter “to prescribe what shall be orthodox in politics nationalism, religion or other matters of opinion.” (Citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624 [1943]).
- ❖ While in *Pico* the Board formed a committee to review the books and then rejected the recommendations, a legitimate pre-library book removal review process based upon policy is now common place in New York’s public schools.

BICKNELL V. VERGENNES UNION HIGH SCHOOL BD. OF DIRECTORS, 638 F.2D 438 (2D CIR. 1980)

- ❖ The Board of Education made a determination to remove two books from the school library based upon the content containing vulgar and indecent language. The Board also established policy restricting the purchase of future books in general must be based upon prior review by the School Administration and the Board.
- ❖ The Plaintiffs, student, parents and the librarian admitted that the content of the books contained the objectionable language that was vulgar and obscene.
- ❖ The Court, applying the Pico standards to its analysis determined that the removal was not based upon the ideas expressed in the books, but, rather the Board's right to regulate "vulgarity and explicit sexual content" (Citing *Thomas v. Board of Education*, 607 F.2d 1043 [2d Cir. 1979])

VERGENNES CONTINUED...

- ❖ Prior to the filing of the Plaintiffs' lawsuit, the Board also voted to:
 - (a) restrict the professional discretion of the school librarian in the selection/acquisition of materials;
 - (b) prohibited the librarian from purchasing any additional major fictional works until further vote of the board other than those in the category of Dorothy Canfield Fisher; science fiction and high interest-low vocabulary be reviewed by the school administration with the assistance of the board.

VERGENNES CONTINUED...

- ❖ The Court noted that state and local authorities are responsible for public education, and the courts cannot intervene in the resolution of conflicts regarding the daily operation of school systems unless there is a direct impact on constitutional rights.
- ❖ So long as the materials are permissibly considered vulgar or indecent, it is not unlawful for board members to use their own standards of taste about vulgarity.

VERGENNES CONTINUED...

- ❖ The teachers and librarians asserted that the actions of the BOE infringed upon their rights under the First Amendment. The Court ruled to the contrary.
- ❖ The Court noted that the Board acted within its legitimate discretion in removing certain functions from the librarian – that in general, an employee of a government agency has no constitutionally protected interest in the particular duties of a job assignment.
- ❖ The Court also determined that a pre-removal due process proceeding is not warranted based upon the claimed First Amendment right.
- ❖ With respect to one of the books, the Board had it placed in a restricted area of the library.

RESTRICTED ACCESS TO SCHOOL LIBRARY BOOKS

- ❖ In dissenting from a decision by the Supreme Court denying a writ of certiorari in the case of *President's Council District 25 v. Community School Board No. 25*, 409 U.S. 998(1972), Justice William O. Douglas opined:

“The first amendment is a preferred right and is of great importance in the schoolsAre we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?”

- ❖ In this case the lower court let stand a school board's decision to restrict the availability of a controversial book shelved in the school library to students with parental permission to access the book – *Down These Mean Streets*.

SCHOOL LIBRARY BILL OF RIGHTS

American Library Association

School libraries are concerned with generating understanding of American freedoms and with the preservation of these freedoms through the development of informed and responsible citizens. To this end, the American Association of School Librarians reaffirms the Library Bill of Rights of the American Library Association and asserts that the responsibility of the school library is:

To provide materials that will enrich and support the curriculum, taking into consideration the varied interests, abilities, and maturity levels of the pupils served

To provide materials that will stimulate growth in factual knowledge, literary appreciation, aesthetic values, and ethical standards

To provide a background of information which will enable pupils to make intelligent judgements in their daily life

To provide materials representative of the many religious, ethnic, and cultural groups and their contributions to our American heritage

To provide materials on opposing side of controversial issues so that young citizens may develop under guidance the practice of critical reading and thinking

To place principle above personal opinion and reason above prejudice in the selection of materials of the highest quality in order to assure a comprehensive collection appropriate for the users of the library.

PARENTAL RIGHTS TO INSPECT AND REVIEW CURRICULUM

- ❖ One of the features of the Family Educational Rights and Privacy Act (“FERPA”) is the right of parents to view materials that inform what their children are learning:

“All instructional materials, including teacher’s manuals, films, tapes, or other supplementary material which will be used in connection with any survey analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.” (20 U.S.C. § 1232-h(a))

“to inspect, upon request, any instructional material used as part of the educational curriculum for the student” (20 USC § 1232h [c] [1][C][i]).

RIGHT TO F.O.I.L. LESSON PLANS AND CURRICULUM

- ❖ In light of parental rights to review and inspect lesson plans and curricular materials under FERPA, the question has been raised regarding access to copies of these materials under the New York State Freedom of Information Law.
- ❖ The Committee on Open Government considers lesson plans to be accessible subject to the rules governing intra-agency records. (FOIL-AO-7992)
- ❖ The Committee on Open Government has opined that intellectual property that is copyrighted may nevertheless be subject to disclosure based upon a F.O.I.L. request, unless there would be a loss of competitive advantage caused by the disclosure. (FOIL-AO-19246[2015])
- ❖ Our state's highest court ruled that a film strip used in the classroom is not exempt from F.O.I.L. disclosure. (*Russo v. Nassau County Community College*, 81 N.Y.2d 690[1993])



QUESTIONS ?



EMERGING FROM THE PANDEMIC: DECISION MAKING IN THE ABSENCE OF MANDATES

Presented By:
Emily Lucas &
David S. Shaw



STATUS OF MANDATORY VACCINATIONS FOR EMPLOYEES

- ❖ No express legal authority for a school district to mandate employee COVID-19 vaccinations.
- ❖ The Equal Employment Opportunity Commission upholds employer determined vaccination mandates, subject to exemptions based upon medical and religious exemptions unless the same would cause an “undue hardship” to the employer.
- ❖ While this federal agency determination applies to the public sector as well, there are other federal constitutional issues that are involved with a vaccine mandate for public school teachers that may be addressed by the US Supreme Court in the NYC Teachers case. (4th, 9th and 14th Amendment issues)

VACCINATIONS (CONT'D)

- ❖ Many Teachers' Associations were supportive of vaccination that included reaching agreements for unpaid leaves of absence until vaccination would be submitted to.
- ❖ Whether or not a vaccine mandate is a management prerogative or a mandatory subject of negotiations has not been determined by the Public Employment Relations Board.
- ❖ Vaccination mandate for new hires to positions, including coaching positions have been implemented without challenge.
- ❖ Litigation over denied religious exemptions has been commenced and otherwise has been threatened. See *Mollo v. Germantown CSD*, Columbia Co. S. Ct. Index No. 012022017951 (2021)

STATUS OF MANDATORY VACCINATIONS FOR STUDENTS

- ❖ Student COVID-19 vaccinations have not been mandated by the New York State Department of Health and the status of such vaccinations still have only emergency use authorization.
- ❖ Every student attending public schools must be immunized as required by Public Health Law Section 2164 (only exception for medical reasons)
- ❖ The list of immunizations required under PHL 2164 does not currently include the COVID-19 vaccine!

MANDATORY TESTING/VACCINES FOR EXTRACURRICULAR ACTIVITIES?

Not expressly addressed in law; however:

- Many school districts implemented vaccine mandates for students participating in privilege activities in the nature of *high risk* (close contact) sports and extra curricular activities.
- NYS Health and Safety Guide for the 2021/22 school year together with the DOH Guidance released on September 2, 2021 provide in pertinent part:

"High risk sports and extracurricular activities should be virtual or cancelled in areas of high community transmission unless all participants are fully vaccinated."

To the extent that a particular sport or extracurricular activity is considered to be "high risk" and provided a school district continues to be identified as an "area of high community transmission", a good faith immunity defense against civil rights liability in federal litigation could be made that the mandatory vaccination of students for high risk privilege activities, as well as testing for attendance upon instruction is lawful.

COVID 19 RELATED PROTOCOLS

2020-2021 School year

- ❖ Following the school closure from March 16, 2020 through June 30, 2020 the Return to School Protocols for the fall of 2020 were set through the New York State Department of Education (SED), in conjunction with the New York State Department of Health (NYSDOH).
- ❖ School Districts in developing their Reopening Plans for the 2020-21 School Year became aware that the primary source of health related mandates was centered in the determinations of the NYSDOH and that federal Center for Disease Control and Prevention (CDC) served to provide guidance that in many cases informed state decision making.
- ❖ Recall, that former Governor Cuomo and NYSED required all school districts to submit reopening plans to ensure each school's safe reopening.
- ❖ Additionally, all reopening plans in 2020-2021 required community and stakeholder input and the submission of an affirmation from the Superintendent of compliance with the guidelines.

COVID 19 RELATED PROTOCOLS

2021-2022 School Year

- ❖ On August 5, 2021, NYSDOH released a statement declaring that it would not issue guidance concerning COVID-19 protocols for the 2021-2022 school year.
- ❖ On August 12, 2021, the SED stepped in and released, *Health and Safety Guide for the 2021-2022 School Year* to aid school districts in reopening for the 2021-2022 school year.
- ❖ No requirement to submit reopening plans to State, no requirement for stakeholder input, no affirmations required

AS STATE-WIDE MANDATES ARE LIFTED...

- ❖ The County Departments of Health also exercise jurisdiction over health conditions within the schools and in the absence of state mandates may mandate health requirements (e.g., isolation and quarantine, contact tracing, sanitary conditions, etc.)
 - ❖ Public Health Law Section 347, county boards of health have the power to “formulate, promulgate, adopt and publish rules, regulations, orders and directions for the security of life and health.”
- ❖ **In the absence of state and county mandates, local school districts bear responsibility for health related decision making pursuant to Education Law bas upon long standing statutory provisions..**
- ❖ See **§1709(33)**:

“To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.”
- ❖ **See §1709(21)** which grants the board of education with the power and duty to “provide school health services...to all children in attendance upon schools under their supervision and to pay any expense incurred therefor.”
- ❖ Further, **§901** includes the authority to implement procedures in the connection with the health and safety of students and teachers while in school.

COVID 19 PROTOCOLS

Education Law §906 addresses protocols to be followed by school districts regarding communicable or infectious diseases:

1. Whenever, upon investigation and evaluation by the director of school health services or other health professionals acting upon direction or referral of such director for care and treatment, a student in the public schools shows symptoms of any communicable or infectious disease reportable under the public health law that imposes a significant risk of infection of others in the school, he or she shall be excluded from the school and sent home immediately, in a safe and proper conveyance. The director of school health services shall immediately notify a local public health agency of any disease reportable under the public health law.
2. Following absence on account of illness or from unknown cause, the director of school health services may examine each student returning to a school without a certificate from a local public health officer, a duly licensed physician, physician assistant, or nurse practitioner.
3. The director of school health services, or other health professionals acting upon direction or referral of such director, may make such evaluations of teachers and any other school employees, school buildings and premises as, in their discretion, they may deem necessary to protect the health of the students and staff.

COVID 19 PROTOCOLS- MOVING FORWARD

- ❖ The COVID 19 Protocols for maintaining open schools have evolved through the time of the 2020-21 and 2021-22 School Years, taking into considering the factors of: community transmission rates, hospitalization rates, testing, vaccination status and, more recently, previous infection status.
- ❖ The critical issues of the mask mandate, distancing and quarantine for close contacts led to political tension between state and county health authorities – who would make the call regarding decision making that could lead to classroom closings, precautionary quarantining and evidence for return from isolation for those infected with the virus?

COVID 19 PROTOCOLS- MOVING FORWARD

- ❖ On March 1, 2022 NYS Guidance was issued by the NYSDOH lifting the mask mandate statewide. The counties were informed that they had authority to implement the mandate at their level – Westchester and Putnam Counties have not done so.
 - ❖ Recall, DOH Regulation, 10 NYCRR 2.60, granted the Commissioner of Health the authority to make masking determinations in public schools
 - ❖ The original regulation was adopted on an emergency basis on August 27, 2021 and subsequently extended.
- ❖ The mask mandate for transportation on school buses and other school transportation vehicles was also lifted by the NYSDOH, noting that the CDC had lifted its order mandating masks on school buses on February 25, 2022.
- ❖ Masks are still required upon return to work for those diagnosed or tested positive for COVID 19 for days 6-10 after the five day isolation period.

COVID 19 PROTOCOLS- MOVING FORWARD

❖ Local Mitigation Measures continue in effect:

- Vaccination
- Testing
- Distancing
- Ventilation
- Hand washing
- Coughing/Sneezing etiquette
- Encouragement to stay home when ill or symptomatic
- Voluntary wearing of masks
- Well fitting masks (covering nose and mouth)

COVID 19 PROTOCOLS- MOVING FORWARD

When Masks are Strongly Recommended:

- ❖ By all individuals who have been exposed to COVID-19 for ten (10) days following the date of exposure.
- ❖ An individual is in the same room within the school as someone diagnosed with COVID-19 for 15 minutes or longer and were thus exposed or potentially exposed
- ❖ An individual known to have been exposed to COVID-19 in any setting within the previous 10 days.
- ❖ An individual moderately-to-severely immunocompromised and have discussed the need to mask with their healthcare provider(s).

COVID 19 PROTOCOLS- MOVING FORWARD

“Close Contact” definition:

NYS now aligns with the CDC definition of “close contacts” exposure to an infected individual (laboratory confirmed or clinical diagnosis) for a cumulative total of 15 minutes or more over a 24-hour period

- If universally masked- within 3 feet
- If no masks- within 6 feet

NYSDOH CURRENT QUARANTINE RULE IN SCHOOLS

- NYSDOH recommends that exposed, fully vaccinated individuals who are quarantined may attend or work at school after an exposure.
- However, these individuals should continue to quarantine as otherwise required outside of school and these school-related activities.
- If these individuals attend or work at a school with a test-to-stay program they should participate in that program.
- If the school does not have a test-to-stay program then it is strongly encouraged that these individuals test at days 2-3 (or the first school day after the exposure is identified) and day 5.
- People who are confirmed to have COVID-19 or are showing symptoms of COVID-19 **need to isolate regardless of their vaccination status**

People with Known Exposure to COVID-19 Who Do Not Have Symptoms¹
"Quarantine"

	Under age 2 years or unable to wear a well-fitting mask	Age 2 – 4 years	Age 5 - 11 years		Age 12 years - Adult				All ages
			Up-to-Date Fully Vaccinated	Not yet Fully Vaccinated	Up-to-Date Fully Vaccinated and Boosted	Up-to-Date Fully Vaccinated, not yet eligible for booster	Fully Vaccinated, eligible for booster but not yet boosted	Not yet Fully Vaccinated	
Quarantine, Duration	Yes, 10 days (masks not recommended for children under age 2)	Yes, 5 days	No	Yes, 5 days	No	No	Yes, 5 days	Yes, 5 days	No
Attend/work at school and eligible child care programs, (includes transportation)	N/A	Yes, if undergoing recommended testing.	Yes	Yes, if undergoing recommended testing.	Yes	Yes	Yes, if undergoing recommended testing.	Yes, if undergoing recommended testing.	Yes
Testing	Test on whichever comes first: at least 5 days after last exposure (testing recommended but optional if unable to test) or if Symptoms develop If positive, isolate for at least 5 days from symptom onset or (if no symptoms) date test was collected								No test needed. Test if Symptoms develop.

1. See specific guidance for individuals in congregate settings and for furlough for healthcare workers.

COVID 19 PROTOCOLS- MOVING FORWARD

- ❖ Whereas in the past unmasked close contacts or exposed individuals were subject to exclusion from school, the March 1, 2022 NYSDOH Guidance does not require quarantine of these individuals.
- ❖ The exposed individuals are not subject to a ten(10) day masking requirement, but the same is strongly recommended.
- ❖ **Test to Stay** has been modified from a requirement to a recommendation (at least twice in a five (5) day period) following an exposure.

COVID 19 PROTOCOLS- MOVING FORWARD

Weekly Testing of Students, Faculty and Staff:

- ❖ Unvaccinated faculty and staff remain subject to weekly testing for COVID-19 infection based upon the use of PCR or Antigen Tests collected on site or tested off-site, subject to a verification process.
- ❖ Vaccinated faculty and staff may opt-out from weekly testing.
- ❖ Testing of unvaccinated students must be offered weekly on a consensual basis by the schools in areas designated by the CDC as having moderate, substantial or high transmission rates.

ROLE OF BOARD POLICY & REOPENING PLANS

- ❖ District Re-opening Plans have been in effect since the beginning of the 2020-21 School Year and have been revised since that time.
- ❖ Some school districts adopted policies consistent with NYSDOL and NYSED Guidance that should be reviewed for possible amendment or repeal.
- ❖ Policy making that is inconsistent, more restrictive than the NYSDOH or local Department of Health Standards may give rise to litigation based upon claims of Constitutional Law violations.

ROLE OF BOARD POLICY & REOPENING PLANS

- ❖ Are there rights under the 1st and 14th Amendments of the U.S. Constitution to be free from mandatory masking requirements imposed by Board of Education policy when there are no corresponding New York State or County mandates?
- ❖ Can a local school district impose a mask mandate based upon very local conditions?
- ❖ Would community response to a strong recommendation to mask be met with widespread support – negating a need to impose a restrictive policy?



QUESTIONS ?