

NYAPT Winterfest Legal Update

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Mile Markers on the Legal Roadmap

- Fitness for Duty
- New Laws of 2022
- Cases to Note
- Zero-Emission Vehicles/All Electric
- Improper Idling Enforcement
- Legislation to Watch



District's Obligation to Monitor School Bus Driver's Fitness for Duty

- Three (3) governing bodies regulate school bus drivers.
 - The New York State Department of Motor Vehicles. (N.Y. Veh. & Traf. Law § 509-L): “Drugs, Controlled Substances and Intoxicating Liquor.”
 - New York State Education Department (SED Regulation 8 NYCRR 156.3).
 - Federal Department of Transportation (49 CFR 382.307).

District's Obligation to Monitor School Bus Driver's Fitness for Duty (Contd.)

- N.Y. Veh. & Traf. Law § 509-L:
 - No motor carrier shall require or permit a driver to:
 - “be on duty or operate a bus if, by such **person’s general appearance or by such person’s conduct or by other substantiating evidence**, such person appears to have consumed a drug, controlled substance or an intoxicating liquor within the preceding six hours, or eight hours when such driver operates a school bus as defined by section one hundred forty-two of this chapter.”
 - Northland Transp., Inc. v Jackson, 271 A.D.2d 846, 706 N.Y.S.2d 501, 2000 N.Y. App. Div. LEXIS 4448 (N.Y. App. Div. 3d Dep't 2000)).

There was undisputed evidence that the driver manifested immediately apparent signs of intoxication. There was a complete lack of evidence concerning what efforts, if any, petitioner took to comply with the statute, namely, to observe and evaluate the general appearance or conduct of its drivers to ensure that none appeared to be under the influence of drugs or alcohol before operating a bus. Thus, the bus company was found to have permitted one to drive, who was drunk, in violation of the VTL.

District's Obligation to Monitor School Bus Driver's Fitness for Duty (Contd.)

- SED Regulation 8 NYCRR 156.3.
 - Responsibility for the transportation program rests with the school district and the superintendent of schools. (SED Regulation 8 NYCRR 156.3 b1).
 - All drivers (including contract drivers, substitutes and drivers who begin employment during the year) are approved in writing by the superintendent of schools or designee/agent. (SED Regulation 8 NYCRR 156.3 b1; see also, Education Law 3624).
 - Only drivers who have the appropriate license for the vehicle being operated and who have complied with DMV and SED Regulations are permitted to drive students to and from home on regularly scheduled routes. (SED Regulation 8 NYCRR 156.3 b4).
 - All school bus drivers receive a physical exam within each 13-month period. (SED Regulation 8 NYCRR 156.3 b3ii).

NYSED Guidance – Monitoring School Bus Driver’s Fitness for Duty

- The guidance issued with respect a carrier’s/district’s obligation to monitor drivers for apparent alcohol and drug use, both prior to and after a driver’s shift, has remained unchanged since 2006. (See, NYSED District Safety Review 2006). SED instructs:
 - A trained supervisor should be physically present to monitor drivers for possible drug or alcohol use as they go on duty in the morning and afternoon each day.
 - A driver should not be allowed to be on duty or operate a bus, if by the driver’s general appearance or conduct he or she appears to have consumed an intoxicating liquor within the past eight hours.
 - Courts have held that operations must have a procedure in place to detect a driver’s intoxicated appearance or behavior. (*In re Northland Transportation, Inc. v Jackson*, 271 AD2d 846 [3d Dep’t 2000]).
 - Operations can be held liable if they knew or should have known that one of their drivers appeared to have consumed alcohol in the preceding eight-hour period.

District's Obligation to Monitor School Bus Driver's Fitness for Duty (Contd.)

- Federal Department of Transportation (DOT) Regulations under Part 382 of Title 49 require:
 - A trained supervisor is present to monitor drivers for possible drug or alcohol use as they go on duty in the morning and afternoon. See, (49 CFR 382.307).
 - All new drivers pass a drug test prior to transporting students. The final test result is received before the driver transports students. See, (49 CFR 382.301).
 - All drivers, including substitutes and part-time drivers, are in a random drug and alcohol testing pool. See, (49 CFR 382.305).

Impact of Legalized Cannabis

- Marijuana Regulation and Taxation Act (MRTA)
 - Prohibits employment discrimination based on an individual's political activities, legal use of consumable products, legal recreational activities, or membership in a union.
 - Provides protections to certain individuals who legally use cannabis outside of work hours, off of the employer's premises and without use of the employer's equipment or other property.



MRTA

- No violation of Section 201-d where the employer takes action related to the use of cannabis because the:
 - Employer's actions were required by State or Federal statute, regulation or mandate;
 - Employee is impaired by the use of cannabis while working; or
 - Employer's actions would require such employer to commit any act in violation of federal law or would result in the loss of a federal contract or federal funding.

MRTA

- Performance concerns
 - Increased danger to the affected employee.
 - Increased exposure and danger to co-workers.
 - Increased liability associated with equipment operations.
 - Increased exposure involving physical coordination.
 - Lifting, fine motor skills, ladders, stairs.

MRTA

- Inconsistent job performance
- A lack of concern over personal appearance and hygiene
- Bloodshot eyes
- Odor/smell of alcohol and marijuana
- Disorientation or confusion
- Slurred speech
- Erratic behavior
- Unable to perform routine tasks

New Laws

Chapter 56 of the Laws of 2022

- Effective until June 30, 2023. RSS Law §211 had a new subdivision (9) added to it. This allows reemployment of retirees without any diminution in pension.
- According to the new law, “notwithstanding 211 or 212, or any other law, a school district or BOCES may employ a retired person in a position **without any effect on his or her status** as retired and without suspension of pension benefits or diminution of retiree earnings. This brings up some interesting questions. For example, entering a three year contract with a superintendent with a traditional salary.
- This is fine, but what if this law does not get renewed after June 30, 2023?

Chapter 138 of the Laws of 2022

Division of Human Rights (DHR): Toll free **hotline** for complaints of workplace harassment. The new laws mandated DHR to establish a toll-free number for confidential reporting of workplace harassment. The hotline will provide callers attorney advice on what their rights are, as well as advice on specific remedies.

Along with DHR

- Complaints filed after 10-12-21, the Division will no longer issue Commissioner's Orders discontinuing complaints after private settlements.
- *“This change is being made in the public interest for increased transparency and good governance regarding settlements. Oftentimes, when a complainant retains private counsel and the matter settles, the parties enter into private settlements - meaning the terms of the settlement are not disclosed in a written agreement available to either the Division or the public. Nearly half of all post-probable cause settlements are private settlements without any public record of the terms of the settlement.”*

DHR

- Previously, when you reached settlement you sought an order from the DHR Commissioner confirming the matter is resolved.
- Now for anything filed after 10-12-21 where discontinuance is requested, the complainant's attorney must submit a written statement explained the request for discontinuance.
- The Division is clear that a discontinuance, and Commissioner's Order, will no longer be granted for private settlements. Instead, to proceed with a settlement, the parties may either settle through a public Order after stipulation that includes the agreed upon terms or proceed through the Division's public hearing process.

Chapter 234 of the Laws of 2022

- This extended the leave provisions in NYS Civil Service Law to December 31, 2023.
- This is the new section 159-c of the Civil Service Law which allows up to **four hours leave time** for Covid vaccinations.
- Issues for us may be the negotiability of the leave – can we mandate it occur to the largest extent possible after hours so we don't have to accommodate and get substitutes?

Improper Practice (*Social Service Employees Union and NYC (15 OCB2d 18)*)

- Union claimed the City violated the Act when it unilaterally implemented staffing and scheduling changes affecting the City Youth Development Specialist employees assigned to the Family Court detention rooms.
- PERB found the staffing and scheduling changes could be made and are not mandatory topics. Notably, the Union made no specific factual allegations of the practical impact. This persuaded the Board.

Social Service Employees Union and NYC (15 OCB2d 18)

- Scheduling work is not a mandatory subject of bargaining.
- Management has the right to assign work in a way that it deems necessary to maintain the efficiency of government operations.
- Hours are mandatory and must bargain total number of hours employees work per day or per week.
- Absent a limit in a CBA the City may take unilateral action in these areas.
- Here, the start and end times were altered but total hours were not. Nothing in the CBA limited managements right to alter start and end times.

Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville CSD (2022 NY APP Div LEXIS 3460; Slip 03566 (June 2, 2022))

- Petitioner United Jewish Community of Blooming Grove, Inc. is a not-for-profit corporation that provides services to Jewish families in Orange County. Petitioners Joel Stern and Yitzchok Epstein reside within respondent Washingtonville Central School District and send their children to nonpublic schools in the Village of Kiryas Joel.
- Although the District provides school bus transportation to resident students who are enrolled in nonpublic schools, it does so only on days when public schools are in session. Given that nonpublic schools, at times, observe different holidays and school breaks than public schools, there are days throughout the school year when the District does not provide transportation to nonpublic school students even though their schools are in session.
- The District's policy on this issue is consistent with guidance posted by (SED), specifically, an online handbook on transportation of students enrolled in nonpublic schools.

Matter of United Jewish Community of Blooming Grove, Inc.

- On two occasions during the 2020-2021 school year, counsel for petitioners wrote to the District, requesting that it provide bus transportation for students of nonpublic schools in Kiryas Joel on days when those schools were in session but the public schools were closed.
- Washingtonville denied. Petitioners sued seeking declaration that school districts are required to transport nonpublic school students on **all days that their schools are open** and that SED's guidance to the contrary is invalid, together with a permanent injunction preventing the District from denying transportation to nonpublic school students on those days.

Matter of United Jewish Community of Blooming Grove, Inc.

- Supreme Court granted summary judgment and awarded to the petitioners.
- Appellate Division **REVERSED!**
 - Education Law § 3635(1)(a) permitted, but did not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools were closed.
 - The Legislature could not have intended to require school districts to transport nonpublic school students in the summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons, none of which would be foreclosed by Supreme Court's interpretation.
 - HELD: Education Law § 3635 (1)(a) permits, but does **not require**, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed.

Kennedy v Bremerton (597 US ___ 2022)

CONCISE FACTS: Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after, school games. His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause. Kennedy refused and instead rallied local and national television, print media, and social media to support him.

Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964. The district court held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified. Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

Kennedy v Bremerton (597 US ___ 2022)

- **ISSUE:** Is a public school employee's prayer during school sports activities protected speech, and if so, can the public school employer prohibit it to avoid violating the Establishment Clause?
- **HELD:** Yes. No. The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Justice Gorsuch authored the majority opinion of the Court.

New York State Electric Bus Mandate

- In January of 2022 Governor Hochul announced a plan to propose legislation which will have a massive impact on the environment...and budgets.
- The proposed legislation seeks to accomplish two goals:
 - (1) making all new school bus purchases zero-emission vehicles by 2027; and
 - (2) all school buses being zero emission by 2035.
- A few noteworthy statistics shed light on anticipated difficulties with compliance.
 - Currently, approximately 95% of the nation's school buses run on diesel.
 - Electric school buses have upfront costs more than double that of diesel buses. The electric buses cost around \$300,000 to \$400,000 with similarly sized diesel buses going for around \$125,000 to \$150,000.

New York State Electric Bus Mandate

- Gov. Hochul announced on January 5th, 2022, that the State would provide aid for installing electric bus infrastructure, including the purchase and lease of buses and their charging equipment.
- Funding for this transition will come from:
 - American Rescue Plan.
 - The Diesel Emissions Reduction Act.
 - The Infrastructure, Investment and Jobs Act.
 - The Inflation Reduction Act.
 - The Volkswagen Clean Air Act Settlement.
 - The New York Truck Voucher Incentive Program (NYTVIP).
- An additional \$500 million is set to be available from New York's proposed Clean Water, Clean Air, and Green Jobs Environmental Bond Act.

New York State Electric Bus Mandate

- With more than 50,000 school buses, New York State holds ten percent (10%) of the national fleet of school busses.
- With current pricing for electric busses being approximately \$150,000 to \$275,000 *more* than diesel buses, plus infrastructure upgrade costs of \$10,000 to \$30,000 per bus...the upfront cost to electrify New York's entire school bus fleet will be between \$8 billion and \$15.25 billion *more* than replacing them all with new diesel buses.
 - It should be noted that additional funding measures and relief packages are likely to be provided in the next several years.
- As it stands, combined outside funding sources (see, prior slide) currently add up to less than \$800 million (which represents an estimated 10% of the transition cost).

New York State Bus Idling Laws

- These Laws are not new, but they have recently become subject to enforcement by the New York State Attorney General.
- New York State Idling Law: (6 NYCRR § 217-3.2)
 - Prohibits a heavy-duty vehicle including a bus or truck, the motive power for which is provided by a diesel or non-diesel fueled engine, from idling for more than five consecutive minutes.
- New York City Idling Law: NYC Administrative Code (§ 24-163).
 - States, “*no person shall cause or permit the engine of a motor vehicle, other than a legally authorized emergency motor vehicle, to idle for longer than three minutes.*”

New York State & City Bus Idling Laws Sparks NYC Lawsuit

- In mid-May of 2022, three companies, operating more than more than 600 school buses in New York City were sued by the State Attorney General's Office on allegations they repeatedly violated bus idling laws and polluted New York City's air since 2019.
- The lawsuit alleges the companies' buses idled longer than state and local laws allow at locations around the city that are predominantly low-income and have high concentrations of Black and Hispanic residents.
 - Exceptions to the state law include: idling necessary due to traffic conditions; to maintain temperatures (under regulation) for passenger comfort; to provide auxiliary power or for maintenance purposes; to recharge batteries in hybrid electric vehicles; for electric vehicles; and for emergency service vehicles.

NYS Senate Bill S.3378 (Bus Monitors)

- Senate Bill S.3378: Requires a school bus attendant or school bus monitor on all school buses transporting students in kindergarten through sixth grade to or from school or to or from any school related activity.
- Purpose: “To ensure that school children are safely escorted on and off of their school buses by an adult school bus attendant or monitor. Such attendants or monitors will accompany these students on and off of the school bus to ensure that students are visible as they cross the road, are a safe distance from the bus or any other motor vehicles, and make it safely out of the road.” See, (Senate Bill S.3378).
- Status: Remains in New York State Senate Committee on Transportation.

Senate Bill S.2570 – Two Stop Arms

- Purpose: Requires the commissioner of motor vehicles to promulgate rules and regulations to require that every school bus be equipped with a stop-arm on each side of the bus regardless of seating capacity. Prohibits the operation of a school bus on public highways without a functioning stop-arm on each side of such bus.
- Current Law: Under VTL § 375 all school buses in the state are already required to be equipped with a driver's side stop-arm camera. Despite these extraordinary measures, the trend of illegal passing school busses has persisted, with an estimated 50,000 motorists illegally passing a school bus statewide each school day, according to the NYAPT Survey.

Senate Bill S.2570 – Two Stop Arms

- Rationale:

“The Department of Pupil Transportation at the NYS Education Department, meanwhile, states that the youngest children are most at risk of being harmed by this reckless behavior, as they are involved in 68% of school bus fatalities despite representing less than 35% of the student population.”

- Status: While the bill is currently referred to the Senate Transportation Committee; if signed into law, it would become effective 108 days after the Governor signs.

NY Assembly Bill A.3423

- Purpose: Amends N.Y. Veh. & Traf. Law § 1229-d to require school bus drivers and school bus attendants who ride with children attending preschool special education programs to complete training in the needs of such children.
- Status: Sits in Senate Committee on Transportation which has been active in the last year.

Final Points

Late Bussing – A District’s Choice?

Appeal of CLANCY, on behalf of his child, from action of the Board of Education of the Lynbrook Union Free School District regarding transportation (Jan. 10, 2023).

- **FACTS:** Parent of child attending private school outside the district challenged the Lynbrook School District’s decision not to offer late bussing to any public or nonpublic school students.
- **ISSUE:** Whether the Board of Education could lawfully choose not to provide late bussing to nonpublic school students, or public school students.
- **HOLDING:** Commissioner of Education ruled: “. . . school districts are not legally required to provide a late bus for any pupil.” Should a district elect to provide late bussing to its public school students, however, they must offer transportation to nonpublic school students “in like circumstances” (*id.*; see generally, *Appeal of Treacy*, 61 Ed Dept Rep, Decision No. 18,038).

Bus Stop Variance

Appeal of SCOTT MULLIGAN, on behalf of his daughter, from action of the New York City Department of Education regarding transportation (Aug. 3, 2021).

- **FACTS:** A parent appeals the determination of the New York City Department of Education to deny his child a hazard variance request which would provide the child with a different location for pick up and drop off. The parent alleged, among other hazards, that there were no sidewalks or shoulders along the walking route from the house to the bus stop.
- **ISSUE:** Whether the Office of Pupil Transportation conducted a hazard evaluation along the student's route to and from school in accordance with the procedure for inspecting a stop following a hazard variance request. Whether the OPT's decision not to grant the variance was improper.
- **HOLDING:** The Parent did not meet their burden of proving entitlement to a bus stop variance for their child where they merely claimed that the bus stop was hazardous, without evidence or photographs in support of his assertions, that dangerous blind spots existed at the stop.
 - *In considering a bus stop variance based on purported hazards the OPT's inspection will consider certain conditions such as the number of road lanes, speed limit, visibility, and traffic. Where these conditions do not warrant a variance the OPT may choose not to provide one.*

Thank you

