



# Removal of a Board Member

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# Board Member Qualifications

- Able to read and write
- A qualified voter of the district; and
- A resident of the school district for at least one year prior to the election

Education Law §2502

# Board Member Responsibility as a Public Officer

- A school board member takes an oath of office to uphold the law and faithfully discharge his/her duties.

*N.Y. State Constitution Art. XIII, Section 1; Public Officers Law § 10*

- School Boards are responsible for, *inter alia*, educational standards, budget matters, management issues, and health and safety
- Board members have a fiduciary obligation to act constructively to achieve the best possible governance of the school district.

*Application of Kozak, 34 Ed Dept Rep 501, Decision No. 13,396*

# Confidential Information

- Municipal Officers and employees may not disclose to anyone confidential information acquired by them in the course of their official duties or use such information to further their personal interests.

*General Municipal Law §805-a(1)(b)*

# Removal of Board Members

A School Board member may be removed from office by either the Commissioner of Education or the School Board.

The legal standards applied and the time frames for proceeding with the removal process are quite different.

# Commissioner of Education Removal

Education Law § 306:

The Commissioner of Education may remove a board member for:

- A willful violation or neglect of duty; or
- The willful disobedience of a law, decision, order, or regulation of the Commissioner or Board of Regents.

## Commissioner of Education Removal Continued

To be considered willful the board member's actions must be **intentional** and with a **wrongful purpose**.

*See, Application of Carbone, 46 Ed Dept Rep 215 Decision No. 15,485 (2007); Application of Scala, 31 Ed Dept Rep 159, Decision No. 12,604 (1991); Application of Nett & Raby, 45 Ed Dept Rep 259, Decision No. 15,215 (2005)*

The Commissioner considers this “a drastic remedy that should be taken only in extreme circumstances.”

*Application of Carbone, Supra*

# Procedure for Commissioner Removal

An application for removal must be made to the Commissioner **within 30 days** of the alleged willful violation, neglect of duty, or wrongful disobedience of law.

8 NYCRR §275.16

Commissioner has held that an application for removal is timely if commenced within 30 days of the petitioner's **good faith discovery** of the alleged conduct.

*Appeal of Leman*, 39 Ed Dept Rep 407 (1999)

Removal shall only be after a hearing at which the Board member is afforded the right to counsel.

Application for removal can be initiated by the Commissioner, any resident, or taxpayer.

*Matter of Viviani*, 18 Ed Dept Rep 263 (1979); 8 NYCRR. §277.2



# Board of Education Removal

Education Law §1709(18):

The Board of Education may remove any of its members for “official misconduct”

“Official misconduct” described as conduct clearly relating to a board member’s official duties.

- Ex: unauthorized exercise of power, intentionally fails to exercise power, etc.

No statute of limitations on filing charges

The term official misconduct “would certainly encompass violations of the school district Code of Ethics.”

*Appeal of Ackerberg, 25 Ed. Dept. Rep. 232 (1985).*

# Board of Education Removal Procedure

Removal may take place **only after a hearing on the charges**

- Written copy of the charges must be served **at least 10 days before hearing**

Board member must be afforded fair opportunity to refute the charges before removal

*Appeal of Taber, 42 Ed Dept Rep 251 (2002)*

The Board may engage a hearing officer to assist in the hearing process.

Attorneys from the same law firm may serve in separate roles (prosecutor and counsel to the Board)

*Appeal of Ziegelbauer Dec. No. 18,143 (2022)*

# Review of Caselaw

# Appeal of Hoefler (2005)

- Board member was charged with violating the laws of the State of New York, the NYS Constitution and his oath of office, as well as neglect of duties.
- Consistently voting “no” on all tenure appointments
- Stating that he does not “believe” in tenure
- **Board commenced removal proceedings** by way of charges and a hearing, pursuant to Education Law §1709(18)
- Also charged with disclosure of sensitive and/or confidential information, much of which was discussed during executive session
- Hearing Officer ruled removal was appropriate.

# Appeal of Hoefler (2005)

- Appeal to the Commissioner of Education
- **Commissioner upheld removal of Board Member**

Commissioner Opined:

“The State has an important, substantial interest in ensuring that members of boards of education fulfill their constitutional oath of office and carry out their official duties in accordance with the law, by requiring a board member to base his or her vote, whether that be a vote in favor, against or an abstention, solely upon such board members’ assessment of the individual merit of each teacher recommended for tenure.

Commissioner concluded:

- Board member’s conduct was **“unauthorized, inappropriate, antagonistic, offensive, and demeaning towards his fellow Board members, the superintendent, and teachers’ union and interfered with and compromised the Board’s effectiveness and ability to function.”**

45 Ed Dept Rep 66 (2005)

# Appeal of Rubinstein (1962)

Board member stated that **he would not comply with a mandate of the US Supreme Court regarding the use of an official prayer in public schools.** He also publicly advocated other individuals to disobey the mandate.

- While Commissioner of Education did not remove the Board member he did hold:
  - Because of this duty and high office, all members of boards of education will wish to ensure that at all times **their public statements are consonant with the responsibility of their high office.**

2 Ed. Dept. Rep. 303 (1962)

# Appeal of Gill (2002)

- Member of the Board of Education was removed after he **used several racial slurs during a board meeting. He also used a racial slur to describe one of the community members at a meeting.**
- The Commissioner removed the board member from office
- The Commissioner opined:
  - **“Although an isolated intemperate remark generally is not grounds for removal, where a trustee engages in a pattern of inappropriate, antagonistic and offensive conduct that interferes with the board’s ability to function, removal is warranted.”**
  - “There can be no question that such behavior is antithetical to the oath of office which petitioner Gill has sworn to uphold. It also sets an extremely poor example to the children of the district, for whose benefit petitioner is obligated to work. Moreover it reveals an animus and disrespect toward certain sectors of the community which respondent is obligated to serve.”

# Appeal of Johnson (2017)

- Board sought the removal of BOE member for the “unlawful disclosure of personnel information”.
- Board brought charges against BOE member and appointed a hearing officer to preside over the hearing.
- The Hearing lasted approximately six days.
- Hearing officer recommended removal based on official misconduct. Board voted 3-1 to remove and appoint a new BOE member.



# Appeal of Johnson (2017)

- On appeal, the Commissioner held that Petitioner was **not provided sufficient due process**. Further, Commissioner found “insufficient proof to establish grounds for petitioner’s removal.”
- At the time of the hearings, Petitioner was suffering from heart problems. Commissioner held that the hearing officer’s refusal to properly request adjournments and changes to the hearing schedule failed to afford sufficient due process to Petitioner.
- Commissioner also held that it was improper to allow a BOE member who served as a primary witness against the Petitioner to vote for his removal.

# Appeal of Johnson (2017)

- Regarding the charge pertaining the release of personnel information, the Commissioner noted: “Respondent was unable to establish how, in fact, petitioner allegedly obtained the names and home addresses of the district employees in question.”
- Key Takeaways: Do not rush through the removal process. Build a record.

*Appeal of Johnson, Decision No. 17,263*

# Appeal of Rivers (2021)

- The Commissioner **refused to uphold the removal of a board member** for revealing that the matter of a Town recreational use of District facilities that was discussed in executive session.
- The reason for the private discussion was concern that there would be “community push back”, was not a classification for executive session under the Open Meetings Law
- The Commissioner has stated that, “[w]hile board members cannot disclose confidential information properly discussed at executive session, boards may not shield all matters from public disclosure simply by entering into executive session” (*Application of Nett and Raby*, 45 Ed Dept Rep 259, Decision No. 15,315). Here, the superintendent’s proffered reason for raising the issue in executive session – that he expected “community push back” – **suggests that he impermissibly sought to shield the issue from public disclosure by raising it in executive session.** *Appeal of Rivers*, 59 Ed. Dept. Rep. \_\_, Decision No.17,989 (2021)

# Appeal of Ziegelbauer (2022)

- The Commissioner upheld the removal of a board member for withholding a confidential report which the Superintendent handed-out in executive session and demanded to collect back at the conclusion of executive session – a breach of fiduciary duty.
- The Board member had relied on a conversation with her counsel in refusing to return the report.
- The Commissioner noted that there is no mindset requirement for official misconduct under Education Law § 1709 (18). The intent of willfulness only applies to Commissioner's removal proceedings under §306.

# Appeal of Ziegelbauer (2022)

- The Commissioner further ruled that the defense of reliance on advice of counsel is only relevant to the removal of school officers under Education Law § 306 because it negates the mindset of willfulness (citing *Matter of Gagliotti*, 24 Ed Dept Rep 402, Decision No. 11,440; *Matter of Israel*, 20 *id.* 67, Decision No. 10,318).
- A finding of official misconduct does not necessarily require a violation of statute or BOE Policy.
- The Commissioner cited the conduct of this board member as being “quintessential official misconduct”

Decision No. 18,143

# Appeal of Corbia (2022)

- Petitioner was elected to the Board in June 2020
- September 2020, 2 posts appeared on a social media account belonging to petitioner
  - Shared post referencing “illegal immigrants”
  - Commented on a reference to “white privilege card”
- Petitioner alleged his cellphone had been “hacked”
- Matter was referred to Board Ethic Committee and outside counsel for investigation
- Ethics Committee made “exhaustive attempts” to secure cooperation from petitioner in investigating the matter.

# Appeal of Corbia (2022)

- Ethics Committee issued a report which included (among other findings) that petitioner “**deliberately tried to prevent the committee** from rendering any conclusive findings in connection with the matter”
- Board counsel emailed a copy of the ethics committee report to petitioner. Email indicated that the report was a “board document” and clarified that “there has been no decision made as to whether the board would release the report”
- Petitioner immediately forwarded the report to his **personal attorney.**
- Board commenced a hearing. Petitioner failed to appear.
- Hearing Officer sustained **all** charges and recommended removal from office.

# Appeal of Corbia (2022)

Commissioner upheld the removal opining:

Pursuant to Education Law §1709(18), a board of education has the power to **remove any member of their board for official misconduct**. The official misconduct must clearly relate to a board member's official duties, either because of the alleged unauthorized exercise of the member's powers or the intentional failure to exercise those powers to the detriment of the school district.

I hereby affirm respondent's determination on the charge that **petitioner failed to cooperate with, and thwarted the aims of, its investigation**.

**The Commissioner did not reach the issue of Petitioner disclosing the confidential report to his attorney.**



# Defense and Indemnification of Individual Board Member

- School districts have a duty to defend and indemnify school board members who are subject to legal actions or proceedings.

*N.Y. Educ. Law §3811; Public Officers Law §18*

Defense: term used for providing legal counsel to defend the interests of an individual

Indemnification: protection afforded to employees and officers from any financial losses after a claim has been concluded.

# Defense and Indemnification Continued

## Education Law §3811:

Upon compliance by the employee with the provisions of subdivision five of this section, the public entity shall provide for **defense of the employee in any civil action or proceeding**, state or federal, arising out of an alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. **This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.**