S T A T E O F N E W Y O R K

6218

2013-2014 Regular Sessions

I N A S S E M B L Y

March 15, 2013

Introduced by M. of A. NOLAN -- read once and referred to the Committee on Education

AN ACT to amend the education law, in relation to discipline for inappropriate sexual conduct

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative intent. School employees hold important positions in our communities, not only as educators, but often as mentors and advisors. They are professionally and personally placed in a position of trust. The vast majority of educators are conscientious and talented and should be credited with a significant part of the overall success of our youth. They play an integral role in both the child's life, as well as the community as a whole; which makes a violation of this position of trust even more pronounced. To that end, reports of cases of inappropriate sexual conduct between educators and students have increased. At times, this behavior involves an educator with a student in a continuum of inappropriate behavior that is intended to create and advance an intimate or sexual relationship with the student. These tragic and heinous cases often result in life-long harm to the student's physical, psychological and educational well-being. Given the serious consequences of these actions, it is imperative that the disciplinary procedures related to this type of misconduct are congruent with the egregiousness of the behavior. Greater protection is needed to more effectively deal with inappropriate sexual conduct by a small minority of school employees to help facilitate a safer environment for our students, target inappropriate behavior, and preserve the integrity of our educational system.

S 2. Paragraph a of subdivision 2 of section 3020-a of the education law, as amended by section 1 of part B of chapter 57 of the laws of 2012, is amended to read as follows:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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a. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section. If such determination is affirmative, a written statement specifying (i) the charges in detail, (ii) ANY OF THE CHARGES THAT HAVE BEEN DESIGNATED AS INVOLVING INAPPROPRIATE SEXUAL CONDUCT, AS DEFINED IN SUBDIVISION SIX OF THIS SECTION; (III) the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing and [(iii)] (IV) the employee's rights under this section, shall be immediately forwarded to the accused employee by certified or registered mail, return receipt requested or by personal delivery to the employee.

S 3. Paragraph b of subdivision 2 of section 3020-a of the education law, as amended by section 1 of part B of chapter 57 of the laws of 2012, is amended to read as follows:

b. The employee may be suspended pending a hearing on the charges and the final determination thereof. The suspension shall be with pay, except the employee may be suspended without pay if (I) the employee has entered a guilty plea to or has been convicted of a felony crime concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance, or drug paraphernalia as defined in article two hundred twenty or two hundred twenty-one of the penal law[;], or a felony crime involving the physical abuse of a minor or student; OR (II) PURSUANT TO PARAGRAPH E OF THIS SUBDIVISION, A HEARING OFFICER HAS FOUND PROBABLE CAUSE THAT THE EMPLOYEE HAS COMMITTED INAPPROPRIATE SEXUAL CONDUCT AS DEFINED IN THIS SECTION. The employee shall be terminated without a hearing, as provided for in this section, upon conviction of a sex offense, as defined in subparagraph two of paragraph b of subdivision seven-a of section three hundred five of this chapter. To the extent this section applies to an employee acting as a school administrator or supervisor, as defined in subparagraph three of paragraph b of subdivision seven-b of section three hundred five of this chapter, such employee shall be terminated without a hearing, as provided for in this section, upon conviction of a felony offense defined in subparagraph two of paragraph b of subdivision seven-b of section three hundred five of this chapter.

S 4. Subdivision 2 of section 3020-a of the education law is amended by adding a new paragraph e to read as follows:

E. WHERE THE EMPLOYEE IS CHARGED BY CRIMINAL COMPLAINT OR INDICTMENT WITH CRIMINAL CONDUCT UNDER ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW AGAINST A STUDENT OR MINOR OR WHERE THE EMPLOYING BOARD HAS FILED A CHARGE OF INAPPROPRIATE SEXUAL CONDUCT AGAINST THE EMPLOYEE, THE EMPLOYING BOARD MAY REQUEST A PROBABLE CAUSE HEARING BEFORE A HEARING OFFICER.

(I) WHERE A CRIMINAL COMPLAINT OR INDICTMENT HAS BEEN FILED CHARGING THE EMPLOYEE WITH CRIMINAL CONDUCT UNDER ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW AGAINST A STUDENT OR MINOR, THE PROBABLE CAUSE HEARING SHALL TAKE PLACE WITHIN FIFTEEN DAYS OF THE FILING OF SUCH CRIMINAL COMPLAINT OR INDICTMENT, AND SUCH CRIMINAL COMPLAINT OR INDICTMENT SHALL BE SUFFICIENT TO ESTABLISH PROBABLE CAUSE WITHOUT FURTHER TESTIMONY.

(II) IN ALL OTHER CASES, WHERE THE EMPLOYING BOARD HAS FILED A CHARGE OF INAPPROPRIATE SEXUAL CONDUCT, SUCH PROBABLE CAUSE HEARING SHALL TAKE PLACE WITHIN TEN DAYS OF THE EMPLOYEE'S REQUEST FOR A HEARING ON THE

CHARGES AND SHALL NOT EXCEED ONE HALF DAY IN LENGTH. FOR PURPOSES OF THIS PARAGRAPH, PROBABLE CAUSE SHALL BE FOUND TO EXIST WHERE EVIDENCE OR INFORMATION WHICH APPEARS RELIABLE DISCLOSES FACTS AND CIRCUMSTANCES MAKING IT LIKELY THAT INAPPROPRIATE SEXUAL CONDUCT IN FACT OCCURRED AND THE EMPLOYEE CHARGED COMMITTED THE CONDUCT. TO ESTABLISH PROBABLE CAUSE, AN INVESTIGATOR OR SCHOOL DISTRICT OFFICIAL SHALL BE PRESENT AND SHALL TESTIFY AT THE PROBABLE CAUSE HEARING. THE EMPLOYING BOARD MAY ALSO BE REQUIRED TO PRODUCE WRITTEN STATEMENTS FROM THE VICTIM OR WITNESSES, IF ANY. THE EMPLOYEE SHALL HAVE AN OPPORTUNITY TO RESPOND ORALLY TO THE OFFER OF PROOF. THE HEARING OFFICER MAY ASK RELEVANT QUESTIONS OR MAKE FURTHER INQUIRY AT THE REQUEST OF THE EMPLOYEE. THE HEARING SHALL NOT REQUIRE TESTIMONY OF OTHER WITNESSES NOR SHALL CROSS-EXAMINATION BE PERMITTED.

(III) SHOULD THE EMPLOYING BOARD MEET ITS BURDEN OF ESTABLISHING PROBABLE CAUSE OF INAPPROPRIATE SEXUAL CONDUCT, THE EMPLOYEE SHALL REMAIN SUSPENDED WITHOUT PAY DURING THE PENDENCY OF THE DISCIPLINARY ACTION, AND THE FINAL HEARING ON THE CHARGES SHALL BE COMPLETED WITHIN THE TIME-FRAME SET FORTH IN SUBPARAGRAPH (VI) OF PARAGRAPH C OF SUBDIVISION THREE OF THIS SECTION.

S 5. Subdivisions 4 and 5 of section 3020-a of the education law, as amended by section 1 of part B of chapter 57 of the laws of 2012, are amended to read as follows:

4. Post hearing procedures. a. [The] (I) IN ANY CASE THAT INCLUDES A CHARGE DESIGNATED BY THE EMPLOYING BOARD AS INVOLVING INAPPROPRIATE SEXUAL CONDUCT THE HEARING OFFICER SHALL PREPARE A DECISION ON ALL CHARGES WITHIN THIRTY DAYS OF THE LAST DAY OF THE FINAL HEARING, OR IN THE CASE OF AN EXPEDITED HEARING WITHIN TEN DAYS OF SUCH EXPEDITED HEARING, AND SHALL FORWARD A COPY THEREOF TO THE COMMISSIONER WHO SHALL IMMEDIATELY FORWARD COPIES OF THE DECISION TO THE EMPLOYEE AND TO THE CLERK OR SECRETARY OF THE EMPLOYING BOARD. THE DECISION SHALL INCLUDE THE HEARING OFFICER'S FINDINGS OF FACT ON EACH CHARGE, AND HIS OR HER CONCLUSIONS WITH REGARD TO EACH CHARGE BASED ON SAID FINDINGS, AND SHALL STATE WHAT PENALTY OR OTHER ACTION, SHOULD BE TAKEN. IN THOSE CASES WHERE A HEARING OFFICER FINDS THAT INAPPROPRIATE SEXUAL CONDUCT HAS OCCURRED THE DECISION SHALL INCLUDE A PENALTY OF TERMINATION UNLESS THE HEARING OFFICER, IN WRITING, IDENTIFIES SPECIFIC REASONS FOR INCLUDING A LESSER PENALTY OR OTHER ACTION.

(II) THE HEARING OFFICER SHALL INDICATE IN THE DECISION WHETHER ANY OF THE CHARGES BROUGHT BY THE EMPLOYING BOARD SHALL BE FOUND FRIVOLOUS AS DEFINED IN SECTION EIGHTY-THREE HUNDRED THREE-A OF THE CIVIL PRACTICE LAW AND RULES. IF THE HEARING OFFICER'S DECISION IS THAT ALL OF THE CHARGES BROUGHT AGAINST THE EMPLOYEE BE FOUND FRIVOLOUS, THE HEARING OFFICER SHALL RECOMMEND THAT THE EMPLOYING BOARD REIMBURSE THE DEPARTMENT THE REASONABLE COSTS SAID DEPARTMENT INCURRED AS A RESULT OF THE PROCEEDING AND REIMBURSE THE EMPLOYEE THE REASONABLE COSTS, INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES, THE EMPLOYEE INCURRED IN DEFENDING THE CHARGES. IF THE HEARING OFFICER'S DECISION IS THAT SOME BUT NOT ALL OF THE CHARGES BROUGHT AGAINST THE EMPLOYEE BE FOUND FRIVOLOUS, THE HEARING OFFICER SHALL RECOMMEND THAT THE EMPLOYING BOARD REIMBURSE THE DEPARTMENT A PORTION OF THE REASONABLE COSTS SAID DEPARTMENT INCURRED AS A RESULT OF THE PROCEEDING AND REIMBURSE THE EMPLOYEE A PORTION OF THE REASONABLE COSTS, INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES, THE EMPLOYEE INCURRED IN DEFENDING THE CHARGES.

(III) FOLLOWING RECEIPT OF THE HEARING OFFICER'S DECISION, THE EMPLOYING BOARD SHALL RENDER A WRITTEN DECISION ADOPTING, MODIFYING OR REJECTING THE HEARING OFFICER'S DECISION, INCLUDING FINDINGS OF FACT, CONCLU-

SIONS AND PENALTIES, IN WHOLE OR IN PART. IF THE EMPLOYING BOARD DOES NOT ADOPT THE DECISION OF THE HEARING OFFICER, THE EMPLOYING BOARD SHALL EXPLAIN ITS REASONING IN THE WRITTEN DECISION. THE EMPLOYING BOARD SHALL FORTHWITH FORWARD A COPY THEREOF TO THE COMMISSIONER WHO SHALL IMMEDIATELY FORWARD A COPY OF THE DECISION TO THE EMPLOYEE. IN THOSE CASES WHERE A PENALTY IS IMPOSED FOR INAPPROPRIATE SEXUAL CONDUCT, SUCH PENALTY SHALL BE TERMINATION UNLESS THE EMPLOYING BOARD, IN WRITING, IDENTIFIES SPECIFIC REASONS FOR IMPOSING A LESSER PENALTY OR OTHER ACTION. IN THOSE CASES WHERE A PENALTY OTHER THAN TERMINATION IS IMPOSED, SUCH PENALTY MAY BE ANY PENALTY AS SET FORTH IN PARAGRAPH A-1 OF THIS SUBDIVISION, AND IN ADDITION TO OR IN LIEU OF SUCH PENALTIES THE EMPLOYING BOARD MAY IMPOSE REMEDIAL ACTIONS AS SET FORTH IN PARAGRAPH A-1 OF THIS SUBDIVISION.

(IV) WITHIN FIFTEEN DAYS OF ISSUANCE OF THE EMPLOYING BOARD'S DECISION THE EMPLOYING BOARD SHALL IMPLEMENT THE DECISION. IF THE DECISION IS A DISMISSAL OF ALL CHARGES OR AN ACQUITTAL THE EMPLOYEE SHALL BE RESTORED TO HIS OR HER POSITION AND RECEIVE BACK PAY WITH INTEREST FOR THE ENTIRE PERIOD OF SUSPENSION WITHOUT PAY AND THE CHARGES EXPUNGED FROM THE EMPLOYMENT RECORD.

(V) THE EMPLOYING BOARD SHALL ALSO MAKE A WRITTEN DETERMINATION WITH RESPECT TO ANY RECOMMENDATION OF THE HEARING OFFICER THAT ANY CHARGES BE FOUND FRIVOLOUS AND THAT REIMBURSEMENT SHOULD BE MADE TO THE DEPARTMENT AND THE EMPLOYEE WITH RESPECT TO REASONABLE COSTS INCURRED AS A RESULT OF SUCH CHARGES.

(VI) NOT LATER THAN TEN DAYS AFTER RECEIPT OF THE EMPLOYING BOARD'S DECISION, THE EMPLOYEE MAY MAKE AN APPLICATION TO THE NEW YORK STATE SUPREME COURT TO VACATE OR MODIFY THE DECISION OF THE EMPLOYING BOARD PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES. THE COURT'S REVIEW SHALL BE LIMITED TO THE GROUNDS SET FORTH IN SUCH SECTION. THE EMPLOYING BOARD'S DETERMINATION SHALL BE DEEMED TO BE FINAL FOR THE PURPOSE OF SUCH PROCEEDING. IF THE EMPLOYING BOARD DETERMINES TO REJECT A RECOMMENDATION BY A HEARING OFFICER THAT ANY CHARGE BE FOUND FRIVOLOUS, AND SUCH DETERMINATION IS FOUND IN SUCH A PROCEEDING TO BE ARBITRARY AND CAPRICIOUS, THE EMPLOYER SHALL BE REQUIRED TO REIMBURSE THE EMPLOYEE FOR THE REASONABLE COSTS, INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES, THE EMPLOYEE INCURRED IN DEFENDING CHARGES FOUND TO BE FRIVOLOUS, AND THE CHARGES EXPUNGED FROM THE EMPLOYMENT RECORD.

(VII) IN NO CASE SHALL THE FILING OR THE PENDENCY OF AN APPEAL DELAY THE IMPLEMENTATION OF THE DECISION OF THE EMPLOYING BOARD UNLESS A COURT ISSUES A STAY OF THE PROCEEDINGS PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES.

(VIII) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, RULE OR REGULATION TO THE CONTRARY, ALL COLLECTIVE BARGAINING AGREEMENTS APPLICABLE TO TEACHERS OR BUILDING PRINCIPALS ENTERED INTO AFTER JULY FIRST, TWO THOUSAND THIRTEEN SHALL BE CONSISTENT WITH REQUIREMENTS OF THIS PARAGRAPH, AND ANY PROVISION TO THE CONTRARY SHALL BE NULL AND VOID AS AGAINST PUBLIC POLICY.

A-1. IN ALL OTHER CASES, THE hearing officer shall render a written decision within thirty days of the last day of the final hearing, or in the case of an expedited hearing within ten days of such expedited hearing, and shall forward a copy thereof to the commissioner who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board. The written decision shall include the hearing officer's findings of fact on each charge, AND his or her conclusions with regard to each charge based on said findings and

shall state what penalty or other action, if any, shall be taken by the employing board. At the request of the employee, in determining what, if any, penalty or other action shall be imposed, the hearing officer shall consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan. In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions.

[b.] Within fifteen days of receipt of the hearing officer's decision the employing board shall implement the decision.

B. If the employee is acquitted he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges expunged from the employment record. If an employee who was convicted of a felony crime specified in paragraph b of subdivision two of this section, has said conviction reversed, the employee, upon application, shall be entitled to have his or her pay and other emoluments restored, for the period from the date of his or her suspension to the date of the decision.

c. The hearing officer shall indicate in the decision OF ANY CASE SUBJECT TO PARAGRAPH A-1 OF THIS SUBDIVISION whether any of the charges brought by the employing board were frivolous as defined in section eighty-three hundred three-a of the civil practice law and rules. If the hearing officer finds that all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the department the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges. If the hearing officer finds that some but not all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the department a portion, in the discretion of the hearing officer, of the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee a portion, in the discretion of the hearing officer, of the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges.

5. Appeal. a. Not later than ten days after receipt of the hearing officer's decision PURSUANT TO PARAGRAPH A-1 OF SUBDIVISION FOUR OF THIS SECTION, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seventy-five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

b. In no case shall the filing or the pendency of an appeal delay the implementation of the decision of the hearing officer.

S 6. Section 3020-a of the education law is amended by adding a new subdivision 6 to read as follows:

6. A. "INAPPROPRIATE SEXUAL CONDUCT" SHALL MEAN:

(I) ANY CONDUCT BETWEEN AN EMPLOYEE AND A STUDENT WHETHER VERBAL, IN PERSON, IN WRITING OR BY ELECTRONIC MEANS, WHETHER IT OCCURS ON SCHOOL GROUNDS, OR AT A SCHOOL FUNCTION AS DEFINED IN SECTION TWENTY-EIGHT HUNDRED ONE OF THIS CHAPTER, OR NOT ON SCHOOL GROUNDS, OR NOT A SCHOOL FUNCTION, THAT IS INTENDED TO INITIATE, CREATE, FOSTER OR ADVANCE AN INTIMATE OR A SEXUAL RELATIONSHIP BY AN EMPLOYEE WITH A STUDENT, INCLUDING BUT NOT LIMITED TO:

(1) ANY SEXUAL EXPRESSION, SEXUAL CONDUCT, CONTACT, TOUCHING, WITHOUT A LEGITIMATE PEDAGOGICAL PURPOSE, INCLUDING BUT NOT LIMITED TO SEXUALLY SUGGESTIVE COMMENTS AND DISCUSSIONS OF SEXUAL ACTS;

(2) EXPOSING A STUDENT TO REPRESENTATIONS, INCLUDING BUT NOT LIMITED TO DRAWINGS OR PHOTOGRAPHS, OF A SEXUAL NATURE, WHETHER VERBAL, WRITTEN, ELECTRONIC OR PHYSICAL, WITHOUT A LEGITIMATE PEDAGOGICAL PURPOSE;

(3) PROVIDING OF A GIFT TO A STUDENT;

(4) ANY ACTION THAT COULD REASONABLY BE INTERPRETED AS SOLICITING, OR INTENDING TO FORM, AN INTIMATE OR SEXUAL RELATIONSHIP OR SEXUAL ACTIVITY, INCLUDING BUT NOT LIMITED TO MEETINGS OF A NON-PEDAGOGICAL NATURE WITHOUT SCHOOL ADMINISTRATION AND PARENTAL NOTIFICATION AND PERMISSION;

(II) SEXUAL INTERCOURSE. ANY ACT OF SEXUAL PENETRATION, HOWEVER SLIGHT, OF A STUDENT'S ANAL, GENITAL, OR ORAL OPENING WITH ANY OBJECT OR BODY PART;

(III) PUBLISHING, RECREATING OR REPRODUCING IMAGES OF A SEXUAL ACT INVOLVING A STUDENT;

(IV) ANY ACT OF PUBLIC LEWDNESS, AS DEFINED IN SECTION 245.00 OF THE PENAL LAW, OR EXPOSURE, AS DEFINED IN SECTION 245.01 OF THE PENAL LAW, IN A PLACE WHERE A STUDENT COULD VIEW SUCH ACT OF PUBLIC LEWDNESS OR EXPOSURE;

(V) EXPOSING A STUDENT TO PORNOGRAPHIC MATERIAL;

(VI) POSSESSION OR USE OF CHILD PORNOGRAPHY;

(VII) SERIOUS OR REPEATED VERBAL ABUSE OF A SEXUAL NATURE;

(VIII) INTENTIONAL OR REPEATED OBSERVING OR VIEWING OF THE SEXUAL OR INTIMATE PARTS OF A STUDENT OR UNDER THE CLOTHING WORN BY A STUDENT, OR ANY ACTION INVOLVING THE USE OF AN IMAGING DEVICE THAT WOULD CONSTITUTE CRIMINAL CONDUCT AS DEFINED UNDER SECTIONS 250.40, 250.45 OR 250.50 OF THE PENAL LAW;

(IX) INDUCING OR ATTEMPTING TO INDUCE INCAPACITATION OR IMPAIRMENT OF A STUDENT FOR THE PURPOSE OF HAVING SEXUAL INTERCOURSE, SEXUAL CONTACT OR FOR THE PURPOSE OF CREATING PORNOGRAPHIC IMAGES OR MATERIALS, REGARDLESS OF WHETHER SEXUAL ACTIVITY ACTUALLY TAKES PLACE;

(X) ANY ACTION THAT WOULD CONSTITUTE CRIMINAL CONDUCT UNDER ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW AGAINST A STUDENT OR MINOR;

(XI) ANY OTHER ACTION OR CONDUCT DESIGNATED BY THE COMMISSIONER;

B. FOR THE PURPOSES OF THIS SUBDIVISION "STUDENT" SHALL MEAN A STUDENT OR A MINOR WHO IS NOT A STUDENT;

C. "INAPPROPRIATE SEXUAL CONDUCT" SHALL NOT BE CONSTRUED TO INCLUDE LEGITIMATE NONSEXUAL TOUCHING OR OTHER NONSEXUAL CONDUCT.

S 7. This act shall take effect immediately and shall apply with respect to cases initiated by the filing of charges on or after such date.