

# On the Legal Side

New York City Board of Education  
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## Class Size Exceptions

By: Robert Waters, Office of Labor Relations

The teachers' contract at Article 7M lists negotiated class sizes and exceptions to these limits. The maximum class sizes range from 15 pupils per teacher for pre-kindergarten to 21 pupils per class for junior high to 50 pupils per teacher for high school physical education classes. The contract should be consulted for specific class size limits.

In recognition that these limits cannot always be met, the contract allows for exceptions to the maximum class sizes if:

- There is no space available for scheduling any additional classes to reduce class size.
- Conformity to the class size objective would result in placing additional classes on a short time schedule.
- Conformity to the class size objective would result in the organization of half classes.
- A class larger than the maximum is necessary or desirable in order to provide for specialized or experimental instruction,

#### Message from the Chancellor's General Counsel:

We hope the topics we've covered in this issue, like holiday displays and conflicts law restrictions on job hunting, prove helpful. Please contact us with suggested future topics and enjoy the holidays.

or for IGC instruction, or for placement of pupils in a subject class of which there is only one in a grade.

If a school exceeds the class size limit, it must explain in writing to both the teacher and the Chancellor. The school should refer to one of the reasons in the contract and specify the size of the class and why it will be larger than the maximum. In determining whether you will be exceeding the class size limit, carefully consider what is the nature of the class – for example, arbitrators have recognized that many subjects taught in vocational high schools are not truly shop instruction, but are regular classes, which have a larger class size limit  
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## Employee Discipline

By: Patria Frias-Colon and Theresa Europe

Over the course of the school year, some of your employees will likely engage in unacceptable conduct. When the time comes to figuring out what action to take, different offices need to be consulted. The Administrative Trials Unit (ATU) in the Office of Legal Services (OLS) handles the discipline of tenured employees (including teachers, principals, assistant principals and secretaries) as well as permanent civil servants. The  
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## Holiday Displays

By: Debbie King

During the holiday season, schools frequently have questions regarding holiday displays and decorations. As educators in a diverse multi-cultural community, it is important that schools foster an understanding and respect for the many beliefs and customs stemming from our students' religious, racial, ethnic and cultural heritage. At the same time, school administrators must be mindful that the First Amendment to the Constitution prohibits  
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## Class Size Exceptions

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Teachers will often grieve their assignment to a class that exceeds the negotiated maximum class size. Schools will need to show that the excess class size falls within the contractually permitted exceptions. A carefully thought out reason will assist in defending the grievance.

Arbitrators look carefully at classes that exceed the limit, especially when the Board relies on the fourth exception listed above. You should be aware of this when setting up and allocating students to classes.

The fourth exception allows for exceeding the limit if needed to provide specialized or experimental instruction.

However, it may not be sufficient simply to assert that a specialized class was created. The principal should also be prepared to justify the establishment of the specialized class.

Further, even where this exception is used to justify exceeding the class size limit, some arbitrators have limited the school to no more than three students above the maximum, even though the contract contains no such restriction. Other arbitrators have imposed time limits on the number of years during which a school may exceed the maximum. However, if despite the passage of time, you still must exceed the class size limit, you may be able to argue successfully that you have made good faith efforts to stop exceeding the limit and that it is impossible to do so. In this case, an arbitrator may permit continued application of the exception. It has also been found acceptable to exceed the limit due to the admission of students from outside the District to a specialized program.

You also may have some flexibility in applying the exception to the limits for short periods of time. Generally, a grievance will not be sustained if the class size limit has been exceeded for only one year.

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## Holiday Displays

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a school system from endorsing or promoting a particular religious or belief system. In determining whether particular decorations or symbols are appropriate, school officials must strike a balance between these competing considerations.

As a general matter, schools are permitted to display secular holiday symbols and decorations. Examples of such decorations include Christmas trees, Menorahs,

reindeers, Santas, dreidels, and the Star and Crescent. In order to ensure that holiday displays do not appear to promote or celebrate any single religion or holiday, any symbol or decoration which is used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs. Finally, all holiday displays should be temporary in nature.

## Requirements vs. Full Value Contracts

By: William Joyce

The Board of Education, as a public agency, is required to follow certain rules regarding the purchase of materials and services. An excellent in depth handbook on purchasing rules can be found in the School Purchasing Guide available from the Division of Financial Operations.

Generally, a formal contract for services needs to be prepared if the contract amount is greater than \$25,000. There are two general kinds of contracts: requirements and full value. A requirements agreement is used when you don't know exactly how much you are going to order but have an individual unit price for the services that can be ordered, e.g., a 3-day professional development program for up to 10 individuals at a unit cost per person of \$1,000. A full value contract is used when you know the services you want to receive and the total cost to be paid to the contractor assuming satisfactory completion of the services.

To write the contract, your lawyer needs certain information from you, the client. The critical pieces of information are a workplan (or statement of work) and budget. A workplan is a detailed explanation of what, where, when and how the contractor will provide the services to the Board. The budget is an itemized breakdown of the costs for providing the services and not simply the total price for all services.

The workplan and budget for full value contracts.

A detailed description of what the contractor will do is essential for any workplan. The more concrete and specific the workplan, the greater the likelihood that the services actually performed will meet your expectations.

The workplan should contain: a) a statement of the services you want to be performed; b) a chronology or time chart listing the month or week of key milestones to be completed; c) a description of service recipients, i.e. students, parents, faculty, or administrators; d) a list of key contractor personnel whom you expect to perform the services; e) an identification of where the services are to be performed (Do you expect to have the contractor come to you or are the services being performed off site?); f) a list of any materials or supplies to be provided to the Board.

The budget is a breakdown of the costs associated with performing the services, which includes personnel costs (full time or pro rated based on the percentage of time an individual is dedicated to the contract), OTPS costs, and administrative or indirect costs such as the apportioned share of rent and utilities incurred by the contractor to run its business. (Anything over 10% of the total cost of the contract must be carefully scrutinized.) When preparing a budget, it is useful to pretend you are an auditor reviewing the invoices at the end of the contract period and ask

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## Employee Discipline

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Office of Appeals and Review (OAR) should be consulted about discipline of teachers who have not achieved tenure. The Office of Labor Relations (OLR) is responsible for the discipline of a variety of union employees. OLR also handles the grievance process and is available to answer questions about what you should and should not include in letters of reprimand.

To facilitate the ability of the ATU to review your proposed discipline case of a tenured employee and take action, we provide the following guidelines of preliminary steps the District or Office should take:

1. Contact the Office of Legal Services at (718) 935-3609 and set up a Technical Assistance Conference (TAC). Where the allegation involves an investigation by the Office of Special Investigations (OSI), the investigator will request the TAC and will also be present at the conference.

2. Come to the TAC prepared with the relevant documentation detailing the allegations, including, but not limited to, the following:

- a. For incompetence cases: observation reports and rating sheets as well as any letters documenting offers of assistance and the pre-and-post observation conferences;
- b. For attendance and punctuality cases: timecards, CARs, any letters of warning to the employee as well as the dates of absences and latenesses, set up in the format provided to all Districts by the ATU (please put this information on computer diskette and bring to the TAC);
- c. For corporal punishment cases: the completed A-420 for each allegation, with witness statements and contact information of all witnesses, and any prior letters of reprimand;
- d. For arrest cases: contact the Office of Personnel Investigations (OPI) at 935-2471 to determine whether the employee has reported the arrest as required by Chancellor's Regulation C-105 and for a copy of the Certificate of Disposition if any. If the criminal matter is still pending, the TAC is premature and, barring

special circumstances, such as a pattern of arrests, you should wait for a disposition before requesting a TAC, or call the ATU for guidance.

3. The principal and a representative from the District Office must attend the TAC.

4. After the TAC, a determination will be made whether to prosecute the employee administratively. If we take the case, we will send a letter indicating the attorney assigned to the case. If we do not take the case, we will send a letter to the District representative who attended the TAC indicating the reasons for our decision and what action should be taken at the District level.

Even before proceeding to a TAC and a formal disciplinary proceeding, there are other steps you can consider to address misconduct. If an employee has done something that is improper, hold a conference with the employee. The conference should be memorialized in a letter to the file if discipline is warranted, but also make sure to draft the letter to leave the possibility of additional disciplinary action if the misbehavior is repeated. If you have questions about what you can or cannot include in the letter, contact OLR for assistance. For more information regarding letters to file, see Issue 3, Spring 2000 of *On the Legal Side*. Additionally, you can rate employees unsatisfactory pending the outcome of an investigation by OSI or the Special Commissioner of Investigations (SCI) if the outcome of that investigation is not known by the time that you have to rate the employee. Finally, make sure you review an employee's personnel file before granting tenure to make sure you have not overlooked any past behavior that should affect the tenure decision. If you find that the person is marginally satisfactory, or engaged in misconduct, extend the probationary period.

Remember, there are many things you can do to discipline an employee without ATU prosecuting administratively. However, if all else fails and you need our intervention, follow the steps above and we will take it from there.

## Requirements vs. Full Value Contracts

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yourself if the budget provides enough detail to justify paying the invoices submitted by the contractor.

### Workplan and budget for requirements contracts.

In requirement contracts, the workplan must explicitly define the "unit" of service that can be requested by the Board. In non-legal terms, you are ordering a "thing," be it widgets or 3-day training sessions. You may not know how many you want but you need to know what it is you are ordering and how much you are going to pay for each one. A requirements agreement is like a menu in a diner. You can individually order each item, which is clearly described, and you pay only for what you individually ordered.

The budget for a requirements contract is relatively straightforward. The budget is a list of unit prices for each kind of service to be performed. There is no need to break the cost down any further than the unit price, but you do have to be careful of inappropriate bundling of services into one unit price instead of individual unit prices. That is why it is important that the unit of service be clearly defined. For example, suppose there is a training course that costs \$10,000 for up to 10 people for three days. If the unit is defined as the course then whether you send 8 or 10 people, the cost is the same \$10,000. But if the unit is on a per person basis at \$1,000 for each person and you send 8 people, the total cost is only \$8,000 (a better deal). Your attorney can help you address these issues with the contractor.

A good workplan and clear budget help avoid disputes between the Board and its contractors. Most contract disputes occur because the user's expectations are not accurately reflected in the workplan. The job of a lawyer is to ensure that what you think you are getting is described in sufficient detail. Keep in mind it is never too early to prepare a detailed workplan and budget.

## Post Employment Rules – Job Hunting

By: David Schacher, Ethics Officer

At long last or perhaps after a bad week, the time may come when you decide to look for other employment. Or, while working, you may learn of an incredible opportunity. Hold on. Before picking up the phone or sending your resume, take a few steps to make sure you don't violate the City's Conflict of Interest rules. The City Conflict of Interest Law, contained in Chapter 68 of the New York City Charter, has rules that affect how you may job hunt and limit some of the work you may do for your new employer.

With respect to job hunting, the Charter provides that "no public servant can negotiate for or accept any position with any person or firm who or which is involved in a particular matter while the public servant is actively considering, or is directly concerned or personally participating in such particular matter on behalf of the agency." In plain terms, this means that you as a Board employee cannot seek a job with a firm that you deal with as part of your Board job. If you are interested in a job, you will have to become uninvolved in the firm.

The Charter's definition of a "firm" is broad, and includes not only for-profit firms, but also not-for-profit organizations, partnerships, sole proprietorships and joint ventures. Government agencies are not covered by the Charter's definition of a "firm." What this means is that it's okay to look for another government job even if you're involved with that government office, including jobs with public agencies.

The practical effect of this job hunting rule is typified in this example: Jane Doe, a teacher trainer, in fulfilling her duties for the Board, is working with a private firm, XYZ, on two projects. XYZ is an agency that contracts with the Board to provide curriculum. Ms. Doe sees an advertisement for a job at XYZ which interests her or a representative of the firm asks her if

she might be interested in leaving the Board and working for XYZ. In either case, if Ms. Doe is interested in pursuing the question of employment further, she must speak to her supervisor and have herself removed from participation in all projects involving XYZ before she contacts XYZ and until any job negotiations are over.

If Ms. Doe removes herself from the project, she should do so in writing so there is a record of her action. She should not send her resume to XYZ or talk with them about an interview until she removes herself from all projects involving XYZ. In the alternative, she may not send her resume or have any job discus-

sions with XYZ until she is not dealing with the firm on any matter as part of her duties for the Board.

As will be discussed in detail in a future article, if she accepts the job, Ms. Doe cannot have any contact with the Board of Education as part of her job with XYZ for one year after she leaves the Board.

It is quite possible that some of you may have questions concerning this provision or other provisions of the Conflicts of Interest Law. Please do not hesitate to contact me in confidence at 718-935-5300. In addition, you may contact the Conflicts of Interest Board directly at 212-442-1400.

## What's New?

### Safe Schools Against Violence In Education Act

The Safe Schools Against Violence in Education (SAVE) act signed into law last summer addresses safety and discipline issues on several fronts. In brief, the law requires the development of both district-wide and school-based school safety plans (known as school emergency response plans); comprehensive codes of conduct; uniform violent incident reporting; and school violence prevention training for employees. Additional elements include the ability of teachers to remove substantially disruptive students from classrooms and the notification to schools, by court officials, of criminal and juvenile delinquency adjudications. Work is being carried out to prepare for implementation of the law, which does not take full effect until July 1, 2001.

### District Liaisons

In an ongoing effort to improve our ability to provide prompt legal advice to the districts, the Office of Legal Services has implemented a new "district liaison" program as a supplement to the office's Rotation attorney. The Rotation attorney is still on call each day to answer questions from the field. For the district liaison program, each attorney in the office has been matched with a district. The

attorneys will work directly with the Superintendent's office, and are available to attend principals' meetings and Community School Board meetings. The liaisons are available to answer questions, which may include directing you to another source of information. Principals should speak to their district offices before contacting the district liaison directly.

### Regulations On Line

Last Spring, the Chancellor announced that the number of Chancellor's Regulations had been reduced. Central office staff together with the Law Office was engaged in an intensive effort to reduce the number of regulations and combine and condense regulations. The reissued and revised regulations can now be found at the Board's web site: [www.nycnet.edu](http://www.nycnet.edu), under Chancellor's Regulations. In addition to the regulations themselves, there are also summaries of the major changes to the Regulations. The placement of the regulations on-line makes them available to the public as well as Board of Education employees, and furthers ongoing paper-work reduction efforts. Also, changes to the Regulations will be placed on the web site immediately, so you will no longer have to worry whether a regulation has been revised from the version that you are looking at.