

**Seniority, Excessing and Recall Workshop**  
**April 4, 2016**



**Sachem Central Teachers' Association**  
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Presented by:

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## BRIEF SUMMARY OF SENIORITY, EXCESSING AND RECALL

This is intended to be a general introduction to the applicable rules and regulations that govern. Seniority/Excessing/Recall is extremely fact specific to the teacher/teaching assistant involved and their exact work history is critical to the analysis. Similarly, the applicable rules and regulations can be complex. Thus, after this introduction, NYSUT will work with the BTA to analyze any specific individual's work history. If the District does abolish positions this year, we will ensure that it is done correctly and in a manner in which everyone's rights are protected.

**JOB ABOLITION-** Has the District created a similar job at the time of the job abolition? If so, the employee who held the abolished position has a right to the newly created one.

- 50% rule

### SENIORITY

- Length of paid full-time service in a designated tenure area.
  - Part-Time counts if you are reduced from full-time at the District's request or you teach half-day kindergarten.
- For those hired on or after August 1, 1975, tenure areas determined by Part 30 of the Commissioner's Regulations.
  - Different from your certification.
  - A teacher appointed to an unauthorized tenure area is deemed to have service in whatever authorized tenure area most closely resembles the teacher's actual duties.
  - Instructional Support Services.
- Earn seniority credit in any tenure area in which you spend a substantial portion of professional time defined as 40%. Thus, you can earn full seniority credit in two tenure areas (for which you are certified) at the same time.
- Time spent as a **regular substitute** prior to a probationary appointment counts toward seniority credit.
  - **Regular substitute** means that the substitute has assumed the duties of the regular classroom teacher. It does not mean intermittent per diem substitute work.
- A Tie-breaker is at the District's reasonable discretion and may include the date of the appointment resolution, order that the Board of Education voted on an appointment resolution, alphabetical order, date of signing a commitment letter etc.

**BUMPING**-A post-1975 teacher who has been appointed to a Part 30 tenure area who previously worked in another tenure area may bump a teacher with less tenure area seniority in that previously worked area.

- If you have changed tenure areas, you may be able to bump back to that previous position if there is someone with less seniority currently there.

## **RECALL**

- Excessed teachers/teaching assistants are placed on a preferred eligible list (the "PEL" or "Recall List") for a period of 7 years.
- While on the PEL, you have recall rights to:
  - Regular Full-Time positions in your tenure area for which you are "qualified" for
    - Not strict seniority, certifications may be taken into consideration.
  - Part-Time positions in that tenure area.
  - A substitute position of 5 months or more (leave replacement).
- Placement on the PEL is based upon **total district-wide seniority**.
  - Will include your time in a previous tenure area.
  - Will not include per diem substitute service.
  - Will not include clerical or teacher aide service.
- Only have a right to be recalled to a vacancy.
- A recall is at the same salary you had at the time of the excess.
- Rejection of a recall offer will generally not remove you from the list.
  - Retirement and Resignation will remove you from the list.
- It is NYSUT's position that you will earn seniority credit if you are recalled to a full-time leave replacement position.
  - It is possible that if you reject a recall offer, the employee next on the list can pass you.

# Rights of Teaching Personnel When Positions Are Abolished

## I. Abolition of Positions

### A. Relevant Statutory Provisions and Regulations

The statutory provisions and Regulations relevant to the abolition of teaching positions are *Education Law* §§2510, 2585, 3013, 3014-a, 3014-b (each of these sections provide for the layoff or excessing of the least senior teacher in the tenure area of the position abolished), and Part 30 of the Rules of the Board of Regents (tenure areas).

Although §2510 is located in Article 51 of the Education Law, which applies to city school districts having less than one hundred twenty-five thousand inhabitants, §2510 has been interpreted to be applicable to both tenured and probationary teachers in all types of school districts, including union free school districts, central school districts, and city school districts.<sup>1</sup>

Section 3013, which contains substantially the same provisions as §2510, became effective July 31, 1992 and applies to school districts other than city school districts.

Under §§2510 and 3013, reinstatement by recall from a preferred eligibility list is limited to seven years from the date of abolition or consolidation of the teaching position. Section 2585 applies to the city school districts of Buffalo, Rochester, Syracuse, and Yonkers and is essentially a mirror image of §2510, except that no time limits are placed upon the eligibility for reinstatement from the preferred eligible list.<sup>2</sup>

Section 3014-a relates to a BOCES takeover of a program formerly operated by a school District and §3014-b relates to a school district's takeover of a program formerly operated by a BOCES. Both sections are equally applicable to tenured and probationary teachers.

Part 30 of the Rules of the Board Regents sets forth the tenure areas for professional educators appointed after August 1, 1975.

<sup>1</sup> *Silver v. Bd. of Educ. of West Canada Valley Cent. Sch. Dist.*, 46 A.D.2d 427, 362 N.Y.S.2d 638 (4th Dep't 1975); *Skliar v. Bd. of Educ., Union Free Sch. Dist. No. 23, Town of Hempstead*, 45 A.D.2d 1012, 358 N.Y.S.2d 208 (2d Dep't 1974); *Dreyfuss v. Bd. of Educ. (Huntington)*, 72 Misc. 2d 703, 39 N.Y.S.2d 547 (N.Y. Sup. Ct. Nassau County Dec. 22, 1972), *rev'd on other grounds*, 42 A.D.2d 845 (2d Dep't 1973).

<sup>2</sup> §2588 of the *Education Law*, which deals with abolitions within the City School District of the City of New York, is not included within the scope of this Article.

## B. Creation of a Similar Position

Where a board of education abolishes a position and simultaneously creates a similar position, either §2510(1), §2585(2), or §3013(1) is applicable. Under these provisions, the teacher who formerly held the abolished position must be given the newly created similar position, even if the title of the new position is different from the position abolished.

The test for determining if a newly created teaching position is similar, as set forth in *Greenspan v. Dutchess County BOCES*,<sup>3</sup> so as to entitle the person filling the abolished position to appointment to the newly created position, is whether more than half of the functions to be performed by the holder of the new position are the same as those performed by the holder of the abolished position.<sup>4</sup>

Recently, however, the Commissioner, in determining the issue of similarity with respect to a recall, disregarded the *Greenspan* 50-percent rule and decreed that for the new position to be similar to the old, it must be in the same tenure area of the abolished position, the teacher seeking the new position must be certified to teach in the new position sought, and the duties of the old and new positions must be comparable.<sup>5</sup>

The Court of Appeals confirmed the Commissioner's determination, but did not address the viability of the 50-percent rule, nor the Commissioner's requirement that the new position be in the same tenure area as the old position. The Court of Appeals held only that for a new position to be similar to a position abolished, it must require the same certification as the old position, and that the person seeking such new position have the required certification. We therefore believe that the 50-percent rule announced in *Greenspan* is still valid and is still applicable in 2510(1) situations.<sup>6</sup>

The same result would obtain where a school board abolishes a position and subsequently creates two part-time positions similar to the position abolished. In *Matter of Schiliro*,<sup>7</sup> the Commissioner of Education held that where a school district abolished the position of a tenured physical education teacher and replaced it with two part-time positions, one for male and one for female students, the teacher was entitled to be appointed to both of these two positions, as they were, in fact, similar to the prior position abolished. In effect, the school district was required by the Commissioner to recreate the teacher's former position. However, if there is a pedagogically sound rationale for the fragmentation, such as the inability of a teacher to teach both portions of a fragmented position due to the time the sections are taught or the distance between the schools where the two sections are taught, a school district may fragment positions.<sup>8</sup>

<sup>3</sup> *Greenspan v. Dutchess County BOCES*, 96 A.D.2d 1028, 466 N.Y.S.2d 430 (2d Dep't 1983).

<sup>4</sup> *Coates v. Ambach*, 52 A.D.2d 261, 383 N.Y.S.2d 672 (3d Dep't 1976), *aff'd*, 42 N.Y.2d 846, 397 N.Y.S.2d 630 (1977); *see also Matter of Englert*, 12 Ed. Dep't Rep. 234 (1973).

<sup>5</sup> *Appeal of Davis*, 39 Ed. Dep't Rep. 275 (1999).

<sup>6</sup> *Davis v. Mills*, 98 N.Y.2d 120, 748 N.Y.S.2d 890 (2002).

<sup>7</sup> 13 Educ. Dep't Rep. 45 (1973).

<sup>8</sup> *Zurlo v. Ambach*, 75 A.D.2d 662, 426 N.Y.S.2d 191 (3d Dep't), *aff'd*, 53 N.Y.2d 1035, 442 N.Y.S.2d 486 (1981).

### C. Excess (Layoff)

Where a school board abolishes a position and does not create a similar position, §2510(2), 3013(2),<sup>9</sup> and §2585(3) require that the services of the teacher having the least seniority in the system within the tenure of the position abolished be discontinued.

Seniority with respect to these subdivisions refers to service time accumulated in the tenure area of the position abolished.<sup>10</sup> Seniority is defined in Part 30.1(f) of the Rules of the Board of Regents as the length of service in a designated tenure area. This service does not have to be consecutive but must have constituted a substantial portion of a professional educator's time during each term seniority credit is claimed. A substantial portion of a professional educator's time is defined in subdivision (g) of Part 30 as at least 40 percent of his/her total time in the performance of his/her duties, not counting prep time, monitoring time, and time spent on co-curricular activities.<sup>11</sup> Time spent as a regular substitute prior to a probationary appointment counts toward seniority within the tenure area of the appointment,<sup>12</sup> which is defined in Part 30 as the "... administrative subdivision within the organizational structure of a school district in which a professional educator is deemed to serve in accordance with the provisions of this part".<sup>13</sup>

In order, therefore, to determine seniority for purposes of §§2510(2) and 2585(3) and 3013(2), it is necessary to determine the tenure area within which the abolition has occurred. The tenure area of a teacher, it should be borne in mind, is fixed upon employment, and may not be altered retroactively by re-designation of the nature of that tenure area. A teacher who is duly appointed to an unauthorized tenure area (*i.e.*, an area not listed in Part 30) must be deemed to have service in whatever authorized tenure area most closely resembles the teacher's actual duties.<sup>14</sup>

<sup>9</sup> *But see* Madison-Oneida BOCES v. Mills, unreported (Sup. Ct. Alb. Co., 2002) (holding that the court held that the layoff provisions of §3013 of the *Education Law* do not apply to teaching assistants because the statute does not specifically mention them, and only refers to "teachers." However, the Third Department reversed, holding that there are no cases which interpret the term teacher as used in § 3013 or its parallel sections to exclude teaching assistants. Slip op. 93661 (Dec. 31, 2003).

<sup>10</sup> *Steele v. Bd. of Educ., New York City*, 40 N.Y.2d 456, 387 N.Y.S.2d 68 (1976).

<sup>11</sup> 8 NYCRR §30.1(f)(g).

<sup>12</sup> *Matter of Ducey*, 65 St. Dep't Rept. 65 (1943); *Matter of Crandall and Toth*, 20 Educ. Dep't Rep. 16 (1980); *Matter of Carey*, 31 Educ. Dep't Rept. 394 (1992); *Kransdorf v. Northport-East Northport Union Free Sch. Dist.*, 81 N.Y.2d 871, 597 N.Y.S.2d 631 (1993); *see also* EDUC. LAW §2509(1)(a); *Appeal of Saderholm*, 12 Educ. Dep't Rept. 207 (1973).

<sup>13</sup> 8 NYCRR §30.1(h).

<sup>14</sup> *Abrantes v. Bd. of Educ. (Norwood-Norfolk)*, 233 A.D.2d 718, 649 N.Y.S.2d 957 (3d Dep't 1996), *mot. for lv. to app. den.*, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (1997); *Appeal of Lessing*, 34 Educ. Dep't Rep. 451 (1995); *Appeal of Sroka*, 31 Educ. Dep't Rept. 513 (1992).

Absent express notification and prior written consent by a teacher that the work to which he or she was assigned was not in his or her tenure area, all such work so assigned must and will be considered to constitute service in his or her appointed tenure area.<sup>15</sup> However, in a recent case, the Court of Appeals called this rule into question and held that service in the new tenure area to which the teacher was assigned without written consent is, at the teacher's option, counted toward seniority in the original tenure area or the new tenure area, whichever benefits the affected teacher.<sup>16</sup>

Part 30 of the Rules of the Board of Regents sets forth tenure areas for all teachers appointed after August 1, 1975.<sup>17</sup> For teachers appointed prior to August 1, 1975 tenure areas have to be determined on a case-by-case basis in accordance with the principles set forth, and discussed below. In determining whether pre-1975 alleged tenure areas are valid, the courts have looked to see whether such tenure areas were traditional ones recognized and existing for a long period of time; whether the teachers within such areas were alerted to, and aware of, the fact that they were teaching in certain particular tenure areas and, if requested by school districts to serve in other areas, whether they were aware that in acceding to such a request, they would be changing tenure areas.<sup>18</sup>

Generally, the pre-1975 tenure areas were at the elementary or secondary (which could be subdivided into junior high school and high school) grade levels, or were "special" tenure areas. Special tenure areas, such as music, art, and physical education, were district-wide tenure areas (although such areas, under certain conditions, could be administratively limited to the same grade levels as the general tenure areas).

Collective bargaining provisions which attempt to protect teachers by allowing them to transfer their accumulated seniority to a new tenure area have not been upheld by the courts<sup>19</sup>. It is the seniority accumulated within the tenure area of the position abolished which counts in determining which teacher will remain and which will be placed on a preferred eligible list. Once a teacher is placed on the preferred eligible list, total seniority within the system applies for purposes of recall when there is a vacancy.

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<sup>15</sup> *Matter of Zappulla*, 25 Educ. Dep't Rep. 54, 59 (1985); *Boron v. Sobol*, 205 A.D.2d 28, 617 N.Y.S.2d 243 (3d Dep't 1994); *Appeal of Lessing*, 34 Educ. Dep't Rep. 451 (1995); *Appeal of Lawrence*, 32 Educ. Dep't Rept. 398 (1992).

<sup>16</sup> *Kaufman v. Fallsburg Cent. Sch. Dist.*, 91 N.Y.2d 57, 666 N.Y.S.2d 1000 (1997), wherein the Court of Appeals "disapproved" of the legal principle in *Boron*. The extent and exact nature of the disapproval has not yet been determined. We read that disapproval to mean that *Boron* could not defeat the claim of a teacher to seniority and/or probationary credits earned in a tenure area other than that in which he was appointed and to which he or she was assigned without his or her consent, but would still serve as support of a claim for such credits in the tenure area of the original appointment.

<sup>17</sup> 8 NYCRR §30.8(d) explicitly creates only one (1) tenure area for teaching assistants.

<sup>18</sup> *Steele*, 40 N.Y.2d 456; *Mitchell v. Bd. of Educ. (Great Neck)*, 40 N.Y.2d 904, 389 N.Y.S.2d 354 (1976); *Blum v. Bd. of Educ. (New York City)*, 39 N.Y.2d 984, 387 N.Y.S.2d 233 (1976).

<sup>19</sup> See *Szumigala v. Hicksville Union Free Sch. Dist., Bd. of Educ.*, 148 A.D.2d 621, 539 N.Y.S.2d 83 (2d Dep't 1989).

An imperative provision of the *Education Law* may not be modified by any collective bargaining agreement between the parties.<sup>20</sup> Likewise, as with collective bargaining agreements, individual agreements cannot supersede imperative provisions of the *Education Law*.<sup>21</sup> However, it may be permissible for school districts and unions to collectively bargain agreements which more fully define and expand seniority rights without violating the *Education Law*.<sup>22</sup>

The Court of Appeals has determined that, in terms of hiring, termination and the tenure track system, the *Education Law* supports defining “teaching assistant” as the “logical extension” of the term teacher.<sup>23</sup> The Court referred to the “statutes of appointment” as amended in 1996 to include teaching assistants and held that, in order for the tenure track system to be “internally consistent,” the “statutes of abolition” should parallel those of appointment. Therefore, the Court held that the teaching assistants should be laid off by order of seniority in their tenure area and not by their specific academic or vocational subject area.

The Commissioner of Education directed the Spencer-VanEtten Central School District to stop improperly assigning its teachers after the District split the State-mandated “home & careers” entire core curriculum, which had previously been taught by a certified home economics teacher, into four modules, with the various modules assigned to incumbent teachers who did not possess home economics certificates.<sup>24</sup> However, the Commissioner refused to grant any affirmative relief to the home economics teacher, who was laid off as a result of the District’s action, as laid off teachers have no recall rights absent a vacancy, and in this case, “. . . no vacancy occurred and no new position was created; instead, the petitioner’s former teaching duties were redistributed . . .”<sup>25</sup> The Commissioner noted that if the District creates a new position in Home and Career Skills, petitioner might be entitled to fill it from the preferred eligibility list. On a procedural issue, the Commissioner held that the improperly assigned incumbent teachers were not necessary parties since “. . . there is no evidence that their status as full-time employees would be adversely affected [if they were no longer to be assigned to the home & careers course].”

<sup>20</sup> See *Matter of Bd. of Educ. of Barker Cent. Sch. Dist.*, 209 A.D.2d 945, 619 N.Y.S.2d 423 (4th Dep’t 1994).

<sup>21</sup> In *Honeoye Falls-Lima Cent. Sch. Dist. v. Honeoye Falls-Lima Educ. Ass’n*, 49 N.Y.2d 732, 426 N.Y.S.2d 263 (1980), the court held that the board of education was exceeding its authority in agreeing to a method of determining seniority which was actually contrary to the explicit statutory directives contained in the *Education Law*. While the contract provided for determination of seniority on a district-wide basis, *Education Law* § 2510(2) mandates that for purposes of layoff that seniority be determined based on service within the tenure area. See also *Matter of Tropia*, 32 Educ. Dep’t Rep. 606 (1993).

<sup>22</sup> Bd. of Educ., Lakeland Cent. Sch. Dist. of Shrub Oak v. Lakeland Fed’n of Teachers, 51 A.D.2d 1033 (2d Dep’t 1976); see also *Schlosser v. Bd. of Educ. of the East Ramapo Cent. Sch. Dist.*, 62 A.D.2d 207, 404 N.Y.S.2d 871 (2d Dep’t 1978), *aff’d*, 47 N.Y.2d 811, 418 N.Y.S.2d 388 (1979) discussed *infra*, at note 51.

<sup>23</sup> *Madison-Oneida BOCES v. Mills*[(Comm’r of Ed.)], 4 N.Y. 3d 51, 58, 790 N.Y.S. 2d 619,622 (2004). (2004).

<sup>24</sup> Appeal of Krause (Spencer-VanEten Cent. Sch. Dist.), 2007 N.Y. Educ. Dept. LEXIS 2 (Jan. 11, 2007).

<sup>25</sup> *Id.*



#### D. Recall

Once the tenure area where the abolition takes place is identified and the respective seniority of the teachers within that area determined, the services of the teacher with the least seniority within that tenure area are discontinued. Such teachers are placed upon a preferred eligible list (for a period of seven years in the case of §§2510(3) and 3013(3)) for recall to a vacancy which may thereafter occur in a position similar to the one filled by that teacher, without reduction in salary or increment, such recall to be based upon the teacher's length of service in the system. Thus, in contrast with §2510(2), 3013(2), and 2585(3), seniority for purposes of recall includes all of the time served in the school district, whether in or out of the tenure area in which the position was abolished. However, there must be a vacancy before there can be a recall to a permanent position. Such a vacancy must be an unencumbered permanent position, and not one temporarily created because a teacher took a leave of absence.<sup>26</sup>

However, a teacher on the preferred eligible list shall be recalled to a substitute position of five (5) months' or more duration without losing his preferred status on the list for a permanent position, and refusal of such offer of reinstatement will not cause removal from the teacher preferred eligible list.<sup>27</sup>

The Commissioner of Education and the Third Department have interpreted the word "similar" in §2510(3) to require that recall be to a position in the same tenure area from which the teacher was excused.<sup>28</sup> The Second Department has reached the opposite conclusion, holding that a person may be recalled from a preferred eligible list to a position in a different tenure area than that from which he or she was excused, providing that the duties of the position are similar to those of the abolished position.<sup>29</sup> As noted in the discussion of similarity with respect to the creation of a new position pursuant to §2510(1), the Commissioner of Education, addressing the issue of similarity, disregarded the *Greenspan* 50-percent rule and decreed that the new position created had to require the same certification as the position from which the teacher seeking the new position was excused, and further held that the new position must be in the same tenure area as the position from which the teacher seeking such position was excused. The Appellate Division, Third Department, affirmed the Commissioner, but the Court of Appeals, on review, did not mention the *Greenspan* 50-percent rule nor the need for the new position to be in the same tenure area as the old position from which the teacher was excused. The Court of Appeals only affirmed the Commissioner insofar as he required that the certification of the alleged similar position be the same as that of the position from which the teacher was excused, and that the teacher seeking such position have the required certification.<sup>30</sup>

<sup>26</sup> *Brewer v. Bd. of Educ. (Plainview-Old Bethpage)*, 51 N.Y.2d 855, 433 N.Y.S.2d 1009 (1980).

<sup>27</sup> EDUC. LAW §§2510(3)(b) and 3013(3)(b); *Lewis v. Cleveland Hill Union Free Sch. Dist.*, 119 A.D.2d 263, 506 N.Y.S.2d 608 (4th Dep't 1986).

<sup>28</sup> *Kelley v. Ambach*, 83 A.D.2d 733, 442 N.Y.S.2d 616 (3d Dep't 1981). *Appeal of Davis*, 39 Educ. Dep't Rept. 270 (1999); *Davis v. Mills*, 285 A.D.2d 703, 726 N.Y.S.2d 808 (3d Dep't 2001).

<sup>29</sup> *Leggio v. Oglesby*, 69 A.D.2d 446, 419 N.Y.S.2d 118 (2d Dep't 1979), *appeal dismissed*, 48 N.Y.2d 882 (1979).

<sup>30</sup> *Davis v. Mills*, 285 A.D.2d 703, 726 N.Y.S.2d 808 (3d Dep't 2001).

A teacher does not lose his or her tenure or seniority rights when leaving a tenure area, but does not take those rights to the new tenure area. The teacher starts a new probationary period with no seniority status in the new tenure area. Upon return to the old tenure area, however, a teacher reclaims the tenure and the seniority rights previously accrued.

When a school district transfers a program to a BOCES and a probationary or tenured teacher's position is abolished as a result, that teacher has a right to be placed on the school district's preferred eligibility list for seven years, in accordance with Education Law §§ 2510 (3) and 3013(3), provided the teacher otherwise qualifies under those statutes.<sup>31</sup> The transferee BOCES must accord the teacher whose position has been abolished the rights set forth in Education Law § 3014-a: to wit, a position in the BOCES, if one is created by reason of the program transfer, or placement on the BOCES preferred eligibility list, if no new position is created by the transfer.

In a case before the Court of Appeals, a district argued that because a teacher had been given seniority rights to a job with the transferee BOCES under Education Law § 3014-a, he had received all the rights to which he was entitled.<sup>32</sup> However, section 3014-a (4) provides that "this section shall in no way be construed to limit the rights of any of such employees set forth in this section granted by any other provision of law."<sup>33</sup> Thus, the Court held that "the existence of a teacher's rights under section 3014-a does not preclude the existence of additional recall rights in the District under sections 2510 (3) and 3013 (3)."<sup>34</sup>

The case was then remanded to the lower court to determine whether the teacher qualified for the statutes' benefits. The district claimed that the record of the teacher was not one of faithful and competent service because his position was terminated by BOCES. In determining whether the teacher qualified, the Appellate Division, Third Department found that the Legislature's intention "was to ensure that the recall rights of a teacher be ready to vest at the moment of termination."<sup>35</sup> Thus, the fact that the teacher was terminated by BOCES after he was previously laid off by his district could not be used in determining whether his service was faithful and competent for purposes of the district's preferred eligibility list.

<sup>31</sup> Educ. Law §§ 2510 (3) and 3013 (6 3); *Schimmel v. Board of Education*, 111 A.D.2d 966, 968, 490 N.Y.S.2d 64, 66 (3d Dep't 1985); *see also Brewer v. Board of Education*, 51 N.Y.2d 855, 433 N.Y.S.2d 1009 (1980).

<sup>32</sup> *Bojarczuk v. Mills*, 98 N.Y.2d 663, 746 N.Y.S.2d 450 (2002).

<sup>33</sup> N.Y. Educ. Law § 3014-a (4).

<sup>34</sup> *Bojarczuk*, 98 N.Y.2d at 665; *see also Koch v. Putnam-Northern Westchester Bd. of Cooperative Educational Services*, 98 A.D.2d 311, 470 N.Y.S.2d 651 (2d Dep't 1984).

<sup>35</sup> *Bojarczuk v. Mills*, 6 A.D. 3d 802, 804, 774 N.Y.S.2d 593, 595 (3d Dep't 2003).

The Appellate Division, Third Department determined that the holding in *Bojarczuk v. Mills*, requiring the teacher's right to be placed on the preferred eligibility list pursuant to Education Law §§ 2510 and 3013, should be applied retroactively.<sup>35</sup> The court reasoned that because the holding in *Bojarczuk* did not represent an "abrupt shift in the continuity of decisional law, its retroactive application was appropriate."<sup>36</sup>

### E. Bumping

Bumping rights exist for teachers appointed after August 1, 1975, in accordance with §30.13 of the Rules of the Board of Regents. Pursuant to that rule, where a Board of Education or a BOCES abolishes a professional education position affecting a post-1975 employee, a Board of Education is directed to transfer the affected employee to other tenure areas created by Part 30 in which he or she has the greatest seniority if there is a teacher in such tenure area having less seniority than such affected employee.<sup>37</sup>

Pre-1975 appointees cannot bump from one tenure area to another in which they may have served, no matter how much seniority they have in the former tenure area.<sup>38</sup> With respect to the teachers who remain in a tenure area after an abolition, the school district must make a good faith effort to reassign such teachers so that their certifications match up with their assignments, and the fact that such a rescheduling may cause administrative inconvenience is no excuse.<sup>39</sup>

<sup>35</sup> *Brown v. Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.*, 5 A.D.3d 939, 775 N.Y.S.2d 191 (3d Dep't 2004).

<sup>36</sup> *Id.* (citing *Koch*, 98 A.D.2d at 315-316, 470 N.Y.S.2d at 654-55).

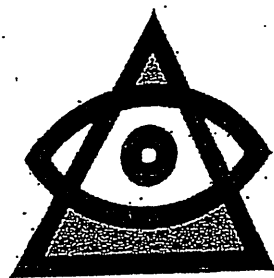
<sup>37</sup> 8 NYCRR §30.13.

<sup>38</sup> *Rippe v. Bd. of Educ. of Comsewogue-Brookhaven Sch. Dist.*, 64 N.Y.2d 281, 486 N.Y.S.2d 713 (1985).

<sup>39</sup> *Steele v. Bd. of Educ. (Valhalla Union Free Sch. Dist.)*, 42 N.Y.2d 840, 397 N.Y.S.2d 382 (1977).

**IMPORTANT  
EDUCATION LAWS  
and  
COMMISSIONER'S  
REGULATIONS  
REGARDING:**

**Seniority, Excess and Recall Rights**



***At a glance...***

**For: Teachers and Teaching Assistants**

## Education Law § 3012. Tenure: certain school districts

1. (a) Teachers and all other members of the teaching staff of school districts, including common school districts and/or school districts employing fewer than eight teachers, other than city school districts, shall be appointed by the board of education, or the trustees of common school districts, upon the recommendation of the superintendent of schools, for a probationary period of three years, except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years or 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 probationary period shall be limited to one year; provided, however, that in the case of a teacher who has been appointed on tenure in another school district within the state, the school district where currently employed, or a board of cooperative educational services, and who was not dismissed from such district or board as a result of charges brought pursuant to subdivision one of section three thousand twenty-a of this chapter, the probationary period shall not exceed two years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education or the trustees of a common school district.



*At-a-Glance:* § 3012

### Teacher Tenure:

- 3 year probationary period
- Appointed by majority vote of BOE upon recommendation of Superintendent of Schools
- Up to 2 years of regular, full-time substitute teaching that immediately precedes probationary appointment can count toward probationary period ("Jarema Credit")
- If tenured in another district or in another tenure area in same district, teacher's probationary period is two years
- May not apply both Jarema Credit and previous tenure
- Probationary period may be extended by one (1) year by the BOE ("Juul Agreement")



## Education Law §3013. (formerly 2510) Abolition of office or position

1. If a trustee, board of trustees, board of education or board of cooperative educational services abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he or she has filled.
2. Whenever a trustee, board of trustee, board of education or board of cooperative educational services abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.
3. (a) If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he or she has filled. The persons on such preferred list shall be reinstated or appointed to such vacancies in such corresponding or similar positions in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position.  
  
(b) The persons on such preferred list shall be reinstated, in accordance with the terms of paragraph (a) of this subdivision, to such substitute positions of five months or more in duration, as may from time to time occur without losing their preferred status on such list. Declination of such reinstatement shall not adversely affect the persons' preferred eligibility status.



*At-a-Glance:* § 3013

- When a position is abolished, the least senior teacher in the tenure area is excessed.
- Teacher is placed on preferred eligibility list (PEL) for seven (7) years.
- Most senior (based on total seniority in the District) teacher on PEL must be offered a new position that is similar to former position and for which teacher is qualified.
- Teachers on PEL must be offered regular substitute positions.
- Teacher need not accept substitute position. Teacher remains on PEL.
- Refer to Part 30 of Commissioner's Regulations as it pertains to "bumping rights."



**Education Law § 3019. Penalty for teacher's failure to complete contract**

Any failure on the part of a teacher to complete an agreement to teach a term of school without good reason therefore shall be deemed sufficient ground for the revocation of the teacher's certificate.



*At-a-Glance:* § 3019

AKA: quitting

**Education Law § 3019-a. Notice of termination of service by teachers**

A teacher who desires to terminate his services to a school district at any time, shall file a written notice thereof with the school authorities of such school district or with the board of cooperative educational services or county vocational education and extension board at least thirty days prior to the date of such termination of services. School authorities or such boards which desire to terminate the services of a teacher during the probationary period shall give a written notice thereof to such teacher at least thirty days prior to the effective date of such termination of services.



*At-a-Glance:* § 3019-a

30 days prior written notice required from a teacher to quit or from a school district to terminate a probationary teacher.



**Education Law §3031 Procedure when tenure not to be granted at conclusion or probationary period or when services to be discontinued.**

Notwithstanding any other provision of this chapter and except in cities having a population of one million or more: (a) boards of education, trustees of common school districts and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

(b) Where a board of education, trustees of a common school district, or board of cooperative educational services votes to reject the recommendation of a superintendent of schools, district superintendent or district principal to grant tenure to any teacher employed on probation, such vote shall be considered advisory and at least thirty days prior to the board meeting at which such recommendation is to be finally considered, the board shall notify said teacher of its intention to deny tenure and the date of the board meeting at which it will take final action. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the board's reasons for such intended action and within seven days thereafter such written statement should be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

(c) This section shall not be construed as modifying existing law with respect to the rights of probationary teachers or the powers and duties of boards of education, trustees of common school districts or boards of cooperative educational services, with respect to the discontinuance of services of teachers or appointments on tenure of teachers.



*At-a-Glance: § 3031*

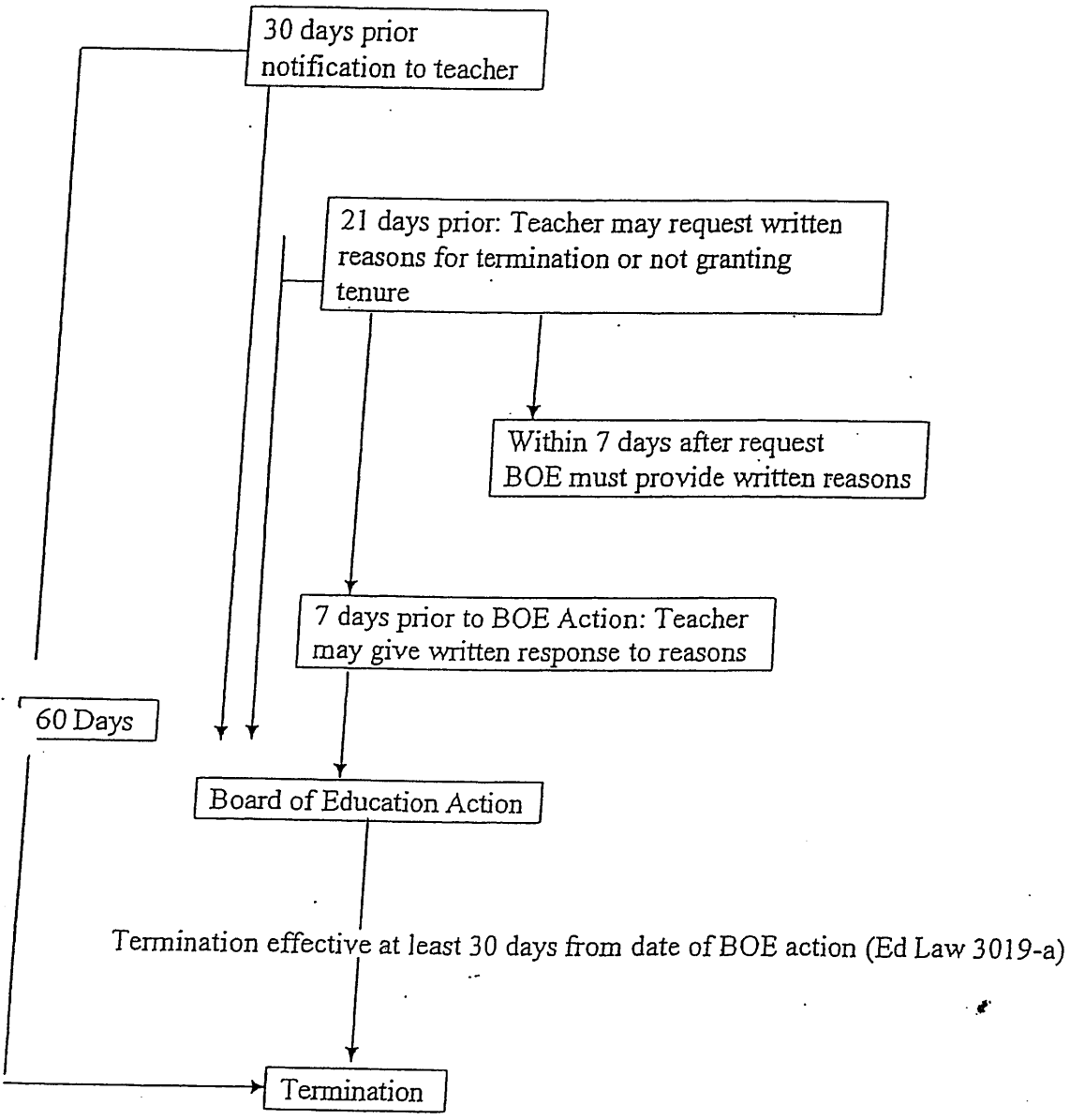
SECTION 3031 of Education Law is sometimes referred to as the "Fair Dismissal Law." That title greatly exaggerates the powers that this Section given to employees. Section 3031 does provide employees who are to be dismissed during the term of their probationary appointment, or who are not to be recommended for tenure, prior notice. This Section sets up a timetable during which the employee may request and shall receive the written reasons for dismissal or no recommendation for tenure. The employee may then respond in writing to the reasons and submit that response to the board of education.

There is no right of a hearing before the board of education or any administrator or agency. There is no due process. This Section provides only the right to the reasons for termination of employment or denial of tenure, and the right to respond to those reasons, and nothing more. The courts of this State have narrowly interpreted the rights of probationary employees under this section.





Education Law Section §3031 Timetable



## PART 30 TENURE AREAS

(Statutory authority: Education Law, §207)

- Sec.
- 30.1 Definitions
  - 30.2 Applicability
  - 30.3 Resolutions making appointments
  - 30.4 Tenure areas
  - 30.5 Elementary tenure area
  - 30.6 Middle grades tenure area
  - 30.7 Academic tenure area
  - 30.8 Special subject tenure area
  - 30.9 Interdisciplinary assignments
  - 30.10 Cumulative tenure areas
  - 30.11 Appropriate certification
  - 30.12 Reorganization of grades

Tenure Areas  
Part 30  
Commissioner's  
Regulations  
(entire text)  
Note:  
Post-1975  
Appointment

### §30.1 Definitions. As used in this Part

(a) *Certificate* means a credential issued pursuant to Part 80 of the Regulations of the Commissioner of Education (8 NYCCR Part 80).

(b) *Common branch subjects* means any or all of the subjects usually included in the daily program of an elementary school classroom such as arithmetic, civics, visual arts, elementary science, English language, geography, history, hygiene, physical activities, practical arts, reading, music, writing, and such other similar subjects.

(c) *Core academic subjects* means courses of instruction in and related to English, social Studies, mathematics, science and foreign languages.

(d) *Departmentalized* means an organizational pattern in a school in which the academic curriculum is divided by academic discipline in such a manner that a professional educator will devote a substantial portion of his time teaching courses of instruction in or related to a particular academic discipline or disciplines, constituting one or more of the core academic subjects.

(e) *Professional educator* means an individual appointed or to be appointed to a full-time position on the professional staff of a school district or board of cooperative educational services, which position has been certified as educational in nature by the commissioner to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law and in which position tenure may be acquired in accordance with the provisions of the Education Law.

(f) *Seniority* means length of Service in a designated tenure area, rather than length of service in the district; such service need not have been consecutive but shall during each term for which seniority credit is sought, have constituted a substantial portion of the time of the professional educator.

(g) *Substantial portion of his time* means 40 percent or more of the total time spent by a professional educator in the performance of his duties, exclusive of time spent in preparation, monitoring or in co-curricular activities.

) *Tenure area* means the administrative subdivision within the organizational structure of a school district in which a professional educator is deemed to serve in accordance with the provisions of this Part.

(Pre-1975  
Appointment  
Different rules)



(i) An *experimental program* means a program which is designed to meet the special needs of secondary school students who are unable to benefit from a school's regular program and which has been approved by the commissioner for such purpose prior to its' implementation, except that such programs shall not include programs for children with handicapping conditions as defined in subdivision I of section 4401 of the Education Law.

### § 30.2 Applicability.

- (a) The provisions of this Part shall apply to all probationary appointments to professional education positions made by a board of education or a board of cooperative educational services by resolution on or after August 1, 1975 and to appointments on tenure based upon such probationary appointments.
- (b) Each board of education or board of cooperative educational services shall on and after the effective date of this Part make probationary appointments and appointments on tenure in accordance with the provisions of this Part.
- (c) This Part shall not be applicable to city school districts located within cities having a population in excess of 400,000 inhabitants or to school districts employing fewer than eight teachers.

### § 30.3 Resolutions making appointments.

Each board of education and board of cooperative educational services shall, in each resolution making a probationary appointment or an appointment on tenure, set forth:

- (a) the name of the appointee;
- (b) the tenure area or areas in which the professional educator will devote a substantial portion of his time;
- (c) the date of commencement of probationary service or service on tenure in each such area;
- (d) the expiration date of the appointment, if made on a probationary basis;
- (e) the certification status of the appointee in reference to the position to which such individual is appointed.

### § 30.4 Tenure areas.

Kindergarten (including pre-kindergarten programs) together with the first six grades shall constitute the elementary tenure area. In those schools in which instruction in the core academic subjects has not been departmentalized at the seventh and/or eighth grade levels, such grades shall constitute the middle grades tenure area. In those grades at or above seventh grade level in which instruction in the core academic subjects is departmentalized, the core academic subjects shall be grouped for tenure purposes into the academic tenure areas of English, social studies, mathematics, science and foreign languages.

### § 30.5 Elementary tenure area.

A professional educator who is employed to devote a substantial portion of his time to classroom instruction in the common branch subjects at the kindergarten (including pre-kindergarten) level and/or in any of the first six grades shall be deemed to serve in the elementary tenure area.

BOE  
Resolutions

ELEM = K-6



§ 30.6 Middle grades tenure area.

A professional educator who is employed to devote a substantial portion of his time to classroom instruction in the common branch subjects at the seventh and/or eighth grades in any school where instruction in the core academic subjects in such grades has not been departmentalized shall be deemed to serve in the middle grades tenure area.

Middle Grades  
Non-  
departmental  
7-8

§ 30.7 Academic tenure area.

(a) A professional educator who is employed at or above seventh grade level to devote a substantial portion of his time to instruction, in one or more of the core academic subjects in a grade or grades in which instruction is departmentalized shall be deemed to serve in the academic tenure area or areas encompassing such subjects.

(b) There shall be five academic tenure areas, reflecting the division of the instructional staff of a departmentalized school into separate units for giving of instruction in English, social studies, mathematics, science and foreign languages.

Secondary  
departmental  
7-12

§ 30.8 Special subject tenure area.

(a) A professional educator who is employed to devote a substantial portion of his time to instruction in one or more of the following subjects shall be deemed to serve in a special subject tenure area or areas encompassing such subject:

- (1) art;
- (2) business education—general;
- (3) driver education;
- (4) education of children with handicapping conditions— education of blind and visually handicapped children;
- (5) education of children with handicapping conditions— education of deaf children
- (6) education of children with handicapping conditions – education of speech and hearing handicapped children
- (7) education of children with handicapping conditions general special education tenure area (education of emotionally disturbed children; mentally retarded children; physically handicapped children; multiply handicapped children; and children with specifically defined learning disabilities);
- (8) health;
- (9) home economics—general;
- (10) industrial arts—general;
- (11) music;
- (12) physical education and recreation;
- (13) remedial reading;
- (14) speech—remedial; and
- (15) English as a second language.

(c) A professional educator employed by a board of education or board of operative educational services to devote a substantial position of his time to the provision of ancillary or supportive educational services in the following positions shall be deemed to serve in a special subject tenure area encompassing the duties of such position:

Ancillary or  
Supportive  
Services



- (1) school attendance teacher;
- (2) school counseling and guidance;
- (3) school dental hygienist;
- (4) school media specialist;
- (5) school media specialist (library);
- (6) school media specialist (educational communications);
- (7) school nurse teacher;
- (8) school psychologist; and
- (9) school social worker.

(c) A professional educator employed by a board of education or board of cooperative educational services to devote a substantial portion of his time to instruction in one of the following vocational subjects shall be deemed to serve in a special subject tenure area coextensive with the certificate possessed by the individual at the time of the probationary appointment

Vocational  
Tenure Areas

- (1) agriculture;
- (2) health occupations;
- (3) home economics—occupational;
- (4) occupational business education and distributive occupation subjects;
- (5) technical subjects; and
- (6) trade subjects.

(d) A professional educator employed by a board of education or board of cooperative educational services as a teaching assistant pursuant to the provisions of Education Law section 3009, subdivision 3 shall be deemed to serve in the special subject tenure area of teaching assistant.

Teaching  
Assistant  
One single tenure  
area

### § 30.9 Interdisciplinary assignments.

(a) A board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time throughout the probationary period in at least one designated tenure area except that a professional educator who teaches in an experimental program as defined in subdivision (i) of section 30.1 of this Part and who does not devote 40 percent or more of his time to service in any one tenure area may be appointed to a tenure area for which he holds the proper certification:

Substantial  
Portion = 40%  
Note: pre-1975  
50% &  
Different rules

(b) No professional educator, whether on tenure or in probationary status, may be assigned to devote a substantial portion of his time in a tenure area other than that in which he has acquired tenure or is in probationary status, without his prior written consent.



(c) If a professional educator possesses certification appropriate to more than a single tenure area and the board of education or board of cooperative educational services proposes at the time of initial appointment to assign such individual in such a manner that he will devote a substantial portion of his time during each of the school years constituting the probationary period in more than one of the tenure areas established by this Part, the board shall in its resolution of appointment designate each such tenure area and shall thereafter separately confer or deny tenure to such individual in the manner prescribed by statute in each designated tenure area.

(d) Where a board of education or board of cooperative educational services proposes to assign a professional educator having tenure or in probationary status in a tenure area created by this Part in such a manner that he will devote a substantial portion of his time in a tenure area to which he has not previously been appointed, the board shall prior to such assignment confer a probationary appointment in accordance with section 30.3 of this Part, designating such additional tenure area. Thereafter, the board shall separately confer or deny tenure to such individual in the designated tenure area in the manner prescribed by statute.

(e) Conferral or denial of tenure at the conclusion of the probationary period or termination of services of a professional educator during the probationary period shall affect only the tenure area under consideration.

#### § 30.10 Cumulative tenure areas.

Where a professional educator acquires tenure in a tenure area created by this Part, he shall retain such tenure while he remains continuously employed by the board of education or board of cooperative educational services as a full-time member of the professional staff of the district, notwithstanding subsequent appointments to tenure or to probation in other tenure areas.

#### §30.11 Appropriate certification.

Nothing herein contained shall be construed to authorize or require a board of education or board of cooperative educational services to place or retain an individual in a position for which such individual does not possess appropriate certification in accordance with the provisions of Part 80 of the Regulations of the Commissioner of Education.

#### § 30.12 Reorganization of grades.

Subject to the provisions of sections 2510 and 2585 of the Education Law, where a board of education, on or after the effective date of this Part, modifies the organizational structure of a school in such a manner that instruction in the core academic subjects is departmentalized in a grade or grades previously taught by professional educators deemed to serve in the middle grades tenure area, each reorganized professional educator or probationer serving in such grade or grades at the time of such departmentalization shall retain such status and shall be eligible to



teach any core academic subject or special subject for which such professional educator possesses appropriate certification; provided that such tenure shall pertain only to grade levels not higher than those formerly associated with the middle grades tenure area in such school district.

**§ 30.13 Rights incident to abolition of positions.**

Subject to the provisions of sections 2510 and 2585 of the Education Law, where a board of education or board of cooperative educational services abolishes professional education positions, it shall do so in accordance with the following rules:

Abolition of Positions  
"Bumping Rights"

Note: pre-1975  
Different rules

- (a) The board shall identify the tenure area in which the professional education position is abolished.
- (b) The board shall determine the person having the least seniority in the tenure area affected by the abolition.
- (c) Should the individual so identified have tenure or be in probationary status in additional tenure areas created by this Part, he shall be transferred to such other tenure area in which he has greatest seniority and shall be retained in such area if there is a professional educator having less seniority than he in such other tenure area.
- (d) If such individual is junior in service in such second tenure area, he shall be transferred in succession in order of length of service, to each of the areas in which he shall have acquired tenure or be in probationary status and shall be retained in any such area if there is a professional educator in such area having less seniority than he.



**PART 80. REQUIREMENTS FOR TEACHERS' CERTIFICATES AND  
TEACHING PRACTICE**

**§80-5.3 Incidental teaching.**

Incidental  
Teaching

5 hours/week  
Outside  
Certification

A superintendent of schools may assign a teacher to teach a subject not covered by such a teacher's certificate or license for a period not to exceed five classroom hours a week, when no certified or qualified teacher is available after extensive and documented recruitment, and provided that approval of the commissioner is obtained in accordance with the following requirements:

(a) Not later than 20 business days after such an assignment, the superintendent of schools shall submit for approval an application, in a form satisfactory to the commissioner, containing the following information:

- (1) Evidence of extensive recruitment of a teacher certified in the appropriate area;
- (2) The name and certification status of the teacher given such assignment;
- (3) The subject which the teacher is being assigned to teach on an incidental basis and the total number of classes in such subject being taught on an incidental basis;
- (4) The qualifications of the teacher to teach such subject on an incidental basis;
- (5) The specific reasons why an incidental assignment is necessary;
- (6) The anticipated duration of the incidental teaching assignment; and
- (7) The number of applications, approved or pending, for authorization to make incidental teaching assignments in the same certification area for which the current authorization is being sought.

(b) To be approved, such application shall demonstrate to the satisfaction of the commissioner that an incidental teaching assignment is necessary, that the teacher so assigned is the best qualified to teach the subject on an incidental basis, and that the requirements of this subdivision have been met.

(c) The commissioner will issue a determination within 20 business days of receipt of the district's application.

(d) In the event that the application is disapproved, the superintendent of schools, within seven business days of receipt of notice of such disapproval, shall terminate the incidental assignment. In the event that the application is approved, such approval shall be deemed to have commenced on the date of the incidental teaching assignment and shall terminate on the last day of the school year for which it is granted. The superintendent of schools may apply, in accordance with subdivision (e) of this section, for renewal of such approval for any teacher.





(e) To obtain renewal of such approval in any subsequent year, the superintendent of schools, as soon as possible after learning that the continued assignment of an incidental teacher is necessary, shall submit an application which, in addition to setting forth the information required pursuant to subdivision (a) of this section, contains an assurance by the superintendent of schools that:

- (1) the teacher who previously taught the course on an incidental basis has been offered the opportunity to continue to teach the course or has not been offered such an opportunity because the superintendent has evidence that the course was not taught in an acceptable manner;
- (2) the teacher who is assigned to teach the course has completed, or has agreed to complete no later than September 1st of the school year next following the first renewal of such approval, at least three semester hours of credit or a satisfactory equivalent leading to certification in the subject which the teacher is being assigned to teach; and
- (3) the teacher who is assigned to teach the course will be reimbursed by the school district for the tuition cost of any portion of the three semester hours of credit or the equivalent required pursuant to paragraph (2) of this subdivision that is taken by the teacher at the request of the school district, and satisfactory evidence that the teacher has been so reimbursed in the event the teacher who is assigned has previously taught the course on an incidental basis, pursuant to a previous renewed approval.

