



# THE ADVOCATE

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**VOLUME XXXII**  
**MAY 2013**

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# School District Must Provide Representation to Employee Sued for Hitting Student

*contributed by Quinn Morris*

The Court of Appeals recently heard two issues, which were consolidated into one case, brought by teacher aides who were being sued for pain and suffering after allegedly hitting students. *Deborah Sagal-Cotler v. New York City Board of Education*, 2013 WL 1759573 (2013). Both teachers were employed by the New York City School District and sought representation from the City of New York Law Department after students commenced civil actions based on the alleged hitting incidents. The aides were denied their requests to be provided an attorney, and they filed Article 78 petitions challenging the denials. The appeals process eventually brought the case to the State's highest court, which issued its decision on April 25, 2013.

The teacher aides argued that they were entitled to representation under the law, specifically Education Law §3028 which addresses, "Liability of school district for costs and attorney's fees of action against, or prosecutions of, teachers, members of supervisory and administrative staff or employees, and school volunteers." In relevant part, it provides, "Each board of education, trustee or trustees in the state shall provide an attorney or attorneys for, and pay such

attorney's fees and expenses necessarily incurred in the defense of a teacher, member of a supervisory or administrative staff or employee, or authorized participant in a school volunteer program in any civil or criminal action or proceeding arising out of disciplinary action taken against any pupil of the district while in the discharge of his duties within the scope of his employment or authorized volunteer duties."

The New York City Department of Education (NYS DOE) argued that the teacher aides were not entitled to representation provided by the district because they had violated school policy when they hit the students. NYS DOE based its argument on Education Law §2560, which requires that school employees in New York City be offered representation under the provisions and guidelines of General Municipal Law §50-k. Section 50-k states that there is no duty to provide a defense to an employee who has acted "in violation of any rule or regulation of his agency." Under the General Municipal Law, the city believed it was obligated to publicly funded defense only where a district employee had not violated a school district rule or regulation. The NYC DOE further argued that since corporal punishment is specifically prohibited, it is a violation of employment rules, and regulations, to use such behavior; thus the teacher aides were not entitled to a defense provided by the District/City. The Court rejected this argument.

The Court of Appeals' ruling reversed the Appellate Division's decision, by holding that Education Law §2560 and General Municipal law §50-k did not control. The Court noted that, the later enacted, §3028 of the Education Law does not include any language limiting the duty to provide a defense to an employee. Judge Robert Smith wrote, "We hold that employees of the New York City Department of Education who are sued for using corporal punishment are entitled to a defense provided by the City, even though the employees' conduct is a violation a State regulation." *Id.* The Court specifically stated that if the Legislature meant to exclude cases involving corporal punishment, it could have done so explicitly since statutes forbade corporal

punishment at the time that §3028 was enacted. In other words, since §3028 contains no limitations, the actions do not need to be permissible, proper or lawful, to require that the school district provide a defense.

The Court of Appeals reasoned that since the law required that an attorney be provided not just in a civil case but also in a criminal case, “the Legislature wanted even employees who engaged in highly questionable conduct to be defended at public expense.” Id. This decision means that school districts are responsible for providing a defense to employees when they are discharging duties within the scope of their job, even if doing so is in violation of employment rules.



## TIPS REGARDING THE RELEASE OF APPR SCORES

Most school districts recall that on June 25, 2012, Governor Cuomo signed into law a bill detailing disclosure requirements for the State Education Department (SED), school districts, and BOCES. However, most schools have not given this law much thought since becoming aware of its passing.

The new law, which amends Section 3012-c of the Education Law regarding the Annual Professional Performance Reviews (APPR) of teachers and principals, adds subdivision 10 to the APPR process and provides requirements to school districts and BOCES regarding the release of the individual composite

effectiveness scores and final ratings of their teachers and principals. The law went into effect on July 1, 2012, but is going to have its first impact in most districts this summer. It specifies two different types of disclosure: public release and release to parents/legal guardians.

The public release requires that SED, school districts, and BOCES ensure that any public release of APPR data does *NOT* contain personally identifying information for any teacher or principal. The law requires that SED publish on its website information, “include[ing] but not be limited to the final quality ratings and composite effectiveness scores by school district for principal evaluation data, by school building for teacher evaluation data and, within each district and school building, by class, subject and grade; final quality ratings and composite effectiveness scores by region, district wealth, district need category, student enrollment, type of school (i.e. elementary, middle and high school), student need (e.g., poverty level), and district spending; final quality ratings and composite effectiveness scores by the percentage or number of teachers and principals in each final quality rating category, moving to a higher rating category than the previous year, moving to a lower rating category than the previous year, and retained in each rating category; and data on tenure granting and denial based on the final quality rating categories.”

Regarding a parent/legal guardian release, school district and BOCES will be required to fully disclose, upon request, the final rating (HEDI) and composite effectiveness scores (0 through 100) of the teachers and for the principal of the school building to which the student is assigned for the *current* school year.

Furthermore, the law states that conspicuous notice of the right to obtain APPR information must be provided to all parents/legal guardians. In addition to this, an oral or written explanation of the scoring ranges for the HEDI ratings must be provided to parents and legal guardians along with opportunities to understand the scores in the context of



teacher evaluation and student performance. The parent/legal guardian will have a right to receive such information by phone.

Prior to the release of such information to parents/legal guardians, school districts and BOCES must make reasonable efforts to verify that any review request is a bonafide request by a parent or guardian entitled to review and that those requesting such information are in fact entitled to receive the requested data.

In determining when ratings and composites scores can be released, for both public release and release to parents/legal guardians, school districts and BOCES must remember that the law specifies that ratings and composite scores can only be released once they are final. Ratings and composite scores will not be deemed final until all portions of the 0 to 100 composite score are completed and the timelines for appeal as specified in the relevant Appeal Process have expired or an appeal has been fully processed to completion.

Finally, a reminder that the standard for public release is different from that of the release to parents/legal guardians. Districts and BOCES must be certain that personally identifying information for any teacher or principal is not contained in the public release of APPR data.

## School Employees' Off Duty DWI



From time-to-time, school district employees may be arrested for driving while intoxicated (DWI) while they are off duty. Consequently, when the matter is made public through an article in the news, district officials must decide what, if any, disciplinary measures are appropriate. These matters should be reviewed on a cases-by case basis. If the employee occupies a non-safety sensitive position, has a good employment record and is not the driver's education teacher, a district

administrator should summon the employee to a meeting with his/her union representative in order to discuss the matter.

It would be advisable to inform the worker that the District is aware of the arrest and ask him or her about the circumstances. When the employee responds, the administrator should inform the employee that such notoriety reflects poorly upon the district and that future DWI convictions could result in disciplinary action. At the same time, the administrator should ask the employee if he or she has an alcohol problem and suggest that they might want to seek assistance through the Employee Assistance Program.

All of the foregoing should be documented and hopefully this will resolve the matter. If it does not, however, and should it become necessary to take future disciplinary action, the district will be able to show that it put the employee on notice and in fact, offered assistance.

Districts should be cautious in taking disciplinary action prior to a conviction. Although it is not necessarily unlawful for a district to do so, if the basis for the discipline is the arrest and the employee is then acquitted, the District may then be put in the difficult position of defending disciplinary action based on an arrest, for which there is no accompanying conviction. In such cases, if the arrest is the only basis for discipline, the district would likely have to rely on the fact that the arrest portrayed the district in a bad light.



Districts should be aware that the New York State Human Rights law prohibits discrimination against an employee on the basis of prior arrest records.

# AREA UNEMPLOYMENT RATES

## New York State Rate

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.3%	8.8%	8.0%										
2012	9.1%	9.1%	8.7%	8.1%	8.4%	8.7%	8.9%	8.5%	8.1%	8.1%	7.9%	8.2%	8.5%

## Syracuse, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.7%	9.3%	8.5%										
2012	9.5%	9.5%	9.0%	8.2%	8.5%	8.8%	8.9%	8.3%	8.2%	8.0%	7.8%	8.5%	8.6%

## Auburn, NY Micropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.8%	9.7%	8.7%										
2012	9.4%	9.5%	8.8%	7.9%	7.9%	8.1%	8.1%	7.6%	7.3%	7.4%	7.4%	8.3%	8.1%

## Cayuga County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.8%	9.7%	8.7%										
2012	9.4%	9.5%	8.8%	7.9%	7.9%	8.1%	8.1%	7.6%	7.3%	7.4%	7.4%	8.3%	8.1%

## Broome County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	10.1%	9.5%	8.7%										
2012	9.8%	9.6%	9.1%	8.3%	8.6%	9.0%	9.3%	8.7%	8.4%	8.3%	8.1%	8.9%	8.8%

## Ithaca, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	6.7%	5.8%	5.3%										
2012	6.6%	6.2%	5.7%	5.4%	6.0%	7.0%	6.9%	6.4%	5.6%	5.5%	5.3%	5.5%	6.0%

## Ontario/Seneca/Wayne/Yates Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.6%	9.4%	8.5%										
2012	9.2%	9.3%	8.9%	7.6%	7.9%	7.9%	7.7%	7.2%	7.0%	7.0%	7.1%	8.0%	7.9%

## Rochester, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2013	9.1%	8.7%	8.0%										
2012	9.5%	9.5%	9.0%	8.2%	8.5%	8.8%	8.9%	8.3%	8.2%	8.0%	7.8%	8.5%	8.6%

*Source: New York State Department of Labor  
Labor Statistics  
[www.labor.state.ny.us](http://www.labor.state.ny.us)*

# CONSUMER PRICE INDEX

## April 2013

	INDEX 1982-84 BASE YEAR=100	% INCREASE FROM 2012	% INCREASE FROM PRIOR MONTH
NY-Northeastern New Jersey Area			
1. All Urban Consumers	255.967	1.4	-0.2
2. Urban Wage Earners & Clerical Workers	252.024	1.3	-0.3
U.S. City Average			
1. All Urban Consumers	232.531	1.1	-0.1
2. Urban Wage Earners & Clerical Workers	228.949	0.9	-0.2

# COST OF LIVING UPDATE

## ALL CITIES

## NY - NORTHEASTERN NEW JERSEY

Month	Revised Wage Earner Index	%	All Urban Consumers Index	%	Revised Wage Earner Index	%	All Urban Consumers Index	%
Jan-11	216.4	1.8	220.2	1.6	238.4	1.8	242.6	1.5
Feb-11	217.5	2.3	221.3	2.1	239.8	2.4	243.8	2.1
Mar-11	220.0	3.0	223.5	2.7	241.7	2.7	245.6	2.3
Apr-11	221.7	3.6	224.9	3.2	242.7	2.9	246.5	2.5
May-11	223.0	4.1	226.0	3.6	244.3	3.5	248.1	2.9
Jun-11	222.5	4.1	225.7	3.6	244.6	3.7	248.5	3.2
Jul-11	222.7	4.1	225.9	3.6	245.3	3.8	249.2	3.3
Aug-11	223.3	4.3	226.5	3.8	246.0	3.9	250.1	3.5
Sep-11	223.7	4.4	226.9	3.9	246.9	4.3	250.6	3.8
Oct-11	223.0	3.9	226.4	3.5	246.3	3.7	250.1	3.3
Nov-11	222.8	3.8	226.2	3.4	245.5	3.3	249.3	3.0
Dec-11	222.2	3.2	225.7	3.0	244.6	3.0	248.3	2.7
Jan-12	223.2	3.1	226.7	2.9	245.5	3.0	249.3	2.8
Feb-12	224.3	3.1	227.7	2.9	246.5	2.8	250.3	2.6
Mar-12	226.3	2.9	229.4	2.7	248.2	2.7	245.1	2.5
Apr-12	227.0	2.4	230.1	2.3	248.7	2.5	245.9	2.3
May-12	226.6	1.6	229.8	1.7	249.0	1.9	252.7	1.8
Jun-12	226.0	1.6	229.5	1.7	248.5	1.6	252.4	1.6
Jul-12	225.6	1.3	229.1	1.4	248.2	1.2	252.0	1.1
Aug-12	227.1	1.7	230.4	1.7	249.7	1.5	253.5	1.4
Sep-12	228.2	2.0	231.4	2.0	251.0	1.7	254.6	1.6
Oct-12	228.0	2.2	231.3	2.2	250.5	1.7	254.3	1.7
Nov-12	226.6	1.7	230.2	1.8	250.6	2.1	254.3	2.0
Dec-12	225.9	1.7	229.6	1.7	249.5	2.0	253.6	2.1
Jan-13	226.5	1.5	230.3	1.6	250.8	2.2	254.8	2.2
Feb-13	228.7	1.9	232.2	2.0	252.3	2.3	256.2	2.4
Mar-13	229.3	1.3	232.8	1.5	252.7	1.8	256.6	1.9
Apr-13	228.9	0.9	232.5	1.1	252.0	1.3	256.0	1.4
May-13								
Jun-13								
Jul-13								
Aug-13								
Sep-13								
Oct-13								
Nov-13								
Dec-13								

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