WPSBA's Ed Law 2023

From the Classroom to the Boardroom

Part 1 - March 16th

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Social Media: Privacy Rights and Accountability

Presented by:
Candace Gomez, Esq.
and
David S. Shaw, Esq.

Introduction

So much of interpersonal relations is conducted through the use of social media both in private life and in communications among school district officials, faculty, job applicants and students.

That raises the question of what privacy rights are enjoyed by students and employees?

How does the First Amendment Protect their speech in their personal but school related actions?

Defining Social Media

Social Media is an umbrella term that defines the various activities that integrate technology, social interaction, and the construction of words, pictures, videos, and audio.

Beneficial Uses of Social Media

- Ease of communication
- Reaching larger audiences
- Instantaneous response
- Getting out in front of a situation
- Group messages
- Addressing instructional, educational or extra-curricular programs or activities
- Official postings
- Informational
- Personal vs. professional social media sites.
- Recommend **not** friending students and parents

Social Media Use in the Employment Hiring Process

There is no legal prohibition against reviewing social media made public by job applicants.

The New York State Human Rights Law protects the following classifications against employment related discrimination:

age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence.

NYS Executive Law §296(a)

Social Media in Employment Recruitment

If the social media of job applicants is reviewed, great care must be taken in determining what to document and what to report - out to the employing authorities; namely the Superintendent of Schools and Board of Education.

After the fact of hire implications of information learned through social media may lead to early termination from employment and monies owed to a candidate if the hire is a probationary pedagogical employee. *(See Ed. Law §§3031 & 3019-a)*

Social Media Policy For Employees

School Districts would be well served in adopting a social media policy that holds employees accountable to the extent that there is a nexus to their employment and implicates their *role model status.* (*Ambach v. Norwick,* 441 U.S. 68 [1979])

Social Media Policy For Employees

Example: District provided communication tools, such as an employee's school email account, voicemail account and/or district website shall be the only means by which you engage students and/or their families and such communications should only pertain to your employment responsibilities. All staff are expected to serve as positive ambassadors for the District and as appropriate role models for students."

Contours of Employee First Amendment Speech Rights

- ***Garcetti v. Ceballos*, 547 U.S. 410 (2006)**
  - A deputy district attorney who issued an internal memo explaining that a case shouldn't be pursued because a police officer's affidavit in support of a warrant was factually inaccurate. The attorney was transferred and denied a promotion.
  - The Supreme Court held that public employees speak as employees and ***not citizens*** when they make statements pursuant to their official duties.
  - If the speech is related to performing job duties (whether or not in a job description) it does ***not*** enjoy 1st Amendment protection.

Contours of Employee First Amendment Speech Rights

Is Employee Speech Protected as "Citizen Speech"?

Weintraub v. Bd. of Educ. City Sch. Distr. of City of N.Y. , 593 F.3d 196 (2d Cir. 2010) – a teacher's complaint and filed grievance about the failure of administration to suspend a student was in furtherance of a "core duty" of the teacher and not citizen speech that would be 1st Amendment protected.

Contours of Employee First Amendment Speech Rights

Is Employee Speech Protected as "Citizen Speech"?

Massaro v. N.Y.C. Dept. of Educ., 2012 WL 1948772 (2d Cir. 2012) – a teacher complained of unsanitary working conditions in which she contracted scabies, for which she submitted an Injury/Accident report. The court concluded that her speech was employee and not citizen speech. When one of her classes was changed along with her schedule, there was ***no*** 1st Amendment protection against such employment action.

Contours of Employee First Amendment Speech Rights

Is Employee Speech Protected as "Citizen Speech"?

Heller v. Bedford Cent. Sch. Dist., 2015 U.S. Dist. LEXIS 155060 (S.D.N.Y. 2015), *aff'd*, Index No. 16-242 (2d Cir. Nov. 4, 2016) – a teacher's conversation on Words with Friends, during which he made violent threats, was **not** a matter of public concern, but rather, the teacher's statements were themselves a cause for public concern

Contours of Employee First Amendment Speech Rights

Matthews v. City of New York, 779 F.3d 167 (2d Cir., 2015)

- Police Officer reported to Supervisor that the Precinct's Policy of implementing a quota system for arrests, summonses and stops was contrary to the Precinct's mission to improve community relations.
- This reporting was not within the officer's job duties
- The report was made through the same channels as citizen complaints.
- The Second Circuit concluded that it was a matter of public concern, ***not*** reported pursuant to job requirements and made through citizen channels—thus

- **First Amendment Protected!!!**

Contours of Employee Social Media Speech Rights/Liability

***Matter of Rubino*, SED Case No. 17,116 (2011)**

The Hearing Officer, R. Lowitt, upheld disciplinary charges based upon a Facebook Post by a 5th grade teacher who commented that she hated the guts of her students and would like them to the beach and wouldn't lift a finger if one particular student would float away.

The fact that the comment was intended to be made privately was of no moment when it was in fact disseminated.

No First Amendment protection was found as the speech was not deemed to be citizen speech.

Contours of Employee Social Media Speech Rights/Liability

***Matter of Le Trell Manchand*, SED Case No. 23,338 (2014)**

Hearing Officer James McKeever found just cause to terminate the employment of a teacher who made many Twitter and Facebook postings which were unrestricted as to access, exposing personally identifiable information (PII) about her students in violation of FERPA rights. The public exposure of the students was deemed to be quite concerning.

Theteachers in the school had all been issued the Chancellor's social media use guidelines.

Contours of Employee Social Media Speech Rights/Liability

***Matter of Giordano*, SED Case No.24,437(2014)**

Hearing Officer Lisa Brogan terminated this teacher for sending numerous Face Book post comments to students, crossing appropriate personal boundaries regarding the content of his posts, in violation of an anti-fraternization policy. The teacher was also found to be insubordinate for rules violation.

Contours of Employee Social Media Speech Rights/Liability

***Matter of Tate*, SED Case No. 25,517(2015)**

Hearing Officer Eugene Ginsberg issued a fourteen(14) day suspension to this teacher who responded to a female students Face Book posts, including a comment about a picture the student posted of her body. The teacher was apologetic about his misconduct.

Student Social Media Discipline Cases/ First Amendment Analysis

***Appeal of K.M., Commissioner's* Dec. No. 17,847 (2020)**

A male student on the boys soccer team admitted to having created a screen shot which was posted on social media of a gesture or picture of a scissors, intended for viewing by girls on the girls soccer team as a reference to their sexual orientation.

The short term suspension meted out was considered to lack First Amendment Free Speech protection because it was reasonable for the school authorities to predict substantial disruption as a consequence of the post. (citing *Wisniewski v. Bd. of Educ.*, 494 F3d 43.

Student Social Media Discipline Cases/ First Amendment Analysis

***Appeal of D.S.*, Commissioner Dec. No.17,171(2017)**

A student made a social media post on Twitter accusing the school of being racist and a video image of a young women handling a gun on another social media platform (Snapchat). Four students who viewed the posting expressed upset to the school's SRO. The suspension of the student from school was challenged in a federal litigation claiming 1st and 14th Amendment Claims. The Commissioner withdrew from exercising jurisdiction in light of the pending federal litigation.

Student Social Media Discipline Cases/ DASA Regulations &First Amendment Analysis

The Commissioner's Regulations implementing the Dignity for All Students Act at 8 NYCRR §100.2kk include as the basis for findings of a violation of law bullying, including cyberbullying, as cited at Ed Law §11(8), including any form of electronic communication.

The use of off-campus social media platforms to threaten, intimidate or abuse through cyberbullying may lead to a DASA violation finding

Student Social Media Discipline Cases/ DASA Regulations &First Amendment Analysis (cont'd)

Bullying is defined as that which:
has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or

1. reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety;
2. Such definition shall include acts of harassment or bullying that occur:
    1. on school property, as defined in subparagraph (kk)(1)(i) of this section; and/or
    2. at a school function, as defined in subparagraph (kk)(1)(ii) of this section; or
    3. **off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property;**

FERPA Student Privacy Rights-Remote Instruction

During the COVID 19 Pandemic questions were raised when remote livestreaming instruction was implemented regarding the privacy rights of students whose images and voiceprints were being transmitted into the homes of other students.

Some school districts addressed this matter through its FERPA Policy by adding streaming video with voiceprint to the list of *Directory Information* and by addressing Opt-outs, if any, through their technology means.

Questions

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LEGAL ASPECTS OF EXECUTIVE SESSION

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Introduction

The executive session of Board of Education meeting is supposed to be a sanctuary in which discussion will be shielded from both public and judicial scrutiny.

To secure that protection, great care must be taken in convening executive sessions and maintaining discussions within the permissible reasons for being in executive session.

Introduction

While board of education members may expect that their executive session deliberations are protected by a deliberative process privilege, the courts may not recognize the same.

When the school attorney joins in the executive session the attorney-client privilege may shield the deliberations from discovery in legal proceedings.

When the subject of discussion isn't covered by the permissible reasons for executive session- there is no cognizable executive session privilege.

Introduction

In recent years the Commissioner of Education has noted that maintaining executive session confidentiality is a fiduciary duty of the member of the board of education. (*Appeal of Ziegelbauer*, *Decision* No. 18,145 (2022)

This presentation informs how to protect the District and how to protect board members from legal liability based upon missteps in conducting executive session.

Legitimate reasons for being in executive session

- **Public Officers Law §105 reasons**
- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to article fourteen of the civil service law;

Legitimate reasons for being in executive session

- Public Officers Law §105 reasons

* f. the medical, financial, credit or **employment history of a particular person or corporation**, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

- g. the preparation, grading or administration of examinations; and
- h. the proposed **acquisition, sale or lease of real property** or the proposed acquisition of securities, or sale or exchange of securities held by such public body**, but only when publicity would substantially affect the value thereof**.

The Vote to Convene Executive Session

The Board must avoid using a boilerplate resolution for moving into executive session

A resolution adjourning into executive session must specify the purpose(s) and must not recite all of the reasons why a Board may conduct an executive session. (*Gernatt Asphalt Prods*., 87 N.Y.2d 668 [1987]).

The vote must be conducted during a duly convened open meeting and the agenda when there is a planned executive session should indicate that it is a proposed executive session (not presuming that a quorum vote will be present to support moving into executive session *(OML-AO-1420; OML-AO-2416).*

Legitimate reasons for being in executive session

- Voting in Executive Session

  There are only two permissible reasons for taking action in executive session

  * voting on charges pursuant to Ed. Law §3020-a
  * Arranging for the placement of students with educational disabilities

  (See Formal Opinion of Counsel [SED No. 239)

Legitimate reasons for being in executive session

An executive session may not be scheduled before a meeting but must occur during a duly convened open meeting (OML-AO-872; OML-AO-1189, OML-AO-1441).

A Board member-elect may be permitted to attend executive session but should be excluded when legal advice is given by an attorney to avoid breach of the attorney-client privilege (OML-AO-3157).

Where a member of the Board has sued or is likely to sue the District, they may be excluded from executive session during the discussion of such matter (OML-AO-3436).

Only litigation that is proposed, pending or current may be discussed in executive session, with the latter two requiring that the title of the case be included in the resolution (OML-AO-2250).

Legitimate reasons for being in executive session

When Litigation is to be discussed:
Only litigation that is proposed, pending or current may be discussed in executive session, with the latter two requiring that the title of the case be included in the resolution (OML-AO-2250).

In the case of proposed litigation, the resolution should refer to discussing litigation strategy regarding the proposed litigation (OML-AO-3646).

When negotiations are to be discussed:
To discuss labor negotiations in executive session, the bargaining unit must be cited in the resolution to adjourn into executive session (OML-AO-4091).

Legitimate reasons for being in executive session

The presence of the Superintendent

The Superintendent of Schools does not have the right to attend executive session by reason of the Open Meetings Law. However, under the Education Law, has the right to be present based upon their right to speak to all matters that come before the Board (OML-AO-4027; OML-AO-3864; Education Law §§ 1711 & 2508).

The evaluation of the superintendent and his/her contract may take place in executive session, but discussing the criteria for hiring a new superintendent should take place at an open meeting (OML-AO-2459; OML-AO-2695).

Legitimate reasons for being in executive session

Meetings with other governments

Two governmental bodies may not hold a joint meeting in executive session (OML-AO-3646).

Where the governments are joint defendants or respondents in a litigation they may meet together privately with their attorneys

Receiving legal advice from an attorney need not take place at an open meeting or even in an executive session. However, decision making about the litigation must occur at a meeting (e.g. executive session discussion and action by public vote) (OML-AO-1376).

Legitimate reasons for being in executive session

Are there any restricted meeting days or times of day?

Meetings are not prohibited on holidays or weekends (OML-AO-2458).

Meetings held in the early morning hours (e.g. 7:20 AM) have been cited as being inconsistent with the law and unreasonable (OML-AO-3828). So to meeting on Sunday Morning at 8:30 AM. (OML-A0-5062

Meetings with the School Attorney

A meeting with legal counsel is exempt from the Open Meetings Law requirements pursuant to Public Officers Law §108(3) due to the long standing common law existence of attorney-client privilege in New York state.

The meeting may occur during executive session.

Meetings with the School Attorney

The privilege applies only in connection with communication related to facts of which the attorney was informed by the client, without the presence of strangers (non-clients) for the purpose of securing primarily either an opinion on law or legal services in some legal proceedings (*People v. Belge*, 59 AD 2d 307 [1977]).

Meetings with the School Attorney

Transitioning from received legal advice to board of education deliberations

"…the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting." *Robert Freeman; (OML-AO-4622)*

Executive Session Privilege in Defending Litigation

As a matter of State Law, executive session discussions, for the purposes described in the Open Meetings Law (POL §105[1][d] (discussions regarding proposed, pending or current litigation); are privileged and may not be disclosed by those attending the executive session.

As regards matters being litigated in federal court, the state privilege may not be recognized under the legal doctrine of comity and disclosure of executive session discussions may be ordered under the Federal Rule of Civil Procedure §26. *(Buon v. Newburgh Enlarged City School District* Case No. 21-cv-5623, S.D.N.Y.[2023])

Executive Session Privilege in Defending Litigation

- While the federal court may be expected to invoke the discovery rule of Rule 26 "*allowing parties to obtain discovery regarding any non-privileged matter that is relevant to any parties' claim or defense and proportional needs of the case*", the state law attorney-client privilege will be recognized in the federal courts to shield executive session content based upon federal decisional law.

Executive Session Privilege in Defending Litigation

For litigation in federal court, for attorney advice given in a board of education executive session to be deemed privileged (subject to the state law recognized attorney-client privilege):

"the predominant purpose should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer." *(In Re County of Erie,473 F.3d 413,419(2d Cir. 2007)*

Executive Session Privilege in Defending Litigation

In *Buon*, the federal litigation involved advice regarding alleged retaliation regarding the terms and conditions of employment of a building principal who had a previous litigation pending against the school district. While discussion included administrators comments about the employee the predominant purpose of the executive session was to obtain legal advice regarding litigation and the law that informed the personnel transactions.

Attorney–client privilege was found by the court to apply in the case so as to preclude further inquiry by regarding executive session discussion regarding the plaintiff's employment through in the discovery process.

Executive Session Privilege in Defending Litigation

Take aways about personnel litigation matters and executive session discussion:

* The legality of proposed changes in assignments, including transfers, job title changes, tenure area rights and level of benefits for employees subject to adverse employment action should involve the presence and advice of the school attorney or insurance company assigned counsel.

* The resolution for convening the executive session should include to receive advice from the school attorney or other legal counsel.

* As always- don't take notes in executive session.

Avoid using “Personnel” as a reason to convene executive session””

Due to the insertion of the term "particular" in §105(1)(fa discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session. *(OML-AO-3478)*

QUESTIONS

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Removal of a Board Member

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Board Member Qualifications

- Able to read and write
- A qualified voter of the district; and
- A resident of the school district for at least one year prior to the election

Education Law §2502

Board Member Responsibility as a Public Officer

- A school board member takes an oath of office to uphold the law and faithfully discharge his/her duties.

  N.Y. State Constitution Art. XIII, Section 1; Public Officers Law § 10

- School Boards are responsible for, *inter alia*, educational standards, budget matters, management issues, and health and safety
- Board members have a fiduciary obligation to act constructively to achieve the best possible governance of the school district.

  Application of Kozak, 34 Ed Dept Rep 501, Decision No. 13,396

Confidential Information

- Municipal Officers and employees may not disclose to anyone confidential information acquired by them in the course of their official duties or use such information to further their personal interests.

General Municipal Law §805-a(1)(b)

Removal of Board Members

A School Board member may be removed from office by either the Commissioner of Education or the School Board.

The legal standards applied and the time frames for proceeding with the removal process are quite different.

Commissioner of Education Removal

Education Law § 306:

The Commissioner of Education may remove a board member for:

- A willful violation or neglect of duty; or
- The willful disobedience of a law, decision, order, or regulation of the Commissioner or Board of Regents.

Commissioner of Education Removal Continued

To be considered willful the board member's actions must be **intentional** and with a **wrongful purpose**.

See, Application of Carbone, 46 Ed Dept Rep 215 Decision No. 15,485 (2007); Application of Scala, 31 Ed Dept Rep 159, Decision No. 12,604 (1991); Application of Nett & Raby, 45 Ed Dept Rep 259, Decision No. 15,215 (2005)

The Commissioner considers this "a drastic remedy that should be taken only in extreme circumstances."

Application of Carbone, Supra

Procedure for Commissioner Removal

An application for removal must be made to the Commissioner within 30 days of the alleged willful violation, neglect of duty, or wrongful disobedience of law.

8 NYCRR §275.16

Commissioner has held that an application for removal is timely if commenced with 30 days of the petitioner's good faith discovery of the alleged conduct.

Appeal of Leman, 39 Ed Dept Rep 407 (1999)

Removal shall only be after a hearing at which the Board member is afforded the right to counsel.

Application for removal can be initiated by the Commissioner, any resident, or taxpayer.

Matter of Viviani, 18 Ed Dept Rep 263 (1979); 8 NYCRR. §277.2

Board of Education Removal

Education Law §1709(18):

The Board of Education may remove any of its members for "official misconduct"

"Official misconduct" described as conduct clearly relating to a board member's official duties.

- Ex: unauthorized exercise of power, intentionally fails to exercise power, etc.

No statute of limitations on filing charges

The term official misconduct "would certainly encompass violations of the school district Code of Ethics."

Appeal of Ackerberg, 25 Ed. Dept. Rep. 232 (1985).

Board of Education Removal Procedure

Removal may take place only after a hearing on the charges

- Written copy of the charges must be served at least 10 days before hearing

Board member must be afforded fair opportunity to refute the charges before removal

Appeal of Taber, 42 Ed Dept Rep 251 (2002)

The Board may engage a hearing officer to assist in the hearing process.

Attorneys from the same law firm may serve in separate roles (prosecutor and counsel to the Board)

Appeal of Ziegelbauer Dec. No. 18,143 (2022)

Review of Caselaw

Appeal of Hoefer (2005)

- Board member was charged with violating the laws of the State of New York, the NYS Constitution and his oath of office, as well as neglect of duties.
- Consistently voting "no" on all tenure appointments
- Stating that he does not "believe" in tenure
- Board commenced removal proceedings by way of charges and a hearing, pursuant to Education Law §1709(18)
- Also charged with disclosure of sensitive and/or confidential information, much of which was discussed during executive session
- Hearing Officer ruled removal was appropriate.

Appeal of Hoefer (2005)

- Appeal to the Commissioner of Education
- Commissioner upheld removal of Board Member

Commissioner Opined:

"The State has an important, substantial interest in ensuring that members of boards of education fulfill their constitutional oath of office and carry out their official duties in accordance with the law, by requiring a board member to base his or her vote, whether that be a vote in favor, against or an abstention, solely upon such board members' assessment of the individual merit of each teacher recommended for tenure.

Commissioner concluded:

- Board member's conduct was **"unauthorized, inappropriate, antagonistic, offensive, and demeaning towards his fellow Board members, the superintendent, and teachers' union and interfered with and compromised the Board's effectiveness and ability to function."**

45 Ed Dept Rep 66 (2005)

Appeal of Rubinstein (1962)

Board member stated that he would not comply with a mandate of the US Supreme Court regarding the use of an official prayer in public schools. He also publicly advocated other individuals to disobey the mandate.

- While Commissioner of Education did not remove the Board member he did hold:
  - Because of this duty and high office, all members of boards of education will wish to ensure that at all times **their public statements are consonant with the responsibility of their high office.**

2 Ed. Dept. Rep. 303 (1962)

Appeal of Gill (2002)

- Member of the Board of Education was removed after he used several racial slurs during a board meeting. He also used a racial slur to describe one of the community members at a meeting.
- The Commissioner removed the board member from office
- The Commissioner opined:
  - "Although an isolated intemperate remark generally is not grounds for removal, **where a trustee engages in a pattern of inappropriate, antagonistic and offensive conduct that interferes with the board's ability to function, removal is warranted."**
  - "There can be no question that such behavior is antithetical to the oath of office which petitioner Gill has sworn to uphold. It also sets an extremely poor example to the children of the district, for whose benefit petitioner is obligated to work. Moreover it reveals an animus and disrespect toward certain sectors of the community which respondent is obligated to serve."

Appeal of Johnson (2017)

- Board sought the removal of BOE member for the "unlawful disclosure of personnel information".
- Board brought charges against BOE member and appointed a hearing officer to preside over the hearing.
- The Hearing lasted approximately six days.
- Hearing officer recommended removal based on official misconduct. Board voted 3-1 to remove and appoint a new BOE member.

Appeal of Johnson (2017)

- On appeal, the Commissioner held that Petitioner was **not provided sufficient due process**. Further, Commissioner found "insufficient proof to establish grounds for petitioner's removal."
- At the time of the hearings, Petitioner was suffering from heart problems. Commissioner held that the hearing officer's refusal to properly request adjournments and changes to the hearing schedule failed to afford sufficient due process to Petitioner.
- Commissioner also held that it was improper to allow a BOE member who served as a primary witness against the Petitioner to vote for his removal.

Appeal of Johnson (2017)

- Regarding the charge pertaining the release of personnel information, the Commissioner noted: "Respondent was unable to establish how, in fact, petitioner allegedly obtained the names and home addresses of the district employees in question."
- Key Takeaways: Do not rush through the removal process. Build a record.

Appeal of Johnson, Decision No. 17,263

Appeal of Rivers (2021)

- The Commissioner refused to uphold the removal of a board member for revealing that the matter of a Town recreational use of District facilities that was discussed in executive session.
- The reason for the private discussion was concern that there would be "community push back", was not a classification for executive session under the Open Meetings Law
- The Commissioner has stated that, "[w]hile board members cannot disclose confidential information properly discussed at executive session, boards may not shield all matters from public disclosure simply by entering into executive session" (*Application of Nett and Raby*, 45 Ed Dept Rep 259, Decision No. 15,315). Here, the superintendent's proffered reason for raising the issue in executive session – that he expected "community push back" – **suggests that he impermissibly sought to shield the issue from public disclosure by raising it in executive session.** *Appeal of Rivers, 59 Ed. Dept. Rep.__,Decision No.17,989 (2021)*

Appeal of Ziegelbauer (2022)

- The Commissioner upheld the removal of a board member for withholding a confidential report which the Superintendent handed-out in executive session and demanded to collect back at the conclusion of executive session – a breach of fiduciary duty.
- The Board member had relied on a conversation with her counsel in refusing to return the report.
- The Commissioner noted that there is no mindset requirement for official misconduct under Education Law § 1709 (18). The intent of willfulness only applies to Commissioner's removal proceedings under §306.

Appeal of Ziegelbauer (2022)

- The Commissioner further ruled that the defense of reliance on advice of counsel is only relevant to the removal of school officers under Education Law § 306 because it negates the mindset of willfulness (citing *Matter of Gagliotti*, 24 Ed Dept Rep 402, Decision No. 11,440; *Matter of Israel*, 20 *id*. 67, Decision No. 10,318).
- A finding of official misconduct does not necessarily require a violation of statute or BOE Policy.
- The Commissioner cited the conduct of this board member as being "quintessential official misconduct"

Decision No. 18,143

Appeal of Corbia (2022)

- Petitioner was elected to the Board in June 2020
- September 2020, 2 posts appeared on a social media account belonging to petitioner
  - Shared post referencing “illegal immigrants”
  - Commented on a reference to “white privilege card”
- Petitioner alleged his cellphone had been “hacked”
- Matter was referred to Board Ethic Committee and outside counsel for investigation
- Ethics Committee made “exhaustive attempts” to secure cooperation from petitioner in investigating the matter.

Appeal of Corbia (2022)

- Ethics Committee issued a report which included (among other findings) that petitioner "**deliberately tried to prevent the committee** from rendering any conclusive findings in connection with the matter"
- Board counsel emailed a copy of the ethics committee report to petitioner. Email indicated that the report was a "board document" and clarified that "there has been no decision made as to whether the board would release the report"
- Petitioner immediately forwarded the report to his personal attorney.
- Board commenced a hearing. Petitioner failed to appear.
- Hearing Officer sustained all charges and recommended removal from office.

Appeal of Corbia (2022)

Commissioner upheld the removal opining:

Pursuant to Education Law §1709(18), a board of education has the power to remove any member of their board for official misconduct. The official misconduct must clearly relate to a board member's official duties, either because of the alleged unauthorized exercise of the member's powers or the intentional failure to exercise those powers to the detriment of the school district.

I hereby affirm respondent's determination on the charge that petitioner failed to cooperate with, and thwarted the aims of, its investigation.

The Commissioner did not reach the issue of Petitioner disclosing the confidential report to his attorney.

Defense and Indemnification of Individual Board Member

- School districts have a duty to defend and indemnify school board members who are subject to legal actions or proceedings.

  N.Y. Educ. Law §3811; Public Officers Law §18

Defense: term used for providing legal counsel to defend the interests of an individual

Indemnification: protection afforded to employees and officers from any financial losses after a claim has been concluded.

Defense and Indemnification Continued

Education Law §3811:

Upon compliance by the employee with the provisions of subdivision five of this section, the public entity shall provide for **defense of the employee in any civil action or proceeding**, state or federal, arising out of an alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. **This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.**

QUESTIONS

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Collective Bargaining Highlights

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Introduction

The COVID-19 Pandemic has strongly influenced the issues and outcomes in collective bargaining in the public schools. The extraordinary inflation experienced this year has driven increased salary and wage demands well beyond the level of settlements in the past few years. The severe downward turn in the stock market forecasts significant annual pension contribution rates. The advent of remote instruction has added a new dimension to teachers' working conditions and negotiations demands to restrict and monetize its use.

Introduction

The pause in health insurance costs realized in the early years of COVID-19 have given rise to significant inflationary pressure on health insurance premium costs

The Tax Levy Limit law remains in effect and State Aid to public education will inform the other major component of the revenue side of the school district budget.

Non-Salary Cost Factors

Changes in the TRS Rate:

2022-23: 10.29%

2023-24: 9.6%

Change in the NYSLRS (ERS) Rate:

2022-23 11.6%

2023-24 13.1%

Non-Salary Cost Factors

HEALTH INSURANCE COSTS

- **PNBOCES HEALTH PLAN**
  July 1, 2022: 8.0%
  July 1, 2023: 5.5%

- New York State Health Insurance Plan:
  January 1, 2022: 12.00%
  January 1, 2023: 14.65%

Non-Salary Cost Factors

HEALTH INSURANCE COSTS

- **SWSCHP**

2022-23: 1.5%

2023-24: 8.0%

METHOD OF INSTRUCTION UNDER THE TAYLOR LAW

In the past, distance learning was typically the exporting of video instruction from one classroom to another in a different school district and the matter was considered to be a mandatory subject of bargaining, except when the multiple classrooms were in more than one school district pursuant to a BOCES CoSer Agreement. *Webster Central School District v. Webster Teachers Association*, 75 N.Y.2d 619(1990).

Exporting instruction to classmates while at home from their classroom has been accepted as a school district right to implement unilaterally.

Long standing PERB precedent informs that the method of instruction is a non-mandatory subject of bargaining. *Somers C.S.D.*,9 PERB¶3005(1976)

THE CONTOURS OF THE INSTRUCTIONAL DAY

During the time of remote instruction in 2019-20 and the transitional period of returning to the classroom during the 2020-21 School Year, school districts and BOCES implemented shortened periods, alternate class/remote days and deep cleaning days. Issues were raised regarding the change to reduced length of periods and the number of classes instructed each day.

The Taylor Law Question: Did the number of classes taught and the length of periods have to be negotiated?

THE CONTOURS OF THE INSTRUCTIONAL DAY (cont'd)

In the absence of contract language prescribing the length and number of periods during the workday the District has the right to determine the length and number of periods to be taught during the workday. Contractually defined duty-free time (lunch and perhaps prep time depending upon the language) couldn't be unilaterally changed.

Cohoes CSD, 12 PERB¶3113(1079), *Wyandanch CSD*, 16 PERB¶3012 (1983), *Greece CSD*, 22 PERB¶3005(2002)

Teachers union's did not challenge shorter periods where contract language specified longer period.

Teaching six classes in hard to find subjects may be a priority negotiations subject for school districts in upcoming negotiations.

WHERE IS TEACHING TO ORIGINATE FROM

When student instruction was wholly remote, but teachers were deemed to be essential employees, the location of the teacher for instructional purposes became an issue.

The Taylor Law Questions: Could teachers be required to come to work to teach? Could they be required to teach from their homes?

If the buildings were open there was no question about the right of the employer to have the teachers report to work and instruct from their classrooms or other school facilities. Instructing from home when buildings were closed, as a job requirement, was a question unanswered by Taylor Law precedent and remains as such.

School Districts relied on cases that might support the requirement for instructing from home in order to carry out the mission of education. County of Orange, 9 PERB¶3068(1976) and Board of Educ. City of New York, 21 PERB¶3068(1988)

Instructing from home will be important to support remote instruction on what otherwise would be snow days.

LIVESTREAMING FROM THE CLASSROOM

The issues that emerged based upon the teacher having to export synchronous live stream instruction included:

- The FERPA Rights of Student Appearing on the Video – directory information provisions in policy are key.
- Teacher responsibility for the maintenance of the video device
- Teacher Camera Presence during instruction – negotiable

CONTEMPORARY ISSUES REGARDING LIVE STREAMING INSTRUCTION

Great opposition has been presented by teachers' unions to avoid hybrid instruction requirements for students who are medically fragile or isolated due to COVID-19 infection. There has been less opposition to hybrid instruction for students in precautionary quarantine.

The parties have universally agree that hybrid instruction should not be extended to vacationers whose stays exceed the return to school date.

CONTEMPORARY ISSUES REGARDING LIVE STREAMING INSTRUCTION

Video Recording of Livestreamed Lessons and job security concerns:

- Could whole courses be recorded for reuse?
- Who owns the intellectual property rights to lesson plans?
- *Shaul v. Cherry Valley-Springfield CSD*, 266 F.3d 71(2004) Work product produced for the school district is the intellectual property of the school district.

Livestreaming Implications

- With this new era of livestreaming, there are requests to use livestreaming as opposed to meeting in person for things like CSE meetings and parent teacher conferences. Some questions that have come up:
  - Can/should/must the District allow for CSE or 504 meetings to be done virtually, or to allow for some virtual participation?
    - Does the Union have a say in this? *Answer: No*
  - Note: Some teacher unions have pushed to only conduct parent teacher conferences virtually

SED Embraces Remote Instruction for State Aid for Emergency Closing Days

Remote instruction may now count towards days of instruction for state aid purposes under Regulations of the Commissioner at 8 NYCRR §175.5(e) entitled "Remote instruction due to emergency conditions" (e.g., extreme weather, heating, water supply, fuel shortage, destroyed facilities, communicable disease outbreak, etc.) with such days being considered session days. (see definition of instruction at 8 NYCRR §100.1(u) – primarily synchronous).

SED Embraces Remote Instruction for State Aid for Emergency Closing Days

Starting with the 2023-24 school year, pursuant to Commissioner's Regulations at8 NYCRRR§ 155.17 (c)(1)(xxi) each school district must have an Emergency Remote Instruction Plan that will lead to days of such instruction counting as session days for the hours of instruction required for state aid.

SED Embraces Remote Instruction for State Aid for Emergency Closing Days

- What does this mean for non-teachers who have previously been given the day off on snow days?
- Are “remote days” considered “snow days” under terms of collective bargaining agreements for non-teachers?
- What if contract specifically uses the word “snow day”?

Coaching & Extracurriculars

- Some Districts wants more control/flexibility over the appointment of coaches or advisors.
- Typically Unions are reluctant to give up any rights to such positions.

Coaching & Extracurriculars

- Some ideas that have been utilized in Districts to address these concerns:
  - Comprehensive evaluation systems
    - Evaluation results tied to whether individual has opportunity to be reappointed (Disqualification by evaluation –*Chappaqua CSD)*
  - Incumbent in position does not have right of first refusal for re-appointment
  - Non-bargaining unit members may have right of first refusal if already serving in position (no right for union member to displace)

Retiree Health Insurance

Chapter 30 Laws of 2009 made permanent the Insurance Moratorium Law that precludes a reduction in retiree health insurance benefits unless there's a commensurate reduction in such benefit(s) regarding the active employees in the bargaining unit from which the retiree was last employed in active service.

If a collective bargaining agreement guarantees a rate of employer contribution for the lifetime of a retiree, that may not be changed by the public employer. Donohue v. Cuomo

30 N.Y.3d 1(2022)

Retiree Health Insurance

A significant cost to school districts is due to the reimbursement of retiree charges for Medicare Part B premiums paid by Medicare eligible retirees. The Insurance Moratorium Law restricts a change in reimbursement charges for those Medicare Part B eligible retirees because active employees could not be subject to a commensurate reduction in the same benefit. *Bailenson v. Chappaqua CSD* ____A.D.3d___ 2021)

Reducing the reimbursement to the standard charge for active member who retire in the future will reduce future costs.

Retiree Medicare Part B 2023

❖Standard or Floor		Jnt Income
Premium share :	$165/mo.	$194K
❖First IRMAA Tier:	$231	$246K
❖Second IRMAA Tier:	$339	$306K
❖Third IRMAA Tier:	$429	$366K
❖Fourth IRMAA Tier:	$527	$750K
❖Fifth IRMAA Tier:	$561	> $750K

QUESTIONS

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