

# **Getting it Right: A Review of Elections Requirements**

**Prepared and Presented by**

**Kimberly A. Fanniff  
Senior Staff Counsel**

**Jeffrey Mongelli  
Senior Staff Counsel**

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**New York State School Boards Association, Inc.**

# ANNUAL MEETING AND ELECTION

## DATE, TIME AND PLACE OF ANNUAL MEETING

1. School boards must present the proposed school budget for the upcoming school year for voter approval at the annual meeting and election held both to elect school board members and approve the school budget and other specific propositions (Educ. Law Art. 41). Each school district must hold its annual meeting and election on the third Tuesday in May.

Voting on school budgets and board member elections on separate days is not permitted.

- a. If, at the request of a local school board, the commissioner of education certifies no later than March 1 that the election would conflict with religious observances, the election may be held on the second Tuesday in May (Educ. Law §§ 1804(4), 1906(1), 2002(1), 2022(1), 2601-a(2)).

(1) In such an instance, the date would change only for the district making the request. That district must submit to the Office of Educational Management Services at the State Education Department (SED) a request letter and supporting documentation with sufficient time for processing and issuance of an order allowing the date change (see 2011 Voting Date Change - Update, NYS Education Department, available at: <http://www.p12.nysed.gov/mgtserv/districtclerks/2010StatewideVotingDateChangeUpdate.htm>).

- b. Although the Albany City School District holds its annual budget vote on the third Tuesday in May, like other school districts, its school board members are elected at a general election the first Tuesday in November conducted by the Albany County Board of Elections (Educ. Law §§ 2502(9)(b), (p), 2602(1)).
- c. In addition, school board elections in the Big 5 also take place at different dates and times as specified by law (Educ. Law § 2553).
- d. The date for holding the annual meeting and election may not be altered to await the outcome of contract negotiations before presenting the school budget for voter approval (Educ. Law §§ 1804(4); 2002(1); 2022(1); 2601-a(2); see Opn. of Counsel No. 228, 8 Ed Dept Rep 227 (1969)).

If a school board underestimates the amount needed to meet salary and other obligations under the contract once it is settled, it may:

- Appropriate an additional amount to meet these obligations (see *Matter of New Paltz CSD*, 30 Ed Dept Rep 300 (1991), citing *Matter of Fagan*, 15 Ed Dept Rep 296 (1976)).
- Issue a budget note during the last nine months of the school year, in an amount not to exceed five percent (5%) (more with voter approval) of the district's annual budget (Local Fin. Law §29(3)).

However, if the budget is defeated, the total contingency budget, including the additional amount appropriated by the board, is subject to certain caps on contingency budget expenditures (discussed in more detail below) (Educ. Law § 2023).

2. Most school districts must hold their annual meeting and election during at least six consecutive hours after 6:00 a.m., two hours of which must be after 6:00 p.m., as determined by resolution of the trustees or school board (Educ. Law § 2002(1)).

Small city school districts must hold their annual meeting and election during at least nine consecutive hours, beginning not earlier than 7:00 a.m., two hours of which must be after 6:00 p.m., as established by board resolution (Educ. Law § 2602(3)).

3. School districts that are not divided into election districts and conduct their election or vote by a show of hands or voice vote must hold their annual meeting and election at 7:30 p.m., unless the time is changed by a vote at a previous district meeting (Educ. Law § 2002(1)). In such districts, once the proposed budget has been presented, the meeting may not be adjourned or concluded until the budget has been voted on (*Appeal of Mazzurco*, 6 Ed Dept Rep 101 (1967); see also *Appeal of Kerr*, 76 St. Dep't Rep. 121 (1955)).
4. If the election is not held on the statewide voting day, the school board or the district clerk must call a special district meeting to transact the business of the annual meeting, which must be held on the same date specified by law for conducting a school budget revote.
  - a. If the school board or district clerk fails to call such a special meeting, then the district superintendent or the commissioner of education may order a special district meeting to conduct the business of the annual meeting. The officers elected at such a special meeting hold their offices only until the next annual meeting, and until their elected successors have been qualified (Educ. Law § 2005).

5. The annual meeting and election is held at the school(s) designated by the school board for this purpose. If the district does not have a school, or if the school is not accessible or adequate, then the annual meeting and election may be held in any place suitable for the occasion (Educ. Law § 2002(1)).

6. In common school districts, the annual meeting and election is called to order by the sole trustee, the chairperson of the board of trustees, or a person chosen by the trustee or trustees. Once the meeting is called to order, the qualified district voters present at the meeting nominate and elect a qualified voter in attendance to serve as permanent chairperson (Educ. Law §§ 2021(1), 2025(1)). As qualified voters, members of the school board are eligible to serve as chairperson (*Appeal of Uciechowski*, 32 Ed Dept Rep 511 (1993)).

In union free, central, and small city school districts, a qualified voter appointed by the school board as permanent chairperson declares the polls open and closed at the appropriate time (Educ. Law §§ 2025(2), 2601-a(2)).

## ACTIVITIES PRECEDING THE ANNUAL MEETING AND ELECTION

### *Notice of Annual Meeting*

1. The district clerk must publish notice of the date, time, and place of the annual meeting and election four times during the seven weeks preceding the date of the annual meeting and election, in two newspapers having general circulation, or one newspaper of general circulation, if there is only one, with the first publication occurring at least 45 days before the date of the annual meeting and election (Educ. Law §§ 2003(1), 2004(1), 2121(4), 2601-a(2)).
  - a. A newspaper of general circulation is, with narrow exceptions, one that is published at least weekly; that contains news, editorials, features, advertising or other matter regarded as of current interest; that is of paid circulation; and that is sent by at least second class mail (Gen. Constr. Law § 60).
  - b. The fees that newspapers may charge for publishing the notice of annual meeting are set forth in section 8007 of the Civil Practice Law and Rules. A school district may not pay a claim for publication of a notice in a newspaper that does not meet the legal definition of a newspaper of general circulation (Opn. St. Comp. 93-33).
  - c. If no newspaper of general circulation is available, or if both newspapers having general circulation in the district refuse to publish the notice at the rates prescribed by law, the notice must be posted in at least 20 of the most public places 45 days before the meeting (Educ. Law §§ 2003(1), 2004(1), 2601-a(2)).
2. The notice must state the date, time, and place of the annual district meeting and election (Educ. Law §§ 2003(1), 2004(1), 2601-a(2)). It also must include the following:
  - a. The date, time, and place of the public hearing on the budget (Educ. Law §§ 1608(2), 1716(2), 2601-a(2)).
  - b. A statement that district residents may obtain a copy of the proposed budget at any district schoolhouse, during designated hours, on each day other than a Saturday, Sunday, or holiday during the 14 days preceding the date of the annual meeting and election and on the day of the election (Educ. Law §§ 1608(2), 1716(2), 2004(6)(d)).
  - c. Notice of any proposed tax, together with a statement specifying both the purpose and the amount of spending for which the tax will be levied, where such tax is proposed to finance: (1) an addition to or change of site or purchase of a new site; (2) purchase of any new site or structure; (3) grading or improving a school site; (4) purchase of an addition to the site of any schoolhouse; (5) purchase of lands and buildings for agricultural, athletic, playground, or social center purposes; (6) construction of any new schoolhouse or the erection of an addition to any schoolhouse already built; and (7) payment or refund of any outstanding bonded indebtedness (Educ. Law § 416(3)).
  - d. Where required by statute, the substance of each specific proposition to be voted on, for example, a proposition:

- (1) To levy a tax by installments as a condition prerequisite to the adoption of a bond resolution or capital note resolution where such bonds or capital notes will be issued to finance a specific object or purpose. The notice of the meeting at which such a proposition shall be voted upon must state the estimated maximum cost of each item of such specific object or purpose and the estimated total cost of all the items (Educ. Law §§ 416(2), 2009; see also Local Fin. Law § 41.10). "There is no legal requirement that the notice of the election specify the term of the bonds" (*Appeal of Brousseau*, 39 Ed Dept Rep 397 (1999)).
  - (2) To rescind a district vote to raise money or to reduce the amount thereof (Educ. Law § 416(5)).
  - (3) To establish certain reserve funds and/or to make expenditures there from (Educ. Law § 3651(1)(b), (3)).
  - (4) To increase or decrease the number of members of the school board (Educ. Law §§ 1703(2), 2502(4)(b); see also *Appeal of Rosenberg*, 31 Ed Dept Rep 398 (1992); *Appeal of Como*, 30 Ed Dept Rep 214 (1990); *Appeal of Swanson*, 29 Ed Dept Rep 503 (1990); *Appeal of Presutti*, 17 Ed Dept Rep 445 (1978)).
  - (5) To increase or decrease the term of office (i.e., the number of years served) of board members in small city school districts (Educ. Law § 2502(4)(b)).
- e. A statement that qualified voters may apply for absentee ballots at the district clerk's office and that a list of persons to whom absentee ballots have been issued will be available for inspection in the district clerk's office during each of the five days prior to the day of the election, except Sundays (Educ. Law § 2004(7); cf. Educ. Law §§ 2018-a(6), 2018-b(7), which state that this list need only be available for public inspection in the district clerk's office "during regular office hours until the day of the election").
  - f. The time and place that the board of registration will meet to prepare the register of the school district (where applicable), together with notice that any person who is not already registered, upon proving that he or she is entitled to vote in the district, may have his or her name placed upon the register. In addition, the notice shall state that the register containing the names of qualified voters will be available for inspection in the clerk's office during the hours determined by the district on each of the five days prior to the day of the election, except Sundays (Educ. Law §§ 2004(5), (6), 2606(6)).
  - g. That petitions for nominating candidates for office of school board member must be filed in the district clerk's office between 9:00 a.m. and 5:00 p.m. no later than 30 days (20 days in small city districts) before the election (Educ. Law §§ 2003(2), 2004(2), 2601-a(2), 2608(1)).
- (1) Note that if the deadline for filing petitions falls on "a Saturday, Sunday or public holiday," the filing may be performed on the "next succeeding business day" (Gen. Constr. Law § 25-a(1); see also *Appeal of Williams*, 36 Ed Dept Rep 270 (1996)).

### ***Public Hearing on the Budget***

1. School districts, must hold a public hearing on the budget at least seven days but not more than 14 days prior to the annual meeting and election or special district meeting at which the school budget vote will occur (Educ. Law §§ 1608(1); 1716(1); 2022(2)).

Large city school districts are not required to hold a public hearing on their proposed school budget. Instead, they prepare an itemized estimate of the sum needed for necessary and other authorized expenses. That estimate is then filed with either the mayor, city manager, other city official, or in New York City with the chancellor, as specified in law (Educ. Law §§ 2576, 2590-q).

2. The purpose of the hearing is to present to the voters the proposed school budget for the upcoming school year (*Appeal of Hubbard*, 45 Ed Dept Rep 422; 2006).
  - a. Although district voters have the right to submit propositions that affect the budget if the propositions concern a matter that requires voter approval (such as an increase in transportation mileage limitations), they do not have the right to add items to a school board's proposed budget. The authority to develop a budget for a school district rests with a board of education, not with the voters of the district (*Matter of Young v. Board of Educ.*, 41 A.D.2d 966 (2<sup>nd</sup> Dept. 1973) *aff'd* 35 N.Y.2d 31 (1974); *Appeal of Sperl*, 33 Ed Dept Rep 388 (1994)).
  - b. Similarly, school district voters do not have the right to delete items from the school board's proposed budget (*Matter of Ansel*, 28 Ed Dept Rep 406 (1989); see also *Appeal of Krause*, 27 Ed Dept Rep 57 (1987)).

3. School districts must give notice of the date, time and place of the public hearing in the notice of the annual meeting and election or of a special district meeting (Educ. Law §§ 1608(2); 1716(2)).

There is no decisional law indicating what would happen if a district fails to hold the budget hearing within the required time frame. It may or not be deemed a technical violation that would not require overturning the budget vote absent proof that the outcome of the vote was affected by the timing of the hearing.

4. Generally, a quorum of the school board is not required to hold the public hearing on the school budget (*Appeals of Campbell & Bedard & Coleman*, 41 Ed Dept Rep 207 (2001)). However, a quorum of the board would be necessary if the school board conducts the budget hearing as part of a school board meeting.

### ***Follow up to the Public Hearing- Budget Notice***

1. Following the public hearing, school district must mail to all qualified voters in the district a school "Budget Notice", no later than six days prior to the annual meeting and election or special district meeting at which the school budget vote will occur.

2. The budget notice must:
  - a. Compare the percentage increase or decrease in total spending under the proposed budget with total spending under the district budget adopted for the current school year.
  - b. Compare the percentage increase or decrease in total spending under the proposed budget with the percentage increase or decrease in the consumer price index from January 1 of the prior school year to January of the current school year.
  - c. Describe how total spending and the tax levy resulting from the proposed budget would compare with a projected contingency budget, if a contingency budget were adopted on the same day as the vote on the proposed budget. This comparison must:
    - (1) Be in total and also broken down by budget components.
    - (2) Include a statement explaining the assumptions made in estimating the projected contingency budget.
  - d. Include in a format and manner prescribed by the commissioner of education an estimate of the tax savings that would be available to an eligible homeowner under the basic School Tax Relief (STAR) exemption if the proposed budget was adopted.
  - e. Include the date, time and place of the budget vote, in the same manner as in the notice of annual meeting.
  - f. The district's tax levy limit determined pursuant to Education Law §2023-a, and the estimated school tax levy excluding any levy necessary to support expenditures for:
    - (1) Expenditures resulting from court orders or judgments arising from tort actions that exceed 5% of the total tax levied in the prior year.
    - (2) Increases in employer contribution rates to state retirement systems in excess of two percentage points.
    - (3) Capital expenditures. (Educ. Law §2022(2-a)).

## **VOTER PROPOSITIONS**

### ***Policy on Voter Propositions***

1. Districts using voting machines must have a policy on the submission of propositions by the voters, for the purpose of preparing ballots for the machine (Educ. Law §2035(2)).
  - a. School boards must ensure compliance with any such rule after it has been established (*Matter of Fetta*, 8 Ed Dept Rep 201 (1969)), but may amend it, in their discretion (Educ. Law § 2035(2)).
  - b. The policy may specify the minimum number of signatures required for such petitions (Educ. Law § 2035(2); *Appeal of Huber*, 41 Ed Dept Rep 240 (2001)).

- c. The law does not require voters to list their addresses on a petition to add a proposition to the ballot, nor does it require that such a petition contain a sworn statement (*Appeal of Atkins*, 35 Ed Dept Rep 375 (1996)).
  - d. This rule does not apply to propositions placed on the ballot by the school board itself (*Appeals of Hendrickson & Guyer*, 28 Ed Dept Rep 254 (1989)).
2. A voter petition must be filed with the school board at least 30 days before the election date, unless the proposition is required by law to be included in the published or posted notice of the annual or special district meeting (Educ. Law § 2035).
- a. A board may establish a rule that requires the proposition be submitted a reasonable period of time before the first publication or posting of the legal notice (see *Appeal of Rosenberg*, 31 Ed Dept Rep 398 (1992); see also *Appeal of Como*, 30 Ed Dept Rep 214 (1990); *Appeal of Presutti*, 17 Ed Dept Rep 445 (1978)).
    - (1) The commissioner of education has sustained as reasonable board policies requiring the submission of propositions to the board 90 and 60 days in advance of the annual meeting, where such propositions are of the type that must be included in the notice of annual meeting (see *Appeal of Reynolds*, 42 Ed Dept Rep 231 (2003); see also *Presutti*).
  - b. Where required by statute, the substance of each specific proposition to be voted on, for example, a proposition:
    - (1) To levy a tax by installments as a condition prerequisite to the adoption of a bond resolution or capital note resolution where such bonds or capital notes will be issued to finance a specific object or purpose. The notice of the meeting at which such a proposition shall be voted upon must state the estimated maximum cost of each item of such specific object or purpose and the estimated total cost of all the items (Educ. Law §§ 416(2), 2009; see also Local Fin. Law § 41.10). "There is no legal requirement that the notice of the election specify the term of the bonds" (*Appeal of Brousseau*, 39 Ed Dept Rep 397 (1999)).
    - (2) To rescind a district vote to raise money or to reduce the amount thereof (Educ. Law § 416(5)).
    - (3) To establish certain reserve funds and/or to make expenditures there from (Educ. Law § 3651(1)(b), (3)).
    - (4) To increase or decrease the number of members of the school board (Educ. Law §§ 1703(2), 2502(4)(b); see also *Appeal of Rosenberg*, 31 Ed Dept Rep 398 (1992); *Appeal of Como*, 30 Ed Dept Rep 214 (1990); *Appeal of Swanson*, 29 Ed Dept Rep 503 (1990); *Appeal of Presutti*, 17 Ed Dept Rep 445 (1978)).
    - (5) To increase or decrease the term of office (i.e., the number of years served) of board members in small city school districts (Educ. Law § 2502(4)(b)).

### *Acceptance of Voter Propositions*

1. Once a voter petition is received the school board determines whether it meets the requirements of the policy and law in order to be validly placed on the ballot.
2. Once any issue has been placed before the voters in a particular year, a school board may refuse to place the issue before the voters again in the same year (*Appeal of Pace*, 47 Ed Dept Rep 515 (2008); *Appeal of Brush*, 34 Ed Dept Rep 273 (1994)).
  - a. An exception would apply when the proposition seeks to abolish any library established by a public vote at the previous district meeting (Educ. Law § 268; *Appeal of Pace*).
3. The school board may refuse to place such a proposition on the ballot if its purpose is not within the power of the voters. This authority must be exercised with care because school boards do not have unfettered discretion to refuse propositions (*Appeal of Como*, 30 Ed Dept Rep 214 (1990)). Examples of propositions the commissioner has found school boards may reject include:
  - a. Would have asked the voters to set aside \$200,000 to fund a lawsuit against school officials. The proposition was not within the power of the voters (*Appeal of Cox*, 37 Ed Dept Rep 404 (1998)).
  - b. Would have required the board to submit a budget to the voters more than once before adopting a contingency budget. School boards, not the voters, have the authority to determine whether to place a budget before the voters a second time or adopt a contingency budget (*Appeal of Osten*, 35 Ed Dept Rep 160 (1995)).
  - c. Sought to direct the school board to move the district's administrative offices from leased space into the high school library, as discussed by the board itself at one time. "Decisions concerning the use of school facilities are within the discretion of the board of education" (*Appeal of Johnson*, 44 Ed Dept Rep 382 (2005)).
  - d. Would have required the board to schedule a vote on an alternative budget proposed by a citizens' group before adopting a contingency budget. The authority to develop a budget rests with the school board, not the voters (*Appeal of Sperl*, 33 Ed Dept Rep 388 (1994)).
  - e. Sought to curtail the board's authority to contract with other districts for the education of its students by limiting the choices to three neighboring districts. Although district voters approve contracts with other districts for the education of resident children, only a school board may designate the receiving district(s). Moreover, the applicable statute and regulations do not contain any geographical limitations (*Appeal of Berhalter and Conti*, 48 Ed Dept Rep 446 (2009)).
4. A school board may reject a voter proposition if it requires an expenditure of money but fails to specify the amount for which voter approval is sought (Educ. Law §§ 2021, 2035; *Appeal of Ciffone*, 45 Ed Dept Rep 444 (2006); *Appeal of Leman*, 32 Ed Dept Rep 579 (1993); *Matter of Sampson*, 14 Ed Dept Rep 162 (1974)).
5. A board of education may not be compelled to place before the voters all propositions submitted in conformity with section 2035 and its bylaws, regardless of ambiguity, feasibility, or difficulty in interpreting election results when conflicting matters are voted on simultaneously. A board must exercise its independent judgment within the law to be certain that the will of the voters can

be ascertained (*Appeal of Krause*, 27 Ed Dept Rep 57 (1987); see also *Appeal of Huber*, 41 Ed Dept Rep 240 (2001)).

- a. For example, two conflicting propositions, one for construction, and the other for renovation, should not be placed on the same ballot (*Appeal of McDougal & Murphy*, 37 Ed Dept Rep 611 (1998); see also *Appeal of Martin*, 32 Ed Dept Rep 567 (1993); and *Appeal of Huber*; but compare with *Appeal of Kohilakis*, 33 Ed Dept Rep 513 (1994)).
6. A school board has the power to alter the language of a proposition submitted by the voters to bring the proposition into conformity with the law. However, it is not required to do so (*Appeal of Como*, 30 Ed Dept Rep 214 (1990); *Appeal of Krause*, 27 Ed Dept Rep 57 (1987); *Appeal of Welch*, 16 Ed Dept Rep 397 (1977)).
    - a. Where it is possible for the school board to make minor modifications to two otherwise mutually inconsistent propositions, such that the voters are presented with a clear choice between alternatives, there is nothing improper about the board submitting both propositions to the voters (*Appeals of the Bd. of Trustees of the George F. Johnson Mem. Library*, 40 Ed Dept Rep 331 (2000)).
  7. A school board should not place propositions on the ballot concerning matters that do not require voter approval because although technically not illegal, the commissioner consistently has advised against this practice because advisory votes may imply voter determination of the issue submitted for consideration (see *Appeal of D'Orazio & Carey*, 41 Ed Dept Rep 292 (2002); *Appeal of Moonan & Richards*, 28 Ed Dept Rep 390 (1989); *Matter of Feldheim*, 8 Ed Dept Rep 136 (1969)).
  8. Any proposition submitted by the voters which requires an expenditure of money that would result in the tax levy limit being exceeded for the corresponding school year then such proposition must be approved by sixty percent of the voters present and voting unless the proposition falls under an exception to the property tax levy limit (§§2008, 2023-a(9)).

## **VOTING AT DISTRICT ELECTIONS**

### ***Qualified Voters***

1. A qualified voter is a person who is a citizen of the United States, at least 18 years old, a resident of the school district for at least 30 days prior to the meeting at which he or she offers to vote, and who is not otherwise prohibited from voting under the provisions of section 5-106 of the Election Law (for example, a person who has been adjudged to be mentally incompetent). Only qualified voters of the school district may vote on a question brought before an annual meeting and election or special school district meeting (Educ. Law §§ 2012, 2603).
  - a. School districts may not require voters to pay taxes or have children attending the public schools to be eligible to vote (*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)).
  - b. Military personnel residing on a military base may also be qualified voters in the school district where that base is located (*Appeal of Kuleszo*, 30 Ed Dept Rep 465 (1991)).

2. Owning a home in a school district does not necessarily make the owner a district resident for purposes of being considered a qualified voter eligible to participate in a school district annual or special school district meeting or election. "A person may have only one legal residence or domicile, and that is the place where such person intends to have his or her permanent residence or home. The residency of dual home owners is dependent on the intent and conduct of the owner" (*Appeal of Taylor*, 39 Ed Dept Rep 712 (2000); see also *Appeal of Klein*, 47 Ed Dept Rep 409 (2008); *Appeal of Ryan, Starbuck and Toomey*, 50 Ed Dept Rep, Dec. No. 16,202 (2011)).
3. New York Election Law provides that a convicted felon has a right to vote, only if he or she has been pardoned, his or her maximum prison sentence has expired, or he or she has been discharged from parole (Elec. Law § 5-106(2)). The U.S. Court of Appeals for the Second Circuit has ruled that this provision of state law does not violate the federal Voting Rights Act, 42 USC § 1973 (*Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006)).
4. The district may sue unqualified voters for a fine of \$10 to be used for the benefit of the district (Educ. Law § 2020(3); see also *Appeal of Lyon*, 30 Ed Dept Rep 169 (1990)).

In addition, a person who willfully makes a false statement about his or her qualifications to vote may be found guilty of a misdemeanor (Educ. Law § 2020(1), (2)), and may be subject to a fine of up to \$1,000 and/or imprisonment for up to one year (Penal Law §§ 55.10(2)(b), 70.15(1), 80.05(1)).

### ***Voter Registration***

1. The law permits, but does not require, school boards in union free, central, and small city school districts to provide for personal registration of voters in their districts (Educ. Law §§ 2014, 2606).  
  
Boards that adopt a resolution providing for personal registration must notify the appropriate board of elections within five days of its adoption (Elec. Law § 5-612(4)). They also must notify the board of elections at least 45 days before the date of the annual district meeting and election, and at least 14 days before the date of any special district meeting (Elec. Law § 5-612(5)).
2. Even in school districts that require personal voter registration (Educ. Law §§ 2014, 2606), qualified voters who are registered with the county board of elections are eligible to vote at school district meetings without further registration (Elec. Law § 5-612(2); see also *Appeal of Crowley*, 39 Ed Dept Rep 665 (2000); *Appeal of Muench*, 38 Ed Dept Rep 649 (1999); and *Appeal of Shortell*, 27 Ed Dept Rep 190 (1987)).
3. The county board of elections is required to provide a list of registered voters to the school district at least 30 days prior to any regularly scheduled election, and a supplemental list of voters who registered after delivery of the first registration list at least 10 days before any regular or special election (Elec. Law § 5-612(3)).

In small city school districts, the school district board of registration may require the board of elections (or other lawful authority having custody of the register(s) used in the last general election preceding the school board election) to turn over the register(s) to the board of registration on or before March 1st of each year for use in preparing the school district registers. At the same time, however, the board of elections (or other authority having lawful custody of the registers) may elect to furnish, in place of the original registers, either a duplicate of the central file registration records, or a list of registered voters, certified to be a complete and accurate copy

of the names and addresses of all persons entered in such register for the preceding general election as well as the names of persons who have registered with the board of elections (or other authority) up to five days before the date of furnishing such list (Educ. Law § 2606(2)).

The law authorizes the school board to require the use of such registers on election day for the purpose of verifying the signature of each voter (Educ. Law § 2609(2)). The registers must be returned following the day of the election (Educ. Law § 2606(2)).

4. Voter registration lists must be filed in the office of the district clerk at least five days before any school district meeting or election and must be open to public inspection by any qualified voter at all reasonable times and days of the week, except Sunday, up to and including the day of the election (Educ. Law § 2015(1)).
  - a. However, in small city school districts, there is no requirement that the list of registered voters be made available on the day of the election (§ 2606; *Appeal of Fraser-McBride*, 36 Ed Dept Rep 488 (1997)).

### ***Time and Place of Voter Registration***

1. The time and location of voter registration is set by school board resolution. However, the last day of registration must not be more than 14 days nor less than five days before the annual district meeting and election (Educ. Law § 2014(2); see also *Matter of Ferraro*, 24 Ed Dept Rep 275 (1985)).

In small city school districts, the last day of registration cannot be less than the two weeks preceding the election (Educ. Law § 2606(2)).

2. Such registration must be open for at least four consecutive hours between 7:00 a.m. and 8:00 p.m. (Educ. Law § 2014(2); see also *Matter of Lortz*, 7 Ed Dept Rep 3 (1967)).
3. The school district board of registration also must conduct registration at the annual meeting and election for the purpose of registering voters to vote in future school district elections (Educ. Law § 2014(2); see also McKinney's 1956 Session Laws of New York, Memorandum of State Education Department for L. 1956, c. 930, pp.1956-57).
  - a. It is improper for a school district to allow any person who registers with the district on election day to vote in the election occurring on that day (*Appeal of Collins*, 39 Ed Dept Rep 226 (1999); see also *Matter of Watson*, 19 Ed Dept Rep 136 (1979)).
4. Subject to approval of the district voters, districts also may authorize registration during the same hours children may be enrolled for a school term or during specified hours of the school day at the office of the district clerk or assistant clerk or at the district's business office (Educ. Law § 2014(2); see also *Appeal of Pecher*, 30 Ed Dept Rep 116 (1990)).
  - a. If approved by the voters, such registration "shall take place at the school or schools within the district designated in the resolution" adopted by the voters (Educ. Law § 2014(2)).

5. In districts with personal registration, the commissioner has recognized the right of school officials to request proof of residency from a voter prior to the election, as a condition of

maintaining the voter's name on the voter registration list (*Appeal of Taylor*, 39 Ed Dept Rep 712 (2000)(redacted copy of tax return- determine which address voter declared for tax purposes).

6. In small city school districts, if the Board of Elections furnishes the school board with "certified registry lists" in place of the "original registers," the school board may require that any voter offer proof of identity before being allowed to vote, provided that the board must establish "reasonable rules and regulations governing the evidence necessary to prove the identity of each voter" no later than 10 days before the election (Educ. Law § 2609(2)).

### ***Contents of Voter Registration List***

1. The registration list used for each district meeting must include the name of everyone who has registered to vote at the meeting, and may include anyone who has registered and voted in prior school district meetings in the preceding four calendar years.
  - a. However, the name of anyone who has died or moved out of the school district, or who otherwise has become ineligible to vote, must be removed (Educ. Law § 2014(2)).
2. More specifically, the registration list must include the name and street address of each voter on the list, arranged alphabetically by last name. If there is no street address, some description must be included that accurately locates the place of residence. It also must have a column or columns in which to indicate whether each person listed has voted previously in any school district election or elections or at any meetings (Educ. Law § 2014(2)).

### ***Board of Registration***

1. The voter registration list is prepared by the school district's board of registration (Educ. Law § 2014(2)). This board consists of four qualified voters of the district appointed annually by the school board, not later than 30 days after the district's annual meeting or election, who serve until 30 days after the annual meeting or election the following year.
  - a. The board of registration is entitled to compensation at a rate fixed by the school board for each day actually and necessarily spent on the duties of the office (Educ. Law § 2014(1)).
2. In districts where the voters have approved registration during specified hours of the school day at the office of the district clerk or assistant clerk, or at the district's business office, the school board may abolish the board of registration (see § 2014(6) as amended by L.1995, c. 537; see also McKinney's 1995 Session Laws of New York at p. 2236, Assembly Sponsor's Memorandum in Support of Chapter 537: "This amendment would exclude school districts with continuous registration from having to establish a board of registration and a separate voter registration day, as currently outlined by the Education Law. This amendment would allow these school districts to save the funds that are usually allocated to create a board of registration and staff a separate voter registration day." See also McKinney's 1995 Session Laws of New York at p. 2355, Governor's Approval Memorandum for Chapter 537: "[S]ome school districts permit residents to register at the district's business office on any school day. The residents of these school districts have ample opportunity to register and there is no need for their boards of registration to incur the cost of holding a separate meeting solely for the purpose of registering voters.").

### ***Discontinue a System of Personal Registration***

1. The board may discontinue personal registration by a board resolution passed at least two months before the next school district meeting or election. However, personal registration may not then be re-instituted without voter approval (Educ. Law § 2014(3); see *Appeal of Fitzpatrick*, 28 Ed Dept Rep 194 (1988); see also *Matter of White v. Bd. of Educ.*, 53 Misc.2d 800 (Sup. Ct., Monroe Cnty. 1967), aff'd, 28 A.D.2d 828 (4th Dep't 1967)).

### ***Challenges to Voter Qualifications***

1. Any qualified voter has the right, although not the duty to challenge, either prior to or at the district meeting, the qualifications of any other voter (Educ. Law §§ 2015(3), (4), 2019, 2609(5); *Matter of Thompson*, 76 St. Dep't Rep. 162 (1956)).

- a. All challenges to the qualifications of a voter must be raised no later than the time the voter goes to the polls to vote (*Appeal of Grant*, 42 Ed Dept Rep 184 (2002); see also *Appeal of Pappas*, 38 Ed Dept Rep 582 (1999); *Appeal of Carlson*, 37 Ed Dept Rep 351 (1998); *Appeal of Fraser-McBride*, 36 Ed Dept Rep 488 (1997)).

2. When a qualified voter challenges a person's qualification to vote, the chairperson presiding at the meeting or election in a non-city district shall require the person offering to vote to make the following declaration: "I do declare and affirm that I am, and have been, for 30 days last past, an actual resident of this school district and that I am qualified to vote at this meeting" (Educ. Law § 2019).

In a city school district, the chairman of the board of inspectors must administer to those challenged the following oath: "I do solemnly swear (or affirm) that I am a citizen of the United States; that I am of the age of eighteen years or more; that I have been an inhabitant of the State for the past year, a resident of the county for the past four months and for the thirty days past an actual resident of this city school district and am therefore qualified to vote at this election" (Educ. Law § 2609(5)).

3. When a voter makes the declaration required by Education Law § 2019 stating that he or she is qualified to vote, then the burden of proof shifts to the school district to demonstrate that the voter is not qualified (*Appeal of Lyon*, 30 Ed Dept Rep 169 (1990)).

- a. The board can conduct an investigation following the election to determine if that person was indeed a qualified voter (*Appeal of Boehm*, 27 Ed Dept Rep 96 (1987)). In fact, in at least two reported decisions, the commissioner of education has ordered school boards to conduct such an investigation and to seek the penalties authorized by section 2020 if warranted (see *Appeal of Cobb*, 32 Ed Dept Rep 139 (1992); see also *Matter of Bernocco*, 20 Ed Dept Rep 343 (1980)).

4. If it appears that the election results were affected by votes cast by unqualified persons, the commissioner may invalidate the vote and require a special meeting or election (*Appeal of Cobb*, 32 Ed Dept Rep 139 (1992)).

### ***Missing Registration***

1. If a person's name cannot be found on the list of registered voters or in the registration poll ledger, then district elections officials shall not permit that person to vote, unless: (1) the person presents a court order requiring that he or she be permitted to vote in the manner otherwise prescribed for voters whose names are on the list of registered voters or in the registration poll ledger; or (2) the person submits an affidavit attesting to his or her qualifications to vote (Educ. Law § 2019-a(1)).
2. If the person is permitted to vote by affidavit, he or she must print on the outside of an envelope a sworn statement indicating (1) that he or she has duly registered to vote; (2) the address at which he or she is registered; (3) that he or she remains a duly qualified voter in the election district where he or she resides; (4) that his or her poll record appears to be lost or misplaced or that his or her name has been incorrectly omitted from the list of registered voters; and (5) that he or she understands that any false statement made therein is perjury punishable according to law (Educ. Law § 2019-a(1)(b)).
3. A person who is permitted to vote by affidavit must vote by paper ballot, which is placed inside the envelope upon which the affidavit was written and then sealed therein until the close of the election and the canvassing of ballots (Id.; see also *Appeal of Brown*, 38 Ed Dept Rep 816 (1999); *Appeal of Meunch*, 38 Ed Dept Rep 649 (1999)). "If it is determined that a voter who cast an affidavit ballot was not registered, the ballot may not be counted" (*Appeal of Crowley*, 39 Ed Dept Rep 665 (2000); *Appeal of Vaughan*, 33 Ed Dept Rep 189 (1993)).

### ***Voting in School Districts without Personal Registration***

1. In districts without personal registration, the Education Law authorizes (but does not require) district election officials to require voters at any school district meeting or election to provide one form of proof of residency, determined by the school district. Acceptable proof of residency includes:
  - a. a driver's license/non-driver identification card,
  - b. utility bill or
  - c. voter registration card.
2. In addition, district election officials also may require such persons offering to vote to provide their signature, printed name, and address (Educ. Law § 2018-c; see also *Appeal of Pugliese*, 40 Ed Dept Rep 499 (2001)).

## ABSENTEE BALLOTS

### *Availability of Absentee Ballots*

1. All school districts are required by law to make absentee ballots available to qualified voters for the election of school board members, school district public library trustees, the adoption of the annual budget, and school district public library budgets and referenda (Educ. Law §§ 2018-a, 2018-b, 2613).

A board of cooperative educational services (BOCES) that is holding certain referenda for submission to the voters within the BOCES supervisory district also must make absentee ballots available to qualified voters pursuant to procedures established by regulations promulgated by the commissioner of education (Educ. Law § 1951(2)(s)).

2. Absentee ballots must be provided upon proper application to any qualified voter who will be unable to vote in person due to illness or physical disability, hospitalization, incarceration (unless incarcerated for conviction of a felony), travel outside the voter's county or city of residence for employment or business reasons, studies, or vacation on the day of the election (Educ. Law §§ 2018-a(2), 2018-b(2)).
3. Dual home ownership does not automatically confer entitlement to an absentee ballot, as a person may have only one legal residence or domicile for purposes of voting at a school district election or budget vote (*Appeal of Ryan, Starbuck and Toomey*, 50 Ed Dept Rep, Dec. No. 16,202 (2011); *Appeal of Klein*, 47 Ed Dept Rep 409 (2008)). Absent proof of permanent residence, the owner of a home within a school district would not be entitled to an absentee ballot (Id.).
4. The law is generally silent on when districts must begin making absentee ballot applications available to voters. With the exception of absentee ballots issued upon receipt of a request by letter, nothing in the law specifies how far in advance of an election school districts must begin making applications for absentee ballots available (see *Appeal of Roxbury Taxpayers Alliance*, 34 Ed Dept Rep 576 (1995)).
  - a. However, since the notice of the district meeting must include a statement that qualified voters may apply for absentee ballots at the clerk's office (Educ. Law § 2004(7)), as a practical matter, ballot applications should be made available at the time of the first publication of the notice of the district meeting and must be made available far enough in advance of the meeting date to permit voters to apply for and return completed ballots as required by law.
5. Education Law §1501-c makes Election Law § 8-407 applicable to "all elections conducted . . . by a school district" pursuant to Title II of the Education Law. Election Law § 8-407 provides that when a county or city board of elections receives 25 or more absentee ballot applications from a nursing home (or other qualifying adult care facility), that board of elections must send elections inspectors to the nursing home between one and 13 days before the election to supervise the completion of absentee ballots by the residents of that facility. It is beyond a school district's authority to supervise the voting (*Appeal of Georges*, 45 Ed Dept Rep 453 (2006)).

### *Applications for Absentee Ballots*

1. A person may request more than one absentee ballot application and need not supply a list of the voters who will use the applications (*Appeal of the Roxbury Taxpayers Alliance*, 34 Ed Dept Rep 576 (1995)).
2. The board of registration (in districts with personal registration) or district clerk or other designee of the school board (in districts without personal registration) must automatically mail an absentee ballot to each voter whose registration record on file with the county board of elections is marked "permanently disabled" (Educ. Law §§ 2018-a(2)(g), 2018-b(2)(g)).
3. All other voters must submit an application prior to obtaining an absentee ballot (Educ. Law §§ 2018-a(2)(a), 2018-b(2)(a)), except as noted below.
  - a. The information that must be included in the application is set by statute (Educ. Law §§ 2018-a(2)(a), 2018-b(2)(a)).
  - b. The application must be received by the district clerk or designee at least seven days before the election, if the ballot is to be mailed to the voter, or the day before the election, if the ballot is to be issued to the voter in person (Educ. Law §§ 2018-a(2)(a), 2018-b(2)(a)).
4. Upon receipt of an application, either the board of registration (in districts with personal registration) or district clerk or other designee of the school board (in districts without personal registration) must review the application to determine if the applicant is a qualified voter and is otherwise entitled to vote by absentee ballot (§§ 2018-a(3), 2018-b(3)).
  - a. Applications that do not specify the reasons why a voter will be unable to vote in person on the day of the election, cannot not be accepted (see *Matter of Levine*, 24 Ed Dept Rep 172 (1984), aff'd sub nom. *Capobianco v. Ambach*, 112 A.D.2d 640 (3d Dep't 1985); cf. *Appeal of Frasier*, 34 Ed Dept Rep 315 (1994)).
5. If the application is proper in all respects, the board of registration or district clerk or other designee of the board then mails or personally issues an absentee ballot to the voter. The board of registration or district clerk must then record the name of the voter to whom the absentee ballot was issued on the district's personal registration list or poll list (Educ. Law §§ 2018-a(3), 2018-b(3)).
6. In districts without personal registration, any qualified voter may request a ballot by signed letter, rather than by application. The letter must be received by the district clerk or designee no earlier than 30 days before the election and no later than seven days before the election. Upon receipt of the letter request, the clerk must send both an application and a ballot to the voter at the same time. The voter then completes both the application and the ballot and returns them together in the same envelope. In fact, the law specifically provides that the ballot will not be counted unless the completed application is returned with it (Educ. Law § 2018-b(4)).
7. No absentee voter's ballot will be counted unless it is received in the office of the district clerk (clerk or designee of the school board in districts without personal registration) by 5:00 p.m. on the day of the election (Educ. Law §§ 2018-a(8), 2018-b(9)). In addition, no law prevents individuals from carrying multiple absentee ballots into the polling place on the day of the

election (see *Appeal of the Bd. of Educ. of Hempstead UFSD*, 55 Ed Dept Rep, Dec. No. 16,878 (2016)).

8. The board of registration (in districts with personal registration) must make a list of all persons to whom absentee ballots have been issued, and file the list in the office of the district clerk, where it must be available for public inspection during regular office hours until the day of the election (Educ. Law § 2018-a(6)).

Similarly, the district clerk or other designee of the school board (in districts without personal registration) must make a list of all persons to whom absentee ballots have been issued and make it available for public inspection during regular office hours until the day of the election (Educ. Law § 2018-b(7); see also *Appeal of Laurie*, 42 Ed Dept Rep 313 (2003); but see Educ. Law § 2004(7)).

### ***Challenging Absentee Ballots***

1. Any qualified voter may, prior to the election, file a written challenge to the qualifications of any person whose name appears on the list of absentee voters prepared for transmittal to the election inspectors on the day of the election, stating the reason for such challenge (Educ. Law §§ 2018-a(6), 2018-b(7)).
  - a. The written challenge must be transmitted by the clerk or designee to the election inspectors on the day of the election (Educ. Law §§ 2018-a(6), 2018-b(7)).
2. The law does not permit a person to wait until after the election to challenge another person's right to vote by absentee ballot (see *Appeal of Karliner*, 36 Ed Dept Rep 30 (1996)).
  - a. However, in one case, the commissioner excused a petitioner's untimely challenge, finding that the board's failure to make available a list of all persons to whom absentee ballots were issued "prevented petitioner from having a reasonable opportunity to challenge the disputed absentee ballots at the time of the election" (*Matter of Levine*, 24 Ed Dept Rep 172 (1984), *aff'd sub nom. Capobianco v. Ambach*, 112 A.D.2d 640 (3d Dep't 1985)).
3. The commissioner of education has ruled it improper for districts with personal registration to open and/or count absentee ballots before the polls close because in those districts any qualified voter may challenge an absentee ballot during the public canvassing of such ballots after the polls close (§ 2018-a(10), (11); *Appeal of Pappas*, 38 Ed Dept Rep 582 (1999)).
4. There is no requirement that school board candidates or their poll watchers be present when the absentee ballots are opened (*Appeal of Christner*, 54 Ed Dept Rep, Dec. No. 16,760 (2015); *Appeal of Bennett*, 48 Ed Dept Rep 311 (2009); *Appeal of Georges*, 45 Ed Dept Rep 453 (2006)).
5. Preventing a qualified voter from exercising his or her right to object to a submitted absentee ballot may be grounds for invalidating the election results (*Appeal of Heller*, 34 Ed Dept Rep 220 (1994)).

## ANNUAL MEETING AND ELECTION LOGISTICS

### *Law Governing School District Elections*

1. In general, the Education Law governs school district meetings and elections, not the Election Law (Educ. Law Article 41).
2. The Election Law applies to school districts only as specifically provided by law (Elec. Law § 1-102; see also Educ. Law § 2609; *Appeal of Lanzilotta*, 48 Ed Dept Rep 428 (2009); *Appeal of Georges*, 45 Ed Dept Rep 453 (2006); *Appeal of Brown*, 43 Ed Dept Rep 231 (2003)).
  - a. For example, various sections of the Election Law require the use of optical scan voting machines (L. 2005, c. 181). However, the Education Law expressly authorizes school districts and boards of cooperative educational services (BOCES) to continue the use of lever voting machines through December 31, 2014 (Educ. Law §§ 1803(5), 1803-a(8), 1951(2)(g), 2035(1), 2502(9)(1), 2502(9-a)(1), 2553(10)(1)). In such an instance, however, the board of elections has no obligation to maintain the care, custody or control of lever machines (Educ. Law §§ 1951(2)(g), 2035(1)).
3. School districts must ensure that their designated polling locations have adequate access and parking for the disabled during the times the polls are opened. That was not the case where, during dismissal time, a school's driveway was open only to school buses and a school's additional parking lot was closed for construction (*Appeal of Goldstein*, 46 Ed Dept Rep 355 (2007)).

### *Election Districts*

1. In districts that have adopted a system of personal registration the district may be divided into election districts. (*Matter of Christie*, 1 Ed Dept Rep 5 (1958); see also *Matter of Nicoletta*, 7 Ed Dept Rep 115 (1968)).
2. Union free and central school districts with personal registration of voters may be divided into election districts by action of the board or by a majority vote of the qualified voters present and voting at a district meeting (Educ. Law § 2017(1); see also *Matter of Clarke*, 13 Ed Dept Rep 256 (1974)).
  - a. Once the decision is made, the school board must immediately adopt a resolution dividing the district into the number of election districts as it may determine. The election districts so formed continue in existence until modified by board resolution (Educ. Law § 2017(2)).
    - (1) Any such resolution must be adopted at least 30 days before the annual or special meeting or election. *Id.*
  - b. Each election district must have at least 300 qualified voters, and if possible, have a school building (Educ. Law § 2017(1), (2)).
3. School boards in small city school districts may pass a resolution modifying election districts already in existence. As with union free and central school districts, election districts in small city school districts should contain a public schoolhouse where possible, in which voting shall take place. A city school district with less than 10,000 inhabitants may designate the entire school

district as a single election district (Educ. Law § 2604). The commissioner of education ordered a small city school district to rescind a resolution adopting a single election district where the last census showed the city had a population of 19,000 (*Appeal of Saleh*, 51 Ed Dep[t Rep, Dec. No. 16,310 (2011)).

### ***Voting Booths, Ballots and Machines***

1. Voting booths must be used at school district meetings in districts other than common school districts (Educ. Law §§ 2030(2), 2609(3)).
2. Generally, ballots must be used at school district meetings. However, in school districts that prior to 1998 conducted their vote at the annual meeting, votes may be taken by recording the ayes and nays of the qualified voters attending and voting at the district meeting (Educ. Law §§ 2022(3), 2608, 2031, 2032).
3. The use of voting machines while optional, is considered to be in compliance with any provision of law requiring the vote to be by ballot (Educ. Law §§ 2035(1), 2611; *Hurd v. Nyquist*, 72 Misc.2d 213 (Sup. Ct. Albany Cnty. 1972); *Matter of Nicoletti*, 21 Ed Dept Rep 38 (1981)).
  - a. Through December 31, 2014, school districts may continue the use of lever voting machines.
  - b. A voting machine or machines may be purchased by the school district or, with the consent of the county board of elections, the school district may use voting machines belonging to the county or the town in which any part of the school district is located. Rental and other terms or conditions are set by resolutions of the board of elections (Educ. Law § 2035(1); Elec. Law § 3-224).
4. If voting machines are used, they must be examined by the election inspectors before each use to ensure all the counters are set at zero, that the ballot labels are properly placed, and that each machine is in all respects in proper condition for use (Educ. Law § 2035(1); see also *Appeal of Breud*, 38 Ed Dept Rep 748 (1999)).
5. Ballots are provided by the school district. When used for school board elections, ballots must contain the names of candidates who have been nominated, listed in the order determined by drawing lots (Educ. Law §§ 2032(2)(e), 2608(2)). If paper ballots are used, a choice is indicated by an "x" or a "√" by pencil or pen in a square before the name of the candidate.
6. Regardless of whether paper ballots or voting machines are used, slots for write-in votes must be provided to afford voters the opportunity to select an alternative candidate of their choice for each vacancy to be filled (Educ. Law § 2032; *Appeal of Thomas*, 47 Ed Dept Rep 442 (2008)).
  - a. In districts where candidates run for specific seats on the board (Educ. Law § 2018(a)), one blank space must be provided under the name of the last candidate for each specific office for write-in candidates (Educ. Law § 2032(2)(e)).
  - b. Where candidates run at large for every vacancy rather than a specific seat, slots for write-in votes equal to the number of vacancies to be filled must be provided (*Appeal of Thomas*).

7. There is no statutory authority permitting the use of proxy votes at school district meetings (*Matter of Kirchhof*, 70 St. Dep't Rep. 33 (1949); *Matter of Dist. No. 1 of the Town of Pittstown*, 58 St. Dep't Rep. 423 (1937)).
8. All qualified voters who are present at the polling place prior to the time of closing the polls must be allowed to vote (Educ. Law §§ 2033, 2609(4); see also *Appeal of Fugle*, 32 Ed Dept Rep 480 (1993)).

### ***Poll Lists, Exit Polls, Poll Watchers***

1. The district clerk or assistant clerk(s) maintain a poll list that contains the names and addresses of the people who actually vote in a district meeting or election.
  - a. The clerk or assistant clerk(s) must record the name and legal residences of all voters as they deposit their ballots (Educ. Law §§ 2029, 2609(4); see *Appeal of Gang*, 32 Ed Dept Rep 337 (1992)).
2. Poll lists are public documents that must be made available for inspection and copying by interested persons, including on the day of the election.
  - a. On the day of the election, districts must take special care to provide access to the poll list(s) in an evenhanded manner and with minimal disruption to the electoral process (*Appeal of Walsh*, 34 Ed Dept Rep 544 (1995); *Appeal of Schneider*, 29 Ed Dept Rep 151 (1989); see also *Appeal of Crowley*, 39 Ed Dept Rep 665 (2000); *Appeal of Fraser-McBride*, 36 Ed Dept Rep 488 (1997)).
3. There is nothing improper about conducting an "exit poll" at a polling place so long as voter access to the polls is not hampered (*Appeal of Tudor*, 38 Ed Dept Rep 591 (1999)).
4. Poll watchers may only be appointed in school districts that have adopted a system of personal registration (Educ. Law § 2019-a(2)(c), (d)). There is no authority for a candidate to appoint poll watchers in districts without personal registration (*Appeal of Chaplin, Jr.*, 30 Ed Dept Rep 420 (1991); see also *Appeal of Morris*, 37 Ed Dept Rep 590 (1998)).
5. Even in districts without personal registration, there is nothing to prevent a qualified voter who supports a particular candidate from being present at a polling place and exercising his or her right to challenge the qualifications of other voters under the Education Law (Educ. Law §§ 2019, 2015, 2609(5)).
  - a. However, such an individual may not interfere with the election or engage in electioneering, which of course, even a designated poll watcher cannot do. According to the commissioner of education, "the mere presence of partisan individuals or groups on school grounds during a school election is not in and of itself improper provided that no electioneering takes place" (*Appeal of Giuliano*, 37 Ed Dept Rep 572 (1998)).

## ELECTION INSPECTORS

### *Requirement for Election Inspectors*

1. In non-city districts, there must be at least two election inspectors for each ballot box or voting machine in use (Educ. Law § 2025(3)).
2. In common school districts, election inspectors are elected by the voters. The election inspectors choose a chief election inspector. There must be at least two inspectors per voting machine or ballot box (Educ. Law § 2025(3)(a)).
3. In union free and central school districts, the school board appoints the election inspectors (at least two per machine or ballot box), and also appoints assistant election inspectors, as needed, in connection with the conduct of a district meeting and election. The board also designates a chief election inspector. Where the district is divided into election districts, the board must appoint a chief election inspector for each election district (Educ. Law § 2025(3)(b)).
4. In small city school districts, the school board is required to appoint three election inspectors for each election district, and may appoint additional election inspectors if necessary. The inspectors themselves elect one of their number as chairperson. The chairperson may appoint one of the inspectors as assistant poll clerk (Educ. Law § 2607).
5. The failure to appoint the required number of election inspectors can invalidate a school district election only if the error affects the outcome of the election (*Appeal of Uciechowski*, 32 Ed Dept Rep 511 (1993); see also *Appeal of Bishop*, 55 Ed Dept Rep, Dec. No. 16,892 (2016)). The same is true if a district removes one of the election inspectors on the day of the district meeting (*Appeal of Lanzilotta*, 48 Ed Dept Rep 428 (2009)).

### *Qualifications of Election Inspectors*

1. In small city school districts the Education Law requires that election inspectors be qualified voters of the school district (Educ. Law § 2607).
2. The Education Law also permits the appointment of 17-year-old students enrolled in a school district to serve as an election inspector or poll clerk (Educ. Law §§ 2025, 2036, 2607, 3207-a; see also Election Law § 3-400(6), (7); Labor Law §§ 132(3), 143(6)), with parental consent (§ 3207-a). The failure to appoint such a student as an election inspector or poll clerk does not constitute cause for invalidating the proceedings of an annual or special school district meeting (Educ. Law § 2036). Students serving as an election inspector or poll clerk while school is in session are to be recorded as in attendance (Educ. Law § 3207-a).
3. Nothing prohibits district employees, school board members, relatives of board members or candidates from serving as election inspectors (*Appeal of Caswell*, 48 Ed Dept Rep 472 (2009); *Appeal of Marchesani*, 44 Ed Dept Rep 460 (2005); *Appeal of Crowley*, 39 Ed Dept Rep 665 (2000); *Appeal of Goldman*, 35 Ed Dept Rep 126 (1995); *Appeal of Bleier*, 32 Ed Dept Rep 63 (1992)).

### ***Compensation of Election Inspectors***

1. Election inspectors in union free and central school districts are compensated at a rate set by the school board (Educ. Law § 2025(5)).
2. Election inspectors in small city school districts are compensated at a rate set by the school board, not to exceed the basic compensation paid to election inspectors at the preceding general election, as fixed by the governing body of the city in which the school district is located (Educ. Law § 2607).

### ***Counting Ballots and Announcing Results***

1. The election inspectors count the ballots and tally the votes (§§ 2034, 2610; *Appeal of Murtagh*, 19 Ed Dept Rep 179 (1979)).
  - a. The inspectors first must count the ballots to determine if they agree with the number of names recorded on the voter list. If they exceed that number, enough ballots must be withdrawn at random by the chief election inspector to reduce the number of ballots to the number of voters. The inspectors then conduct the final ballot count and inform the chairperson of the results of the meeting (Educ. Law § 2034; see Educ. Law § 2610 as to additional or different procedures for canvassing the vote in small city school districts).
  - b. The sole method of securing a recount of the vote is pursuant to an appeal to the commissioner of education (*Appeal of Bennett*, 48 Ed Dept Rep 311 (2009); *Appeal of Ell*, 34 Ed Dept Rep 394 (1995); see also *Appeal of the Board of Educ. Of the Hilton CSD*, 56 Ed Dept Rep, Dec. No. 17,091 (2017)).
2. After the closing of the polls, the election inspectors examine absentee voters' ballots received by the district in the manner required by law. Absent any grounds for rejecting such ballot, the election inspectors will open the envelope containing the absentee ballot, withdraw the ballot and deposit it unfolded in the proper ballot box (Educ. Law §§ 2018-a(10), 2018-b(11); see also Educ. Law §§ 2018-a(6), 2018-b(7)). The election inspectors will then count or canvass the absentee ballots along with the other ballots cast or the votes recorded on voting machines (Educ. Law §§ 2018-a(12), 2018-b(12)).
  - a. Counting of absentee ballots with incorrect or no dates is not unlawful. Missing or inaccurate dates on the ballot envelopes are not grounds for voiding a ballot (*Appeal of Georges*, 45 Ed Dept Rep 453 (2006)).
3. The chairperson of the meeting at which the election takes place declares the result of each ballot, as announced by the election inspectors (Educ. Law § 2034(7)(a)).
4. If a district has been divided into election districts, and voting machines are used, the election inspectors must make a written report of the results, signed by all the inspectors, to the chief election inspector of each district, who then reports the results to the district clerk within 24 hours. The school board then tabulates and declares the result of the ballot within 24 hours of receiving the results (Educ. Law §§ 2034(7)(b), 2610(4)).

5. All disputes regarding the validity of any district meeting or election must be referred to the commissioner of education (*Appeal of Bennett*, 48 Ed Dept Rep 311 (2009); *Appeal of Ell*, 34 Ed Dept Rep 394 (1995)).
  - a. Upon the filing of a petition, the commissioner of education may annul the vote, and in his or her discretion order a new meeting or election (§ 2037; see *Appeal of the Bd. of Educ. of the City Sch. Dist. of the City of Elmira*, 47 Ed Dept Rep 27 (2007)).
  - b. The petition may be filed by a district resident or a school board itself (see *Appeal of the Bd. of Educ. of the Goshen CSD*, 47 Ed Dept Rep 352 (2008); *Appeal of the Bd. of Educ. of the City Sch. Dist. of the City of Elmira*; *Appeal of the Bd. of Educ. of the Honeoye CSD*, 45 Ed Dept Rep 58 (2005)).
  - c. The commissioner's decisions in these matters are final and not subject to review (§ 2037).

***Voter Approval of the Proposed School Budget***

1. There is no minimum percentage of total qualified voters residing in the district required to approve a school budget (*Appeal of Sherrill*, 43 Ed Dept Rep 312 (2003)). If a proposed budget complies with the district’s tax levy limit, a simple majority of those present and voting is required for approval.
2. If the proposed budget requires a tax levy which exceeds the limit such budget requires approval by 60% of the votes cast in order to be adopted. (Educ. Law §2023-a(6)). School boards proposing a budget that exceeds the tax levy limit must include in the ballot a statement that indicates, in substantially the same form:
  - a. “Adoption of this budget requires a tax levy increase of \_\_\_\_\_ which exceeds the statutory tax levy increase limit of \_\_\_ for this school fiscal year and therefore exceeds the state tax cap and must be approved by sixty percent of the qualified voters present and voting”. (Educ. Law §2023-a(6)(b)).
3. If a school district presents multiple propositions where the core budget proposition is under the tax levy limit but the addition of the expense of an additional proposition would result in a levy over the limit the voter approval necessary is determined by type of proposition. The following chart represents the necessary voter approval when the core budget proposition and the additional proposition result in a levy over the limit:

| Proposition Type  | Level of Voter Approval |
|---|-------------------------|
| Proposition for additional transportation service                                       | 60% or more             |
| Proposition for additional educational programs (separate from core budget proposition) | 60% or more             |
| Proposition for capital expenditure   | Simple majority         |
| Position for capital transportation expenditure   | Simple majority         |

4. School boards can submit a budget or any proposition involving the expenditure of money for a vote at a district meeting, no more than two times (including a revote if the voters reject the

proposed budget at the annual meeting and election or the special district meeting where the budget vote occurs (Educ. Law §§ 2022(4); 2601-a(4)).

5. School boards may not submit to the voters more than twice during any 12-month period a proposition for the construction of a new schoolhouse or an addition to an existing schoolhouse at the same site. Moreover, the second such proposition may not be submitted to the voters within 90 days of the first vote.

However, neither of these limitations applies where the voters approve a building project, but the bids that subsequently are received on the project exceed the amount approved by the voters (Educ. Law §416(6)).

## **VOTER REJECTION OF THE PROPOSED SCHOOL BUDGET**

### ***School District Options***

1. If a majority of the qualified district voters present and voting at the annual meeting and election or special district meeting at which the vote on the budget occurs reject the proposed school budget, a school board may do one of the following:
  - a. Prepare and adopt a contingency budget without going back to the voters, subject to the caps on contingency budgets. In this case, the board may levy a tax sufficient to pay for teachers' salaries and items that constitute ordinary contingent expenses (Educ. Law §§ 2022(4),(5); 2023; 2601-a(4),(5)).
  - b. Present the original budget for a second vote, or a revised budget, at a special district meeting, within the limitations set by law (§§ 2022(4), 2601-a(4)).
  - c. Adopt a contingency budget, and then present one or more propositions to the voters, giving them the opportunity to vote to fund services that cannot be provided without voter approval.
    - (1) A separate proposition may be presented for each such service, or several services may be included in one proposition (*Appeal of Aarseth*, 32 Ed Dept Rep 506 (1993)).
    - (2) Nothing prohibits school districts from combining several unrelated objects and purposes in a single proposition (Local Fin. Law § 11) such as the reconstruction of various school buildings, the purchase and installation of oil tanks, and the purchase of school buses (*Appeal of Friedman*, 36 Ed Dept Rep 431 (1997)).
    - (3) The various propositions submitted should not be in conflict with each other, such as one for construction and the other for renovation (see *Appeal of McDougal & Murphy*, 37 Educ Dept Rep 611 (1998)), so that the will of the voters can be ascertained (*Appeal of Krause*, 27 Educ. Dep't. Rep. 57 (1987)).

2. A school board is under no obligation to submit a budget to the voters more than once prior to the adoption of a contingency budget, and the voters cannot compel it to do so (Educ. Law § 2022(4),(5); *Appeal of Osten*, 35 Ed Dept Rep 160 (1995); *Appeal of Brosseau*, 31 Ed Dept Rep 155 (1991)).

### ***Date and Time of Budget Revote***

1. If a school district chooses to hold a budget revote it must be held on the third Tuesday in June, the statewide day for holding a school district budget revote.
2. The budget revote may be held, instead, on the second Tuesday in June only if the commissioner of education, at the request of a school district, certified no later than March 1<sup>st</sup> that such revote would conflict with religious observances (Educ. Law §§ 1804(4); 1906(1); 2005; 2006(1); 2007(3); 2601-a(2),(4); 2022(4)).

### ***Two Vote Limitation***

1. School boards may not submit a proposed budget or budget proposition to the voters more than twice (Educ. Law §§ 2022(4); 2601-a(4)).
2. If voters fail to approve a proposed budget or budget proposition after the second submission, the board must adopt a contingency budget.

## **RETENTION OF ELECTION RECORDS**

### ***General Requirements***

1. The "Records Retention and Disposition Schedule ED-1" (8 NYCRR § 185.12 "Appendix I"), which all school districts and boards of cooperative educational services (BOCES) must follow, sets forth specific periods of time that various types of school elections records must be maintained.
  - a. For example, "final election results, including election inspectors' return and statement of canvass (where information is not duplicated in report of final election results) and election results report" must be permanently maintained.
  - b. "Intermediate records used to compile final election results, including tally sheets and voting machine tabulations" must be maintained for one year after the election, or, if the election is contested, until any investigation and/or litigation is complete.

Schedule ED-1 is available electronically at  
[http://www.archives.nysed.gov/a/records/mr\\_pub\\_ed1.shtml](http://www.archives.nysed.gov/a/records/mr_pub_ed1.shtml).

2. In districts that use paper ballots and ballot boxes, the Education Law further requires that after the election is over and the results have been announced, the election inspectors must lock and seal the ballot boxes, and the chief election inspector must deliver them to the district clerk. Thereafter, the ballot boxes cannot be opened, except: (1) upon order of the commissioner; or (2) after the elapse of a period of six months without challenge to the election, the board passes a

resolution ordering the opening of the ballot boxes and the destruction of the ballots therein (§ 2034(6)).

## LEGAL RESTRICTIONS ON PROMOTING THE BUDGET

### ***General Rule***

1. School districts may not use district resources or personnel to exhort the voters to support the school budget. However, a school district may disseminate factual information reasonably necessary to educate the public (*Phillips v. Maurer*, 67 N.Y.2d 672 (1986)).

This prohibition extends not only to advocating a yes vote (see *Appeal of Meyer*, 38 Ed Dept Rep 285 (1998)), but also to statements that do not specifically urge a yes vote but nonetheless persuade or convey support for a particular position (*Appeal of Gravink*, 37 Ed Dept Rep 393 (1998)), and to actions that technically do not violate the law, but create the appearance of impropriety (*Appeals of Schadtke and Wilcox*, 38 Ed Dept Rep 599 (1999)).

2. Districts may provide purely factual materials on the school budget or other ballot propositions through means aimed at reaching the electorate as a whole in order to help them make an informed decision (*Appeal of Prentice*, 38 Ed Dept Rep 736 (1999); see also *Appeal of Loriz*, 27 Ed Dept Rep 376 (1988)). In fact, school boards and school superintendents have a “statutory obligation to present and publicize school budgets so as to ‘promote public comprehension’” (*Gersen v. Mills*, Sup. Ct., Albany Cnty., Special Term, Sheridan, J., Apr. 21, 2000, unreported, *rev’d on other grounds*, 290 A.D.2d 839 (3d Dep’t 2002)). Such activities promote “the general public policy of this State to foster public awareness and understanding of governmental actions and to encourage participation therein” (*Gersen*, citing Pub. Off. Law § 84).

However, if factual information distributed by a district is later found to be inaccurate, the commissioner of education may overturn the results of a vote and order a new meeting on the matter (see *Appeal of Wolverton*, 46 Ed Dept Rep 208 (2006)). That was the case with respect to a school district annexation vote where the voters were not given accurate information regarding the financial status of one of the districts involved (*Id.*).

### ***Advocacy by Individual School Board Members and School Officials***

1. Individual school board members and other school officials, acting in their personal capacity, have the same right as any other member of the community to express their views on public issues. They may actively support a proposed budget and other ballot propositions, as long as they do so at their own expense and on their own behalf. In other words, they cannot use district funds, facilities, or channels of communication, or claim to be speaking on behalf of the board and must avoid giving the impression they are doing so (*Appeal of Leger-Vargas*, 54 Ed Dept Rep, Dec. No. 16,771 (2015); *Appeal of Koehler*, 52 Ed Dept Rep, Dec. No. 16,373 (2012); *Appeal of Johnson*, 45 Ed Dept Rep 469 (2006); *Appeal of Goldin*, 40 Ed Dept Rep 628 (2001); see also *Appeal of Eisenkraft*, 38 Ed Dept Rep 553 (1999); *Appeal of Dinan*, 36 Ed Dept Rep 370 (1997); *Appeal of Carroll*, 33 Ed Dept Rep 219 (1993); *Appeal of Weaver*, 28 Ed Dept Rep 183 (1988); *Matter of Wolff*, 17 Ed Dept Rep 297 (1978)).

2. Board members expressing their personal views in a letter to the editor must “clearly distinguish their personal views from those of the board they represent” (*Appeal of Wallace*, 46 Ed Dept Rep 347 (2007); see also *Appeal of Koehler*, 52 Ed Dept Rep, Dec. No. 16,373 (2012)). A byline of an editorial that identifies the author as a board member would be inappropriate, because it gives the impression that the author was speaking in his or her official capacity (*Id.*).
3. According to the commissioner of education, districts must take affirmative steps to ensure that teachers and staff do not convey partisan positions to students on school time on matters pending before the voters (*Appeal of Lawson*, 36 Ed Dept Rep 450 (1997)).

Likewise, a federal district court in New York upheld a school district regulation that prohibited staff from wearing political buttons in the classroom. The regulation required that all school personnel “maintain a posture of complete neutrality” and “not wear buttons, pins, articles of clothing, or any other items advocating a candidate, candidates, slate of candidates or political organization/committee.” The court agreed with the school district that such displays of political partisanship are inconsistent with a school district’s educational mission, can improperly influence students and impinge on their right to learn in an environment free from partisan political influence, and convey a message of school district support for the view expressed by such displays (*Weingarten v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 680 F.Supp.2d 595 (S.D.N.Y. 2010)).

However, the commissioner also has ruled that there was nothing improper about a teacher explaining the meaning of a “contingency budget” to students in class because the teacher only provided factual information to the students (*Appeal of Roxbury Taxpayers Alliance*, 34 Ed Dept Rep 576 (1995)).

### ***Use of School District Facilities and Channels of Communication***

1. The commissioner of education has ruled that districts cannot do indirectly that which they cannot do directly. In general, this means that school officials can neither actively encourage nor tacitly permit anyone else to use district facilities or channels of communication to engage in promotional activities. School boards are “ultimately accountable for how district facilities and resources are used and must avoid even the appearance of impermissible partisan activity” (*Appeal of Cass, Furnkranz & Poet*, 46 Ed Dept Rep 321 (2007); *Appeal of Maliha*, 41 Ed Dept Rep 367 (2002); see also *Appeal of McBride*, 39 Ed Dept Rep 702 (2000); *Appeal of Karpoff*, 40 Ed Dept Rep 459 (2000), 192 Misc.2d 487 (Sup. Ct. Albany Cnty. 2001), *aff’d*, 296 A.D.2d 691 (3d Dep’t 2002), *appeal denied*, 99 N.Y.2d 501 (2002)).

Thus districts should not:

- a. Make sets of mailing labels available to outside organizations including the parent-teacher association (PTA), in the absence of safeguards to ensure that such district resources will not be used to exhort the electorate to vote in a particular way (*Appeal of Hoey & Kosowski*, 45 Ed Dept Rep 501 (2006); *Appeal of Allen*, 39 Ed Dept Rep 528 (2000); see also *Appeal of Lawson*, 38 Ed Dept Rep 713 (1999)).

Allow distribution of PTA flyers urging passing the budget in students’ backpacks (*Appeal of Hoey & Kosowski*).

2. A district also may not allow a union to utilize district facilities and channels of communication to advocate, even if a collective bargaining agreement provision exists that otherwise allows a

union “the right to use office machines and equipment for union business” (*Appeal of Himmelberg*, 46 Ed Dept Rep 228 (2006)). According to the commissioner of education, such an agreement cannot authorize unconstitutional partisan use of district resources (*Id.*). Therefore, it was improper for a union to:

- a. use a district’s email system to disseminate a message endorsing two candidates running for the school board (*Id.*).
- b. use school mailboxes to distribute flyers to union members urging them to vote for certain preferred board candidates. Although the superintendent told union leaders to desist and directed building principals to retrieve the flyers from the mailboxes upon learning of the distribution, the commissioner admonished the district to take steps to prevent other groups from taking similar action in the future (*Appeal of Van Allen*, 38 Ed Dept Rep 701 (1999); see also *Appeal of Hoefler*, 41 Ed Dept Rep 203 (2001)).

In contrast, a federal district court in New York enjoined a school district from enforcing a regulation that prohibited teachers from placing campaign materials related to a presidential election in their colleagues’ mailboxes and from posting such materials on union bulletin boards in areas closed to students (*Weingarten v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 591 F.Supp.2d 511 (S.D.N.Y. 2008); but see *Weingarten v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 680 F.Supp.2d 595 (S.D.N.Y. 2010)).

## ELECTION OF SCHOOL BOARD MEMBERS

### *Statutory Qualifications*

1. To qualify for membership on a school board in a common, union free, central, central high school, or small city school district, an individual:
  - a. Must be able to read and write (Educ. Law § 2102).
  - b. Must be a qualified voter of the district; that is, a citizen of the United States, at least 18 years of age or older, and not adjudged to be an incompetent (Educ. Law §§ 2102, 2012, 2502(7); Elec. Law § 5-106(6)). (Note: a convicted felon is barred from running for a seat on a school board if his or her maximum prison sentence has not expired or if he or she has not been pardoned or discharged from parole (Elec. Law § 5-106(2)-(4)).
  - c. Must be and have been a resident (but need not be a taxpayer) of the district for a continuous and uninterrupted period of at least one year (30 days in the city of Rensselaer (§ 2502(9-a)(d)) immediately before the election (Educ. Law §§ 2102, 2502(7), (9)(d); see also *Appeal of Baleno*, 30 Ed Dept Rep 358 (1991)).
  - d. May not have been removed from any school district office within the preceding year (Educ. Law § 2103(2)).
  - e. May not reside with another member of the same school board as a member of the same family (Educ. Law § 2103(3); *Rosenstock v. Scaringe*, 40 N.Y.2d 563 (1976)).
  - f. May not be a current employee of the school board (Educ. Law §§ 2103(4)).
  - g. May not simultaneously hold another incompatible public office (*Matter of Schoch & Betheil*, 21 Ed Dept Rep 300 (1981)).
2. In large city school districts, different rules of law and/or exceptions to the above rules may govern membership on the school board (see Educ. Law §§ 2553(1), 2590-b(1)(a), (4)(e), 2590-

c(1), (5)). For example, in New York City, no person may serve at the same time on more than one city-wide council or on both a city-wide council and any community district education council (Educ. Law §§ 2590-b(7)(c)-(f); 2590-c(5)).

3. The United States Supreme Court declared unconstitutional any ban on the eligibility of members of the clergy to run for public office, provided they meet all the statutory qualifications (*McDaniel v. Paty*, 435 U.S. 618 (1978)).
4. A school district may not require candidates for a school board position to meet eligibility requirements in addition to those imposed by statute (*Matter of Guilderland CSD*, 23 Ed Dept Rep 262 (1984)).
  - a. The commissioner of education invalidated a "gentlemen's agreement" observed by a school district for more than 60 years, under which seats of elected school board members were allocated among the communities comprising the district (*Appeal of Gravink*, 37 Ed Dept Rep 393 (1998)).

#### ***Former Employee May Be Candidate***

1. A former employee of the school district may serve on the school board even where the school board could address a matter directly pertaining to the former employee's personal interests, such as continuing retiree health insurance benefits, because contracts with a teachers' union, which is a "voluntary nonprofit association," are exempt from the provisions of the conflict of interest law (*Appeal of Budich*, 48 Ed Dept Rep 383 (2009); *Application of Casazza*, 32 Ed Dept Rep 462 (1993); Gen. Mun. Law § 802(1)(f)).

#### ***Employment of Relatives by School District not bar to Candidacy***

1. There is no prohibition against the employment of spouses, children, or other relatives of board members to positions in the district. Nor are board members prohibited from being elected or appointed to the board if that person's spouse, child or other relative is employed by the district.
  - a. Furthermore, due to a specific statutory exception, a "contract of employment" between the district and a board member's relative does not create a prohibited conflicting interest for the board member (Gen. Mun. Law § 800(3)(a); *Appeal of Budich*, 48 Ed Dept Rep 383 (2009); *Appeal of Behuniak & Lattimore*, 30 Ed Dept Rep 236 (1991)).
  - b. The Education Law, however, requires a two-thirds vote by the board to employ a teacher who is related to a board member by blood or by marriage (Educ. Law § 3016).
    - (1) The two-thirds vote requirement does not apply and has no effect on the continued employment of a tenured teacher who is initially hired before his or her relative is elected or appointed to the school board (*Appeal of Heizman*, 31 Ed Dept Rep 387 (1992)).

## INCOMPATIBILITY OF OFFICE

### *Introduction*

1. There is no general prohibition against holding two or more public offices at the same time (Opn. Att'y Gen. I 82-1 (1982)). However, one person cannot simultaneously hold two public offices or positions of employment if one office is subordinate to the other, such that the person would essentially be his or her own boss, or if the functions of the two positions are inherently inconsistent with each other, such as serving simultaneously as the district's finance officer and as the auditor responsible for the integrity of the district's finances (see *O'Malley v. Macejka*, 44 N.Y.2d 530 (1978); Opn. Att'y Gen. I 92-13). There must be a great likelihood of a division of loyalties or a conflict of duties between the offices, not merely a possibility that such complications may arise on occasion.
2. Two questions must be answered to determine if dual office holding is permissible:
  - a. whether there is an express prohibition against the board member holding or running for the office in question; and
  - b. whether the duties of the two offices may be legally incompatible.
3. The doctrine of compatibility of office does not prohibit an individual from being a candidate for election to a second office where that office is incompatible with the first, if he or she intends to resign from the first office if elected to the second.
  - a. However, if there is a specific provision of law that makes two offices or positions incompatible, such a provision of law may expressly disqualify a person from even being a candidate for a second incompatible office or position (Opn. Att'y Gen. I 89-62;).
  - b. Once elected and upon accepting the second office, an individual vacates the first office automatically (Opn. Att'y Gen. I 89-62; *People ex rel. Ryan v. Green*, 58 N.Y.295 (1874)).
4. Even where two public offices or positions of employment are compatible, a situation may arise in which holding both offices creates a conflict of interest. If this occurs, the conflict can be avoided by declining to participate in the conflicted matter (Opn. Att'y Gen. I 92-13).

### *Statutory Prohibitions for Dual Office Holding by Board of Education Members*

1. The Education Law specifically prohibits a board member from simultaneously holding the positions of:
  - a. district superintendent,
  - b. supervisor,
  - c. clerk,
  - d. tax collector,
  - e. treasurer,
  - f. librarian,
  - g. from being an employee of his or her school board (Educ. Law §§ 2103(1), (4); see also Opn. Att'y Gen. I 93-38)

- (1) A board member of a board of cooperative educational services (BOCES) may not be employed by any of that BOCES' component districts (Educ. Law § 1950(9); see also *Appeal of Reynolds*, 42 Ed Dept Rep 278 (2003)), even when the work is on a short-term per diem basis (Opn. Att'y Gen I 07-2 (2007)).
- h. In small city school districts, the Education Law provides that school board members may not hold any city office other than that of police officer or firefighter (Educ. Law § 2502(7); Opn. Att'y Gen. I 90-80, I 87-6.
    - (1) Decisions determining whether an employee holds an office within the meaning of this provision turn on the presence of traditional indicia of office, such as the taking of an oath of office, the filing of an undertaking or bond, designation as an office holder in a city charter, significant policy-making authority and other job characteristics including duties and supervisory relationships (*Application of Washock*, 41 Ed Dept Rep 280 (2002); Opn. Att'y Gen. I 90-80, I 87-6).
- 2. In New York City, no person may serve on more than one community council or on the city-wide council on special education, the city-wide council on English language learners, or on the city-wide council on high schools and a community council, in addition to several other restrictions on employment and appointment in city positions (Educ. Law §§ 2590-b(7)(c)-(f), 2590-c(5)).
  - 3. Additionally, a town supervisor may not be a trustee of a school district (Town Law § 23(1)). But there is no prohibition against a deputy town supervisor serving as a member of a school board (Opn. Att'y Gen. I 96-29).
  - 4. Election Law provides that a person may not simultaneously hold the office of election commissioner and school board member of a city school district. An election commissioner cannot be a candidate for any elective office which he would not be entitled to hold unless he has ceased by resignation or otherwise to be a commissioner prior to his nomination or designation therefor. Otherwise such nomination or designation shall be null and void (Election Law §§3-200(4), (6); see also *Appeal of Fries*, 50 Ed Dept Rep Dec. No. 16,182 (2010)).

***Exception***

- 1. In union free and central school districts, however, a board member may be appointed clerk of the board and of the district (Educ. Law §§ 2130(1), 1804(1); *Matter of Hurtgam*, 22 Ed Dept Rep 219 (1982)).

***Other Positions Determined to be Incompatible with Board of Education***

- 1. Counsel to the state attorney general has expressed the opinion that a public school board member may not serve simultaneously as:
  - a. a member of the school board of a private school within the district (Opn. Att'y Gen. I 87-58),
  - b. a director of weights and measures in small city school districts (Opn. Att'y Gen. I 90-80),

- c. a county elections commissioner in any city school district (Opn. Att'y Gen. I 87-50; see also Elec. Law § 3-200(4)),
  - d. as a district attorney with jurisdiction over the school district (Opn. Att'y Gen. I 2000-13),
  - e. on a city's common council in small city school districts (Opn. Att'y Gen. I 84-61),
  - f. a city's corporation counsel in a small city school district (Opn. Att'y Gen. I 96-2),
  - g. a city's board of ethics in a small city school district (Opn. Att'y Gen. I 2008-5).
2. The state Advisory Committee on Judicial Ethics has indicated that a part-time judge may not seek election to a local school board because the Rules of the Chief Administrator of the Courts prohibit judges from campaigning for elective office (Joint Opn. of Advisory Committee on Judicial Ethics 89-157/90-7; 22 NYCRR § 100.5).
- a. The Advisory Committee has also stated that a judge who already has been elected to a school board should resign because the "position on the school board [is] one that may involve dealing with quasi-political and highly controversial issues" that are incompatible with holding judicial office (Id., see also 22 NYCRR § 100.5(A)(1)(h)).
  - b. But a part-time justice may accept "appointment" to the board of trustees of a publicly-funded school district for children with disabilities, because by virtue of the "appointment," the justice would not be required to compete in a public, political election in order to obtain a seat on the school board, and because in that particular type of school district there is no public referendum on the school district's budget (Joint Opn. of Advisory Committee on Judicial Ethics 94-59; 22 NYCRR § 100.5(A)(1)(b), (h)).

### ***Offices Compatible with Board of Education for Dual Office Holding***

1. A school board member may serve simultaneously in the following offices:
- a. trustee of a public library (*Matter of Schoch*, 21 Ed Dept Rep 300 (1981); see also Opn. Att'y Gen. I 81-110);
  - b. town assessor (Opn. Att'y Gen. I 2000-14; Opn. St. Comp. 73-1174);
  - c. employee of a BOCES (*Appeal of Reynolds*, 42 Ed Dept Rep 278 (2003); *Matter of Todd*, 19 Ed Dept Rep 277 (1979));
  - d. village mayor or village trustee (Opn. Att'y Gen. I 91-59; see also Village Law § 3-300; Opn. Att'y Gen. I 81-17);
  - e. member of a town zoning board of appeals (Opn. Att'y Gen. I 84-68);
  - f. member of town board of assessment review (Opn. Att'y Gen. I 92-26);
  - g. member of a city school board and county director of real property tax services (Opn. Att'y Gen. I 93-9);
  - h. member of a city school board and city supervisor whose only function is to represent the city on a county legislature (Opn. Att'y Gen. I 2005-16);
  - i. county treasurer, county legislator, and county clerk (Opn. Att'y Gen. I 2002-12, Opn. Att'y Gen. I 82-1, Opn. St. Comp 55-7802);
  - j. volunteer in an athletic department of the school, depending upon the significance of the volunteer's responsibilities (Opn. Att'y Gen. I 92-13);
  - k. deputy town supervisor and member of town council (Opn. Att'y Gen. I 96-29; Opn. St. Comp 67-354); and
  - l. trustee of a not-for-profit foundation that raises money and makes gifts to the school district (Opn. St. Comp 2008-1).

This is only a partial list of opinions on compatibility of office. For more information, contact the state Attorney General's Office.

### ***Employment of Board Member by School Board***

1. There are two instances expressly authorized by law in which a school board member may be employed by the school board while simultaneously serving on the board. A board member may serve as a district clerk (Educ. Law §2103(4)), or the school physician (2/3 vote required) (Gen. Mun. Law §802(1)(i)).
2. Otherwise, a board may not appoint one of its members to a position of employment with the district (*Wood v. Whitehall*, 120 Misc. 124 (Sup. Ct. Washington Cnty. 1923), aff'd, 206 A.D. 786 (3d Dep't 1923); Opn. Att'y Gen. I 87-4; *Appeal of Boeddener*, 28 Ed Dept Rep 578 (1989); see also Educ. Law § 2103(4)).
  - a. Furthermore, an appointment following resignation from the board may or may not be proper depending upon the facts and circumstances. For example, it would not be proper for a board to decide to appoint one of its members to an employment position with the district at a future date, prior to the board member's resignation when the board member still sat on the board (Opn. Att'y Gen. I 87-4; *Appeal of Boeddener*).

## **NOMINATION OF CANDIDATES FOR SCHOOL BOARD**

### ***Specific Seat v. At Large Voting***

1. Ordinarily, nominating petitions are for specific seats on the school board (Educ. Law § 2018(a)). However, district voters may choose to make all seats "at large," which means that each nominee is eligible for every vacancy, rather than only for a specific seat (Educ. Law § 2018(b)) and nominating petitions do not state a specific seat (see *Appeal of Martin*, 32 Ed Dept Rep 567 (1993)). A duly adopted "at large" proposition becomes effective at the next election and remains valid until repealed by the voters (Educ. Law § 2018(b)).
2. Board members in small city school districts run "at large." The nominating petition must name the specific seat for which the board member is running only if the voters have adopted a proposition requiring candidates to run for specific seats (Educ. Law § 2608(1)).
3. Candidates may be nominated for only one vacancy (Educ. Law § 2018(a)).

### ***Contents of the Petition***

1. Nominating petitions must be signed by at least 25 qualified district voters or two percent of the number of voters who voted in the previous annual election of the members of the school board, whichever is greater (Educ. Law § 2018(a)). In small city school districts, nominating petitions must be signed by at least 100 qualified voters (§ 2608(1)).

- a. A qualified voter is person is a citizen of the United States, at least 18 years old, and a "resident" of the school district for at least 30 days immediately prior to the election at which he or she seeks to vote (Educ. Law §2012)
    - (1) a person need not be a registered voter to satisfy the legal definition of a "qualified voter" (*Appeal of Dreyer*, 18 Ed Dept Rep 235 (1978); see also *Appeal of Crowley*, 39 Ed Dept Rep 665 (2000)).
  - b. There is no limit on the number of nominating petitions a district resident may sign.
2. The petition must include the candidate's name and residence and the residences of the people who signed the petition (Educ. Law §2018(a), 2608(1)).
    - a. In districts where candidates run for specific seats, it must also identify the specific seat for which the candidate is running, including the name of the incumbent, and the length of the term of office to be filled (Educ. Law §§ 2018(a), 2608(1)).
  3. In school districts that conduct their school board elections pursuant to the provisions of the Education Law, it is impermissible to require that nominating petitions be verified (*Appeal of Loughlin*, 35 Ed Dept Rep 432 (1996)). However, in city school districts that may conduct certain aspects of their school board elections pursuant to provisions of the Election Law, different rules sometimes apply.
  4. Nothing in the Education Law specifies the earliest date that candidates may begin collecting signatures on nominating petitions. In one case, the commissioner ruled that it was not unreasonable for a district to accept nominating petitions that contained signatures collected prior to the posting of the notice of the annual meeting, absent evidence that this practice gave some candidates an unfair advantage over others (*Appeal of Leman*, 32 Ed Dept Rep 579 (1993)).

### ***Deadline for filing nominating petitions***

1. Nominating petitions must be filed in the office of the district clerk no later than 30 days (20 days in small city school districts) before the annual or special district meeting at which the school board election will occur, between 9:00 a.m. and 5:00 p.m. (Educ. Law §§ 2018(a), 2608(1); *Appeal of Geiger*, 52 Ed Dept Rep, Dec. No. 16,379 (2012); *Matter of Crespo*, 23 Ed Dept Rep 446 (1984)).
  - a. If the deadline for filing nominating petitions falls on "a Saturday, Sunday or public holiday, the filing may be performed on the next succeeding business day" (Gen. Constr. Law § 25-a(1); see also *Appeal of Williams*, 36 Ed Dept Rep 270 (1996)).
2. Notice of the deadline for filing nominating petitions must be published in the notice of the annual or special district meeting (Educ. Law §§ 2003(2), 2004(2), 2007(1), 2601-a(2), 2602(2)). Under certain specified circumstances, the nominating deadline may be extended.
3. A school board properly rejected a nominating petitioner filed after the statutory deadline even though the district has incorrectly published notice of the deadline for petitions to be filed. According to the commissioner, the district's mistake did not authorize it to extend the time for filing petitions (*Appeal of Koehler*, 52 Ed Dept Rep, Dec. No. 16,373 (2012)).

### ***Acceptance of Nominating Petitions***

1. A nominating petition may be rejected if the nominating petition has been incorrectly filed, or if the candidate is ineligible for office or has declared an unwillingness to serve (Educ. Law § 2035(2)). Although nominating petitions are presented to the district clerk, the school board is authorized to determine whether a board candidate is eligible to serve and to reject a nominating petition from an ineligible candidate (*Appeal of Martin*, 31 Ed Dept Rep 441 (1992)).
2. A failure to include the candidate's name and address or the specific seat or term of office on each page of a multi-sheet petition does not provide sufficient grounds to reject a nominating petition absent proof that persons signing the petition did not know what they were signing (*Appeal of Taubenfeld*, 18 Ed Dept Rep 10 (1978)).

### ***Write-in Candidates***

1. A person need not file a nominating petition in order to be elected to serve on a school board. All ballots must have one blank space for each vacancy on the board, in which voters may write in the name of any candidate who is not listed on the ballot (Educ. Law §§ 2032(2)(e), 2608(2); *Appeal of Thomas*, 47 Ed Dept Rep 442 (2008)).
  - a. If the ballot does not have an open space for write-in votes, and the outcome of the election is affected as a result of the omission, the election may be nullified by the commissioner of education (*Appeal of Bd. of Trustees of Syosset Pub. Library*, 32 Ed Dept Rep 460 (1993); see also *Appeal of Thomas*).
2. There is no requirement in the Education Law that a voter place a check mark or an "x" or any other kind of mark next to the name of the write-in candidate (*Appeal of Titus*, 36 Ed Dept Rep 407 (1997); *Appeal of Gresty*, 31 Ed Dept Rep 90 (1991)). If the name of a qualified person is written on a write-in ballot, it must be counted.
3. Write-in ballots with minor misspellings of a candidate's name should be credited to that candidate in the absence of a showing that there is another district resident with the same or a similar name (*Appeal of Cook*, 20 Ed Dept Rep 1 (1980)).
4. Where voting machines are used, it is improper to require voters to cast write-in ballots in a separate ballot box (*Matter of Yost*, 21 Ed Dept Rep 140 (1981)).
5. If there are no candidates or not enough candidates properly nominated for each vacancy, the election must still be held, and the vacancies will be filled by the individuals with the most write-in votes (Educ. Law §§ 2032(2)(e), 2034(7)(a)).
  - a. If there are not enough write-in candidates to fill vacancies, any remaining vacancy may be filled pursuant to the provisions of sections 1709(17), 2502(6), or 2113 of the Education Law.

### ***Candidate Withdrawal, Death or Ineligibility***

1. If a board candidate, for whom a nominating petition has been duly filed, withdraws the petition, dies, or otherwise becomes ineligible to hold the office of school board member at a point in time later than 15 days before the last day for the filing of nominating petitions, the district is required to extend the nominating deadline by as much as 15 days; provided, however, that in no event may nominating petitions be filed later than 5:00 p.m. on the seventh day before the date of the election (Educ. Law §§ 2018(d), 2608(1); see also *Appeal of Schultz*, 48 Ed Dept Rep 70 (2008)).
2. A candidate who withdraws from an election may resubmit his or her candidacy but that person must file a new petition within the same time limitations applicable to other candidates (Educ. Law § 2018(a))

### ***Ballot Issues***

1. Candidates' names must be grouped together in order, as determined by the drawing of lots, either under the specific vacancy for which they have been nominated, or all together for "at large" seats.
2. The district clerk conducts the drawing "the day after the last possible date for candidates to file a petition. In the event that any candidate is not present in person or by a person designated in a written proxy to accomplish the drawing, the district clerk shall be authorized to act as proxy" (Educ. Law §§ 2032(2)(b), 2608(2); see *Koppell v. N.Y. State Bd. of Elections*, 108 F.Supp.2d 355 (S.D.N.Y. 2000)).
  - a. In one case, the commissioner of education ruled that the failure of the district clerk to draw lots for placement on the ballot by the statutory deadline was a technical error that did not affect the outcome of the election (*Appeal of Reese*, 34 Ed Dept Rep 187 (1994); see also *Appeal of Olivia*, 16 Ed Dept Rep 355 (1977)).
  - b. An appeal from a losing candidate who failed to prove that she lost the election because a district's printer mistakenly printed the candidates' names on the ballot in the wrong order was dismissed (*Appeal of Apgar*, 43 Ed Dept Rep 351 (2004)).
3. In elections for "specific seats" the Education Law requires that "at the top of each group" of candidates running for separate specific seats on a school board there must be a description that includes, at a minimum, "the length of the term of office and the name of the last incumbent, if any, and in addition, a direction that only one vote may be cast in each separate group" (Educ. Law § 2032(2)(b); see also *Appeal of Mead*, 42 Ed Dept Rep 359 (2003); *Appeal of Kushner & Pinto*, 39 Ed Dept Rep 770 (2000)).

## CAMPAIGN EXPENDITURE AND CONTRIBUTION STATEMENTS

### *When and What Required for filing*

1. If a school board candidate's campaign expenditures exceed \$500, the candidate must file a sworn statement with both the district clerk and the commissioner of education itemizing their expenditures and contributions received (Educ. Law §§ 1528-1531).
2. This statement must list the amounts of all money or other valuable things paid, given, expended or promised by the candidate, or incurred for or on the candidate's behalf with his or her approval (Educ. Law § 1528).
3. Any expenditure made on behalf of the candidate without his or her approval is not to be included in this statement. Unapproved expenditures are limited to \$25 and those making any such expenditure must file a sworn statement with the clerk and the commissioner that the candidate did not approve it (Educ. Law § 1528(1)(c)).
4. Contribution statements shall include the dollar amount of any donation or the fair market value of any contribution which is other than money, and the name and address of the donor.
  - a. If the donor is a political committee as defined in section 14-100 of the Election Law, the statement shall include the name of and the political unit represented by the committee, the date of receipt of the donation, the dollar amount of every expenditure, the name and address of the person to whom it was made, and the date thereof (Educ. Law § 1528(1)(b)).
5. A candidate who spends \$500 or less must file a sworn statement with the district clerk indicating this to be the case (Educ. Law § 1528). No other campaign expenditure statement is required.
  - a. Candidates for community school district education councils in New York City do not need to file these statements (Educ. Law § 1528(1)).

### *Time for Filing*

1. Campaign expenditure statement must be filed at three intervals.
  - a. An initial statement must be filed at least 30 days before the election
  - b. A second statement must be filed on or before the fifth day preceding the election
  - c. A final statement must be filed within 20 days after the election (Educ. Law § 1529(1)).
    - (1) The statement must cover the period up to and including the day next preceding the day specified for the filing of the statement (Educ. Law § 1529(2)).
    - (2) If any contribution in excess of \$1,000 is received after the close of the period to be covered in the last statement filed before the election that contribution must be reported within 24 hours of its receipt (Educ. Law § 1529(2), see also *Appeal of Bd. of Educ. of Hempstead UFSD*, 55 Ed Dept Rep, Dec. No. 16,878 (2016)).

### ***Consequences for Failure to File***

1. In the event that the appropriate statement is not filed with the district clerk, the law provides that the candidate must promptly file a copy of such statement upon notice from the school district and/or the commissioner that the statement was not received. If a candidate still fails to file the statement, then the only way the law can be enforced is for any other "candidate voted for at the election" or "any five qualified voters" to commence legal action in state Supreme Court requesting the court to order the candidate to file the required statements (Educ. Law § 1530).
  - a. In other words, school officials can and should remind candidates to file the appropriate expenditure statements, but only the state Supreme Court has the authority to order candidates to file these statements (see *Appeal of Tang*, 48 Ed Dept Rep 507 (2009); *Appeal of Johnson*, 45 Ed Dept Rep 320 (2005); *Appeal of Muench*, 38 Ed Dept Rep 649 (1999); see also *Appeal of Donnelly*, 33 Ed Dept Rep 362 (1993)).
2. A candidate's failure to file a complete statement of election expenditures is an insufficient basis for setting aside the results of a school board election (see *Appeal of Muench*; see also *Appeal of Guttman*, 32 Ed Dept Rep 228 (1992); *Matter of Pendergast*, 20 Ed Dept Rep 127 (1980)).

### ***Financial Disclosure Statements***

1. The Ethics in Government Act, which requires individuals holding or running for office to make financial disclosure statements, applies to municipalities with populations of 50,000 or more, but not to school districts (Gen. Mun. Law §§ 810(1), 811).

## **DAY OF ELECTION**

### ***Prohibition Against Electioneering***

1. The distribution of materials in support of or in opposition to any particular position within 100-foot zone measured from the entrance to a polling place would constitute impermissible electioneering (Educ. Law §§ 2031-a; 2609(4-a)).
2. District election inspectors must post distance markers delineating the 100-foot zone (Educ. Law §§ 2031-a(1); 2609(4-a)(a); *Cullen v. Fliegner*, 18 F.3d 96 (2<sup>nd</sup> Cir. 1994))
3. On the day when a school budget vote or revote occurs, a school board may display within any polling place a copy or copies of any budget or proposition to be voted upon (Educ. Law §§ 2031-a(2)).
4. The distribution of purely factual information at polling places is permissible (see *Appeal of VanAllen*, 38 Ed Dept Rep 701 (1999); *Appeal of Leman*, 38 Ed Dept Rep 683 (1999); *Appeal of Hart*, 34 Ed Dept Rep 299 (1994); *Appeal of Tomkins*, 34 Ed Dept Rep 174 (1994)).

### ***Election and Declaration of Winner***

1. School board members are elected either at an annual or special school district meeting by a plurality of the votes cast for each vacancy (Educ. Law §§ 2034(7)(a), 2502(9)(n), (9-a)(n), 2610(4)).
2. In districts with "at large" seats, if there are vacant positions of different lengths, positions are filled in decreasing order of the number of votes and length of office (Educ. Law §§ 2034(7)(c), 2502(9)(n), (9-a)(n), 2610(4)). Thus, the candidate with the highest number of votes is entitled to the position of the longest length.
  - a. Moreover, the law provides that where the term of office for a school board seat expires at the end of the school year, and the seat is vacant, or becomes vacant on the date of the annual meeting and election, "the person elected to fill the full term vacancy is deemed elected to fill the remainder of the term preceding the commencement of the full term" (Educ. Law § 2105(14)).
3. The chairperson of the meeting at which the election takes place declares the result of each ballot, as announced by the election inspectors (Educ. Law § 2034(7)(a)).
4. If the district has been divided into election districts and voting machines are used, the election inspectors must report the results to the chief election inspector of each district, who then reports the results to the district clerk within 24 hours. The school board must then tabulate and declare the result of the ballot within 24 hours of receiving the results (Educ. Law § 2034(7)(b)).
5. The school district clerk must notify in writing every person elected as a school board member (Educ. Law §§ 2108(1), 2121(5), 2610(5)). However, the presence of a person elected to the board at the district meeting at which he or she is elected is considered sufficient legal notice to the candidate of his or her election (Educ. Law § 2108(2)).
  - a. The district clerk also must report the names and post office addresses of elected board members to the town clerk of the town where the district is situated. There is a \$5 penalty for failing to do so (Educ. Law § 2121(5)).
6. If there is a tie vote for a board seat, the district must have a run-off election within 45 days. The only candidates in a run-off election are those who tied. No new nominating petitions are required (Educ. Law §§ 2034(10), 2610(6)).

### ***Taking Office once Winner Declared***

1. Newly elected school board members are considered to have accepted the office unless they file a written refusal with the school district clerk within five days after receiving notice of their election (Educ. Law § 2108(2)). However, they must take and file an oath of office prior to commencing service on the board.
2. A new board member takes office when the incumbent's term of office expires, or if the seat is vacant at the time of the election, immediately after the election (Educ. Law § 2105(14)).
3. The new board member must file an oath of office (N.Y. Const. art. 13, § 1; Pub. Off. Law § 10). If a new member has not filed an oath of office or is otherwise not qualified to take office when

the term begins, the incumbent "holds over" in office until the new member becomes "qualified," that is, takes all the steps necessary to take office (Pub. Off. Law § 5; see *Appeal of Foshee*, 38 Ed Dept Rep 346 (1998); see also *Matter of Waxman*, 19 Ed Dept Rep 157 (1979)).

- a. The failure or neglect of a board member to file an oath of office within 30 days after the commencement of his or her term causes the office to become vacant (Pub. Off. Law § 30(1)(h); see, for example, *Appeal of Rausch*, 41 Ed Dept Rep 351 (2002); see also *Appeal of Karpen*, 39 Ed Dept Rep 98 (1999)).

## **CHALLENGES TO ELECTIONS**

### ***Process to Challenge Election Results***

1. All disputes over any district meeting or election must be referred to the commissioner of education (Educ. Law § 2037), including when the school board itself believes the election results are in dispute (see *Appeal of the Bd. of Educ. of the Rush-Henrietta CSD*, 48 Ed Dept Rep 486 (2009); *Appeal of the Bd. of Educ. of the Schroon Lake CSD*, 47 Ed Dept Rep 502 (2008)).
2. The commissioner may, at his discretion, order a recount of the ballots or a new election (Educ. Law §§ 2034(6)(a), 2037; *Appeal of Murtagh*, 19 Ed Dept Rep 179 (1979); *Appeal of Bennett*, 48 Ed Dept Rep 311 (2009); *Appeal of Doro*, 41 Ed Dept Rep 13 (2001); see also *Matter of Senecal*, 22 Ed Dept Rep 367 (1983); but see *Appeal of Ell*, 34 Ed Dept Rep 394 (1995)).

### ***Standard by which Election Results may be Overturned***

1. There is a presumption of regularity in the conduct of school district elections. The burden of proof rests on the person who challenges the results to establish all the facts based upon which he or she seeks to have the commissioner overturn the election results. The commissioner has held that "mere speculation as to the possible existence of irregularities provides an insufficient basis on which to annul election results" (*Appeal of Nahas*, 55 Ed Dept Rep, Dec. No. 16,816 (2015)).
2. The challenger must prove (1) that the district engaged in improper conduct, such as a violation of the Education Law or commissioner's regulations and (2) the improper activity engaged in by the district actually affected the outcome of the election.
  - a. Otherwise, if the improper activity occurred but did not affect the outcome of the election, the commissioner may admonish the district, but usually will decline to overturn the results of the election (*Appeal of Karpoff*, 40 Ed Dept Rep 459 (2000), 192 Misc.2d 487 (Sup. Ct. Albany Cnty. 2001), aff'd, 296 A.D.2d 691 (3d Dep't 2002), appeal denied, 99 N.Y.2d 501 (2002); see also *Appeal of Emond*, 54 Ed Dept Rep, Dec. No. 16,754 (2015) (wherein the commissioner cautioned the board to "ensure full compliance with Commissioner's decisions in future elections and to review its election practices with respect to voter privacy.")).
  - b. Where a district failed to counter allegations that an individual voted twice at the same polling place characterized as "chaotic" and of improper conduct on the part of election inspectors the commissioner overturned the results (*Appeal of Lanzilotta*, 48 Ed Dept Rep 428 (2009)).

3. The commissioner of education may overturn the results of an election also if the challenger can prove irregularities occurred that were "so pervasive that they vitiated the electoral process" or can "demonstrate a clear and convincing picture of informality to the point of laxity in adherence to the Education Law." (see *Appeal of Touré*, 54 Ed Dept Rep, Dec. No. 16,660 (2014)).
  - a. The commissioner has made it clear, however, that "it is a rare case where errors in the conduct of the election become so pervasive that they vitiate the fundamental fairness of the election" (*Appeal of Ghezzi and Farr*, 55 Ed Dept, Dec. No. 16,890 (2016); *Appeal of Crawford*, 47 Ed Dept Rep 413 (2008); *Appeal of Cass, Furnkranz & Poet*, 46 Ed Dept Rep 321 (2007); *Appeal of Huber*, 41 Ed Dept Rep 240 (2001); *Appeal of D'Oronzio*, 41 Ed Dept Rep 457 (2002); *Appeal of De Berardinis*, 39 Ed Dept Rep 145 (1999)).
  - b. Examples where irregularities were so pervasive include, where a voting machine malfunctioned and the number of registered voters did not match the poll list (*Appeal of Bd. of Educ. of the Goshen CSD*, 47 Ed Dept Rep 352 (2008)), and where the voting machines incorrectly displayed the prior year's budget proposal (*Appeal of the Bd. of Educ. of the Rush-Henrietta CSD*, 48 Ed Dept Rep 486 (2009)).
  
4. A third standard the commissioner has applied on occasion to overturn a school district election is a probability standard. In one case where the commissioner invalidated certain absentee ballots and the vote on a library proposition ended in a tie, he ordered a new vote even though there was no proof that the invalidated absentee ballots actually cast a vote on the library proposition. The commissioner found "the probability that the will of the voters was not expressed, because of illegally cast absentee votes, to be too high to allow the election results to stand" (*Appeal of the Weller Library Comm'n*, 42 Ed Dept Rep 338 (2003); see also *Appeal of Cobb*, 32 Ed Dept Rep 139 (1992); *Matter of Boyes v. Allen*, 32 A.D.2d 990 (3d Dep't 1969), aff'd, 26 N.Y.2d 709 (1970); and *Appeal of Crawmer*, 35 Ed Dept Rep 206 (1995), aff'd, 239 A.D.2d 844 (3d Dep't 1997), appeal dismissed, 90 N.Y.2d 934 (1997), appeal denied, 91 N.Y.2d 804 (1997)).
  - a. Applying both the probability and the vitiation of the electoral process standards, the commissioner set aside the results of an election where approximately 30 percent of the votes were cast using a lever either above the first candidate's name or to the side of the last candidate's name and where the names of three candidates running for the same vacant board seat were listed vertically on the ballot and nearly one-third of the voters misplaced their vote. It was probable from the evidence that nearly one-third of the votes were misplaced, thereby compromising the election. Voter confusion over the listing of candidates compromised the election results (*Appeal of Bd. of Educ. of the Schroon Lake CSD*, 47 Ed Dept Rep 502 (2008)).

### ***Challenge to Board Member Election***

1. In one case the commissioner of education ruled that an incumbent board member who sought reelection to his own seat and wrote his name in the space on the nominating petition identifying himself as the incumbent, technically violated the Education Law because he failed to list his name in the space identifying himself as the "candidate." However, the record established that as each person was asked to sign the nominating petition, the person gathering the signatures explained who was running and described the seat for which the candidate was running. Moreover, there was no proof that any voter was confused about who was seeking the

nomination. Therefore, the commissioner dismissed the challenge to the election (*Appeal of Grant*, 42 Ed Dept Rep 184 (2002)).

2. Where a challenge to a board member's election is successful, the commissioner of education has determined that the person initially declared the winner is a de facto board member during the period of time that an appeal of the election results is pending. Therefore, the actions taken by the board during the pendency of the appeal are valid (*Appeal of Titus*, 36 Ed Dept Rep 407 (1997); see also *Appeal of Loughlin*, 35 Ed Dept Rep 432 (1996); and *Appeal of Heller*, 34 Ed Dept Rep 220 (1994)).
3. A candidate who earned the highest number of votes but was ineligible for election to the office of school board member was unsuccessful in petitioning the commissioner to declare her the winner. The school district learned that the petitioner had not resigned the incompatible office prior to the school board election and therefore declared the second highest vote getter as the winner. The commissioner upheld the district's action given that the petitioner was ineligible for office (*Appeal of Fries*, 50 Ed Dept Rep, Dec. No. 16,182 (2010)).

### ***Challenge Based upon Deficiencies in Election Notice***

1. If a district fails to comply with the legal requirements for providing adequate public notice, the results of the budget vote and/or board member elections, in all likelihood, will be upheld and will not be found illegal, unless it appears that the failure to give proper notice was willful or fraudulent (Educ. Law § 2010; see also *Appeals of Campbell & Coleman*, 41 Ed Dept Rep 207 (2001)).
  - a. "Where the notice given is reasonably calculated to and effectively does give notice to the public of the election, a technical failure to give proper notice is not a basis for invalidating the result" (*Appeal of Winograd*, 42 Ed Dept Rep 180 (2002)).
2. A district provided correct information for publication in the local newspaper, indicating that it would hold its budget hearing on May 6 of that year. However, the newspaper incorrectly advertised the date of the hearing as May 5. Observing that all the other information the district provided to community residents listed the correct date, the commissioner of education found nothing willful or fraudulent about the error in the notice of the budget hearing and refused to overturn the results of the election (*Appeal of Leman*, 39 Ed Dept Rep 35 (1999)).
3. The commissioner refused to overturn the election results where the district had published notice in only one newspaper, not realizing until just five days before the election that the law generally requires publication in two newspapers, at which point in time it was too late to correct the error. The commissioner found that the error was not willful or fraudulent, especially since, upon discovering the error, the district mailed and hand-delivered a flyer regarding the election to district households (*Appeal of Hebel*, 34 Ed Dept Rep 319 (1994); see also *Appeal of Winograd*, 42 Ed Dept Rep 180 (2002); *Appeal of Bartosik*, 37 Ed Dept Rep 531 (1998); and *Application of Martin*, 32 Ed Dept Rep 208 (1992)).
4. A school district did not act improperly when it placed six signs along roads bordering district schools and ten signs at major intersections throughout the district, informing the public of the date and time of the budget vote and election. The district had properly published notice of the meeting in the newspaper and placement of the signs was not improper advocacy given the signs' content (*Appeal of Tillet*, 52 Ed Dept Rep, Dec. No. 16,473 (2013)).

### ***Challenge Based upon Poll List or Machine Deficiencies***

1. A school district's technical failure to maintain a complete and accurate poll list is no basis to invalidate an election, absent proof that this irregularity affected the outcome of the election (*Appeal of Crowley*, 39 Ed Dept Rep 665 (2000); *Appeal of Diamond*, 39 Ed Dept Rep 541 (2000); *Appeal of Singer*, 34 Ed Dept Rep 355 (1995); *Matter of Kavanaugh*, 5 Ed Dept Rep 19 (1965)).
2. Discrepancies between the machine count and the sign-in sheets at the conclusion of an election do not necessarily require that the commissioner invalidate an election absent evidence "that the outcome of the election was affected by the apparent failure of some voters to sign the poll list" (*Appeals of Campbell & Coleman*, 41 Ed Dept Rep 207 (2001)).
3. Voting machine problems did not support overturning the results of an election in a case where the rear doors of the voting machines were open and unlocked, but the key on the side of the machine that locked the control to prevent tampering was in the proper position and the machines functioned properly, and where the curtain fell off a voting machine during voting but was fixed by the Board of Elections and the malfunction did not affect the vote count while the machine was in service (*Appeal of Bennett*, 48 Ed Dept Rep 311 (2009)).
4. The commissioner ordered a school district to hold a special budget vote when one voting machine incorrectly displayed the budget proposition for the prior school year at the May 2011 election. The budget had passed by a margin of 16 votes, however, 383 voters cast their votes on the machine with the incorrect propositions before the error was discovered and the machine was taken out of service. Here, the commissioner found the failure to display the correct propositions "deprived district voters using such voting machine of essential information needed to cast their votes" such that the will of the voters could not be accurately determined. Such error vitiated the electoral process (*Appeal of the Board of Education of the Beekmantown Central School Dist.*, 50 Ed Dept Rep, Dec. No. 16,253 (2011)).

### ***Challenge Based upon Write-In Ballot***

1. Petitioner challenged his election loss alleging the electronic voting machine did not count a write-in ballot for him. Had the vote been counted Reed and the other candidate, Hatcher, would have tied.

The district clerk averred that during the course of the election there was no review of the scanned ballots to determine if write-in votes were cast on the ballots. The day after the election the clerk reviewed the scanned ballots and discovered this disputed ballot which contained write-in votes for candidates in spots other than those so designated. Upon the advice of counsel, the ballot was not counted to avoid improperly conducting a recount, which only the commissioner may order. The district as part of its papers stated it did not object to the commissioner ordering a recount or new vote if it was determined an error occurred.

The commissioner examined a certified copy of the ballot in question and identified two issues. First, rather than filling in the oval next to the voter's candidate of choice, the voter wrote the names of his selections under each seat. Compounding this error, the voter did not write his selections in the boxes designated for write-ins but rather in a box directly under each candidate's name. According to the commissioner, a voter is not precluded from writing in a candidate's name even if it is already printed on the ballot. In determining whether the ballot should be

counted, the commissioner considered interpretations of election law as guidance for interpreting the education law. Cases in the election law context have allowed votes for candidates to be counted when the names were written in the correct column but the wrong row. “Where the intent of the voters is apparent... it should not be frustrated by technical rules.” Similarly, Education Law §2034 provides that if it is impossible to determine the voter’s choice than the ballot shall not be counted for such office. The commissioner determined, in this case, it was not impossible to determine the choice of the voter in question.

Based on the foregoing, the commissioner found that the petitioner established both that irregularities occurred and affected the outcome of the election. Specifically, she found error that the ballots were not reviewed for write-in votes and that the ballot in question should have been counted. As such she annulled the election results and ordered a new election be held no later than annual vote in May 2016. *Appeal of Reed*, 55 Ed Dept Rep, Dec. No. 16,871 (2016).

### ***Appeals Commenced by Boards of Education***

1. The Board of Education of the Crown Point Central School District petitioned the commissioner of education seeking an order to annul and correct the canvass of votes with respect to its 2011 budget proposition. On May 17, 2011 the election inspectors announced the election results on the budget as follows: 138 yes votes; 86 no votes; 4 abstentions and 1 vote was voided. The following day the superintendent reviewed the results and discovered a discrepancy in that the total number of votes determined to be cast on the budget (270) did not match the sum of the results certified by the election inspectors (229 votes). An examination of the tally sheet of the inspectors showed that 41 yes votes were allegedly not included in the tally of the final results. The board asked the commissioner to annul the canvassing and declared result from May 17<sup>th</sup> and to declare the budget to have passed by a vote of 179 in favor to 86 against or in the alternative to annul the result and direct a recount pursuant to Education Law §2034. The commissioner examined the tabulation sheets submitted as evidence and determined the notations on it were unclear and could be interpreted two ways. He determined that the discrepancies in the tabulation constituted a “substantial attack on the integrity of the tallies and returns of the inspectors of election” and ordered a recounting of the ballots pursuant to Education Law § 2034 (*Appeal of the Board of Education of the Crown Point CSD*, 51 Ed Dept Rep. Dec. No. 16,291 (2011)).
2. The commissioner of education granted a school district’s appeal seeking to annul the certification of election results and correct the canvass for the May 2010 budget vote. After counting the ballots for the budget multiple times the election inspectors certified the budget vote as a tie; but agreed that the ballots should be re-counted again the next morning. The district recounted the ballots the following morning and determined the budget passed by one vote (224 for 223 against). A discrepancy noted in the total number of votes determined to be cast on the budget (447) versus the total number of voters recorded on the poll list plus the returned absentee ballots (449) was resolved when a search of the garbage cans in the auditorium where the vote was conducted turned up two ballots which included votes for trustees but lacked a vote for the budget. The commissioner cautioned the school district that it has no authority under the law to engage in a recount of ballots without an order from the commissioner. However, since a recount was conducted and there was no evidence in the record of improper conduct, the commissioner declined to order another recount. He strongly cautioned the board to ensure all ballot canvassing procedures comply with law in the future and ordered the certified election results annulled and directed the canvass of the budget to be changed to reflect 224 votes

in favor and 223 votes against (*Appeal of the Board of Education of the Deposit CSD*, 49 Ed Dept Rep 449 (2010)).

3. Board sought an order annulling the results of a district meeting, recanvassing the votes, and certifying the final election results. The absentee ballots contained instructions, including the following instruction: “Any mark in a voting bubble other than a complete fill will render the ballot void” (emphasis in original). With regard to the 38 absentee ballots received, four were not counted since they were not signed, and of the remaining 34 absentee ballots, 7 were excluded because they had been marked incorrectly; that is, the voters did not completely fill in the bubbles next to the candidates’ pre-printed names, and instead only partially filled in the bubbles on the absentee ballot with a check mark or x mark.

The next day (May 18), the assistant superintendent, believed that the 7 ballots were wrongly excluded given that the intent of the voters was discernible from the markings on each ballot. The assistant superintendent reopened the ballot box and counted the 7 previously excluded ballots. This new count resulted in a change in the election results such that one candidate now received a 3 year term as opposed to a 2 year term. The election results were then certified and the board ultimately declared the results of the election on May 24, 2016.

Commissioner expressed concern that the ballot box was reopened for a recanvas. Section 2034(6) requires that the ballots be placed in a locked and sealed ballot box, and that the box must not be opened except by order of the commissioner or upon resolution of the board after a period of 6 months without any proceeding being commenced in regard to the election. However, the commissioner noted that the results of the election were not declared until May 24, 2016. Thus, the assistant superintendent conducted the recanvas on May 18 before the board’s declaration, to correct an error, upon learning that the intent of the voters was discernible from the markings on each rejected absentee ballot. “Therefore, I cannot find that a second count of ballots held after the discovery of the error and before official results are declared, is such an irregularity as to warrant the setting aside of an election.”

Regarding the absentee ballot itself, the commissioner had 2 concerns. First, the instructions on the absentee ballots indicating that the failure to completely fill in the bubbles on the form renders the ballot void, are inconsistent with Education Law sections 2018-a(4), 2032 and 2034. Second, with respect to the 7 excluded absentee ballots, the “voters’ choices of candidates are readily discernible” and “should have been counted in the first instance.”

The commissioner noted that it would “serve no purpose for me to order another recount” and that the board “has demonstrated to my satisfaction, based on the recanvass of the previously-rejected absentee ballots conducted on May 18, 2016, that Ms. Ames was the actual winner of the three-year term and that Mr. Byer was the actual winner of the two-year term.” (*Appeal of the Board of Education of the Hilton CSD*, 56 Ed Dept Rep, Dec. No. 17,091 (2017)).

### ***Content of Bond Resolution***

1. The petitioner in this case sought to overturn the results relating to a bond referendum. Herloski believed the school district violated the terms of the local finance law by not disclosing the interest costs of the referendum to the voters. The commissioner rejected this argument stating a reference to interest payments in the notice of the district meeting and bond resolution is not required by law because interest is not an object or purpose which can be financed except in extremely limited circumstances which would not apply in this case. Moreover, interest costs are

determined based on market conditions at the time of sale so at best a bond resolution may contain an estimate. Lastly, there is no requirement that bond interest be expressed in district communications. Based upon the foregoing, the commissioner dismissed the appeal (*Appeal of Herloski*, 50 Ed Dept Rep, Dec. No. 16,089 (2010)).