

# Summer Leadership Training Education Law

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# **Topics**

Tenure

Probation

Discipline

Seniority

Excessing

Tenure Areas

Medical Exams

Indemnification



# Seniority Rights, Excessing and Tenure Areas

- 1. When a school district abolishes teaching positions it must follow certain legal and sometimes contractual procedures, in determining which teachers are excessed or laid off. Most layoffs are determined in accordance with Education Law, Section 3013 (*formerly 2510*) and Commissioner's Regulation Part 30.13.

# Education Law 3013

- 2. Whenever a trustee, board of trustee, board of education or board of cooperative educational services abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

# Education Law 3013

3. (a) If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, **provided the record of such person has been one of faithful, competent service in the office or position he or she has filled.** The persons on such preferred list shall be reinstated or appointed to such vacancies in such corresponding or similar positions in the order of **their length of service in the system** at any time within seven years from the date of abolition or consolidation of such office or position.



(b) The persons on such preferred list shall be reinstated, in accordance with the terms of paragraph (a) of this subdivision, to such substitute positions of five months or more in duration, as may from time to time occur without losing their preferred status on such list. Declination of such reinstatement shall not adversely affect the persons' preferred eligibility status.

# Tenure Areas

- Part 30 of the Rules of the Board of Regents establishes the various “vertical” or subject tenure areas that must be used for teachers hired after August 1, 1975. The tenure areas under part 30 include, for example, elementary education, mathematics, English, science and art.

# Tenure Areas

- The tenure areas for teachers hired after August 1, 1975 include elementary, middle grades, academic and special subject areas. The elementary tenure area encompasses pre-kindergarten through sixth grade. The middle grades tenure area applies when the instruction of seventh and eighth grades is not departmentalized by academic area.



# Tenure Areas

- Teachers at or above the seventh-grade level, where instruction in the core academic subjects is departmentalized, are placed into the academic tenure areas of English, social studies, mathematics, science and foreign languages.

# Tenure Areas

- In addition, there are approximately thirty-nine (39) special subject tenure areas, encompassing fifteen (15) academic areas, six (6) vocational education subject areas, nine (9) ancillary or supportive educational services, eight (8) instructional support services and one (1) teaching assistant area.

# Tenure Areas

- Special subject tenure areas are specific topical areas that the Regents have designated as being tenure areas. There are five general types of special-subject tenure areas:
  - Academic Areas
  - Career Education Subject Areas
  - Supportive Educational Services
  - Instructional Support Services
  - Teaching Assistant Area



# Tenure Areas

- The academic areas include such subjects as art, music, driver education, business education, health, home economics (general), industrial arts (general), physical education, remedial reading, remedial speech, English as a second language, and four branches of education of children with handicapping conditions and Computer Science.

# Tenure Areas

- Vocational education subject areas in which the tenure area is coextensive with the certification possessed by the teacher, such as, for example, agriculture, health occupations, home economics (occupational), occupational business education and distributive occupation subjects and lastly, technical subjects and trade subjects, are also special subject tenure areas.

# Tenure Areas

- Positions in supportive educational services include school counseling and guidance, school media specialist, school library media specialist, school educational communications media specialist, school psychologist, school social worker, school nurse teacher, school dental hygienist and school attendance teacher.



# Tenure Areas

- Positions in instructional support services (Teachers on Special Assignment "TOSA") include instructional support services in the following: mathematics, English language arts and literacy, science, special education, curriculum and differentiated instruction..., integration of technology into instructional practices, technical support for bilingual and English as a second language for ELL learners and professional learning.

# Tenure Areas

- Instructional support services were added as a tenure area to allow teachers providing these services to teachers on special assignment (TOSA's) who were not providing instruction to students within their assignment at least 40% of their day pursuant to Part 30

# TOSA's

Part 30 was amended so as to allow teachers to accrue tenure and seniority rights for the performance of instructional support duties in a tenure area for which they are certified.



# Application

Teacher hired  
for/assigned to  
instructional support  
prior to 5.1.09;  
appointed with  
consent to improper  
or non-existent tenure  
area, and still  
employed as TOSA on  
5.1.09

Past and future  
service applied to  
tenure area for which  
certified

# Application

Certified individual hired for/assigned to instructional support prior to 5.1.09, but not appointed to a tenure area, and still employed as TOSA on 5.1.09

New probationary appointment to tenure area for which certified by 7.1.09 for those teachers that the district/BOCES desires to continue to employ; future service applied to this tenure area; no credit for past service prior to probationary appointment.

# Application

Teacher newly hired or assigned to provide instructional support on or after 5.1.09

- Hired on or after 5.1.09 to perform duties in instructional support services.
- Currently employed and servicing in a Part 30 tenure area
- Probationary appointment to tenure area for which certified
- Retain tenure area



# Not all Special Assignments are the same

- Prior to DeVente, In the *Matter of Tropa*, the Commissioner found that a business education teacher who became a TOSA assigned to administrative duties (filling in for an Assistant Superintendent) in the district's business office, ceased to accrue seniority in the business education tenure area when the special assignment began. Notably, it made no difference in *Tropa* that there was a written agreement signed by the union, school district and employee stating that he would continue to gain seniority as a business teacher.

# **The Tropa Decision**

- Based on the same rationale, there is a serious risk that a local union officer who is on release time and is not engaged in at least 40% teaching, would be deemed to not be serving in a Part 30 tenure area and therefore not accruing seniority

# Tenure Areas

- The Regents' rules designate the position of "teaching assistant" as a special subject tenure area.



# Tenure Areas

- The rules do not allow districts to classify teaching assistant tenure areas by specific subject assignment, for example...
- teaching assistant – kindergarten, or
- teaching assistant -- science, or
- teaching assistant -- heavy equipment, or
- teaching assistant -- special education, or
- teaching assistant -- computer room

These “tenure areas” do not exist!

# Tenure Areas

- The commissioner of education has ruled that districts **may only** appoint teachers to those tenure areas designated in Part 30 and may not create new tenure areas for teaching positions, such as a gifted and talented teacher, that do not easily fit within those areas.

# Tenure Areas

- If a district should appoint a teacher to an unauthorized tenure area, the teacher will be deemed to actually serve within the authorized tenure area which encompasses the teacher's **actual duties**.



# Tenure Areas

- Teachers may serve in more than one tenure area at a time. Under Part 30 of the commissioner's regulations, teachers are deemed to serve in any tenure area in which they spend at least 40 percent **(40%)** of their time. Teachers serving in more than one tenure area at the same time gain seniority credit under both tenure areas.

# Tenure Areas

- A teacher assigned to spend 40 percent or more of his or her time in a second tenure area may acquire tenure by estoppel in that area despite a district's failure to give him or her a formal probationary appointment.

# Seniority

- Seniority is defined, by Sections 2510 (old statute number) and 3013 (new statute number) of the Education Law as "service in the system within the tenure area of the position abolished ... " This means that the teacher who must be laid off (excessed) is the one who has the least seniority as defined above.



# Seniority

- A teacher that is involuntarily transferred to a different tenure area accrues seniority in both tenure areas. (Kaufman v. Fallsburg NY Court of Appeals (December 17, 1997)).

# Seniority

- Days spent on **unpaid** leave of absence may **not** be included in determining tenure (Matter of Halayko)



# Seniority

- The teacher with the least amount of service *in the tenure area in the school district*, shall be excessed when positions are abolished.



# SENIORITY AND BUMPING RIGHTS

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## **What are "bumping" rights?**

- Teachers who work in one tenure area and then take a new assignment in a different tenure area, and are then laid off from the second tenure area, have the right to "bump" a less senior teacher in their initial tenure area.

# Seniority

- Example: The District informs the union President that they must layoff one teacher in the tenure area of Social Studies. The District has identified Mr. Watson as the least senior teacher in the Social Studies tenure area. Mr. Watson has been a social studies teacher in the high school for the past **five** years. Before that, he was a fourth-grade teacher in the same District for **15** years.

# Seniority

- For the purpose of layoff, he only has five years of seniority in the Social Studies Tenure Area.
- He must be excessed from the secondary social studies tenure area before teachers with six years of service in the secondary social studies tenure area can be laid off.



What rights does Mr. Watson  
Have?

# Seniority

- Mr. Watson has the right to “bump” a less senior teacher in the elementary tenure area...if there is a teacher with less than 14 years of service.



- If Mr. Watson is laid off, he must be placed on a **preferred eligibility list** (PEL); AND for the purposes of recall, his *total service in the district is counted.*

- $$15 + 5$$

- *20 years of seniority for Mr. Watson for purposes of Recall from the PEL*

# Three Years Later.....

The district has an opening for a Social Studies Teacher,

There are three certified Social Studies Teachers on the PEL.

- Mr. Watson (5 years Social Studies and 15 additional years in District)

- Ms. Kalente (10 years Social Studies) and

- Ms. Coles (14 years Social Studies)-



**Who is entitled to be recalled from the PEL first?**

# Seniority

- Generally, therefore, the school district must, when it has an opening, go to the recall list and hire the first person on the list who has the appropriate certification. The "opening" may be a long-term substitute position of five (5) months or more.

# Seniority

- A teacher may refuse a substitute position and remain on the PEL.
- If a teacher takes a substitute position and is subsequently excessed, the teacher starts a new 7 year PEL.



# Recall Rights

- Requirements for recall to vacancy from PEL:
  - Must be qualified
  - Must have appropriate certification
  - Must be a position “similar” to the position from which the employee was excessed.

# Recall Rights

- “Similar”...in section 2510(3) *[3013(3)]* means recall may be to a position in a tenure area **different** from the tenure area from which the employee was excessed.
- This is true in the **2<sup>nd</sup> Department of the Appellate Division** of the NYS Courts...where we work in the TRO Region...not the same in the upstate 3<sup>rd</sup> Department where the tenure area must be the same.

Do teachers lose their right to remain on the PEL if they accept a position in a different tenure area or refuse a particular offer of reemployment?

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Answer: No!



- A teacher does not waive any right to reappointment within his or her tenure area by accepting a position in another tenure area in the district.
- A teacher who accepts a subsequent position in another tenure area in the district and who thereafter voluntarily resigns from that subsequent position does not waive recall rights to the initial position.
- A teacher does not waive any right to reappointment from the PEL for refusing an offer reemployment, even if the refusal is due to a short-term commitment to another employer.

## Termination of PEL or Reappointment Rights

A teacher's retirement or resignation terminates their PEL rights.

➤ Exception: A teacher who retires under the disability retirement provisions of the Education Law and then later has such disability retirement allowance rescinded is entitled to be placed on the PEL as of the date of the disability retirement.

# SHUFFLING

Some tenure areas, such as foreign languages and science, encompass more than one certification area.

When abolishing positions within such tenure areas, districts must, when they can, shuffle teachers to retain the most senior teachers in the tenure areas.



District can make decisions based on “economics and sound educational policy.”



District bears the burden to show that it could not shuffle the positions.

- Burden will be met if district shows proposed schedules would not be educationally or financially feasible.

# Seniority

- We must be certain to distinguish between “bumping rights” under Commissioner’s Regulation 30.13 from the right of recall under Education Law §2510(3) [3013(3)]\*.

\*remember...same statute

# **Clarification and Refinements**

- When does Seniority Commence?



Seniority commences on the date the teacher began **probationary**\* service in the tenure area in the district. If, however, the teacher had prior service as a *regular substitute* (i.e., for a semester or more) in the tenure area in the district preceding a probationary appointment (need **not** immediately precede the probationary appointment), then the regular substitute service counts toward seniority.

\*This is different from Civil Service!!!

# **Clarification and Refinements**

- However, where a probationer or a tenured teacher is excessed and returns to a long-term substitute position of five (5) months or more in duration, that service does not affect their PEL status.

# Clarification and Refinements

- Part-timers, with a few exceptions, **do not** accrue seniority. Both the Commissioner and the Courts have determined that part-timers do not accrue seniority unless involuntarily reduced to part-time status, in which case he/she continues to accrue seniority as if he/ she were working full-time or if the union and the school district have negotiated seniority or tenure rights for part-timers.



# **Clarification and Refinements**

- In order for the part-timer to accrue seniority rights, such rights must be part of a collective bargaining agreement because the courts have consistently held that Education Law does not provide seniority or tenure rights for part-timers. However, a kindergarten teacher who only works in a half-day kindergarten program will accrue seniority for that service.

# Clarification and Refinements

- If two or more teachers began working on the same day, they obviously have the same amount of seniority. How do you determine preference among them?

# Seniority

The first criterion for determining seniority is actual full-time service rendered (Matter of Dreyfuss v. Board of Education).

If such full-time service is equal, the teachers' respective appointment dates are to be used for determining seniority (Matter of Schoenfeld v. BOCES of Nassau County, et al)





# Clarification and Refinements

- If two or more teachers were appointed at the same board meeting and "no other factors' existed," then the one who was first listed on the board resolution **could** have preference. However, it is clear that other methods of breaking ties, when the tied teachers were appointed at the same meeting, are permissible, so long as those methods are reasonable and non-discriminatory.

# Clarification and Refinements

- A district may consider the salaries of the teachers, when breaking a tie in seniority credit.



- Please note that the negotiation of “tie breakers” for seniority when teachers were appointed at the same meeting is a mandatory subject of bargaining.

Can a district consider the first letter of the last name as a tie breaker?



# Clarification and Refinements

- Probationary teachers have seniority rights, too.
- ENOUGH SAID!



Yes!

# Clarification and Refinements

If a teacher works in the school district, then resigns from the district, and at a later date is re-hired, the time spent in the district *before* the resignation **does not count** towards seniority.

However, time spent on military leave **is** counted toward seniority, *provided* the military leave *interrupted service to the district*. That is, the teacher taught in the district, went directly from the district to the service, then returned directly to the district from the military and resumed his/her old position. This right is guaranteed by Military Law.

# What about funding?

- In the *Matter of McPhillips*, the Commissioner stated:

"The source of funds which were utilized to finance the teacher's employment has no bearing on their right to be afforded protection under the various tenure statutes."

This, of course, means that federally funded teachers have the same seniority rights as all other teachers.



## **3014-a and 3014-b**

- When a teacher, teaching assistant, or teacher aide will be excessed because a district program is contracted out to a BOCES, the BOCES taking over the district program must continue the employment of the districts' teachers, teaching assistants, and teacher aides who worked in the program ( 3014-a(1)).

## **3014-a and 3014-b**

- If the BOCES cannot employ them all, then it must hire those teachers, teaching assistants, and teacher aides with the greatest seniority to fill the teaching positions for the program.

# **3014-a and 3014-b**

- The district must place all excessed teachers, teaching assistants, and teacher aides who cannot be employed on its Preferred Eligible List for similar positions.



## **3014-a and 3014-b**

- The teacher, teaching assistant, or teacher aide maintains the same tenure and seniority status he or she enjoyed before the takeover. The teacher, teaching assistant, or teacher aide may also be entitled to retain the salary step and sick days credited to him or her prior to the takeover.

## **3014-a and 3014-b**

- Even if a teacher accepts an offer of full-time employment with the BOCES, the excessed teacher still retains any Preferred Eligibility rights that he or she has acquired pursuant to Education Law with the component district from which he or she was excessed.

# 3014-a and 3014-b

- A teacher fired for cause by a BOCES following a BOCES takeover does not necessarily lose his or her PEL rights with the component district. Under the law, however, a teacher only retains PEL rights with the component district if the teachers record with that district demonstrates faithful, competent service in the office or position that he or she filled. Therefore, it is the teachers record of service with the component that determines whether the teacher has PEL rights to a position of employment with that component, not the teachers record of service with the BOCES.



## **\*\*\*3014-a and 3014-b\*\*\***

- When a teacher, teaching assistant, or teacher aide is excessed from a BOCES because of a takeback by a component district, the former BOCES employee has a vested right to employment with the component district, and in fact, becomes an employee of the component district by operation of law, subject to availability of positions based on seniority.

# 3014-a and 3014-b

- School counselors and social workers who lose their BOCES jobs due to a takeback of services by a component district are not entitled to these job protections.



# Tenure and Probation

Probationary Appointments must be made in recognized  
TENURE AREA(s)

To earn tenure in a particular tenure area, the teacher must devote at least 40% of their time-- exclusive of time spent in preparation, monitoring, or co-curricular activities -- to that tenure area(s).


- :

Members can earn tenure and seniority rights without appointments.



If the teacher is appointed to an unrecognized/non-existent tenure area, the teacher is deemed to be in the tenure area that encompasses the teacher's actual service

Once the teacher is appointed, the district cannot change their tenure area without their prior written consent. 8 NYCRR § 30-1.9 [c].

A handwritten signature in blue ink, appearing to read "John Smith", is displayed on a white rectangular background.

- Two tenure areas? Transfer from one to the other still requires consent.

Note: If certification allows, a teacher may be assigned—  
long **without consent**—to serve in another tenure area so  
as it is less than 40% of the time.

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- Transfer to a new tenure area begins a new probationary period. 8 NYCRR § 30-1.9 [e]. However,

## ➤ CONSEQUENCES OF AN INVOLUNTARY TRANSFER TO A NEW TENURE AREA

- If a teacher is transferred without their consent, all service in the other tenure area is deemed as a matter of law to constitute service for purposes of seniority in the teacher's prior tenure area. *Cronk v King*, 130 AD3d 1415 [3d Dept 2015].



Probationary Appointments [tenure track appointments] are required when a school district employs a teacher to fill a vacant, unencumbered, full-time teaching position.

Vacant Position(s) [unencumbered vacancies]

Must be filled with a probationary tenure-track appointment

- ✓ PEL
- ✓ New Hire

## ✓ Reassignment

It is well-settled that a school district has broad authority to decide how many employees it needs and how to assign those

“School districts must have sufficient latitude within the law to manage their affairs efficiently and effectively, [and] this implies, where appropriate, the power to consolidate and abolish positions for economic reasons.” *Young v. Bd. of Educ.*, 35 N.Y.2d 31 (1974); *See Chambers v. Bd. of Educ. of Lisbon Cent. Sch. Dist.*, 47 N.Y.2d 279 (1979) (the rights of teachers can yield to sound economic and educational policy).

Probationary Appointments [tenure track appointments] are required when a school district employs a teacher to fill a vacant, unencumbered, full-time teaching position.

-  
**NOT** a substitute (A substitute may be hired only to fill an **encumbered position**- one where a teacher is on leave and expected to return).

**NOT** an “acting” employee

**NOT** a temporary employee

*WAIT....See Feinerman Agreements*



# Did you know?



Teachers may voluntarily consent to an appointment to a limited probationary term which, ***by express agreement***, does not carry an expectation of tenure and seniority.

## Waiver

- Such agreements constitute a waiver of rights and must be entered into freely, knowingly, and openly without taint of coercion or duress.
- Commonly referred to as “Feinerman Agreements” after COA decision *Feinerman v BOCES of Nassau County* where the<sup>11</sup> Court validated such waiver under limited circumstances.



Q. THE TEACHER(S) [already] SIGNED A “FEINERMAN AGREEMENT(S)” IS IT VALID???

A. Probably.

\*Court in *Feinerman* said the decision was limited, but it has been liberally construed (at least by the Third Department).

Factors to Consider:

- ✓ Mutual Agreement between EE and ER?
- ✓ Voluntary Consent?
- ✓ EE was *NOT* TRICKED, COERCED, or PLACED UNDER DURESS.<sup>12</sup>

- ❖ Q. If Feinerman Agreements/Waiver of tenure rights are offered *as a condition of employment* are they valid?
- ❖ A. No, this is viewed as an attempt to evade the tenure laws. *Costello v BOE, E. Islip CSD*, 250 AD2d 846, 847 [2d Dept 1998].

Q. How many hires conditioned on such terms is too many?

A. To be determined.  
valid under the right conditions



Q. Why don't districts hire all teachers under such conditions?

A. They can't.

❖ *A District could not systematically ask all newly hired teachers to execute waivers of tenure rights as a condition of employment as this has been viewed as an attempt to evade the tenure laws. Costello v BOE, E. Islip CSD, 250 AD2d 846, 847 [2d Dept 1998].*

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Probation was three years, now (post 7/1/15) it is four years, unless extended. (Educ. Law §§2509, 2573, 3012, and 3014)

During probation, the teacher can be dismissed at any time (essentially at-will employment). (See, e.g. Educ. Law § 3012[1][a][I])

Dismissal is valid as long as it is not in violation of the Constitution or statute, or in bad faith.

On July 1, 1972 the so-called Fair Dismissal Law, Section 3031 of the Education Law, went into effect in New York State. Since that time, many teachers have come to believe that they had more rights than the law granted them.

The law provides that in those instances where a superintendent of schools intends to recommend that a teacher's services be discontinued (i.e. not be granted tenure) the following shall take place:

At least 30 days prior to the Board meeting where the recommendation of discontinuance is to be considered the teacher shall be informed that the teacher will not be recommended for tenure and shall be notified of the date of the Board meeting at which said recommendation shall be considered.



# Notice

- If tenure will not be granted:
  - 60 days prior to expiration of probationary period, the district must give the teacher notice of that determination. (Educ. Law §§ 2509[1]; 2573[1]; and 3012[2]).
  - 30 days prior to Board meeting. (Educ. Law § 3031)
- Teacher dismissed during the probationary period:
  - 30 days prior to dismissal. (Educ. Law § 3019-a).

# The so-called “Fair Dismissal Law” DOES NOT:

- Guarantee, or even provide for a hearing.
- Grant the teacher the right to confront or cross examine any school official.
- Provide the teacher the right to appear before the Board to argue his/her case, either in a private or public session.



Post 7/1/15, APPR ratings (HEDI) have a role to play in probation. (Educ.Law §§2509, 2573, 3012, and 3014)

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-To pass probation a teacher must have a rating of Effective or Highly Effective in three of the four years.

To pass probation a teacher may not have an Ineffective rating in the fourth year of probation, although the district has the option to offer the teacher a *Juul* agreement.





## Shortening the Probationary Period (Educ. Law §§3012, 3014, 2509 and 2573)

- Jarema Credit
  - Regular substitute service
  - Two years (formerly “*up to two years*”)
  - Immediately preceding probationary appointment
  - Same tenure area
  - Must be certified
- Prior tenure at another school district

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## Extending the Probationary Period

- Unpaid leave
- *Juul* agreement
  - Voluntary, reached and communicated in good faith (no coercion)



Usually a teacher is granted (or denied) tenure based on a recommendation of the Superintendent to the Board of Education and an official act of the board granting (or denying) tenure.

A teacher, however, may obtain “tenure by estoppel” (tenure by operation of law) when the board fails to take action to grant or deny tenure.

Then, if, with knowledge and consent, the board allows the teacher to work beyond the expiration of the probationary period, the teacher obtains tenure by estoppel.



# Probationary Appointments

Probationary appointment before July 1, 2015: 3 year probationary period.

Appointments on or after July 1, 2015: 4 year probationary period.

If appointed on or after July 1, 2015 to be eligible for tenure “the educator” must receive a rating of either effective or highly effective in at least three of the four probationary years. If an educator receives an ineffective rating in year four, they would not be eligible for tenure, but the District may extend the probationary year for an additional year.

Tenure decisions are recommended by the Superintendent and determined by a by majority vote of the Board of Education.

- For all probationary appointments post 7/1/15, it is unclear if tenure by estoppel is still available.
- APPR ratings are also a factor.



# TENURE

Assignment to a different tenure area requires the teacher's prior written consent. (8 NYCRR §30-1.9[c])

A transfer to a different tenure area should be distinguished from a retroactive change in the teacher's appointed tenure area.

An award of tenure may be rescinded prior to the effective date.



2021 and 2022 APPR Bills eliminated the requirement for school districts and BOCES to complete an annual professional performance review (APPR) for any classroom teacher or building principal for the 2020-21 and 2021-22 school years.

- Teachers hired during these years will not be penalized because of the lack of APPR ratings in the 2019-20, 2020-21 and 2021-22 school years.

Classroom teachers or building principals appointed during the 2017-18, 2018-19, 2019-20 or 2020-21 school years, at the expiration of their probationary term, shall be eligible for tenure if he or she received composite APPR ratings pursuant to section 3012-c or 3012-d, of either effective or highly effective in at least one of the four preceding years and did not receive an ineffective rating in the final year of his or her probationary period, or during the most recent school year where a rating was received, and would have been in the superintendents discretion qualified for appointment on tenure based upon performance



Classroom teachers or building principals appointed during the 2021-22 school year would be eligible for tenure if they have received composite APPR ratings of either effective or highly effective in at least 2 of the 4 preceding years and did not receive an ineffective rating in the final year of his or her probationary period, or during the most recent school year where a rating was received, and would have been in the superintendent's discretion qualified for appointment on tenure based on performance.

**Discipline**

# What rights do tenured teachers and teaching assistants have under Education Law?

Education Law § 3020 Prohibits discipline or termination of tenured teachers and teaching assistants absent just cause and proven by the District in accordance with procedures set forth in Education Law § 3020-a.

Education Law § 3020-a Disciplinary procedures and penalties for tenured teachers and teaching assistants.

Prior to the actual hearing the teacher/ teaching assistant can be reassigned:

- » With pay
- » Classroom duties or other "assignment"



## Tenured teacher/teaching assistant due process rights.

Employee *may* be suspended without pay before a due process hearing where teacher/teaching assistant:

- failed to maintain certification;
- received felony conviction regarding drugs or abuse of a minor or student;
- is charged with misconduct constituting physical or sexual abuse of a student.
- (pursuant to caselaw – refused to attend medical exam or refused to bring medical records to exam)

# Tenured teacher/teaching assistant due process rights.

## Charges:

- Written Charges;
- Voted on by BOE;
- Delivered to teacher by certified mail/personal service;
- Teacher/ teaching assistant has 10 calendar days to request a hearing;
- 3 year statute of limitations if not criminal conduct;
- Charges can only be brought during school year.



## Tenured teacher/teaching assistant due process rights (continued).

Grounds for 3020-a charges:

- Insubordination
- Immoral character
- Conduct unbecoming a teacher
- Inefficiency
- Incompetence (2 or more ineffective APPR scores may result in charges, 3 ineffective scores shall result in charges. )
- Physical or mental disability (see Section 913 of the Ed Law)
- Neglect of duty
- Failure to maintain teacher certification



# PENALTIES

- Letter of Reprimand
- Suspension without Pay
- Termination

What is a Holt Letter?

**A written admonition such as a counseling letter of a tenured teacher does not constitute discipline and does not trigger the formal hearing process.**

## **Characteristics of a Holt Letter:**

Should be labeled as a “counseling memorandum”

Letter should be from the teacher’s immediate supervisor and not the Superintendent or Board of Education.

Purpose of letter must be to instruct, correct, warn, or discuss future expectations— should not use accusatory language or impose punishment.

- Calls the teacher’s attention to a relatively minor breach of school policy and encourages compliance.

Contains constructive criticism suggestions for improvement. May contain sharply critical language.



## Can a school district send members for medical exams?

- Education Law § 913. Medical examinations of teachers and other employees.
- To determine physical or mental capacity to perform duties of the job a Board of Education has the power to require any employee to submit to a medical exam with the Board's chosen doctor and at the Board's expense.
- This may be a physical or mental examination and the appointment must be made during contractual workday.
- The employee may be required to bring medical records.
- The employee has the right to be accompanied by a physician or other person of his/her choice.

# Medial Exams



## Can a school district send members for medical exam?

- Employee must be given notice to arrange for presence of his/her own physician or other representative.
- However, a violation of right to be accompanied during examination, without more, does not require suppression of the exam results in a future proceeding.
- The doctor's findings are reported to the Board.
- Refusal to undergo Section 913 exam or provide requested medical records constitutes insubordination (grounds for discipline) and the employee may be taken off payroll.



## Related issues around medical exams and leaves. . .

- District may refuse to allow an employee to return to work following an extended medical absence until the employee provides medical records and submits to an examination by the Board's appointed physician.
- While a school district may require its employees to submit to medical examinations in accordance with Education Law § 913, requiring job applicants to submit to such exams prior to an offer of employment would violate anti-discrimination laws.

# Indemnification

# *Education Law's* protections for school employees (indemnity statutes)

## **Education Law § 3023**

School districts must indemnify and provide legal assistance to employees facing claims of alleged negligence or acts resulting in accidental bodily injury to any person within or without a school building, provided such employee at the time of the accident or injury was acting in the discharge of his or her duties within the scope of his or her employment and/or under the direction of the school board.



# *Education Law's* protections for school employees (indemnity statutes)

## Education Law § 3028

School districts must provide an attorney and pay legal fees in a case where civil or criminal action is brought against a teacher or school related personnel who, in the discharge of his or her duties, takes disciplinary action against a student.

# *Education Law's* protections for school employees (indemnity statutes)

## **Education Laws § 3811**

Requires Districts and BOCES to defend and indemnify its employees for all reasonable costs, and expenses, including awards resulting from any action or proceeding against him/her arising out of the exercise of his/her powers or the performance of his/her duties (other than one brought by a school district or a criminal action brought against the individual).



# Time limits!

Education Law §§ 3023 and 3028: Employee must deliver a copy of the legal papers in the criminal or civil proceedings to the Board within **ten days** of being served to be eligible for district assistance. However, Education Law §3811: says the employee has **five days** of being served with the legal papers to give the Board copies of such documents.

Therefore it is best to serve the Board with the copies of the complaint and demand to be indemnified within **five calendar days** of being served with the complaint. It is best to assume 3811 applies and use the more conservative five days. Otherwise, the district could be exempt from paying for the costs and reasonable expenses of defending any such action, as well as all costs and damages adjusted against the employee.



# Scenario 1 (John)

John Smith is a teaching assistant appointed in his School District two years ago. One day after school, right outside of one of the school building's gates, John sees two male students physically fighting (one boy is bigger than the other). He approaches the students and speaks loudly telling them to stop. They do not listen. John shouts again. The fight continues. John grabs the bigger boy off the smaller boy and gets physically between the two students. The bigger boy screams, "I think you dislocated my shoulder!" The two boys run off before John can do anything further. The next day, John comes to school and does his work without incident.

# Scenario 1 (John)

By the end of that same week John is served with a civil complaint against him alleging he damaged the bigger student's shoulder costing in excess of ten thousand dollars. The District has also received a call from the bigger student's parent complaining that John used excessive force on the boy and caused permanent nerve damage in the boy's shoulder. The parent demands the District do something. The following week John is called into the principal's office and told that his employment will be terminated within two weeks. John contacts his Union.



# Questions raised by John's scenario. . .

Before we review the law, think about the following questions:

- Is there any assistance the Union can give John immediately regarding the lawsuit facing him?
- Has the District given John enough notice of his termination?
- What rights, if any, does John have regarding his termination?



## Returning to John . . . Who pays if you are sued?

Is there any assistance the Union can give John immediately regarding the lawsuit facing him? Is there any urgency in this situation?

*John must serve the District with a request for indemnification and a copy of the complaint against him immediately.*

*The best advice is for John to contact his union immediately and for his union to assist him to file the demand on the BOE within five days of receipt of the complaint.*

*Always assume calendar days.*

**John . . . How much notice is the District required to give untenured employees of their termination?**

Did the District give John sufficient notice that he was being terminated (remember the District gave him 2 weeks of notice)?

*No – Education Law 3019-a requires thirty days of notice.*

What rights, if any, does John have regarding his termination?

*Under Education Law 3031 he can only request the reasons for the termination.*

*The only remedy he can get is the additional notice (2 additional weeks of pay in this case).*



## More questions raised by John's scenario. . .

- Could John have done anything differently after the incident between the two students?
- What if there had been no incident and John was discontinued at the end of his fourth year of probation (with proper notice from the District) but John had not received an evaluation that year? Would the fact that the District failed to evaluate John have afforded him any rights regarding his termination by the District?



John . . . Final considerations.

**Could John have done anything differently after the incident between the two students?**

*He should have reported the incident immediately so that he could give the District his side of the story first.*

**What if there had been no incident and John was discontinued at the end of his fourth year of probation (with proper notice from the District) but John had not received an evaluation that year? Would the fact that the District failed to evaluate John have afforded him any rights regarding his termination by the District?**

*No, in 2015 the legislature modified to law to specifically allow for the termination of probationary teachers/ teaching assistants without considering their APPR score.*

Before we move on . . .

Questions regarding Districts indemnifying employees, giving notice of termination to untenured employees, or rights of untenured employees?



## Scenario 2 (Mary)

Mary Smith has worked in the School District for eleven years and is a full-time tenured elementary teacher and proud NYSUT member.

After her tenth year of working without problems, Mary began going through personal issues. In her most recent observation Mary was rated "developing." Mary's principal told her he was concerned about Mary's work performance as well as her emotional instability. The principal told Mary that a fellow teacher reported that Mary had been slurring her speech recently and had seemed somewhat incoherent in a conversation- - though no alcohol was detected on her breath.



## Scenario 2 (Mary continued)

The following year (her eleventh year in the District) Mary has been placed on a Teacher Improvement Plan (TIP). Teachers begin increasingly to report erratic behavior by Mary and a few parents have also complained to the principal. The principal comes to you as a union representative and gives you the information above and asks if there is something the Union can do to help Mary?

Meanwhile the District has decided to layoff elementary teachers. There is only one elementary teacher with less seniority than Mary, he has ten years in the District as an elementary teacher.

The teacher contract has a provision for paid sick leave and unpaid medical leave (up to one year). Mary has only 43 sick days in her bank.

# Considerations regarding Mary

What rights does the District have to address Mary's alleged erratic behavior?

What rights does the District have to address Mary's alleged erratic behavior?

*Under Education Law Section 913 the District may order that Mary see the District doctor.*

*This must come in the form of a resolution from the Board of Education.*



Any thoughts regarding Mary  
being placed on a TIP?

What kind of help, if any, can the Union offer Mary if the District requires her to undergo a medical exam?

?

Mary . . . The medical exam.

What kind of help, if any, can the Union offer Mary if the District requires her to undergo a medical exam?

*A Union representative can attend the exam with Mary if Mary wants that.*



Based on the sick time language in the teachers' contract, what proactive steps could the Union suggest to Mary to try and avoid District action?

What considerations must the Union (and Mary) keep in mind if a proposed solution involves any time off for Mary from the District?

## Mary . . . taking sick leave time.

Based on the sick time language in the teachers' contract, what proactive steps could the Union suggest to Mary to try and avoid District action?

*The Union can discuss the possibility of medical leave with Mary pursuant to the parties' contract.*

What considerations must the Union (and Mary) keep in mind if a proposed solution involves any time off for Mary from the District?

*If Mary takes time off and it is without pay she will not accrue seniority during her time off. This may push her behind the least senior elementary teacher for purposes of layoffs. Note that “seniority” is not defined by statute. Case law from the courts and Commissioner has defined seniority as full-time paid service in the District. Paid sick time counts as paid service – unpaid sick time does not.*

What if more evidence comes out that Mary is in fact drinking alcohol while teaching, what rights does she have if the District wants to terminate her employment



Mary . . . due process protections for tenured  
? employees.

*Because Mary is tenured she has a right to a hearing prior to discipline against her. The District is required to prove that she has been drinking alcohol while at work. Mary will remain on the payroll until her hearing and until an independent arbitrator decides whether she may keep her job.*

*As a NYSUT member Mary receives her own attorney from NYSUT to present her defense. Non-members are not provided with attorneys from NYSUT.*

Before we move on. . .

Any questions regarding Districts' ability to send employees for medical exams, unpaid leave and seniority accrual or the due process rights (3020-a rights) for teachers and teaching assistants?



## Scenario 3 (Bob)

Bob Smith received a probationary appointment in the District as a Math teacher (for which he is certified) ten years ago. After five years of teaching, Bob's principal asks Bob if he would mind picking up two English classes as part of his five instructional class load. Bob verbally agrees to teach the two English classes. Bob teaches a load of three Math classes and two English classes for five of his ten years in the District.



In Bob's tenth year the District decides to abolish one Math position. Bob has a total of 10 years as a Math teacher and has taught 2 English classes for 5 years. Bob is the least senior in the Math department. However, there are three current English positions in the District. Sarah Jones is one of the English teachers and she has three years in the English department.

Bob comes to you and asks if he is out of a job or if he has any rights to Sarah's English position?

## Scenario 3 (continued)

Based on the facts about Bob please consider the following:

- 1) What facts do we need to know about Bob to know whether he has any rights to a job as an English teacher? Why are these facts relevant?

## Returning to Bob . . .

### Consideration 1

*Is Bob certified in English? If so, he will have begun accruing full time seniority in the English tenure area. A teacher must be certified in the tenure area in which they are teaching to acquire seniority in a tenure area.*



## Bob - Consideration 2

Assuming Bob has seniority in both Math and English in the District, to which job would he be entitled?

*Bob has the least seniority in Math so would likely be laid off in Math, however Bob likely acquired full time seniority in the English tenure area because he is certified in English and spent 40% of his time teaching in the English tenure area (2 out of his 5 classes equals 40%). Bob taught for five years in the English tenure area and therefore has more seniority in English than Sarah (who only has three years).*

## Bob-Consideration 3

Assuming Bob is properly laid off by the District, and he discovers that the District hired an employee to fill in as a long-term leave replacement the following year (while Bob was laid off) what rights does Bob have to the leave replacement position? What additional information do you need to know to answer this question?

## Bob - Consideration 3

*Pursuant Education Law 3013(b) Bob may be entitled to the leave replacement position. However we need to know if it is foreseeable that the leave replacement position will last for five months or more.*



2) If Bob has a right to Sarah's English position, what, if any rights does Sarah have?

*Sarah will be placed on the PEL.*

Any  
questions?





