

APPR & Tenure Decisions in the Aftermath of COVID-19

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Presentation Roadmap

- APPR in a World Before COVID 19
- COVID 19 – Crawling through the end of the 2019-2020 School Year
- A Whole New World of Hybrid & Remote Instruction
- Recent Legislation – APPR, Probationary Appointments, and Tenure Decisions
- Practical Considerations

Refresher Course - APPR Before COVID-19

- In NYS, School districts and BOCES are required to follow a statutory process for the evaluation of classroom teachers and building principals, commonly referred to as APPR (which stands for Annual Professional Performance Review).
- The State's APPR law was first enacted in 2010 as Education Law §3012-c. In 2015, a redesigned APPR system was enacted as Education Law §3012-d. Education Law §3012-d has been amended several times, significantly in 2019 as part of the State budget legislation (Ch. 59 of the Laws of 2019, Part YYY).
- The APPR law “links” a district's receipt of any State aid increase upon completion of APPRs.

EDUCATION LAW §3012-d BASICS

- Statute requires APPR to be a “significant factor” for employment decisions.
- APPR based on two categories:
 1. Student Performance category; and
 2. Teacher Observation/Principal School Visits category.
- Overall rating of H, E, D, I calculated by combining the ratings received in each category using a scoring matrix.



EDUCATION TRANSFORMATION ACT of 2015 (Ch. 56 Laws of 2015, Part EE) – MAJOR CHANGES

- APPR redesign – Added new Education Law §3012-d.
- Probationary appointments and tenure eligibility - Amended various sections of the Education Law to lengthen the probationary period and added new APPR requirements for reductions in the length of the period; also added new APPR threshold requirements for tenure eligibility.
- Expedited APPR disciplinary proceedings – Added new Education Law §3020-b.



PROBATIONARY APPOINTMENTS – 2015 CHANGES

- General rule - 4-year probationary period for all members of the teaching and administrative staff appointed on or after July 1, 2015.
- Probationary period may be reduced by up to 2 years for teachers with “regular substitute service” provided, that if a “classroom teacher”, must have received APPR ratings each year.
- 3-year probationary period for teachers with prior tenure provided, that if a “classroom teacher”, teacher must demonstrate that he or she received an APPR rating in “final year of service” in other district/BOCES in order to receive reduced period (in the case of an appointment at a BOCES, rating must have been HE or E in order to receive the reduction).
- Note - Administrators beginning a probationary appointment on or after June 1, 2020, are eligible to received credit for prior administrative tenure with no APPR requirement (Ch. 345 of Laws of 2019).

New York Education Law §§ 2509; 2573; 3012; 3014.



TENURE ELIGIBILITY – 2015 CHANGES

- Classroom teachers/building principals appointed on or after July 1, 2015, must receive an APPR rating of H or E in at least 3 of the preceding 4 years, exclusive of any breaks in service, in order to be eligible to receive tenure.
- A classroom teacher/building principal rated I in the last year cannot receive tenure at the end of the 4-year period. In such case, probationary period may be extended by an additional year.
- Contingent award of tenure may be granted (i.e., upon receipt of minimum rating in final year). If contingency not met (after appeals exhausted) grant of tenure is void.

New York Education Law §§ 2509; 2573; 3012; 3014.



***Jarema* Credit – Appointed Prior to July 1, 2015**

Teachers appointed **prior to July 1, 2015**, were hired to a 3-year probationary term which could be reduced by the application of *Jarema* credit to 2 years upon the completion of 2 years satisfactory regular substitute service.

- Despite the explicit reference to “2 years,” the New York Court of Appeals and the Commissioner of Education have broadly interpreted the application of *Jarema* credit to appointments made prior to July 1, 2015.
- The probationary period could be reduced by regular substitute service of *at least one semester, up to two years*.



***Jarema* Credit – Appointed on or after July 1, 2015**

Sections 2059(1)(a)(ii), 2573(1)(a)(ii), and 3012(1)(a)(ii), set forth in pertinent part that teachers and other members of the teaching staff appointed on or after July 1, 2015, are appointed:

“... for a probationary period of four years, except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years and, if a classroom teacher, has received [composite] annual professional performance review ratings in each of those years, or has rendered satisfactory service as a seasonally licensed per session teacher of swimming in day schools who has served in that capacity for a period of two years and has been appointed to teach the same subject in day schools, on an annual salary, the teacher shall be appointed for a probationary period of two years ...”

The term “composite” in this quote is only present in Section 2509 of the Education Law.



Why is it important to understand *Jarema* credit?

TENURE BY ESTOPPEL

***McManus v. Board of Educ. of Hempstead UFSD*, 87 N.Y.2d 183 (1995)**

- “Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher’s probationary period.”

What is “regular substitute” service?

- “Regular substitute” has no statutory or regulatory definition
- ***Robins v. Blaney*, 59 N.Y.2d 393 (1983)** - “[The Commissioner] has also held that *Jarema* credit is only available when such service has been rendered prior to an initial probationary appointment...”
- ***Speichler v. BOCES*, 90 N.Y.2d 110 (1997)**
 - Regular substitute is defined by the actual nature and continuity of the substitute service rather than the anticipated duration of the replaced teacher’s absence.
 - A regular substitute is “one who takes over the class of another teacher upon a permanent substitute basis, i.e., under circumstances where the regular teacher for maternity reasons, or for sabbatical or sick leave, or for some other reason, has been given a definite leave of absence.” (Citing *Matter of Ducey*, 65 St. Dept. Rep. 65, 67)

***Jarema* Credit – Appointed on or after July 1, 2015**

Did the APPR amendment requiring APPR scores in **each** of the 2 years modify the interpretation of up to 2 years of regular substitute service as a mandated 2 years?

The question remained unanswered until February 10, 2021, when *Sisson v. Johnson City Central School District* was decided by the New York Supreme Court in Broome County.



***Jarema* Credit – Appointed on or after July 1, 2015**

***Sisson v. Johnson City Central School District* (Supreme Court, Index No. EFCA2020001793)**

- Article 78 proceeding by Petitioner Sisson challenging a determination of the School District denying her tenure and terminating her employment with the District. Petitioner asserted her termination was improper as she obtained tenure by estoppel.
- School District argued that *Jarema* credit is only applicable in a 2-year increment. “In other words, they argue there is no partial credit toward tenure for the probationary period for substitute teaching service increments less than two full years.”
- Petitioner argued she is entitled to *Jarema* credit for her substitute service during the 2015-2016 school year.



Jarema Credit – Appointed on or after July 1, 2015

Sisson v. Johnson City Central School District (Supreme Court, Index No. EFCA2020001793)

- The Court agreed with Petitioner.
 - Relying on *Robins v. Blaney* the Court said:
 - “The statute clearly could be read to hold that the statutory language establishes a threshold or a ceiling... Since the Court of Appeals accepted the ceiling interpretation, albeit where deference to the Commissioner was required unless his interpretation was irrational or unreasonable, the ceiling interpretation will be applied here.”
 - “Courts have made it clear that this credit can be earned and applied in term (half school year) increments.”
 - *Sisson is entitled to this credit toward her probationary period.*



Jarema Credit Takeaways

- The School District in *Sisson v. Johnson City Central School District* appealed to the Third Department Appellate Division on March 26, 2021.
 - “The court is mindful of the adage referring to the highest court at the federal and state level... [t]he actual quote is “We are not final because we are infallible, but we are infallible only because we are final” from Justice Robert Jackson in *Brown v. Allen*... Not being final, I’ll go with the guidance of the infallible.”
- Be diligent when considering prior substitute service and probationary appointment end dates.
- Consult with the school attorney and figure out the end date in advance.



APPR AND TENURE AWARDS - 2019-20 SCHOOL YEAR

- Due to the COVID-19 pandemic, beginning in March 2020, the Governor issued a series of Executive Orders directing the closure of schools statewide through the end of the 2019-20 school year.
- In the Spring of 2020, the Board of Regents cancelled State assessments, including the Regents examinations.
- By Executive Order 202.39, dated June 7, 2020, the APPR statute and regulations were suspended for the 2019-2020 school year. NYSED took the position that all APPR requirements waived for 2019-20 school year.
- EO 202.39 permitted tenure awards for those in the final year of their probationary period despite the absence of APPR rating in final year if the educator received previous requisite APPR ratings and otherwise qualified.



APPR During the 2020-2021 School Year

- Districts were told they must implement their SED approved APPR plans for the 2020-2021 school year



APPR During the 2020-2021 School Year

- Considerations when approaching APPR in a hybrid and/or remote setting
 - Review of APPR plans v. minimum APPR requirements set forth in legislation
 - Possible collective bargaining implications
 - Limited agreements with Unions/APPR Variances
 - Administrator training for new remote observations
 - Consideration of what is actually manageable for both teachers and administrators in a hybrid setting

APPR During the 2020-2021 School Year

- NYSED December 15, 2020 Guidance:
 - NYSED had issued guidance providing flexibility to negotiate how to conduct observations remotely on a local level and would not deem such revisions as a “material change” which would have necessitated application to NYSED for an APPR variance.
 - NYSED also listed various possible revisions which could be considered a “material change” and require an APPR variance such as:
 - *If an LEA locally determined to substitute asynchronous recorded instruction in place of in-person observations;*
 - *If an LEA wished to make COVID-19 related changes to the assessments or how student growth is measured;*
 - *In certain circumstances, if an LEA changed the number, frequency, or duration of observations.*
- NYSED, 2020-2021 Annual Professional Performance Reviews (APPR) Q&A (Updated December 15, 2020)*

APPR During the 2020-2021 School Year

Example of issues that some Districts and Unions addressed:

- *Modifications to rubric*
- *Reducing number of observations, or changing types of observations*
- *Additional limited appeal rights*
- *Ensuring adequate observations of probationary teachers*
- *Observing a class where there is both in person and remote instruction happening simultaneously*
- *How best to not disrupt class when doing remote observation*

2021 APPR AMENDMENTS

- Chapter 112 of the Laws of 2021 added, effective immediately upon being signed by Governor Cuomo on June 7, 2021.
- Subsequently amended by Chapter 147 of the Laws of 2021, was signed by Governor Cuomo on June 11, 2021.

2021 APPR AMENDMENTS

- Adds Education Law Section 3012-d(17)
 - School districts or BOCES **not required** to complete an APPR evaluation for any teacher or principal for the 2020-2021 school year (only).
 - State funding will not be withheld if an APPR evaluation is not conducted during the 2020-2021 school year as otherwise required by Section 3012-d.



Status of APPR Evaluations for 2020-2021 School Year

- While the statute excuses school districts and BOCES from completing APPR evaluations and eliminates any state aid penalties for school districts and BOCES that fail to implement any component of their approved APPR plans, school districts and BOCES are not prohibited from continuing their evaluations.
 NYSED: 2021-21 School Year Annual Professional Performance Review (APPR) Update (Revised June 16, 2021).



Status of APPR Evaluations for 2020-2021 School Year

- NYSED has also explained:
 - “To the extent that LEAs are able to complete all or part of an educator’s evaluation, the Department expects that such scores and ratings will be reported.”
 - “To reduce the burden on LEAs, the Department will not be requiring LEAs to certify data or complete an APPR implementation certification for the 2020-21 school year. “
 NYSED: 2021-21 School Year Annual Professional Performance Review (APPR) Update (Revised June 16, 2021).



Status of APPR Evaluations for 2020-2021 School Year

- NYSED’s June 16, 2021 Guidance explains:
 - “If your LEA has a variance approved by the Department and such variance was able to be implemented during this school year, then you may, but are not required to, complete evaluations for the applicable teachers and principals using the measures described in that variance.”
 - Multi-year variances which are not COVID-related can still be implemented for multiple years.
 - Multi-year COVID-related variances which were awarded on a conditional basis must await additional guidance before being implemented in the 2021-22 school year.
 NYSED: 2021-21 School Year Annual Professional Performance Review (APPR) Update (Revised June 16, 2021).



Status of APPR Evaluations for 2020-2021 School Year

- Caution:
 - The JUSTIFICATION Section for Chapter 112 of the Laws of 2021 states, in pertinent part:
 - *“Accountability measurements from required state assessments for this year should not be considered for purposes of evaluating professional performance.”*



APPR REQUIREMENTS FOR OBTAINING TENURE FOR CLASSROOM TEACHERS AND BUILDING PRINCIPALS

Requirement to be Eligible to be Granted Tenure	All Classroom Teachers and Building Principals, Except Those Appointed During the 2017-2018 through 2020-2021 School Years (No Changes to Current Law)	All Classroom Teachers and Building Principals Appointed During the 2017-2018, 2018-2019 and 2019-2020 School Years	All Classroom Teachers and Building Principals Appointed During the 2020-2021 School Year
“Effective” or “Highly Effective” Ratings	Classroom teachers and building principals must have received an APPR rating of “effective” or “highly effective” in at least three of the four preceding years.	Classroom teachers and building principals must have received an APPR rating of “effective” or “highly effective” in at least one of the four preceding years.	Classroom teachers and building principals must have received an APPR rating of “effective” or “highly effective” in at least two of the four preceding years
“Ineffective” Ratings	Classroom teachers and building principals must not have received an “ineffective” rating in the final year of their probationary period.	Classroom teachers and building principals must not have received an “ineffective” rating in the final year of their probationary period or during the most recent school year where an APPR rating was received.	Classroom teachers and building principals must not have received an “ineffective” rating in the final year of their probationary period or during the most recent school year where an APPR rating was received.
Superintendent’s Recommendation		Would have been in the Superintendent/District Superintendent’s discretion qualified for appointment on tenure based upon performance, notwithstanding that the 2019-2020 and 2020-2021 school year APPR was not completed and received.	Would have been in the Superintendent/District Superintendent’s discretion qualified for appointment on tenure based upon performance, notwithstanding that the 2020-2021 school year APPR was not completed and received.

Education Law §§ 2509(2)(b), 2573(5)(b), 3012(2)(B), 3014(2)(b).



SHORTENED THREE YEAR PROBATIONARY PERIOD FOR CLASSROOM TEACHERS APPOINTED DURING THE 2020-2021 SCHOOL YEAR WHO WERE PREVIOUSLY GRANTED TENURE

Requirements for a Shortened Probationary Period Based on a Prior Award of Tenure	All Teachers, Except Those Appointed During the 2020-2021 School Year <i>(No Changes to Current Law)</i>	Teachers Appointed During the 2020-2021 School Year
Teacher May Not Have Been Terminated from the Prior Position <i>(No Changes to Current Law)</i>	Teachers must not have been terminated pursuant to Education Law § 3020-a or § 3020-b.	Teacher must not have been terminated pursuant to Education Law § 3020-a or § 3020-b.
Previous APPR Rating <i>(Only applicable to "Classroom Teachers")</i>	<u>School Districts</u> : Teachers must have received an APPR rating in their <i>final year</i> of service in their previous position.	<u>School Districts</u> : Teachers must have received an APPR rating in their previous position in <i>2017-2018 or 2018-2019</i> .
	<u>BOCES</u> : Teachers must have received an APPR rating of "effective" or "highly effective" in their <i>final year</i> of service in their previous position.	<u>BOCES</u> : Teachers must have received an APPR rating of "effective" or "highly effective" in their previous position in <i>2017-2018 or 2018-2019</i> .

Education Law §§ 2509(1)(a)(ii), 2573(1)(a)(ii), 3012(1)(a)(ii), 3014(1)(b), 3014(2)(b).



Open Questions

- Are classroom teachers who served as regular substitutes during 2019-20 and 2020-21 school years entitled to a reduced probationary appointment when appointed to a probationary position for the 2021-22 school year?
 - Remember, to receive *Jarema* credit, the Education Law requires a teacher/principal receive an APPR score in each of the years of regular substitute service. But what if there are no ratings?
- Do tenured teachers accepting a position in another school district in 2021-22 school year receive a three-year probationary appointment if they received an APPR rating in either the 2017-18 or 2018-19 school years?



PRACTICAL CONSIDERATIONS

- If there are no APPR ratings this year, how can districts use the information/data that may have been collected related to teacher/principal performance? (e.g. counseling memos, TIPs etc.)
- What is the potential impact of these “gap” years on teacher/principal disciplinary proceedings for incompetence?



PRACTICAL CONSIDERATIONS

When conducting observations of teachers instructing virtually:

- If the observation is announced:
 - Consider the observer signing on in advance, and enacting “mute” and “no video” before students log in. Minimize the appearance of the observer and disruption to the lesson.
 - Consider the observer being in the same room with the teacher, if the teacher is instructing from a classroom. Observer placement may be such that the observer can see the teacher and students, but students cannot see the observer.



PRACTICAL CONSIDERATIONS

When conducting observations of teachers instructing virtually:

- If the observation is **un**announced:
 - Encourage use of the same video link for the class the entire year.
 - Observer will be able to access whenever necessary/similar to a “drop in”
 - If the link must be provided in advance, is this really an unannounced observation?



Practical Considerations

- Reemphasize the need to document facts and evidence; the context may be different but the same methods should be used.
- Memorialize if the lesson was virtual in the record of the observation.
 - The teacher and observer might not remember later.
 - Neutral party needs to understand this was a virtual lesson by reading the final evaluation.



Practical Considerations

- Document the details:
 - *Is the teacher virtual or in a classroom?*
 - *Are the students all virtual? Are some students virtual and some physically present?*
 - *Do students have their video on/is it required? Are there clear parameters and expectations for virtual participation?*
 - *How are students behaving in a remote setting and how is the teacher addressing it?*
- *Records of a virtual lesson may help explain a lower score than the teacher typically receives.*



Practical Considerations

- Do not reinvent the wheel:
 - The rubric likely contains elements designed to evaluate teacher creativity and adaptability (e.g. Danielson Domain 3). Teachers may be surprised to receive extra recognition.
 - You have an APPR Plan – use it. The lack of state-provided scores and/or the lack of requirements for APPR ratings does not require ignoring the negotiated plan.
- Address and be transparent about recording capabilities.
- The existence of APPR-style observations and evaluations will substantiate employment decisions, even if APPR was not strictly required.



Practical Considerations

- Work with administrators to emphasize the importance of completing observations of probationary teachers.
- Remind them that the ability to observe, reflect, and provide feedback to a teacher is not limited to the observations required by the APPR plan.
- As was true before COVID 19- address concerns with probationary teachers early and often

QUESTIONS?