

WPSBA

Ed Law Essentials

Part 1
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Artificial Intelligence

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What is AI?

- Artificial Intelligence (AI) refers to computer systems that can perform tasks that once required human intelligence.
- Computers do this by taking in large amounts of data, processing it, and learning from their past in order to streamline future processes.
- Examples of these tasks are:
 - visual perception
 - speech recognition
 - decision-making
- AI has taken many shapes and forms over recent years:
 - Mobile Phones (Siri/Cortana)
 - Self Driving Cars
 - GPS/Voice Recognition
 - Robotics

History of AI

- 1950s: Alan Turing published the “Turing Test” of computer and machine intelligence to determine if such intelligence is indistinguishable from that of a human; the term “artificial intelligence” was first coined.
- 1980s: “Deep Learning” techniques are developed, allowing computers to learn from their mistakes and make independent decisions.
- 1990s: AI enters everyday life (Roomba, speech recognition software); Deep Blue beats a human chess champion.
- 2020s: surge of common-use AI: virtual assistants, search engines; emergence of Deep Learning and Big Data.
- 2020: OpenAI launches GPT, which uses Deep Learning to create content almost indistinguishable from those created by humans.

Generative AI

- Generative AI describes algorithms that can be used to create new content, such as text, imagery, audio and synthetic data.
- Examples: ChatGPT, DALL-E
- This new content is based on patterns in existing content, and build text by predicting most likely words.
- Generative AI can be used to compose essays, lesson plans, curriculum, etc.

What About Biometric Data?

- One application of AI that we do know is prohibited is the use of facial recognition technology. By order of the Commissioner dated September 27, 2023, a school district may not purchase or utilize facial recognition technology.
- Schools can decide whether to use biometric identifying technology other than facial recognition technology at the local level so long as they consider the technology's privacy implications, impact on civil rights, effectiveness, and parental input.
- School districts may still utilize technology for fingerprint identification of prospective school employees.



Balancing Concerns Over Academic Fraud with the Promises of Academic Benefit

Plagiarism

- One area school district's Code of Conduct defined plagiarism as “the act of stealing and passing off as one's own, the ideas or words of another, or using a created production without giving credit to the source.”
- Legal issue – should Codes of Conduct be updated to reflect the use of AI on assignments, or should that be left to teachers who inform students of their responsibilities at the start of each school year?
- It is recommended that, if any form of AI is used on an assignment, a disclosure statement should be required by the classroom teacher, explaining how the AI was used.

Plagiarism Cont'd - Attribution

- Links to AI chats can be available in most LLM models. If a teacher allows students to use AI, the link will allow the teacher to access a student's prompt language to verify search terms and instructions to ascertain how much assistance the AI provided the student.
- Q. How would a school prove AI generated plagiarism occurred? As noted in previous slides, AI is advanced enough to mimic human responses, and the jury is out on the efficacy of AI detectors.
- Would the Commissioner uphold a suspension and/or grade reduction of a student suspected of plagiarism with evidence from an AI detector?

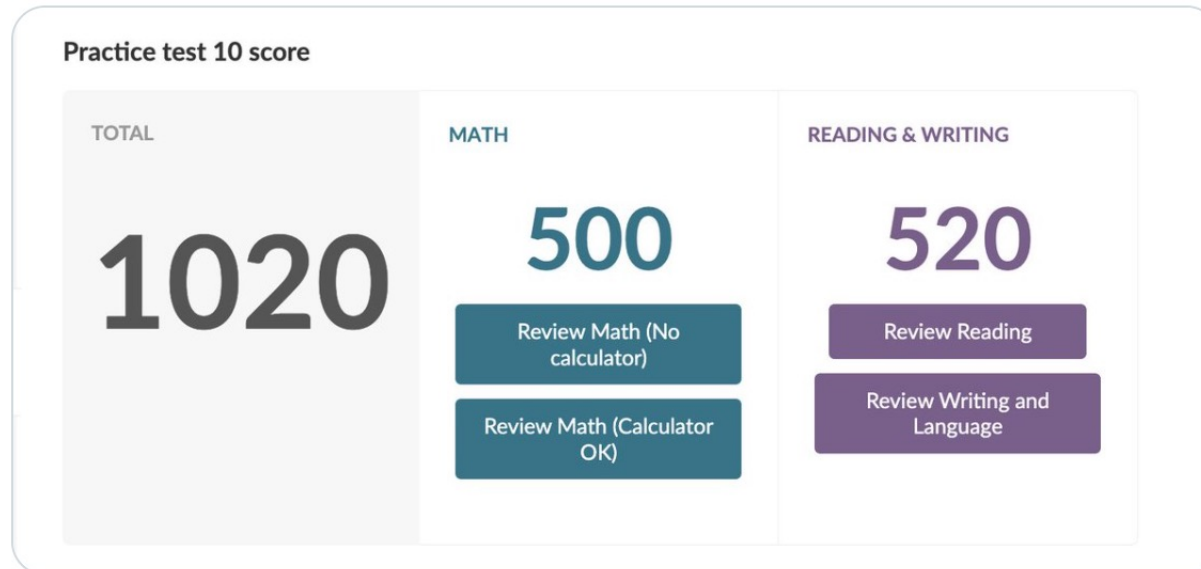
Creating False Documentation

- There are AI programs that create works of art. If an AI is sophisticated enough to replicate a Rembrandt, or create something similar from scratch, how hard can it be to duplicate a parent's signature on a document?

Cheating



I made ChatGPT take a full SAT test. Here's how it did:



2:53 PM · Dec 2, 2022

Detection

- LLM's such as ChatGPT are sophisticated enough that they can draft prose in a manner that can readily evade detection.
- There are some products in the market that hold themselves out to be AI detectors, such as GPTZero and Turnitin. As with any competing technologies, it will become a race to see who can get to the top. There is some doubt among commentators as to whether AI detectors are sufficiently dependable enough to detect if a student cheated or plagiarized another work. For example, OpenAI (the folks behind ChatGPT) has abandoned its work on AI detection tools.

See Pia Ceres & Amanda Hoover, Kids Are Going Back to School. So Is ChatGPT, wired (August 23, 2023 7:00 AM), <https://www.wired.com/story/chatgpt-schools-plagiarism-lesson-plans/>

Detection Cont'd

- In addition, given the current state of AI detectors, problems may arise, including but not limited to:
 - False positives
 - Additional work for teachers
 - Lack of transparency on how AI detectors work
 - Discrimination against non-native English speakers
 - AI detection can be circumvented

See Holly Clark, Why AI Detectors Are Problematic and What To Do Instead, infused classroom, <https://www.hollyclark.org/2023/09/22/why-ai-detectors-are-problematic-and-what-to-do-instead/> (last visited April 3, 2024).

Section 504 Implications

- If a school district decides to not only allow AI, but utilize it in the classroom, the district must ensure that the AI is accessible to all students and instructional staff.
- For example, if a student has a visual impairment, and their classmates all are allowed access to ChatGPT, the visually impaired student may need an accommodation to allow the student to access ChatGPT through other means (i.e. speech to text + prompt readback for proof reading before submitting a prompt instruction).

The Return of Pen and Paper?

Potential(?) Solutions:

- Allow AI for assignments, but test aptitude with oral exams, or pen and paper in-class assignments.
- Allow students to demonstrate knowledge of material in ways other than through AI.



AI and School Board Policies

AI – Policy Implications for School Districts

Some district policies may have to be reviewed (for consideration of possible revisions) regarding AI; e.g.:

- Code of Conduct – e.g., plagiarism, prohibited conduct;
- Compliance with Intellectual Property law;
- Internet Safety (CIPA);
- Computer Use In Instruction;
- Student Records;
- Equal Opportunity;
- Data Security Breach and Notification.

AI – Policy Implications for School Districts Cont'd

- Inherent problem with drafting a fact-laden policy on AI is that the policy may become obsolete before the ink dries on the policy language. . .

AI – Policy Implications for School Districts Cont’d

NYSSBA Policy (“8636”) on AI:

- acknowledges equity issues regarding use of AI by students;
- Points out limitations on use of AI detection tools (including possible bias against English Language Learners);
- points out responses by Generative AI “may be biased, wrong, or violate copyright laws”;
- references existing policies on acceptable use of computers and academic honesty;
- requires that use of Generative AI in school network and computers be 2-d compliant;
- largely defers to classroom teachers on appropriate assignment of AI in classroom work;
- clarifies school district expectations for students in their use of AI, and allowing “...for multiple methods for students to demonstrate competence and understanding.”

AI – Policy Implications for School Districts Cont’d

The New York State Office of Information Technology Services (ITS) developed their own internal policy regarding AI. The following Policy on Acceptable Use of AI Technologies is not a model policy for school districts, but rather should be considered:

- establishes guidelines for acceptable use of AI by State Entities (SEs)
- applies to all technology systems that employ AI
- requires the use of AI to comply with applicable NYS and ITS policies and standards, and NY and federal law
- requires SEs to maintain awareness of how AI system uses personally identifiable, confidential, or sensitive information

AI – Policy Implications for School Districts Cont'd

- requires SEs to identify an Information Owner for each AI system and have human oversight
- requires AI systems to be fair and equitable
- encourages transparency
- requires SEs perform a Risk Assessment for each AI system, including a review of all security, privacy, legal, reputational, and competency risks
- suggests SEs adopt the National Institute of Standards and Technology (NIST) AI 100-1 Artificial Intelligence Risk Management Framework
- suggests SEs develop policies to govern data privacy, retention, accuracy, and disposal
- suggests SEs ensure adequate security controls, such as encryption

What to do with Existing Policy Manuals

- Should school districts employ a permission slip process?
- What about requests to monitor student use?
- Should the FERPA annual notice and 2-d Parent Bill of Rights be updated?

NYS Board of Regents

- At its March 2024 meeting, the NYS Board of Regents considered AI's potential impact on learning, privacy and other areas.

*See Sara Foss, Board of Regents discuss AI's impact on education, new york state school boards association (March 18, 2024),
https://www.nyssba.org/index.php?src=news&submenu=News&srctype=detail&category=On%20Board%20Online%20March%2018%202024&refno=4863&srctype=news_detail_2019*



Confidentiality

FERPA, PII and AI Search Prompts

- Generative AI programs such as ChatGPT progress by analyzing data sets to train the AI, mostly from the internet (which has its own problems).
- ChatGPT and other LLM's also utilize user input (i.e. prompt search terms) to train the program. If a prompt instruction contains personally identifiable information, that PII is now part of the data set that ChatGPT or similar program has access to.
- Some AI services can scan, identify and categorize student data.
- After identifying student data, lawyers should still monitor usage of the data, sharing patterns, and access logs to detect risks from inappropriate permissions, risky sharing, and unauthorized access.

AI and Education Law 2-d

- Education Law 2-d outlines requirements for protecting the personally identifiable information of students, and requires software companies to sign school districts' Parents' Bill of Rights.
 - Part 121 of the Regulations of the Commissioner of Education also address data privacy and security
- Unlikely the current AI models would comply with FERPA and Education Law 2-d or that the existing vendors could sign a parents' bill of rights.
- NYSED has stated because decisions about tools, curriculum, and programs are up to school districts, school districts must generally be mindful of privacy and security laws and regulations.
- Districts should consult with school attorneys on the risks associated with different AI models and service plans.

FERPA / Education Law-d Issues

- In 2021, Respondus, Inc., (a software company which provide “sophisticated digital/surveillance technologies” to high school and colleges), was sued in federal court for privacy injuries due to its allegedly amassing and storing personal student data without informed written consent, and by failure to comply with various requirements for biometric data, under Illinois law. *See Bridges v. Respondus, Inc.* [N.D. Ill.- 1:21-01-01785]
- This action could conceivably be in violation of 2-d if it occurred in New York.

A Note About FOIL

- FOIL allows public agencies to withhold certain agency records from disclosure if they fall within certain categories (i.e. records that if disclosed would constitute an unwarranted invasion of personal privacy).
- If AI is used in preparation of an agency record that contains information that would otherwise be exempt from disclosure, the information becomes part of the AI's database, to be relied upon by the AI in any future task.



Questions?

Title IX and Transgender Students

Addressing Anti-discrimination and Harassment

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The Social Climate

Understanding the Concerns Behind the
Guidance and Regulations

BULLYING AND HARASSMENT

- 68% of LGBTQ students ages 13-21 surveyed indicated they felt unsafe at school due to their sexual orientation, gender expression or gender identity (2021 National School Climate Survey conducted by GLSEN). Examples of why they felt unsafe included:
 - Anti-LGBTQ remarks made at school
 - Harassment and assaults occurring at school
 - Discriminatory policies and practices used at school that restricted students' gender affirming decisions
- These feelings resulted in school avoidance, increased drop-out rates, diminished academic performance, depression, and reduced likelihood of post-secondary education
- Nearly 1 out of 5 transgender and non-binary youth attempted suicide (2022 National Survey on LGBTQ Youth Mental Health)

State and Federal Laws and Regulations

Understanding the Agencies that Enforce the Laws and Regulations and
What Authority They Have Over Public Schools

NYS Human Rights Law

New York State HRL expressly prohibits discrimination by educational institutions based upon students, employees or applicants' actual or perceived sex and gender identity, which includes gender-related identity, appearance, behavior, expression, or other gender-related characteristics, regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

NYS Human Rights Law

Examples of discriminatory conduct under the HRL can include:

- Denying equal access to school;
- Denying the use of restroom or other facilities consistent with a person's gender identity;
- Requiring a transgender person to use a single-occupancy facilities;
- Requiring individuals to show medical documents to use facilities consistent with gender identity;

NYS Human Rights Law

Examples of discriminatory conduct under the HRL can include:

- Refusing to use an individual's requested name or pronoun;
- Denying access to an educational program or school-sponsored club based upon gender identity;
- Subjecting the individual to harassment at school or work.

NYS Education Law § 3201-a

Prohibits discrimination based on sex with respect to admission into or inclusion in courses of instruction and athletic teams in public schools. “Discrimination based on sex” includes discrimination based on gender identity and expression.

Dignity for All Students Act (DASA)

Provides that “no students shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person’s actual or perceived...sexual orientation, gender, or sex...by school employees or students on school property or at a school function.”

Title IX

Provides that “No person in the United States on the basis of sex shall be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

“Sex” has been interpreted as encompassing gender identity and expression.

US Dept. of Education Office of Civil Rights

Has jurisdiction over school districts receiving Federal funds and enforces Title IX.

OCR can investigate complaints relating to discrimination on the basis of gender and/or sex, including gender expression and identity

US Dept. of Education Office of Civil Rights

Enforcement powers include authority over federal funding for school districts

Title IX Regulations released April 19, 2024.

2024 Title IX Regulations

The new regulations go into effect August 1, 2024:

- Clearly prohibit discrimination and harassment based on sexual orientation, gender identity, and sex characteristics;
- Clarify that schools cannot prevent students from participating in school consistent with their gender identity, except in limited circumstances (sex-separate living facilities and sex separate athletic teams)

School District Liability Under Title IX

- A school district is deliberately indifferent if its response to gender/sexual harassment is clearly unreasonable in light of the known circumstances.
- Complaints of discrimination must be resolved promptly and equitably.

School District Liability Under Title IX

- 2024 Regulations require school districts to address conduct that is subject to its disciplinary authority (previous regulations limited obligation to respond under Title IX to conduct that occurred within school or school-sponsored events).
- Codes of Conduct and DASA authorize school districts to address off campus conduct and cyberbullying which rise to a certain threshold.

Best Practices

Suggested Guidance from NYSED

Students Transitioning

- School personnel's acceptance of a student's asserted gender identity should require no more than a statement from the student expressing their preference. Schools do not need to require permission, letters from professionals, or proof of gender identity.
- Discuss and clarify expectations and challenges to transitioning, especially if student is not ready for a full social transition.

Students Transitioning

- Discuss and clarify issues such as:
 - Which names and pronouns to use and in what setting?
 - Rest room and locker room choices
 - Confidentiality concerns
 - How to handle overnight field trips, gender segregated health assemblies, etc.

Student Records

- If a transgender student requests a change to educational records to reflect the stated gender identity and affirmed name and pronouns, the school should honor that request, regardless of whether the student has completed a legal name change.
- Previous records that reflect the birth name or gender should be kept confidential.

Student Records

- Unless a student has a legal name change order, health records maintained by the nurse must remain in the birth name.
- If a school is presented with a legal name change order, then all student records must be updated.

Student Names

- Students are not required to obtain parental/guardian consent or a court-ordered name and/or gender change before being addressed by their affirmed name and pronouns.
- School staff are responsible for ensuring students are referred to correctly. Intentionally referring to a student, verbally or in writing, by a pronoun inconsistent with the student's gender identity or by a name other than the student's affirmed name. Students should be given the opportunity to share the name and pronouns that they identify with and want to be used.

Student Names

- In classrooms, teachers should update items that have each student's affirmed name, such as attendance lists, name plates, seating charts, or participation popsicle sticks throughout the year. If participating in virtual classrooms, schools should adjust their settings so that TGE students can edit their display names for virtual classrooms and virtual calls.

Privacy and Confidentiality

- The federal Family Educational Rights and Privacy Act (FERPA) prohibits the improper disclosure of personally identifiable information (PII) derived from students' educational records. PII includes, but is not limited to, the student's name, date of birth, sex, gender, indirect identifiers, and other information that alone or in combination is linked or linkable to a specific student that would allow a reasonable person in the school community to identify the student.
- Schools should clearly and unambiguously advise the student that their parents/guardians may become aware of the use of an affirmed name in school and on school records, through school communication or if their parent/guardian seeks to review the student's education records.

Privacy and Confidentiality

- With the student's consent, a trusted trained school professional may facilitate a conversation between the student and their parent/guardian regarding the student's affirmed name and gender identity.
- When TGE students use an affirmed name in school, the legal name must be kept confidential by school staff. FERPA only authorizes the release of PII from education records to school officials (including teachers, among others) who have a *legitimate educational interest* in the information. Therefore, once a legal name is made confidential, the student's legal name should only be shared with school officials who have a legitimate educational interest in knowing this information.

Restrooms and Locker Rooms

- “[U]nder Title IX, discrimination based on a person’s gender identity, a person’s transgender status, or a person’s nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match [their] gender identity is prohibited sex discrimination under Title IX. There is a public interest in ensuring that all students, including transgender students, have the opportunity to learn in an environment free of sex discrimination.”

U.S. Dept. of Educ. Letter from Suzanne Goldberg April 6, 2021

- Denying the use of restrooms or other facilities because of a person’s gender identity is a violation of NYS Human Rights Law and is unlawful discrimination. Arrangements should be provided in a non-stigmatizing manner that protect student privacy and are not marginalizing or disruptive for the student.
- Schools may not ask a TGE person to use a single-stall restroom because of someone’s concerns or condition the use of facilities such as restrooms, locker rooms, or residential facilities upon students’ provision of medical or other specific documentation.

Relevant Guidance Documents

- **Creating a Safe, Supportive and Affirming School Environment for Transgender and Gender Expansive Students: NYSED July 2023**
http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf
- **Guidance on Protections from Gender Identity Discrimination Under New York State Human Rights Law (2020, January 29) *New York State Division of Human Rights.***
<https://dhr.ny.gov/system/files/documents/2022/04/nysdhr-genda-guidance-2020.pdf>
- **The Dignity Act, A Resource and Promising Practices Guide for School Administrators & Faculty**
<https://www.p12.nysed.gov/dignityact/documents/FINALDignityForAllStudentsActGuidanceDec2017.pdf>
- **New York State Gender Recognition Act FAQs (2022).**
<https://ahihealth.org/wp-content/uploads/2022/03/NYS-Gender-Recognition-Act-FAQS.pdf>



QUESTIONS?

Student Discipline and The Emphasis on Restorative Justice

Westchester Putnam School Boards Association (WPSBA)

May, 2024

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Board of Regents Releases Report Recognizing Racial Disparities in School Discipline in New York State

- In December of 2022, the Regents released a report that addressed, among other things, findings in 2019 that recognized racial inequities in discipline across the State.
- A Task Force was formed to examine data related to student exclusionary discipline across the State; it found that exclusionary discipline was administered in a biased and inequitable manner.
- The inequities were seen when comparing white students to black students and, also, general education students to classified students.
- Black male students with special education needs were two times more likely to be suspended than white students with disabilities and ten times more likely to be suspended than white students without disabilities.
- The Task Force found that in NYS, 23 days are lost due to out-of-school suspensions for every 100 students; it is 29 days lost for students who are multi- or biracial; 32 days for American Indian/Alaska Native students; and 47 days for every 100 black students.

Board of Regents Recommendations for Reducing Disparities in and Reforming School Discipline in New York State

- The Task Force developed short-term recommendations to reduce the use of exclusionary discipline and promote alternatives. They include:
- Training and Preparation
 - Amending State regulations regarding pre-service training and certification requirements for all school-based employees, from administrators and teachers to aides;
 - Allocation of permanent legislative funding to develop and deliver training and preparation in effective school discipline;
 - Development and implementation of plans at colleges, universities, and local school districts to recruit, prepare, graduate, and retain diverse teaching candidates, leaders, and counselors

Board of Regents Recommendations for Reducing Disparities in and Reforming School Discipline in New York State

- Recommendations Related to Changes in Practice
 - Amend the NYS Education Law to reframe the model of discipline to be more proactive, developmentally appropriate, positive, and supportive, allowing students to learn from their mistakes
 - Support educators in creating environments that are proactive, developmentally appropriate, positive and supportive of alternatives to discipline that allow students to learn from their mistakes
 - Support schools in building community understanding, buy-in and participation in changes to practice

Board of Regents Recommendations for Reducing Disparities in and Reforming School Discipline in New York State

- Recommendations Related to Codes of Conduct
 - Amend the NYS Education Law and Commissioner's Regulations to provide model language regarding discipline that demonstrates inclusivity, cultural responsiveness, proactive, developmentally appropriate, positive, and supportive language
 - Amend the NYS Education Law and Commissioner's Regulations to limit exclusionary discipline and require proactive discipline responses to misconduct.
 - Codes of Conduct should be amended to include language that focuses on building a positive, inclusive climate that addresses inequities for students and families who have been traditionally marginalized

Board of Regents Recommendations for Reducing Disparities in and Reforming School Discipline in New York State


- Recommendations Related to Data Collection and Analysis
 - Create a technical assistance center/provider to facilitate implementation of the recommendations surrounding exclusionary discipline
 - Develop a Data Analysis Toolkit to facilitate implementation of the recommendations
 - Ensure best practices and responsible use of data collection and reporting
 - Collect additional key data variables at the school and district level in addition to the detailed demographic data provided by NYSED to schools
 - data related to repetitive exclusionary discipline of students;
 - reasons for classroom removal, suspension or violations;
 - conditions that led to the referral;
 - classroom management supports available for staff;
 - the number and type of proactive interventions provided to the student after removal from class but before suspension;
 - interventions to support academic progress when student is removed; and
 - referrals and engagement of the SRO, if any

Board of Regents – “Supporting Student Wellbeing and Equity: Effective School Discipline Practices from New York State School Districts”

- Presented at the February, 2023 Board of Regents Meeting
- Included discussion on disparity in discipline, including based on race/ethnicity
- Specific District presentations addressing:
 - Proactivity v. reactivity
 - Data analysis on discipline
 - Staff training on trauma responsive systems, restorative practices, youth mental health, therapeutic crisis intervention
 - Prevention and intervention

Early Returns/Consent to Discipline

- ❖ Commissioner recently held that if a student is offered an early return to school IF they voluntarily participate in counseling, the District ***must*** ensure that there is a cost-free option.
- ❖ The Commissioner stated that it may create a financial hardship for families and therefore it raises substantial equity concerns.
- ❖ The Commissioner specifically stated that this cost-free option includes direct delivery by school personnel.
- ❖ *Appeal of A.W.*, 62 Ed. Dept. Rep. Decision No. 18,256 (2023)



RECENT STUDENT DISCIPLINE DECISIONS OF THE CURRENT COMMISSIONER OF EDUCATION

Appeal of B.A., Decision No. 18,209 (2022)

- Facts:
 - Student A is out on suspension and receives a message from Student B via social media app which reads “Should I jump [Student C]?”
 - Student A responds “Go ahead...U show film it tho if u do”
 - Student B responds “I will”
 - Student A responds “Ok send that s*@& to me after u do it”
 - Student B responds “Ok”
 - Student A responds “Ima laugh my as[sic] off so hard if u bear his a*@”
 - Student B attacks Student C the next day
 - The principal suspends Student A for “co-conspiring” to injure Student C and after a superintendent’s hearing, Student A was suspended for 11 ½ months with the possibility of return in 6 months
 - Student A’s family appeals

Appeal of B.A., Decision No. 18,209 (2022) (cont.)

- On appeal, the Commissioner found Student A did not “conspire” with Student B, as conspiracy requires an agreement to do something illegal or wrongful.
 - The Commissioner reported the district presented no evidence that Student B only acted because Student A and he made an agreement.
 - The Commissioner reported the district presented no testimony from Student B.
 - The Commissioner reported Student A testified that he did not think Student B would listen to him.
 - The Commissioner found that, at most the district demonstrated that Student A encouraged Student B.

Appeal of B.A., Decision No. 18,209 (2022) (cont.)

In the decision, the Commissioner wrote :

“Students must understand that impulsive and juvenile comments can have real world consequences. ‘Punitive and exclusionary’ suspension, however, will not impart that lesson. The facts of this appeal proves the point: the student sent the messages at issue while suspended for a previous infraction. Learning and success are not solely academic in nature; they are dependent upon the social-emotional support that school districts are required to provide. In this respect, I take notice [the district’s] Core Beliefs, the second of which – ‘every student can learn and achieve success – is inclusive of *all* students. Thus, respondent is responsible for ensuring that *all* students have equitable access to interventions that will support their holistic academic and social-emotional development as learners and developing, contributing members of society. Instead of punishment, respondent should have helped the student ‘learn to assume and accept responsibility for [his] own behavior’ while simultaneously establishing remedial supports to foster, and thus augment, the student’s emotional intelligence. Punishment for its own sake does not reform; it only creates cycles of resentment and distrust.”

Appeal of E.R., Decision No. 18,309 (2023)

- **Facts**

- Student ate lunch in school library as usual
- Two teens, who turned out not to be students of the school, told him they had weapons and would use them against him if he told anyone
- Non-students showed student a video of them assaulting someone
- Student accompanied one of the non-students to the east gym locker
- Non-students eventually discovered by district – search revealed one had a taser and pepper spray, and another had a butterfly knife

- **Hearing**

- Student was charged with (1) being with a non-student who was not authorized to be on school grounds and (2) escorting non-student to east gym locker room while knowing non-student was in possession of a weapon.
- Student was found guilty of only charge 2, and suspended for the remaining 5.5 months of the school year

Appeal of E.R., Decision No. 18,309 (2023) (cont.)

- On appeal, the Commissioner found that the student admitted the conduct of which he was found guilty, so the record supported a guilty finding.
- However, the Commissioner further found mitigating circumstances rendered the penalty excessive, and “so shocking to the conscience as to warrant substitution of the Commissioner’s judgment for that of the board of education.”
- The Commissioner accepted the student’s explanation that he feared for his safety and found no support in the record for finding that the student willingly joined the non-student.
- The Commissioner ordered that the records of both the short and long-terms suspensions to be expunged.

Appeal of M.W., Decision No. 18,068 (2022)

- Student suspended for 30 days for sending inappropriate electronic communications
- Long-term suspension expunged due to denial of fair hearing because:
 - MDR held prior to factfinding, presupposing student's guilt
 - Superintendent did not ensure he served as neutral hearing officer (responded to questions from parent and advocate as if he was the District's representative)
 - Superintendent failed to enter evidence into hearing record
 - Superintendent made statements reflecting unwillingness to consider parent's arguments (saying arguments were "technicalities" or "troublesome")
 - District witness read testimony from prepared statement, but despite request by parent's advocate, statement was not provided to advocate or entered into evidence.
- Commissioner also ordered previous suspensions that had been found to be manifestations of student's disability expunged

Appeal of J.R., Decision No. 18,091 (2022)

- Student suspended for 7 months for (1) possession of vaping pen/vaping substance and (2) attempted sale of drugs
- Only evidence presented was testimony of building principal, who stated:
 - Parent of another student told him that her child (the “buyer”) agreed to buy “acid” from the student.
 - The buyer’s parent displayed screenshots of a social media conversation between the student and buyer.
 - The principal and the parent contacted police, who conducted a “forensic ... scan” of the buyer’s phone revealing a social media chat between the student and buyer.
 - According to the principal, in that chat, the student told the buyer to bring \$5 to school the next day for the acid tab, and the student would bring the acid tab to school to give the buyer the day after.
- The school introduced no documentary evidence and the principal could not identify the date of the alleged sale

Appeal of J.R., Decision No. 18,091 (2022) (cont.)

- Hearing officer denied requests by the student’s parent to subpoena the buyer’s parent and the police officers involved
- Despite student’s admission on the first charge, the Commissioner ordered record expunged – 7-month suspension for vaping “shocks the conscience”
 - Failure of hearing officer to issue subpoenas for parent and police officers constituted abuse of discretion
 - Although “[h]earsay evidence is admissible in administrative hearings, and hearsay alone may constitute competent and substantial evidence so long as ‘such evidence is sufficiently relevant and probative or sufficiently reliable and is not otherwise seriously controverted,’ here, the District’s evidence was entirely hearsay, much of it double or triple hearsay
 - Given this limited evidence, the buyer’s parent and the police would likely have been able to offer testimony or evidence directly relevant to the student’s guilt.

Appeal of J.R., Decision No. 18,091 (2022) (cont.)

- In the Decision, the Commissioner wrote:
 - While the parents ultimately prevailed on appeal, these are pyrrhic victories for parents whose children were improperly suspended for weeks or months. School districts should carefully consider the nature and quality of proof against students before pursuing long-term suspensions. Should they choose to proceed, school districts must ensure the assiduous protection of students' due process rights.

Appeal of J.F., Decision No. 18,272 (2023)

- Facts

- Middle School Student B reported that Student A made a threat during lunch a few weeks previously to shoot up the school and claimed to have a list of people. Student B said Student C heard it, too. Parent of Student B confirmed that Student B reported to the allegations to her a few weeks prior.
- Student C reported Student A said he was going to shoot up the school on June 3.
- Student A denied the threats, and said he had a “character list” of “people he intended to draw.”
- Three other students who sat at the lunch table denied Student A made any threats.
- Student was suspended for 5 days, from June 2-8, and hearing was held.
- Hearing evidence consisted of principal’s hearsay testimony regarding the investigation including the conflicting reports of the students, and a written summary of statements of students and staff. Student A testified and denied the charge.

Appeal of J.F., Decision No. 18,272 (2023) (cont.)

- Hearing officer found student guilty and recommended suspension through 1/27/23, with the “option” to return in September 2022, if the student participated in counseling and threat assessment, and completed an alternative education program. Superintendent adopted these findings and recommendations
- Appeal sustained
 - Hearing officer failed to address the conflicting evidence, given that Students B and C reported the threats, but three other students denied it had occurred
 - Hearing officer failed to make credibility determination regarding Student A
- District failed to meet its burden of producing competent and substantial evidence that the student engaged in the charged conduct

Appeal of C.W., Decision No. 18,121 (2022)

- Student permanently suspended for incident involving display of suicide note, statement that he had a list of students he did not like on his phone, and asking fellow student if she had a gun he could use
- Five-day suspension expunged for failure to comply with Education Law Section 3214 procedures
- School District's 15-day timeline for appeal of long-term suspension constituted denial of due process
- In lieu of remanding proceeding to Board for further review, Commissioner noted that student was not permanently suspended, as he had been placed by the district's CSE in a BOCES program. Moreover, permanent suspension is only appropriate if it is "is necessary to safeguard the well-being of other students." The district demonstrated it did not believe this was true, since the CSE enrolled him in a program with other students. As the appeal had been pending for nearly a year, the Commissioner ordered suspension expunged.

Appeal of C.W., Decision No. 18,253 (2023)

- Part 2
 - Fifteen days after the Commissioner expunged the permanent suspension, the Superintendent issued letter banning the student from school grounds absent written permission from the principal or superintendent, because his “presence on school property pose[d] serious and significant safety concerns to the school community”
 - School boards do have the authority to “impose reasonable restrictions on individuals’ access to school property”
 - This does not apply to resident students, who have a constitutional right to a sound basic education
 - Any restriction of a student’s right to access school grounds must be in conjunction with suspension.
 - In the Decision, the Commissioner wrote:
 - While it is undeniable that ‘our nation is beset by an epidemic of such shootings’, and ‘school officials [must] retain the ability to protect their students and staff,’ these sentiments do not provide districts with unfettered license to disregard students’ rights.

Appeal of P.M., Decisions No. 18,373 (2024)

- In June, 2023, teacher asked two students to stop pushing each other in the hallway. Each student then pushed the teacher.
- P.M. was suspended from the start of 2023-2024 school year through 11/10/23.
- Commissioner noted that pushing is unacceptable. But found that the push was “innocuous.” The record indicated that the students were jokingly pushing one another in the hallway, and when the teacher asked the students to stop, the teacher was pushed by the students, causing her to take a few steps backward. Students testified they had a good relationship with the teacher, no one was harmed, and they had since apologized to the teacher.

Appeal of P.M., Decision No. 18,373 (2024)

- Commissioner noted that the District presented no witnesses/evidence to rebut the student's testimony, and the teacher did not testify or submit an affidavit.
- Commissioner said the student engaged in innocent, if ill advised jocularity that did not warrant a long term suspension.
- Commissioner rebuffed District's argument that the Commissioner has routinely held that a lengthy suspension is warranted when there is physical violence by a school. The Commissioner said this argument "presupposed that the student's conduct can be characterized as 'violent'", which was not supported in the record
- Commissioner found that the suspension was shocking to the conscience and was to be expunged from the student's record

Appeal of D.W., Decision No. 18,370 (2024)

- 9th grade student recorded a 4 second video in the school cafeteria of a school security guard breaking up an altercation between 2 students using her personal cell phone.
- Student was suspended for 1 day. Commissioner sustained the appeal for insufficient notice of an informal conference.
- Commissioner stated: “I am compelled to comment on the superintendent’s opinion that the student’s conduct “require[d] a disciplinary response that [was] a deterrent not only to the student ... but also to the rest of the student body should there be subsequent incidents.” Given the confidentiality of student disciplinary records, suspensions cannot serve as a “deterrent” to others.”

Special Education Obligations:

Implications of service provision to age 22

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Background

- In July 2023, NYSED issued a Formal Opinion of Counsel advising school districts to provide special education services to some students with disabilities through age 22 – an additional year that is likely to continue impacting school district budgets

A.R. v. Connecticut State Bd. of Education

5 F.4th 155 (2d Cir. 2021)

- Based on Connecticut statutes and federal IDEA – but the Second Circuit Court of Appeals also has jurisdiction over NY
- Connecticut requirements are similar to NY in that students with disabilities have a right to receive FAPE until they earn a high school diploma or the conclusion of the school year in which they turn 21, whichever occurs first

A.R. v. Connecticut State Bd. of Education 5 F.4th 155 (2d Cir. 2021) (cont.)

- Connecticut provides public education to nondisabled students over the age of 21 to age 22 through its adult education programs (GED high school equivalency course)
- Second Circuit found the state is therefore required to provide educational programming to students with disabilities in the same age range, *i.e.*, up to age 22
 - Such educational programming would be FAPE, thus extending the FAPE entitlement from the conclusion of the school year in which the student turns 21 to when they reach age 22

July 6, 2023 NYSED Formal Opinion of Counsel

- Based on a U.S. Second Circuit Court of Appeals decision (*A.R. v. Connecticut*) holding that Connecticut must make available a FAPE until age 22 for students with disabilities who had not received a high school diploma
- Extended the previous longstanding requirement in NY that students with disabilities are entitled to special education programs and services until they either receive a Regents or local high school diploma, or upon the conclusion of the school year in which they turn 21, whichever occurs first

July 6, 2023 NYSED Formal Opinion of Counsel (cont.)

- Fully embraced the *A.R.* decision as applicable to NY
- Explains that NY law defining eligibility for special education is “materially indistinguishable” from Connecticut law
- NY also offers publicly funded adult education programs to nondisabled students in the same age group as CT
- Therefore, NYSED Counsel concludes that the holding in *A.R.* regarding the interaction between federal law as set forth in the IDEA and state law requires NY public schools to provide special education and related services to resident students with disabilities at least until their 22nd birthday if they have not received a high school diploma

July 6, 2023 NYSED Formal Opinion of Counsel (cont.)

- NYSED Office of Counsel went even further, stating that the students' 22nd birthdays may fall at any point during a school year which creates a complication not addressed in the *A.R.* decision
 - Office of Counsel admits that, while not required by the applicable federal court decision, “SED’s Office of Special Education recommends that school districts consider providing such services through the end of the school year in which the student turns 22 or upon receipt of a high school diploma, whichever comes first.”

Katonah-Lewisboro UFSD v. New York State Educ. Dept., (Sup. Ct., Albany Co. Mar. 8, 2024)

- In an Article 78 proceeding, the school district challenged the obligation to provide a FAPE to a student after the conclusion of the year in which the student turned 21 years old.
- The Court found that under the provisions of Article 89 of the New York State Education Law and the IDEA, a school district is not obligated to educate a student after the termination of the school year in which the student turns 21.

Katonah-Lewisboro UFSD v. New York State Educ. Dept., (Sup. Ct., Albany Co. Mar. 8, 2024)

- The Court ruled that SED's reliance on *A.R.* was misplaced, indicating that unlike Connecticut law, "New York Education Law expressly limits the right to a free public education in New York State to students under the age of 21."
- The case did not address the Office of Counsel's Formal Opinion directly.

Takeaways

- The NYSED Formal Opinion of Counsel which essentially effectuates the movement from age 21 to age 22 for the provision of services to students with disabilities has been questioned by a State Court decision; a Notice of Appeal has been filed.
- Even before the *Katonah-Lewisboro* decision, it was unclear whether the Board of Regents and NYSED program offices will provide additional funding and guidance to support districts in meeting the new special education programming and service requirements