BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON EDUCATION

A NEW YORK STATE SENATE HEARING

DUE PROCESS TEACHER DISCIPLINE WITHOUT DELAY:

REFORMING SECTION 3020-A OF THE EDUCATION LAW
TO MEET THE NEEDS OF THE 21st CENTURY

Van Buren Hearing Room A, 2nd Floor
Legislative Office Building
Albany, New York

May 23, 2011
10:00 a.m.

PRESIDING:

Senator John A. Flanagan
Chair

SENATE MEMBERS PRESENT:

Senator Suzi Oppenheimer (RM)

Senator Hugh T. Farley

Senator Martin J. Golden

Senator Kenneth P. LaValle

Senator Carl L. Marcellino

Senator George D. Maziarz

Senator Joseph E. Robach

Senator Stephan M. Saland

Senator James L. Seward

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SENATOR FLANAGAN: Good morning.

I want to thank everyone for coming.

We are -- I'm expecting Senator Oppenheimer momentarily. At a deference to all of the folks who are here, and particularly to those testifying, I don't want to be disrespectful to her, but I do want to get started.

And, I just want to make a couple of opening comments.

I want to thank my colleagues, Senator Farley and Senator Marcellino, for joining us.

And I certainly thank our witnesses who will be testifying, including our new chancellor from the city of New York, Chancellor Walcott.

Chancellor, good morning.

CHANCELLOR WALCOTT: Good morning.

SENATOR FLANAGAN: But, before we start, I just want to make a few brief comments.

And we have received, right -- as effective now, we've received testimony from everyone who will be testifying today.

We had gotten most of the testimony, either in the latter part of the week or over the weekend, which we greatly appreciate.

And, respectfully, I know I had spoken to the

chancellor about this.

I'm going to ask, and repeat to everyone, there's no reason to read testimony.

I don't want anyone reading testimony because we're all competent in reading. We can do that on our own. I'd much rather have a summary, people make comments, and then we can have some give-and-take on questions. I think it would be a far more efficient use of everybody's time.

And, a number of people are asking, why are we doing this?

I'm chairing education for the first time. And, I have had many people talk to me about different aspects of the educational process.

And I believe that education is New York State's number one obligation. The only way we can demonstrate that is by directing the most money towards education, and working on policies that ultimately have a positive effect on children.

And I'm going to jump ahead, just a tad, by stealing, paraphrasing, part of Chancellor Walcott's testimony.

And in that context, there is nothing more important than having a competent, qualified, professional teacher helping kids.

At the beginning of the day, and the end of the day, I think that overrides everything else that we may talk about, and I think that's how we should be approaching this.

But, I would also say that it's always good to review and discuss these types of issues, that, in my estimation, even though some may differ, the last substantial modification to the tenure law; or the 3020-a, I should say, more appropriately, was in 1994. And while we've had many people talk about it, I really haven't met too many people who think it works swimmingly, that everything is going really well.

And, if nothing else, we can have a full-blown discussion and dialogue on some of the changes that are being talked about, and seeing, if we are not going to accomplish all of them, maybe we can accomplish some of them, with an eye towards doing the best thing for kids in the state of New York.

So, with that, I would like to welcome my colleague, Senator Maziarz.

And I would also, now, like to ask Chancellor Walcott to introduce his colleagues.

And, Chancellor, we very much appreciate you

being here.

CHANCELLOR WALCOTT: Good morning, Chair, and thank you for your leadership on this issue.

And to the members of the committee, thank you also for being here as well.

To my right is our general counsel, Michael Best.

And to my left is Lenny Speiller, who is the head of our intergovernmental office, and working with state legislators.

First, again, thank you for your leadership.

And for those who know me, and know me well, they know I do not read comments, either that people prepare for me, or testimony. I really like to speak from the heart, and talk about the issues of importance that really impact our students.

And the one thing I've talked about, I guess, in the 30 days or so that I've been chancellor, is, students, students, students; and how we --

SENATOR FLANAGAN: Chancellor, would you be kind enough to pull that mic closer, please.

CHANCELLOR WALCOTT: I'm sorry.

Is that better?

SENATOR FLANAGAN: I don't know if they can hear you in the back.

CHANCELLOR WALCOTT: Okay.

-- and how we improve our educational system for our 1.1 million students in New York City.

And, to me, that's our bottom-line goal.

So, in any type of issue, I always look at it from the perspective of the students.

And your leadership today is extremely important as we talk about 3020-a, and how to reform a system that has not been changed in a number of years. And, how we make it better for all of our students.

And, so, we will be submitting our testimony.

We've submitted our testimony for the review of the committee itself.

I want to focus on a couple of things.

One: We have, roughly, 75,000 teachers in New York City.

And the majority of them, or a good portion of them, are fantastic teachers, who work long hours, who work under, sometimes, very difficult circumstances, who do a great job.

This past Saturday, I was up in Harlem at an event, a STEM event, where we were at the Harlem Armory. And there were teachers there, on a Saturday, with their students, focusing on math and

sciences, and all the great projects that they had undertaken in Central Harlem, to make sure that our students are learning at a high level.

And today is the focus on those educators who, for whatever reasons, may not be doing that great job, and for whatever reason, are being brought up on 3020-a charges.

And we need to do a better job in making sure that our system is better and more efficient in accomplishing those goals.

So, I want to be very clear, that: This is not demonizing our teachers. This is not about the overall number of teachers in the system.

It's about those teachers who had difficulties meeting our standard, and making sure that we have qualified teachers in front of the classroom.

What we must have is a fair and rational, speedy, cost-effective process that allows us to take prompt action on discipline.

3020-a, right now, is currently structured as long and arduous. It requires substantial resources, and often resulting in inconsistent outcomes.

And I want to share with you a couple of

those outcomes because, when we talk about the outcomes, and the way it's set up now with arbitrators, it allows the arbitrator, basically, to make his or her decision about a particular case. And sometimes those decisions are not all the same.

And what we've been able to do, as a result of our work with the UFT, last year in particular, was, we were able to, basically, eliminate what was called "the rubber rooms." And we've gone a long way, but there's still a lot more work to be done.

And over the agreement -- in an agreement that we struck with the UFT, we were able to, basically, eliminate 700 backlogged cases. And we resolved that by December 31, 2010.

But even with that resolution, 3020-a still remains an inefficient and cumbersome process. And it really takes up to 105 days, sometimes, to hear a case, if not even longer.

So, for example, let me give you a couple of examples. And if you allow me just to read these two or three cases, and I think that will paint a picture, as far as what we have in front of us.

Example 1: We had two cases with Teacher A and Teacher B, who were both charged with, verbal abuse, and conduct unbecoming an employee.

Both were found guilty by an arbitrator for using racial slurs with colleagues and students.

Teacher A was terminated, while Teacher B was only required to pay a $5,000 fine. That teacher was still allowed to be in front of a classroom.

We have another example.

Teacher X and Teacher Y were both found guilty of misusing sick time to travel abroad.

Teacher X received a $500 fine, while Teacher Y was terminated.

And, Example Number 3, is that a teacher was brought up on charges of total incompetence; U-rated four straight years.

An arbitrator acknowledged that the teacher had received professional development, yet continued to get unsatisfactory classroom observations.

And the arbitrator decided to neither fine nor suspend this particular teacher.

Instead, a disciplinary reprimand was recommended. And this teacher, with 21 years experience, was still allowed to be in front of the classroom.

Totally unacceptable.

And the way the law is currently structured, it allowed these inconsistencies to continue, where

we had teachers who were poor performing to still be in front of the classroom.

We have many cases like these, and it's time for that to end.

So, your leadership today allows us the opportunity to reform a system, and make it more rational in how we deal with employment decisions about the people that we have in front of our classrooms.

So, let me propose a couple of things to you, for your consideration, and then I'll allow for us to have maximum time for any type of questions that you may that have, that we can respond to.

What we're calling for is, really, commonsense changes.

We want, school-district decisions should be upheld if it is not arbitrary or capricious.

This benefits consistent and proper results.

Currently, 3020 requires a school district to show just cause.

"Just cause"; after all of our due diligence and our hard work, we have to show just cause.

"Just cause" may sound fair, but the result of setting that standard in law, it permits arbitrators to substitute their own judgment, as the

cases I just indicated, for the judgment of our principals, our superintendents, and eventually, the chancellor.

It leads to inconsistent results, the penalties for the same type of conduct.

In addition to that, we're calling for the law to change, to allow us in New York City to use the Office of the Administrative Trial Hearings, which we call "OATH," rather than arbitrators, to make the final determination.

OATH hears disciplinary cases against many city municipal employees. And, it also hears cases from the MTA and the Triborough Bridge Tunnel Authority as well.

OATH administrative law judges are experienced. They understand employee discipline matters, and are professional and impartial.

They hear cases every day -- "every day"; not like the arbitrators, where they're there only some of the time -- as opposed to a few days a month, so the cases can be resolved in a more expeditious manner.

Arbitrators are paid on a daily basis by the hearing day, and the days they work on a decision.

We estimate that each arbitrator's bill state

over $150,000 a year.

$150,000 a year, by arbitrator.

OATH judges are salaried, and preside over cases on a full-time basis.

So, you have consistent leadership. You have a system where they're not based on the number of hours per day, but based on the salaried people who are employed to do these types of things.

The state could provide a funding stream to OATH to hear these cases, and pay on a per-hearing basis, similar to what the MTA and the TBTA also does.

We want this modeled on disciplinary proceedings, like our Article 78, like any other government agency. This benefits a faster timeline and more effective cost efficiency.

When someone wants to bring a court challenge against an action by a government agency, they generally do so by, as you well know, filing an Article 78.

In an Article 78, the petitioner and the agency both file paperwork. The court makes a decision without the need for a trial.

We believe that this process for determining teacher discipline cases should be similar.

Consistency, again.

School districts would file papers. The teacher could file papers, challenging the decision. And the hearing officer could review that decision based upon the papers that are filed by both sides, rather than conducting a lengthy and time-consuming hearing.

This process would progress more quickly. We project 30-45 days, as opposed to the current 105 days of the filing of charges.

Finally, these changes provide a fair and expedited process, and permits the removal of teachers who should not be in front of the classroom, but also preserves the right of accused teachers to obtain due process.

We need a system that's fair, cost effective, speedy, and the results are consistent.

The bottom line, Chair, as you indicated, is that, we do not want ineffective teachers in front of our classrooms.

We do not want the capriciousness of a decision by an arbitrator to determine who should be in front of that classroom.

We have to look at this from the eyes of our students and our parents, in making sure that we're

providing high-quality teachers; teachers who have consistent decisions based on the decision by an OATH judge, and not based on the arbitrary nature of an arbitrator.

With that, sir, I will close, and entertain any questions that you may have.

SENATOR FLANAGAN: Thank you very much, Chancellor.

I have a couple of brief initial questions; but, following up on some of the comments you made: I think it's laudable that the agreement between the city of New York and the UFT has helped reduced, if not completely eliminated, the backlog, and the, quote/unquote, rubber rooms.

But, I have a related question, and then a separate question.

In reviewing some of the testimony, preparing for this hearing, it seems to me that one of the problems that is pervasive, is the lack of mutual discovery, or this concept of mutual discovery.

And in looking at your agreement with the UFT, there are sections that speak to discovery and timing.

And I'm not sure -- maybe Mr. Best could comment on this.

I'm not sure if I understand those well enough.

But if you look at these things, people talk about other sections of the law. And you talk about Article 75, CSEA, and PEF, and how these things are done.

It seems that this is the only area where the burden continues to rest on the employer, and the employee can present some of the details of their case at the last minute, which, it at least appears on the surface, to exacerbate the lack of appropriate timing and inefficiencies.

Could you comment on that component of the agreement, and the whole -- is that your mutual discovery, or is that not close to it?

ATTORNEY BEST: Well, the current contract does -- the provision for discovery only require that the employee turn over witness statements, and the like, you know, the written materials, prior to their putting on their direct case; so, in the middle of the hearing, basically.

We agree with the tenor of your comments, Senator, that this is the kind of thing that causes delay.

It makes it harder for both sides to evaluate

the cases earlier, so that you can expeditiously resolve them, if a resolution is possible.

And, it also makes the trials more complicated; and, therefore, longer.

So, we think that a provisional law would allow for discovery up front, you know, which would be similar to, frankly, any civil litigation that happens.

These are not criminal cases. These are civil -- this is more akin to a civil case.

And in civil litigation, both sides turn over all their documents so that they can, both, review the strength of their case, and also move the cases along quickly once it gets to trial.

The same should be true here.

SENATOR FLANAGAN: If you had this opportunity to do this, do you think that would have an effect on how you settle cases, or whether or not you bring cases?

ATTORNEY BEST: I think it would, probably, for both sides.

There might be cases where, if all of this happened earlier, and both sides were exchanging documents before the hearing happened, that the employee might realize the strength of the case was

such, that they should resign, or take a disposition that progressively disciplines them, much earlier than they might otherwise, and not, maybe, even require a hearing.

On the other hand, there may be cases when the employer's attorneys are asking us to settle a case for something less than termination, where we might be persuaded, in those situations, if we saw the evidence that the employee was going to put on during the course of the hearing, we might be more willing to discuss that in some cases.

And, so, I think, from both sides, yes, it would have some -- it would have a good impact on our ability to discuss the cases before they ever get to hearing, and potentially resolve them.

I think it would also speed the hearings along more quickly.

SENATOR FLANAGAN: So, you feel as, that you're disadvantaged by the lack of opportunity to have this type of information earlier on in the process?

ATTORNEY BEST: Yes.

SENATOR FLANAGAN: Okay.

Chancellor, if I could, related to that, there's, obviously, been media attention to a number

of high-profile cases. And, you know, I look at this, sometimes in terms of, misconduct, then you have competence -- or, excuse me, incompetence --

CHANCELLOR WALCOTT: Competence.

SENATOR FLANAGAN: -- hopefully competence as well.

But, having said that, I know that we have made one change in the law; that, if someone is convicted of a sexual offense, that that could lead to an automatic termination without the need for the full-blown process being implemented.

Do you think there are other crimes that should be reasonable cause for immediate termination?

And, I -- you know, in looking at this, I just -- one thing that popped in my head, someone gets convicted, criminally, say, armed robbery, you would you still be under an obligation to go through the complete disciplinary process to remove that individual.

CHANCELLOR WALCOTT: Any felonies, quite frankly, Senator, should be an agreement for removal.

I mean, plain and simple, we do not want any teacher convicted of felony in front of our

classroom.

The rights of adults should never trump the rights of our children.

And if you've committed a felony, then you should not be in front of the classroom.

Plain and simple.

There was case profiled -- and Michael can elaborate on this -- a little while ago, where someone was convicted of manslaughter. And that person eventually made her way back to the classroom.

We should not allow that to happen.

Our teachers have a right to make sure that they're teaching; but, also, they follow the letter of the law. And anyone convicted of a felony should not be in front of the classroom.

Should not be in the system, quite frankly.

SENATOR FLANAGAN: Thank you.

And we've been joined by my colleague, our colleague, Senator Saland, and Senator Marcellino.

Questions?

SENATOR MARCELLINO: Thank you, Mr. Chairman.

Commissioner, we can all agree, the criminality conviction of a felony, using inappropriate language, the cases you cited, pretty

objective in their discovery, if you will. They either happened or didn't happen.

However, when you get to the relative -- relevance of competency -- someone's ability to control a class, someone's ability to work within the system, and teach, now we're talking about a little bit more subjective areas.

CHANCELLOR WALCOTT: Uh-huh.

SENATOR MARCELLINO: A little bit more difficult areas, more gray.

You have a system that's, obviously, we would all agree, is not working for the benefit of the -- in my mind, for the teacher or the benefit of the students in the city of New York.

Why should any teacher put faith in this new system that you want, when it's abbreviated time frames, as opposed to the current system that's there now?

Why should they put their faith in that? Why should they agree to this?

CHANCELLOR WALCOTT: Senator, let me take a stab at that, and Michael can elaborate as well.

I cited you an example, where you had a teacher who was U-rated four years, and was brought up on a variety of charges. And, as indicated in

the testimony, had had a significant amount of professional development given to that teacher.

And that teacher was a prime example of a teacher who should no longer be in the classroom teaching our students.

And as a result of that, the arbitrator felt that, he or she, I'm not sure if the arbitrator was a man or a woman, that the teacher should go back to the classroom.

Whereas, in presenting the cases, and both sides, as indicated in my testimony, would present paper to the cases, and the OATH judge would make a recommendation.

They are professional in making that determination. That is part of their job on a regular basis. And, they are able to sort through the papers submitted by both sides, to make that determination.

SENATOR MARCELLINO: What do you mean by "professional"?

CHANCELLOR WALCOTT: In that, they're appointed. They're appointed for a five-year term. Their term goes beyond the --

SENATOR MARCELLINO: What qualifies them to evaluate a teacher's functioning in a classroom?

CHANCELLOR WALCOTT: Well, they're trained in that regard. They're trained, as far as municipal employees are concerned, they're trained as law judges, in making determinations based on the evidence that's presented to them.

So, they have that ability, and that's what they do. That's part of their professional job. That is part of the responsibility of the OATH court.

Michael, do you want to elaborate?

ATTORNEY BEST: Well, I'd also make the point, Senator, that as it stands now, the way that the system works, setting up a system of independent arbitrators who are charged with making decisions about pedagogical effectiveness, actually takes the --

SENATOR SALAND: Excuse me, may I interrupt for a second?

May I ask that you -- it may well simply be my hearing -- could you move your microphone a little closer?

ATTORNEY BEST: Oh, certainly, Senator. I apologize.

SENATOR SALAND: Thank you.

ATTORNEY BEST: -- the way the system works

now, the arbitrators are not pedagogues. They're not former principals. They're mostly lawyers.

And they're making these decisions right now, under the current system.

And, actually, part of our proposal, is to -- with changing the standard of review for these decisions, is to ensure that it's people who are actually in the schools and in the school system who are making these decisions about whether or not teachers are effective, with a review -- a due-process review for -- under an arbitrating and capricious standard, to ensure that there is, in fact, evidence for --

SENATOR MARCELLINO: So, under this system that you want to bring in, the people involved in judging would be educators?

ATTORNEY BEST: Well, no --

CHANCELLOR WALCOTT: No, that's not what he said.

In our testimony, we lay out the various steps that are undertaken before a case actually reaches the person who is, either the arbitrator now, or proposed to be the OATH judges.

So, there are a number of professional individuals who are educators, who make that

determination; because, we don't take this lightly, as far as, reaching the level of asking for someone's removed.

So, those steps are built into the review process that we currently undertake.

And what Michael is indicating, is that the arbitrators right now are lawyers, who are not necessarily grounded in pedagogical ideology as well.

Whereas, the OATH judges, while maybe not educators, are professional in reviewing hearings on a regular basis, dealing with employees; employees from the spectrum of the city agencies.

So, were the determination made by, the principal, by the superintendent, possibly even by the chancellor, to go before an OATH judge, you have a consistent individual who was trained in reviewing these types of cases, who makes that determination, and not a person who is only there on a part-time basis.

So, it's the level of professionalism of the individual reviewing the case. But, the pedagogical pieces that you're referring to, those steps are undertaken prior to those cases being recommended, currently now, to the arbitrator; or, if approved,

to the --

SENATOR MARCELLINO: So, the OATH, this judge that you have -- or, that you are proposing to put into place, would understand that that teacher involved might have had two or three different, for lack of a better term, supervisors observe them, come in with different standards, different intellectual opinions, different points of view, coming into a classroom, looking at a teacher in front of a class, one month, with a certain group of kids. Two months later, half those kids are gone, for whatever reason; might not be in the class anymore, for whatever reason -- moving out, taking a trip, families pick up and leave, kids just disappear from the system -- for whatever reason, he would know that, he would understand, or she would understand, the difference that's going in there?

My point is, it's a subjective system.

You're telling me that, someone who has never been in the system -- who has never been there, who hasn't been part of that system -- to understand the changes that a teacher might be confronted with, and who can observe and who can evaluate someone from the MTA who drives a train, or someone from the sanitation department who picks up garbage -- and I

don't mean to knock these two different professions.

SENATOR FLANAGAN: All hard-working employees.

SENATOR MARCELLINO: All hard-working, all honest labor, all, should be treated fairly. But, they're not the same.

CHANCELLOR WALCOTT: So, let me -- if I may, let me just respond, because, currently structured, the arbitrators are not educators as well.

SENATOR MARCELLINO: I agree; in the system, they're not.

CHANCELLOR WALCOTT: So, I want to be very clear: And that's why it doesn't work.

But the judges are professionally trained. The judges are trained to hear cases of employees of a variety of agencies.

And we're proposing that the department of education be added to those agencies that they review.

In addition to that, there are a number of steps that we undertake within the department of education, for us then to make the determination to remove these individuals, or have them go before, currently, the arbitrators or the OATH judges. And those are very elaborate steps.

And as indicated, both in my testimony and Michael's response, that we would then submit papers. And then the representative of that employee, the union or their lawyer, would also submit papers as well.

There are occasions where that individual will be called for testimony as well.

But, these individuals are professionally trained. This is part of their regular job. They're there on a five-day-a-week basis. They're not there on a part-time basis at all. And, it's not based on the whim of when they come in and review the cases; which, also, not just from a pedagogical point of view, but from a financial point of view, costs the state a tremendous amount of money as well.

So, this is a more expeditious process.

It's a more financially conservative process, as far as making sure we spend the state's money wisely.

And, then, we also have professional individuals who are trained in reviewing these types of cases to make their decisions.

But, again, I want to reinforce the point, that the various levels that are included in your

testimony, that we undertake at the department of education, is extremely professional.

Obviously, there will be disagreements, both on the management side and the employee side.

And when we have to have these cases submitted before a person, we want that individual to be an OATH judge, and not an arbitrator who comes in on a part-time basis.

SENATOR MARCELLINO: I can understand the savings-of-money concern.

I can understand the, quote/unquote, professionalism of the person evaluating the people.

For the life of me, you haven't convinced me yet, that there's a big difference in this system that you are proposing to the system that exists, but for an abbreviated time frame.

CHANCELLOR WALCOTT: Well, I --

SENATOR MARCELLINO: I don't see that much a difference here, sir.

CHANCELLOR WALCOTT: With all due respect to you, Senator, and I know that we've talked, and we will continue to have a great relationship with each other, I see a tremendous difference with what we're proposing, compared to what's in place right now.

And it's just not around money, and it's just

not around the timeline, but it's around the professionalism of the individuals as well.

I mean, OATH judges have never been called into question, as far as their professionalism, and their ability to review cases and make determinations around employee misconduct, and other charges that are brought before these judges.

And, so, you have a body that's in place that is their purpose overall.

That's what OATH stands for.

And, so, I -- we just have a disagreement around this, sir. But, I think that's the purpose of OATH. And we would want to be part of this system which allows for our employees to be treated that way as well.

SENATOR MARCELLINO: And this is the last comment.

I could see your system, if the system dealt strictly with the education field.

I do see a difference. You know I'm a former teacher.

CHANCELLOR WALCOTT: I do know that well. I was --

SENATOR MARCELLINO: That's okay. It's what I run on every two years, somewhat successfully.

The issue being, I see education as something unique. I see it different and apart from other systems and other fields that the city has to deal with.

I don't see the evaluation of teachers the same as evaluation of an MTA engineer, or somebody else.

If these judges, trained, perhaps former educators, perhaps former people in the system who understand the system, learned the vagaries of the system, understand the fluctuation of population in the system, the changes that the system has undergone, the pressures that teachers and administrators are under in the system, who were part of it, and that was separate and apart, I could say that there's a difference now, and now you have set up, not only an abbreviated time frame, highly professionally trained people, but something that is unique for the system, because it is a unique system.

Just dumping, or putting all of this in one bag, I'm saying, these same people who are going to evaluate MTA problems, evaluate other problems -- police problems, or other disciplinary situations -- are the same people that are evaluating teaching

problems, will make it work better?

I don't see it.

Make it one, where there are educators part of that system, who are trained in the business, who understand the system, and then we can -- then I can see where you're going.

CHANCELLOR WALCOTT: So, if I may, just, with the Chair's permission, I mean, one final comment to that: I mean, I would imagine -- and we'd be glad to get you additional information after our testimony as well -- with OATH judges, OATH judges don't operate in a vacuum as well.

I mean, OATH judges are definitely steeped in the culture of the particular agencies that they're reviewing, and they know the knowledge issues connected to those agencies as well.

And the issue of having the pedagogical expertise, I mean, we have the pedagogical expertise, and we know what we're recommending, based on our review, and also standards that we have in place as well.

And, for whatever reason, these individuals have not met those standards.

We cannot afford to have teachers, teaching our children, who do not meet those standards.

And teachers know this as well.

And we need to have a system in place that's not based on arbitrators coming in on a part-time basis, costing us an arm and a leg.

We need to have professional individuals who are steeped in the ideology, steeped in the issues connected with the agencies that they review.

So, I think our middle ground, sir, is that, with OATH judges, OATH judges would have the ability of knowing exactly what an agency is about.

And that's something we'll be glad to follow up with the committee about, as far as, you know, the type of training that goes along with that.

But, at the same time, we believe this system of review that we're proposing is significantly better, not just for the system, but better for our children as well.

SENATOR FLANAGAN: Thank you, Senator Marcellino.

We've been joined by Senator Seward, and our ranker, Senator Oppenheimer, who is back amongst us, and doing quite well.

Senator Maziarz, and then Senator Saland.

SENATOR MAZIARZ: Thank you very much, Chancellor Walcott, for being here.

CHANCELLOR WALCOTT: Thank you, sir.

SENATOR MAZIARZ: By point of reference, I represent a district that's in the far northwest corner of New York, probably the furthest one away from New York City. But, I do represent -- I represent mostly rural and suburban districts, with one exception; I have a small portion of the city of Rochester, an urban district which faces many of the same problems that -- and issues and challenges that you face, sir.

So, thank you very much for taking time out of what I'm sure is a very busy schedule.

CHANCELLOR WALCOTT: Thank you, sir.

SENATOR MAZIARZ: You mentioned in your testimony, and I think Senator Flanagan followed up on it a little bit, and I'm not sure if it quite answered the question that I have for you.

You said that, in the agreement with the UFT, on ending the rubber rooms, that you immediately cleared up, or very quickly cleared up, 700 cases.

How many -- how many were left after that? And how were they -- are they still in the process of being adjudicated, or what?

ATTORNEY BEST: Well, if I may, Senator, we have, you know, ongoing cases all the time.

SENATOR MAZIARZ: Right.

ATTORNEY BEST: So, we'll have something, like, probably, between investigate -- you know, investigate -- we have many, many investigations going on.

The agreement to which you refer, only applies to those cases where, during an investigation, or during a hearing, the employee was reassigned out of the classroom; either to an administrative job within their school, or to an administrative office of the DOE.

Of those, I don't have the numbers offhand, but I think, probably, we would have about, something like, 100, or 120 going at any one time, including, both, cases that are still in the investigative phase, and cases where we've charged the employee.

We have 39 arbitrators right now, so we have, basically, 39 cases going at any one time, one per arbitrator.

SENATOR MAZIARZ: See, I guess my point, and maybe I'll clarify it a little bit: I mean, if you say, I don't know, there was 1,000 teachers assigned to rubber rooms because they couldn't be in the classroom. And we ended rubber rooms, we signed an

agreement, cleared up 700 of them. That means there are 300 left.

And I guess my question would be: What are you doing with those 300 now?

And these are hypothetical numbers.

ATTORNEY BEST: No, that's actually not quite how it works.

The 700 were cases that had been in the system for a long time.

SENATOR MAZIARZ: Okay.

ATTORNEY BEST: And, that, because of the way that the process was moving very slowly, we couldn't get them to hearing and resolve them.

Well, when we did, they would take a very long time.

There was some media interest in the -- there was a story in the "New Yorker" a couple of years ago about one case; about a teacher we had charged with incompetence, which took over a year to try.

And while that case was going on, the arbitrator -- that arbitrator was busy for a year and couldn't hear any other cases.

So, all the other people in the queue for that arbitrator to hear, would just sit, waiting.

What we've done is, we cleared up the whole

backlog of cases in the second half of last year.

Try -- you know, either finished investigations, where they were pending; or we finished the trials that were supposed to have started already.

And then we've tried all the rest of the people since then, or they have reached some kind of disposition.

And what's going on now is, as we continue to investigate and charge people, we'll have something, like, 100-and-something number of people every day, who might be reassigned as a result of -- or, who might be reassigned as a result of new investigations, but they're not from the old case load.

SENATOR MAZIARZ: Okay, thank you.

Just another very short point of clarification.

You used the example, Chancellor, of, Teacher A, and B.

Both were found guilty of using racial slurs in their interactions with colleagues and students. One was terminated. One was required to pay a $5,000 fine.

I assume that there was probably different

arbitrators, and the decision was just the whim of the arbitrator. Is that correct?

CHANCELLOR WALCOTT: That is correct.

And that's why I used, as an example, where, based on the whim of the arbitrator, and no telling how the arbitrator would rule.

And, again, it goes back to the point earlier, around the OATH judges, in that, they would review the paperwork, and then make the determination based on a consistent standard.

SENATOR MAZIARZ: Thank you.

Thank you very much.

CHANCELLOR WALCOTT: And, Senator, to be fair, I want to really highlight this: As a result of the cooperation of the UFT, we were able to reach the rubber-room agreement.

So, it wasn't just based on the city. The UFT worked very hard as well. And their president, Michael Mulgrew, worked hard to accomplish that.

And I just had to be fair to the UFT, in that, this was a mutual agreement that staff worked extremely hard to accomplish.

SENATOR MAZIARZ: Thank you.

SENATOR FLANAGAN: Thank you, Senator Maziarz.

Senator Saland?

SENATOR SALAND: Thank you, Mr. Chairman.

My apologies for being late.

With your permission, I would just like to preface some questions. And I caught the very tail-end of either of your testimony or questions, Chancellor, so I wasn't present for your testimony.

As a former chair of this committee, one of the things that was of concern to me, was a system that would ensure security for a teacher, in a fashion which did what 3020-a reports to do, which is, provide due process.

I fear that due process has become dilatory process. And I was always puzzled by the language in 3020-a, that basically said, that discovery was only going one way.

And the Chairman may have alluded to that, coming in, but it's, literally, in the statute.

And I know, in 1998, I believe the regents recommended that that be changed. And that never came to pass.

So, let me start off with a question for you. And, if not -- if it's not for you, then perhaps it would be for the ed -- representative of the ed. department when they arrive -- or, when they

testify.

Is there a basis for denying, as far as you know, for the due-process mechanism to be a two-way street? Why would anybody not want discovery that, basically, underscores everything about our civil and criminal systems of justice?

CHANCELLOR WALCOTT: My general counsel, I'll let him respond.

ATTORNEY BEST: Well, Senator, we believe that reciprocal discovery in these proceedings would be a very useful thing for both sides.

It would speed up the process.

It would also allow everybody to evaluate the cases in a way, for instance, that happens in civil cases in court, as you've alluded to.

And, you know, we don't think that it actually makes sense not to have that, but that's the way the current system is.

SENATOR SALAND: If you can, my reading is, that the proposed new system, with regard to the changes in the current hearing process --

ATTORNEY BEST: Uh-huh.

SENATOR SALAND: -- seem to be specifically targeted to the question of teacher effectiveness; whatever falls within the realm of teacher

effectiveness.

Does that not continue, the current system, with regard to any issues that may arise outside of the question of teacher effectiveness? Or does that assume, that each and every issue; for example, the issue of a felony that is not a sex-offense felony, is a question of teacher effectiveness?

CHANCELLOR WALCOTT: With teacher effectiveness; teacher effectiveness would still be being evaluated, as far as the effectiveness of the teacher. But there are certain cases where we have to have those cases reviewed, no matter if a teacher is effective or not.

And what we're proposing is, a mechanism to, both, improve the system, to make the system more cost effective, but also to have a common standard apply to a variety of different cases as well.

And, so, with the proposed evaluation system that we're looking at, again, that's collectively bargained, no matter what the regents have proposed, each district has a responsibility to collectively bargain with their union to put that in place.

Our goal is to make sure that we have a mechanism, at the end of the day, when there's a crime committed or felonies are proposed -- or, have

occurred, that those issues are addressed as quickly as possible.

Michael?

SENATOR SALAND: Let me rephrase my question.

Would we be recreating a bifurcated system, whereby, certain issues; i.e., those dealing with effectiveness, will be handled under this proposed new system? And anything that is, technically, not a question of effectiveness, remains subject to the current tenure proceedings as exists under 3020-a?

ATTORNEY BEST: Senator, I believe they'll both still be under Section 3020-a.

CHANCELLOR WALCOTT: 3020-a. Right.

ATTORNEY BEST: So, in that regard, the hearing procedures --

SENATOR SALAND: No, I understand 3020-a.

Are we creating a bifurcated system?

So, if somebody is charged with some type of misconduct -- criminal misconduct; some actions, within the context of the classroom that do not pertain to whether he or she has been an effective teacher -- would that person go through the hearing process that's being proposed now, under the --

CHANCELLOR WALCOTT: Yes.

SENATOR SALAND: -- amended proposal?

CHANCELLOR WALCOTT: There would still be one system, if I understand the question correctly, whether they're dealing with incompetence or malfeasance or some type of criminality involved, and that will still be the 3020-a.

What we're proposing is a different 3020-a process --

SENATOR SALAND: So, you -- the entire 3020-a, as we know it now, would be eliminated, and replaced by a new 3020-a?

CHANCELLOR WALCOTT: We're proposing a new system, and to have the law changed.

And what we're proposing in our legis- -- our proposal, is to change that entire system.

SENATOR SALAND: And I'll just leave this last, and defer to the Chairman, and it's more a rhetorical question than question that you can provide an answer for.

The existing 3020-a provides clear timelines, provides for expedited hearings, and on the face of it, should be a system, that should, as the word "expedited" implies, move quickly, or with relative speed.

And we know that that is anything but the truth.

CHANCELLOR WALCOTT: Right.

SENATOR SALAND: So, the question then becomes: Why would you expect -- and, again, I'll pose this rhetorically, and I would certainly --

CHANCELLOR WALCOTT: This one, I can give you a clear answer on.

SENATOR SALAND: -- but, why would you expect the response of the system to be different under this expedited-hearing system, versus the preceding expedited-hearing system?

CHANCELLOR WALCOTT: Because we have a system in place, or that we're proposing, with the OATH judges who have a standard that they have to meet, and they've been able to meet that standard on a regular basis.

And, so, within the timeline of, both, the current 3020-a law, but also the timeline of the review of what OATH actually does, it would be a more expedited system to meet the timelines built in to 3020-a.

So, we have a demonstrated system that does this on a regular basis. It's not based on the arbitrary nature of arbitrators coming in on a part-time basis.

And the way the system is structured now,

with arbitrators in place, it limits our ability to meet the timelines structured in the law.

Whereas, OATH, and the OATH judges, are able to do that.

And, so, we're really confident in what we're proposing, as far as the ability to meet a very expedited timeline, but also maintaining the due-process rights of the employees who would be reviewed.

SENATOR SALAND: Thank you, Mr. Chairman.

SENATOR FLANAGAN: Senator Oppenheimer?

SENATOR OPPENHEIMER: Congratulations.

CHANCELLOR WALCOTT: Thank you, ma'am.

Thank you very much.

SENATOR OPPENHEIMER: Another past chair of the education committee.

And I enjoyed working, collaboratively, with you in the past, and I know we will in the future.

I feel very badly that I got here a little late also. I'm trying to read as fast as I can, your statement. But the fog was just terrible driving up from Westchester.

I don't know what this proposal is; and, therefore, I'm sort of at a little disadvantage, but let me just pose a couple of questions.

My understanding, in the past, not taking into account what your proposals are, is that, only about 25 percent of our teachers will be evaluated under the new process, where we look at accountability, and we look at how effective the teacher was in the classroom. And, of course, we're going to put in as much effort as possible, to keep the teacher that is in the process of learning, to be more effective, and to try and hold them in their position as long as they are a teacher that will improve as they go along.

So, right now, I only see that process, which we put in place last year, to affect -- as Senator Saland was questioning -- only about 25 percent of the teachers that are being brought up, those are the ones that are specifically deemed to have been non-effective at two years in a row.

I think what you're trying to do, is to broaden that, so that there will be a more expedited process for all teachers who are found to be not working to the advantage of their students; that they are not engaging the students, that they have done something that is criminal, that something that is offensive, so that there will be an accountability process which will be, certainly, a

whole lot faster than what was existing before the rubber room -- after the rubber room.

But what I've been recommending for a number of years, and it might be in your proposals, is, instead of bringing the arbitrators, which is costing us a bloody fortune, and taking forever, that we devise some kind of a panel.

The panel could be retired teachers, the panel could be retired lawyers, who act as non-paid arbitrators.

I see no reason why we have to deal with the situation as it has been for years.

And, the panel could either be paid or not paid, but I think it would enormously expedite the process.

We would probably pick people from our immediate area, who are not flying off to California.

It's just something. I don't know if that's in your hopper already, but it's something that I feel strongly about. I think a panel could just expedite this process amazingly faster than has been done.

CHANCELLOR WALCOTT: So, Senator, if I may respond: I think what we're proposing, while not

the type of panel that you're suggesting, is a body that are paid professionals already, who do this on a full-time basis. And, that those individuals are the "OATH judges" that I referred to in my testimony.

The OATH office does this for their business.

They review cases; they review cases like these, and they make determinations within a 30-day period of time.

As indicated in the testimony, and I think I touched on it a little bit in just my verbal testimony, that both sides would submit papers to the judges for their review, on those occasions where the individual needs to come for a personal testimony. That can happen as well.

But these are individuals who are already in place. And, so, you're not, even with the volunteers that you're talking about, the volunteers are based on their schedules. And you don't know when a volunteer's schedule may be there, or may not be there; may be available, may not be available, and, to make the final determination.

So, this proposal somewhat touches on what you're proposing, but it deals with professional individuals, who are full-time employees, who do

this as part of their business, and they're administrative law judges that operate out of the office of administrative trials.

I mean, and that is part of the proposal that we are suggesting to you.

SENATOR OPPENHEIMER: Well, I welcome that too, because anything that expedites this process would be wonderful.

Thanks.

SENATOR FLANAGAN: Thank you, Senator Oppenheimer.

We've been joined by Senator Golden.

Senator Farley?

SENATOR FARLEY: Thank you very much, Mr. Chairman.

Let me apologize for my running out, but I'm a local senator, and I have had two school groups that are meeting, grilling me about questions.

Incidentally, I've been a teacher longer than I've been a senator. And I've been a senator for 35 years.

CHANCELLOR WALCOTT: I think I've been a teacher longer than I've been a chancellor, and I've only been a chancellor for 30 days.

[Laughter.]

CHANCELLOR WALCOTT: So, I can empathize with that.

SENATOR FARLEY: Well, you're doing very well.

And I have read your testimony. And we're discussing something that is very, very significant, not only to the voters of this state, but to all the parents, and so forth, that have children in schools.

And I think that we can be very proud of the teachers that we have. But, I think it is absolutely agreed, that the process needs a little bit of looking at, and reformation.

And, certainly, I was interested in your comments on the rubber rooms, and so forth, because that got a lot of play around the state, to say the least.

I certainly wish you well in what you're trying to do.

CHANCELLOR WALCOTT: Thank you, Senator.

SENATOR FARLEY: And I think that we're very blessed to have a great chairman in Senator Flanagan, who has really taken on a lot of the hard issues. And this committee is going to look at all of these issues very firmly, and see if

we can't resolve something.

But, we appreciate your testimony.

CHANCELLOR WALCOTT: Thank you, sir.

And thank you for having us up here.

SENATOR FLANAGAN: Chancellor, thank you very much.

Senator, I appreciate you being here.

CHANCELLOR WALCOTT: Thank you for your leadership. And we truly appreciate this opportunity to present, and look forward to any future questions that you may have.

And to all the members of the committee, thank you for your leadership as well.

Thank you, sir.

SENATOR FLANAGAN: Thank you.

Next, we will hear from the state education department.

SENATOR FLANAGAN: Good morning.

MS. GREY: Good morning.

SENATOR FLANAGAN: Thank you for coming, Ms. Grey.

Would you, kindly, just introduce everybody who is with you today.

MS. GREY: Sure.

Thank you, Senator Flanagan.

We are happy to be here today, to talk about this very important issue.

I want to introduce members of the SED team that are with me.

On my right is Richard Trautwein, general counsel.

On my left, we have Deb Marriott, who oversees the tenure-teacher hearings, 3028 process.

And, Ken Slenz is also to my left, and he is in charge of district services.

So, I don't want -- we have testimony before you that includes a number of charts with some data, that I may need to refer to as we talk this morning.

But, I want to echo a couple of things that Chancellor Walcott mentioned in his testimony.

And, first, and foremost, is that, in New York State, I think we have about 200,000 teachers.

In 3020-a, we have, probably, about 400 new cases each year.

So, I would just emphasize, that the majority of our teachers are to be commended for the job that they do every day in the classroom.

That being said, though, the teachers that are currently subject to the 3020-a process, for

either misconduct or incompetence, this system is definitely broken. And, I mean that, literally, and figuratively.

The current process takes far too long.

I want to throw out just a couple of statistics because I think they tell a story.

New York City mentioned the improvement that they were able to achieve through their agreement with UFT. And the statistics that we have in our testimony bears that out.

But, if you take a look at the rest of the state, the numbers are quite startling.

We've got about, a delay, that the process for the rest of the state, for a "guilty" decision, oftentimes takes two years.

For a "not guilty" decision, it can take about a year and half.

And, settlements, typically take approximately a year.

This, to us, seems far too long.

And I think that we have some ideas about how we can speed the process.

On page 5, there's also a timeline that demonstrates what the statute contemplates, in terms of how long these cases should take to resolve.

And it's -- I apologize, it's a little bit busy, but it does give you a sense of where the different breakdowns occur.

And you'll see that -- you know, that the statute contemplates selecting an arbitrator in about 45 days; when, if you look at the statewide average, the reality, it's about two months longer than that.

And if you go through each step of the process:

Prehearing conference takes three months longer than the law contemplates.

Final hearing days, six months.

Et cetera, et cetera.

On average, these proceedings are taking more than a year longer than the timelines provided in the statute.

The system also costs a lot of money.

It's -- the state, for the 3020-a process, pays 100 percent of the hearing costs. That includes the arbitrators, as well as the court recorders.

And this program has been chronically underfunded for a number of years.

Right now, our estimate for the current

fiscal year, is that the accumulated deficit is going to be in the neighborhood of $10 million.

That's the result of funding, around, 4 million a year, when the program has consistently grown to be costing us about 7 to 8 million dollars a year.

And, so, what that has also meant, is that, we are way behind in paying the bills.

We use every dollar that's appropriated; but, right now, we're about 15 months behind in paying the arbitrator bills.

It also costs a lot of money, in terms of the district. As these proceedings take longer than they should, the district is also paying for substitute teachers, as well as, many times, the teacher that's suspended with pay.

There's also extensive legal costs that go along with this.

I would argue that those are higher than they need to be because there is no reciprocal discovery.

And, so, there are just -- there are a number of things that are coming together, we believe, at this point in time, that if we don't do anything, the system has a chance of collapse.

We're already having arbitrators refusing to

serve. And while we are also looking for additional statutory authority to enforce these timelines, it's sometimes, of course, challenging when you're not paying the person for their services in a timely fashion.

So, that being said, I think that the time to reform is now.

And I salute you for taking all of this time to really explore this issue thoroughly.

There are a lot of ideas on the table.

SED has a departmental that we believe would make a dramatic improvement in the program.

Basically, we believe that we could speed up the process in a number of ways.

3020-a is one of the few areas I'm aware of, where, the employee, or the employees' bargaining unit, does not pay any share of the hearing costs.

When you take a look at the contracts that the state has with the major state employee unions, like CSC and PEF, those costs are split 50/50.

And when you look at the list of all the other unions, for the most part, that's consistent.

I think there's a couple of unions that the state has contracts with, where the loser pays.

But, for the most part, it's a 50/50 split,

so that the incentives are shared in terms of trying to get to a speedy resolution.

I think that it helps us speed that process, but it also would help in terms of dealing with the fiscal crisis that the program currently has.

So, the way that we would envision this working, is that, whatever the legislature decides to appropriate, we would use to pay the hearing costs.

Anything above and beyond that would be split 50/50 between, the school district, and the employee or the employees' bargaining unit.

We think that that would go a long way in terms of fixing your process, as well as the fiscal side of things.

We would also speed up the process by proposing to include reciprocal discovery. That's something that was discussed just a few minutes ago.

We think that it's one of the few areas where that doesn't exist.

And even in criminal proceedings, there's no trial by surprises.

And all of the SAPA-related administrative proceedings do require a mutual discovery.

We would also -- we would also be looking for

specific statutory authority for the commissioner to step in and disqualify arbitrators when the timelines that are in the current statute are not followed.

Right now, our ability to enforce is limited. And we're looking for specific authority which was included, for purposes of the 3020-a expedited process, which relates to the new teacher eval.

We're looking to have that same authority come in for the overall system.

We would also propose, to reduce costs -- I mean, all of those things speed the process, so that saves money.

We also would -- we would also be seeking authority to set maximum arbitrator rates.

Right now, the rates range, from, between $900 to $1,800. And it depends on what region of the state you are in.

The current law requires that we pay customary -- usual and customary fees. We don't necessarily have the ability to cap at a reasonable rate.

And, again, we would be looking to set this at a reasonable rate, after consultation with experts and stakeholders. But, it does seem that we

need to do more to control the costs.

We would also set some additional controls on the study days that are permitted right now. The arbitrators are paid for their hearing days, as well as preparation days, to study for the hearing, and to write their decisions.

So, we think that you could -- we could reduce costs there as well.

And, so, I think that those are the basic provisions in the bill that, Senator Flanagan, you've introduced on our behalf. And I appreciate that.

Our goal is to have a speedy process, that continues to have the teachers that should be in the classroom, in the classroom.

Those that should not, out of the classroom, in a very swift and speedy basis.

Again, we believe in due process, but we think that these changes do not affect due process, and would serve the state well.

And, with that, I'm happy to answer any questions.

SENATOR FLANAGAN: Thank you very much.

Let me just, Senator Seward has to get to another appointment, so he's going ask some questions.

But, I want to start: I can't speak to Mr. Slentz, as I haven't the opportunity to interact with him, but I would like to compliment the department, and Miss Marriott and Mr. Trautwein in particular, for, no pun intended, helping educate me, not only on this process, but on the new teacher evaluation process.

So, Senator Seward.

SENATOR SEWARD: Thank you.

Well, Senator Flanagan, I can vouch for Mr. Slentz, because he's a former school superintendent in my senate district. So, I will vouch for him.

MR. SLENTZ: Good morning, Senator.

SENATOR SEWARD: Well, good morning.

And I just had couple of questions.

The visuals in your testimony were very helpful, and very telling.

I wanted to get behind the numbers a bit, in terms of the reasons for missing the deadlines in that protracted timeline, in your view.

Obviously, in your departmental bill, you zero in on the reciprocal-of-discovery issue, as well as the arbitrators' role here.

I mean, are they the reasons for the delays, or in missing deadlines, or something systemic that needs to be corrected here?

Could you just, before we look at the solutions to a perceived problem, what are the reasons for the problem?

MS. GREY: Sure, I'll take a stab at this, and ask Deb to fill in some of the details.

But, some of the breakdowns, for example, selecting an arbitrator, which is contemplated to take, maybe a month and a half, and takes two months longer than that, is oftentimes the result of difficulty in finding arbitrators that are willing to serve, that meets the needs of both parties.

That's become even more problematic in the last year or so, as the bills have been piling up.

I would say that, in terms of the prehearing and the final hearing dates, reciprocal discovery should go a long way toward reducing those timelines.

But, frankly, I would say that a lot of this is just not being able to enforce the timelines that

are in the legislation now.

I think, if you look at UFT and New York City's agreement, they -- their agreement started, and began to take effect, at September 1st. And closed out cases by the end of December.

So, that's about four months.

The current law contemplates about five months.

So, this can be done. It just needs to have -- it just needs to be strengthened, in terms of making sure that the folks have the authority to say: This is it, and we're not going to -- you know, we're not going to tolerate any delays.

So, I think it can be done.

Deb, do you have anything to add in terms of the problems that contribute to this?

SENATOR FLANAGAN: I think, as we -- I think, as Val had started her testimony, she indicated that the incentives were misaligned.

And part of that is, is that, the parties that are at the hearing, present at the hearing, have no stake in the process, in ensuring that the hearings get quickly resolved.

So, the hearing officers are not prioritizing the work, partly because SED is not paying the

bills, so that they are putting other private-sector work, or other work, in front of conducting these hearings.

And, in terms of delays in selecting the arbitrators, Val is correct; we are experiencing, at least in the rest of the state, not New York City -- New York City, we know they have preselected panel of arbitrators -- for the rest of the state, the parties sit down and choose from a list.

And we are having a number of -- a significant number of declinations.

So, once the parties have agreed upon the arbitrator, it's our office's role to contact them, to see if they're ready, willing, and able to accept the case.

And, many times, they're declining.

And, again, a lot of it has to do with the fact that we're not paying our bills.

In the rest of the state, the arbitrators are traveling distances to attend the hearings, and they lay the travel money out at their own pockets. And, now, they're waiting.

In addition to not paying the bills for the issuance of the decision, they're also waiting to get their travel expenses that they've laid out of

their own pocket, upwards of 15 months to get reimbursed.

SENATOR SEWARD: Thank you.

Just one follow-up question. Perhaps it would be -- may be more difficult to answer.

You've outlined the -- what happens to cases once they are commenced through the 3020-a process.

And I would have to say, you know, with the 200,000 teachers in New York State, the number of cases that we're talking about, I mean, is very, very small. Minuscule.

And the point has to be made, that 99.9 percent of the teachers are excellent, and we're very, very proud of the job that they do.

However, my question is: Anecdotally, from some of my school districts, when they talk to me about the 3020-a process, they do cite the delays and the costs, which we're talking about here today.

But they wanted to say, that, in some cases -- and this is all anecdotal -- that, unfortunately, some of them don't even commence the cases because of the delays and the costs.

And I would say that that's a sad commentary on the system.

Is there any way to quantify just how

widespread that problem is, in terms of cases that are not even commenced, perhaps handled in a different way, or not handled at all, because of the breakdown in the system currently?

MS. GREY: Yeah, you're right, that's a much more difficult question, which I don't think that we can answer, in terms of any sort of data about what cases are not brought because of the challenges in the current system.

But, I, too, have heard from a number of school districts, that they're saying, they're just not even pursuing 3020-a cases because of the costs and length of time.

I think the school board's association, and I know they're going to be speaking with you later, did a survey several years ago. And they estimate that each 3020-a case, at average, costs schools $217,000. So...

SENATOR SEWARD: Thank you.

Thank you, Chair.

SENATOR FLANAGAN: Thank you, Senator Seward.

Senator Saland?

SENATOR SALAND: In terms of, just on that last question, and response by Senator Seward, what prevents SED from becoming a repository of

information each time a charge is made?

In other words: As we all know, most of these cases settle.

So, when you say your universe consists of three to four hundred, many of them settle, as indicated by Senator Seward, because of the expense and delay associated with the proceeding.

And I have to assume that what comes through the funnel is, comparatively, a small, or minor, portion of the number of charges.

Would it not be important to have a database, even if charges were maintained as confidential, as distinguished from the formal initiation of a proceeding, so, you, and the rest of the world, would know how many of these charges are out there?

And if a charge turned out to be unfounded, or dismissed, or settled, that your records be noted accordingly.

MS. GREY: Yeah, I think that I would have to check with counsel, whether we would need statutory authority to collect that information.

But, regardless, just conceptually, I guess the department could certainly collect it.

We would, of course, want to make sure that we had a database, and the staff and the resources,

to actually do something with it, and monitor, so that it became meaningful.

But, it's certainly something we could talk about.

SENATOR SALAND: Just a follow-up, and I would welcome counsel advising what difficulties, if any, that might present, inasmuch as you are maintaining records with regard to those cases that are actually initiated.

And I'll allow myself the indulgence of an assumption -- which one is always at great risk when you do -- which would be, given the fact that we live in a highly technological world right now, I have to assume that entering this type of data is not that difficult or expensive.

But, I would welcome counsel's comment, if he would like to, you know, ponder it for a while before commenting, as to why SED could or could not start to accumulate that --

MS. GREY: Sure.

And, actually, before Richard speaks to that, I'm just going to have Deb Marriott -- there are some charges that we do get, and some charges that we may not get. And, so, I'm just going to have her clarify. She's in the field, in the trenches.

MS. MARRIOTT: Once the board votes on charges, and they're proceeding down a formal 3020-a path, they file those charges with the department.

That -- so, we get all of the formal charges.

I think what Senator Seward and Senator Saland are alluding to are, perhaps, cases that get resolved at the investigation stage, prior to the formal charges.

We do not get that information.

I can tell you that, anecdotally, it breaks down on, probationary teachers versus tenured teachers.

If they're a probationary teacher, if you're having the whispers of issues, they're going to be terminated as part of the probationary appointment.

Tenured teachers, unless there's serious misconduct, they're typically not moving towards the formal charges. They may be looking for other informal ways.

And the statistics that you were looking for, Senator Seward, in terms of finding out how many cases are not brought, because it's too expensive and too lengthy, are going to be much harder to nail down because you are kind of asking school districts to shoot themselves in the foot, to let you know how

many incompetent or bad teachers they are retaining because the process is too difficult and expensive and lengthy.

SENATOR FLANAGAN: Val, I'm looking at you, but I have the feeling I'm going to get answers from Rich and Deb.

Two questions, in particular.

There is discussion, and some of my colleagues have raised this, the concept of 3020-a; and, now, 3012-c.

MS. GREY: Uh-huh.

SENATOR FLANAGAN: So, the new teacher evaluation process, how does that relate to 3020-a?

In my own simple mind, I kind of look at it, the 3012-c is separate and distinct. It's a new process, it includes an appeal. And, that has to be exhausted before this other statute would appropriately kick in.

If you could, perhaps, comment on that.

And, then, in particular the role that SED plays with, I guess loosely described as, Part 83.

Can you just enlighten us; where are there situations where, in essence, state ed. doesn't have to wait for anybody. They can come in, you know, throw down the hammers of hell, and this is what's

going to happen, and action gets taken quickly.

And how does affect some of the things that we're talking about?

MS. GREY: Uh-huh.

On 3012-c, on teacher eval, I'm going to have Rich give you the details.

But, basically, the new teacher eval system that was included in the statute last year, includes a new expedited 3020-a process.

And, so, the fundamental problems and issues with 3020-a, I think is -- still needs to be addressed in order to have a fully functioning teacher eval system.

But, I'm going to let Rich talk about the details.

MR. TRAUTWEIN: Sure.

First of all, the 3020-a is much broader than just the, you know, incompetency cases; or, the newer system that was established by Chapter 103, provides for an expedited hearing when a teacher gets two consecutive ratings of "ineffective."

That is subset of 3020-a. It's just a tighter timeline. There's a specific provision that allows the commissioner to remove the arbitrator from the list for those expedited hearings if they

don't comply with timelines.

Our proposal -- or, bill; that proposal would expand that authority enough to cover all 3020-a's, whether the charge is incompetence; conduct unbecoming; insubordination; conviction, which can involve things like conviction of a crime; or any of the variety of things that can be a form of misconduct, giving rise to discipline.

So, if there is a need; if there are two consecutive -- you know, the inability to expedite the hearing, the -- for one thing, it doesn't have, even in the expedited hearings, there's no provision for the reciprocal discovery at this point.

So, parts of this bill will impact even those hearings.

SENATOR FLANAGAN: I'm sorry, could you repeat that?

MR. TRAUTWEIN: There's no provision for reciprocal discovery in the new expedited.

SENATOR FLANAGAN: Is, or is not?

MR. TRAUTWEIN: "Is not." They're 3020-a hearings. And there wasn't specific language on that.

There was a little, you know, tighter time frame with which the hearing would be completed, but

not the reciprocal discovery.

The other portions of our bill that deal, I think, with the very practical issues, I mean, our viewpoint is, this is a system in crisis right now, and that tries to deal with some of the final issues, the fact that there's no incentive to end these hearings in a reasonable time.

All of that comes into play, no matter what. You know, no matter which type of hearing you are contemplating, the state still, under the current law, pays, and pays at the higher rate.

So, the -- you know, our opinion is, you know, both are needed: Our proposal here, which will, to a certain extent, cover the expedited hearings. And, we certainly need it for the full range of charges beyond incompetence.

MS. GREY: In terms of Part 83, which is the process that we have for moral-character hearings, I just want to, sort of -- 3020-a -- I'll try to distinguish between the two:

3020-a deals with the teacher's employment status at a particular school.

Part 83 can deal with, whether or not that teacher's certification is revoked or suspended if there are issues of moral character.

But, do you want to, Deb, give a --

MS. MARRIOTT: The Part 83 proceeding would deal with, as Val indicated, a person's certification.

There are -- as we refer to it, there are many different proceedings that could be pro- -- happening simultaneously, that deal with different issues, and the outcomes are different.

In a 3020-a proceeding, the most significant penalty that could happen is the termination of that tenured teacher's rights to that position. But, they still retain their certification, and they can move to another school district.

The Part 83 proceeding that you're referring to, is held pursuant to the commissioner's regulations. It's also grounded in the education law, the commissioner's authority to regulate the practice of teaching.

The final result of that particular proceeding, the most significant penalty could be revocation of their teacher certification, which means, they could not teach in any position, for which certification is required, throughout the state.

Now, that can only happen for questions that

raise a substantial question of moral character.

So, 3020-a is broader, in terms of the employer's right to seek to terminate an employee, as Rich had indicated, for insubordination, incompetence, but also misconduct.

Part 83 applies primarily to the misconduct, or the substantial question of moral character.

Our office is under a lot of pressure because of the high expense and the duration of the 3020-a proceedings, from the school-district perspective, to simply go ahead and pursue the moral-character proceeding at the statewide level, to impact the certification, so they can avoid the lengthy and expensive 3020-a process.

MR. TRAUTWEIN: And I just would add that, as a general proposition, Part 83 is -- applies when the offense reaches -- is of statewide concern.

You know, 3020-a is the employer-employee relationship, and it applies to wide range of offenses.

I think as, you know, Senator Saland knows, we -- legislation was adopted a couple of years ago, dealing with the most serious sex offenses, that provides a process; whereby, an expedited process under Part 83, where there's automatic revocation,

and then a hearing at post revocation.

One thing we did in this bill, which I don't know if you understood the relationship, but we're proposing that there be no hearing under the 3020-a when a teacher's certification is revoked, or is no longer in effect.

So, that's a counterpart to what we proposed a couple of years ago regarding those most serious offenses. And this would allow districts to dispense with the hearing, against that, when automatic revocation occurred.

You know, as a general proposition, I also see the Part 83s, you can think about them, when we get case -- we get, a lot of the cases involve various sorts of criminal conduct. More serious offenses do come us to. And, we to deal with them.

MS. GREY: Uh-huh.

MR. TRAUTWEIN: But, you know, the 3020-a is a broader employee-employer situation, where -- of -- you know, a much broader range of charges are considered.

SENATOR FLANAGAN: Just a couple of follow-ups on that.

Just give me a sense of the volume of cases; has it -- is it large now, is it growing?

But, in that context, going back to something that Chancellor Walcott said, there was a case highlighted, about a teacher who was convicted of manslaughter. And I believe there was a fine imposed.

I don't remember the exact punishment.

But, is that an example of a case where the state education department could step in and, potentially, take some action?

And, then, two-part question:

There is -- there are due-process protections within Part 83 as well. Am I correct?

Okay.

If you can just speak to those two points in particular.

MS. MARRIOTT: Yes, that is correct. There are due-process protections within Part 83.

We are -- there have been times when proceedings have gone through a 3020-a process, and the penalty determined by the arbitrator is less than termination; which we would agree, is the most significant penalty that can come out of the 3020-a process.

Where we have, believe the underlying conduct is a substantial question of moral character, and we

will still proceed with a Part 83 proceeding.

So, the employee in that 3020-a proceeding may have received a suspension or a fine, or something less than termination. But we believe, from the statewide perspective, that the behavior was a substantial question of moral character, and we may still proceed with our own proceeding, to take action against the certification.

And in that event, if we did that, and at the end of our process, if the certification was revoked, the school district would then be unable to employ that teacher in a certified capacity, and would have to then proceed with another 3020-a proceeding based on lack of certification.

So, in the case you're talking about, where a person got a fine for a manslaughter conviction, if we believe that was a substantial question of moral character -- and I have to speak hypothetically, because I can't speak about any particular case --

SENATOR FLANAGAN: Uh-huh.

MS. MARRIOTT: -- we would not be precluded from bringing an action under Part 83, which would also involve due process for the teacher, the right to be represented by counsel, the right to have a hearing, the right to confront and cross-examine

witnesses and the evidence against you.

SENATOR FLANAGAN: Senator Marcellino?

SENATOR MARCELLINO: Thank you, Mr. Chairman.

And, good morning.

MS. GREY: Good morning.

SENATOR MARCELLINO: Are you familiar with the testimony that Mr. Walcott -- Chancellor Walcott gave --

MS. GREY: Yes, I am.

SENATOR MARCELLINO: -- and their plan for their kind of -- the city's 3020-a proceedings?

MS. GREY: I heard about it the same time you did.

But, I think I would just -- just some initial reactions. I can't speak to the details of their proposal.

But, when we were talking with the board of regents about the tenured-teacher hearing issues, we did discuss a couple of alternatives, in terms of the proposal that we sent to the legislature.

One of those was, establishing administrative law judges within SED, to hear these cases. It's a model that's used in other state agencies, like DEC. I think there's a tax tribunal.

So, I think, conceptually, it was something

that we were interested in.

I think that we decided to go this route, by building on the existing system. And we thought it would be fairly challenging to get the resources and approval to expand the SED work force at this point in time.

SENATOR MARCELLINO: I'm assuming the panel that the chancellor was talking about would be a permanent panel that would be employed full-time, because they would be doing this, and nothing but this, and only this.

My concern was -- and I don't know if you heard my questioning, but, my concern with them was, that the -- and it's the same thing that I had with the arbitrators: they're not educators.

If someone commits a felony, they steal something, they're convicted, that's pretty clear-and-cut: they're gone. Or should be.

But when you get into the realm of effectiveness or competency, in my mind, I think you need someone to understand the problems, and understand the system, and understand what the individuals within the system have to go through.

Teachers, principals, they all have certain concerns.

I don't see this.

And I'm beginning to wonder if we're just substituting one set of lawyers for another set of lawyers here, and we're working around the outsides of the system, and we're not really getting to the true heart of it.

Everybody seems to want to save money. That's good. I certainly am for that.

I really want to expedite the process without hurting anybody's rights. That's good. I'm for that. I don't think anybody would be against that.

But I don't see how your system does that, by simply saying -- I mean, as Senator Saland pointed out, the law says: It's got to be quick. It's got to be as fast as possible.

The minute you bring in adversarial lawyers, who are going to come in there, that, "I object"; "I need a delay"; "I need a postponement"; "I need this" -- how does that change? How do you change that process?

MS. GREY: Well, I think that we better align the incentives. We change the process by having some teeth, in terms of enforcing the process.

And by better aligning these incentives, will there still be a legal back-and-forth? Yes.

But I think the city has demonstrated that, when you have an agreement -- or, in our case, statutory change is necessary to make it happen -- it can be done.

And, so, I believe that our bill dramatically improves the system.

You're right; it builds on our existing system.

And, there are other alternatives out there, and we're happy to talk to folks about other alternatives.

Our goal really is, just to try and see the system fixed.

SENATOR MARCELLINO: I will say the same thing I said before, and I'm going to have to leave myself because I have another thing to go to.

MS. GREY: Sure.

SENATOR MARCELLINO: Chancellor Walcott's predecessor failed, in my mind, because she did not understand the system that she was coming to administer.

She was a great executive. She knew how to handle corporate entities, and so forth and so on. I give her great credit for what her background was.

But, she didn't understand the educational

system.

I don't see how an arbitrator can function within that system, I don't see how the city's law judges can function within the system, without having a basic understanding of the system.

I'm not talking about just the reading of the law. I'm talking about truly understanding what the people involved in the process, delivering the services, go through.

If you don't know what they're doing; if you don't understand what they're doing, and why they're doing it, there's no way you can fairly evaluate them, in my mind.

So, I think, one of the things I haven't heard in either one of your testimonies, is that, we're going to bring in people who are trained, who know the system.

Just calling someone an "arbitrator" doesn't train them. And just because they're a lawyer -- with all due respect to my two colleagues on either side, who will hit me -- he just did.

[Laughter.]

SENATOR MARCELLINO: That's okay. I've been hit before.

[Laughter.]

SENATOR FLANAGAN: A lot harder too.

SENATOR MARCELLINO: A lot harder too. My wife does that.

-- you're not going to change the system, by wishing it. You need some people who really understand it, to do this.

And I'm more than willing to work with the Chairman for that, and with you too.

I appreciate the goal. We all have the same goal, and I believe the union has the same goal.

Competent teachers in front of the classroom, delivering the right service, the maximum service, to our children; that's our goal. We all -- with the best possible price.

We all understand that. That's our goal.

I just don't think you're getting there, really, at this point in time. And I think you need to work this program a lot more before you get there.

It's like shooting a Sherman tank with a bow and arrow. It's not going to work, not in my mind.

MS. GREY: Well, we look forward to working with you.

SENATOR FLANAGAN: Before I go to Senator Oppenheimer, I just wanted to clarify,

following up on what Senator Marcellino is saying: Is it a relatively fair description to say, that the arbitrators are chosen through a process, by which, they're evaluated by state ed., and then independently evaluated by the school districts, and the union?

And, in my own limited experience involving arbitration, you can, literally, pick out people who have a wealth of experience in, labor, or transportation, or environment?

So, can you cover some of those concerns in that respect? Or...

MS. GREY: All of the arbitrators that are used in the 3020-a process are on the American Arbitration Association list.

And they have demonstrated certain qualifications in the area of, education, or employer-employee relations' hearings, to get in the pool that is selected from for these proceedings.

In other words: You wouldn't necessarily get somebody who's -- specializes in environmental arbitrations, that are in the pool of arbitrators.

But, I do hear Senator Marcellino's comments with respect to their qualifications.

We do understand that the individuals have a

choice. They get 15 arbitrators that they can choose from.

The panel of arbitrators that are used in New York City by the DOE and the UFT, are a group of 39 individuals that are all AAA arbitrators, that the two organizations have agreed are best suited to handle their types of cases.

So -- but, we certainly take your comments to heart, and are happy to -- and entertain other ideas.

SENATOR MARCELLINO: Thank you.

SENATOR FLANAGAN: Thank you.

Senator Oppenheimer?

SENATOR OPPENHEIMER: I'm not questioning the competency of the arbitrators, only the delay of the arbitrators.

And my suggestion, which I made earlier, could be tailored.

I first suggested that there be a panel, maybe chosen by the governor, or whoever, that were just retired teachers that were willing to do this, either for-pay or not-for-pay. And they certainly would have had the background.

The other choice would be, to have a panel that is just comprised of, maybe, retired attorneys.

I hate to stick up for the attorneys, but I will say that they learn very quickly, their new fields.

My husband, ever since he retired, has been a federal arbitrator.

And I must say, the cases come quickly, and are diverse, but that is their background. They have a background in learning what the issue is, quickly.

So, I think panels of either group would -- or maybe a combination -- but, I think they're here. They're not going away. And they would be, you know, able to resolve this in a fraction of the time.

So, it's just another one of the choices, adding to the others that we've heard.

But, thank you.

SENATOR FLANAGAN: Senator Saland?

SENATOR SALAND: There has been numerous references to the fact that there's a lack of a reciprocal discovery.

You alluded to it, Ms. Grey, as one of the reasons why these proceedings are as costly as they are.

And, yet, when Mr. Trautwein made reference

to the new proposed legislation, you said there's still no reciprocal discovery.

And, quite candidly, I would just ask the question, why not?

How is it justified, if everybody acknowledges that it's such a critical component of due process, and it's going to save time and money, why is it not part of the proposal?

MS. GREY: Oh, I -- go ahead.

MR. TRAUTWEIN: The language that was enacted in Chapter 103 was negotiated. And we did advocate for reciprocal discovery.

It was not included in the final bill.

SENATOR SALAND: Negotiated by, whom?

MR. TRAUTWEIN: By -- well, we approached the -- we negotiated by -- our proposal originally was for reciprocal discovery.

And the legislation ultimately enacted, just didn't include it.

SENATOR SALAND: Well, how the hell can you have due process if you don't have discovery?

MR. TRAUTWEIN: We advocated for it.

We agree. And that's why our proposal included --

SENATOR SALAND: And who refused --

MR. TRAUTWEIN: I really can't speak to that, Senator. That's privileged.

SENATOR SALAND: That is outrageous. Absolutely outrageous.

You're talking about fixing the system.

MR. TRAUTWEIN: Uh-huh.

SENATOR SALAND: And I'm sorry to vent at your expense. I apologize. I've known you for years, and I know how capable you are, and how dedicated you are.

But, it is truly outrageous to propose this as a major reform, when, what is lacking, is reciprocal discovery.

This isn't leveling the playing field. You know, it's critically important that a teacher have due process.

MR. TRAUTWEIN: Uh-huh.

SENATOR SALAND: But the playing field should be level, not like this, sloped.

I mean, this is a gross deficiency in any proposal to try and fix the problem.

MR. TRAUTWEIN: Understood.

And I think, and one other thing to comment on, the expedited hearing, one of the major changes that we made, was to move to a single hearing

officer.

You know, generally, as a panel, it would require other things related to the time frames.

So, it is still an expedited process.

We would like to see reciprocal discovery be a part of the rule for all 3020-a cases, including the expedited hearings.

SENATOR SALAND: Let me, if I might, I want to go back to the question of the felony, and it's not a moral-turpitude felony and a Part 83.

MR. TRAUTWEIN: Uh-huh.

SENATOR SALAND: What happens under your 3012 construct? How is it treated vis-a-vis its current treatment under 3020-a?

MR. TRAUTWEIN: Uh-huh.

SENATOR SALAND: It just falls under the --

MR. TRAUTWEIN: 3012-c relates to a pattern of ineffective teaching, which is solely relating to, what a lawyer would call, "incompetency."

Any other charge is outside of that process entirely.

SENATOR SALAND: So, then, if you were here earlier, when I asked the chancellor, "Are we talking about a bifurcated system?" then it will be a bifurcated system?

That felony, if it doesn't rise to the level of a moral-turpitude felony, is going to be treated under the existing 3020-a?

MR. TRAUTWEIN: Yes.

There is an -- there was an expedited appeals process established in the legislation, for a very specific purpose, dealing with, you know, the teacher performance -- academic; the performance of the teacher teaching students on the evaluation.

And it did not deal with misconduct, which is independent of the teacher performance.

SENATOR SALAND: Ms. Grey, you had said something to the effect, that you're looking for the authority to impose adherence to timelines.

What is it that you're looking for? Do you have anything idea, that would enable you to effectively enforce those timelines?

MS. GREY: Yeah, I think that our proposal has specific language. It's modeled after the authority that was provided for the -- related to the teacher eval system.

And, so, we would want to have the ability to remove an arbitrator if they're not following the timelines. And I think that we contemplate a number of other activities that could give us the teeth,

and make some changes.

I think what we -- what we would do, is similar to what New York City did, in terms of getting tough with payments, timelines, et cetera.

I would add, though, that it is important, and I don't want to sound like a fiscal geek, to keep coming back to this, but, the system, if it relies on arbitrators, you know, these changes will make dramatic improvements, in our opinion.

But, unless there's some funding that's also allocated at some point in the future, we're going to continue to lag behind in paying bills. And it will be hard to tell arbitrators they've got to stick to these timelines, if you're not paying them for a couple of years.

And, so, I just throw that out there.

I know that the budget has been adopted. But, the way that we had structured the departmental, we envisioned two separate appropriations; one would deal with cases that had already started, and the other would deal with the go-forward cases, which this bill would start to apply to cases, I believe, starting in September.

SENATOR SALAND: The Chairman has been very patient with me, so let me just ask one more

question, and that will be it. I could ask several more.

Assume for the moment, there were no funding issues.

MS. GREY: Uh-huh.

SENATOR SALAND: Let's assume we're starting off with a clean slate; everybody's fine.

With regard to the selection of an arbitrator, which you say takes as much as a couple of months longer than the existing timeline provides for, why not make SED the default, so that, if, in fact, the decision is not made within that six-week period, both parties know, up front, that you are going to pick the arbitrator?

Would that not light a fire under their collective derrieres, to make sure they moved on selection of an arbitrator?

MS. GREY: I think that's an idea worth considering. I will go back, and --

I know every -- I'm not delirious, and I don't think that anyone is going to pass the bill, as is. And, of course, there will be -- there would changes with any reform proposal.

So, we could take a look at that.

SENATOR SALAND: Thank you.

I apologize, Mr. Chair.

SENATOR FLANAGAN: And that is good. I would just to follow up on that.

I think we had briefly talked about this before: Take the concept of, like the city and the UFT, you have 39 members. Let's assume there are a pool of, say, 100 arbitrators that could be used across the state.

What do you think of the option of, basically, just -- and these are agreed upon, essentially, by the stakeholders -- just a random pick.

You're picking a number out of a hat, and it's got to be on a rotating basis.

There -- then, I would think that's probably as objective as possible.

You know, you certainly don't want to have someone getting, five, six, seven cases in a row; but, what do you think of the general concept of saying: Here's the pool. Number 22 is going to be the hearing officer for this case?

MS. GREY: Yeah, I think that's something that we can go back and think about it.

It's -- you know, just an initial reaction, is that that seems like an interesting alternative

that could be workable.

MR. TRAUTWEIN: And, just, the special ed. hearing process, due-process hearings, has a random selection process now.

So, that's something that we definitely could consider.

MS. GREY: Uh-huh.

SENATOR FLANAGAN: Okay. Thank you very much.

MS. GREY: Thank you.

SENATOR FLANAGAN: Next is NYSUT and UFT.

Good morning.

At this juncture, we have two immediate-past chairs and one present chair; so, you're stuck with us for the time being.

But, Mr. Pallotta, welcome.

And Ms. Gerstel and Mr. Allinger, we appreciate you being here.

ATTORNEY GERSTEL: Thank you.

MR. PALLOTTA: Thank you.

Good morning.

Good morning, Senator.

SENATOR FLANAGAN: Could you pull that microphone in closer so people can hear you, please.

Thank you.

MR. PALLOTTA: Good morning, Senator Flanagan, other members of the state education committee. It's our privilege to be here today.

My name is Andy Pallotta. I represent NYSUT as the executive vice president.

And you know Carol Gerstel and Steve Allinger.

Michael Mulgrew apologizes for being not able to be here today.

You have requested that we not read testimony, so we will not read testimony today.

I do have some points which I will be reading --

SENATOR FLANAGAN: Sure.

MR. PALLOTTA: -- because of the fiscal importance of those.

In order to properly address this issue, we just want to quickly look back almost 100 years ago, at why we have tenure in the state.

Prior to the adaptation --

SENATOR SALAND: Pardon me. May I interrupt you?

Could you move the mic a little closer to you?

SENATOR OPPENHEIMER: Or in the center.

SENATOR SALAND: Into the center.

It's off to the side.

Thank you.

MR. PALLOTTA: Okay.

So, prior to the adaptation of the adoption of the state's tenure statute in 1917, teachers were subject to dismissal based on the whims of administration. This is something that we, obviously, do not want to return to.

There were numerous examples in our testimony of teachers who, without the protection of tenure, would have been improperly discharged from their employment for the most outrageous reasons.

The due-process protections set forth in 3020-a are designed to ensure that educators, once having passed probation and appointed tenure, cannot be disciplined or discharged from their employment without just cause, after a truly fair and due-process hearing.

NYSUT does not, and has never, opposed ensuring that the procedures in 3020-a are efficient.

NYSUT does oppose, however, any changes to 3020-a that would weaken the fairness of the process

in the name of efficiency.

Some of the statistics that I will speak on today:

The claim that it is difficult or impossible to fire a tenured teacher, is simply not true.

We have studied the results of 351 cases handled by NYSUT attorneys brought outside of the city of New York, which began and ended in the last 5 1/2 years.

In about 35 percent of the cases, the teacher resigned soon after charges were filed.

In 40 percent of the cases that went to a decision, the teacher was terminated by the hearing officer.

Many of the other decisions or settlements resulted in substantial penalties or other resolutions designed to remediate any deficiencies in the teacher's performance.

The claims by some about how long it takes to prosecute a 3020-a proceeding are also greatly exaggerated, and based on flawed or incomplete fiscal analysis.

In our written testimony, we have provided you with numerous examples of these delays.

There are over 120,000 tenured teachers in

New York State, not including those working in New York City.

NYSUT's legal department handles the vast majority of the 3020-a cases.

During the 2005-2006 through 2009-2010 school years, our office handled an average of 104 new cases annually, outside of New York City.

In other words: Fewer than one 3020-a case is filed for every seven school districts, per year, outside of New York City.

Further, 84 percent of the cases commenced and completed in these five years was settled prior to a hearing, or prior to final decision by the hearing officer.

Additionally, in many cases, teachers, when confronted with the threat of 3020-a charges, immediately resign, or otherwise resolve the matter, without the necessity of charges ever being filed.

Any suggestion that the current process somehow forces school districts to keep large numbers of unsuitable or incompetent teachers in the classroom is not supported by these numbers.

As for the New York City School District, an agreement made in April of last year between UFT and then-Chancellor Klein has improved the process

immeasurably.

The agreement was made because more than 500 teachers were sitting in the so-called rubber rooms for years sometimes. At least half were there for investigations and, many, never charged.

That system did not work for the DOE, or the teachers.

At the time of the agreement, there was a backlog of 350 cases. One year later, all but 18 cases have been completed or otherwise resolved. The 18 cases are all awaiting decision.

With respect to the charges filed after September 1, 2010, the statutory timelines are being met and there is no backlog.

There have been 128 cases filed and completed.

31 cases have gone to hearing and decision. These cases have averaged 93 days.

The remaining 97 cases have been settled, and have averaged 33 days from charge to settlement.

Over the 2009-2010 and 2010-2011 school years, a period which covers both the backlogged and newly filed cases, 561 have been completed; 176 decisions, and 382 settlements.

Of those, 34 percent, or 191, were either

terminated by decision, or resigned, or retired, in a settlement.

Bottom line here is, that there are no more rubber rooms.

Before we make any charges or changes, it is important to remember that Section 3020-a was amended only last year, to provide expedited hearings for charges of teacher incompetence.

The new law also tightened the standards for adjournments, and it authorized the commissioner to exclude hearing officers who failed to adhere to statutory timelines.

We believe that it would be wise to allow the amended law to take full effect before making any substantial changes to the current statute.

In closing, I would like to express my sincere hope that the members of this committee understand that we are all working toward the same goal.

Ensuring the process of removing individuals that do not belong in the teaching profession is one that is fair, timely, and consistent with this nation's concept of due process, and one that is based not on political expedience.

I appreciate this opportunity to address you,

and I welcome any questions.

SENATOR FLANAGAN: Mr. Pallotta, thank you.

I have a -- I do have a couple questions. I certainly want to allow my colleagues the opportunity to ask some question.

Specifically, in your written testimony, you have language in here:

"Additionally, in many more cases, which are not captured by statistics being floated by the New York State School Board's Association, and others, teachers confronted with the threat of 3020-a charges immediately resign, or otherwise resolve the matter, without the necessity of charges ever being filed."

Let me use it as a backdrop to reiterate what you just said, the chancellor said, what Ms. Grey said from the state education department.

I think, overwhelmingly, that we would agree that there are, you know, tens of thousands of teachers in the state of New York, the overwhelming majority of them are doing a very good job.

So --

MR. PALLOTTA: Correct.

SENATOR FLANAGAN: -- what we're looking at is a very isolated group, and an isolated set of

circumstances.

But, do you have any data?

Because, part of what we have an obligation to do, is to synthesize all of these numbers and look at them, and say: What's working, and what's not? Who's got the accurate statistics?

Are there -- is that anecdotal? Or, do you have, there were 50 cases that were resolved this way? Or, 150?

MR. ALLINGER: Senator, I think that particular point was anecdotal, but it's underscored by the fact that, in those cases that settled, 35 percent resulted in resignation. And that percent isn't that different from the 39 percent that led to the dismissal when they went to full decision by the arbitrator.

ATTORNEY GERSTEL: If I could add, Senator, part of the reason why it's very hard to know beyond anecdotal evidence in those cases, is that, I know, in the city, there will be teachers who we never even know, as the union, that this was -- until, maybe, you know, we hear about it from somebody -- that, there were discussions with the principal; that he was -- thinking he or she was going to bring the teacher up on charges, and a teacher decides:

Nah, I've had it, and I'm not even going to go through this, and go.

So, we can't -- it's very, very hard to quantify that.

MR. PALLOTTA: Right.

And, as an educator for 24 years in New York City, I was able to see that; where, you would just -- maybe just resign, rather than deal with the issue.

SENATOR FLANAGAN: Right, but one of the challenges that we have, and this is somewhat rhetorical, you have that type of problem.

We have a commensurate problem, dealing with the school boards and listening to them about that notion that there are cases that just don't get brought for time inefficiencies and consuming cost delays.

But -- and I appreciate you not reading all the testimony, but I want to paraphrase, because there are those who will testify after you who might want to respond.

It seems to me that, on the whole, in the latter part of your testimony, you think that the present system works fairly well, and that we should allow for the full implementation of some of the

recent changes.

And that, in my reading of this, and I can get exact language, there are delays. It's a general failure to adhere to statutory guidelines, which you lay at the door of SED. And, correspondingly, that it's the, quote/unquote, school attorneys who are causing the delays.

Is that a fair characterization?

MR. PALLOTTA: It would be fair to say that it is not the teacher brought up on charges that is causing the delay.

So, we have a situation where they go on and on and on. The teacher is not the person that would say, let's drag this out forever.

My experience with teachers brought up on charges, is that they do want a fair and just hearing.

So, having it delayed forever really doesn't help them in the long-run.

SENATOR FLANAGAN: So, you would disagree with the statistics brought forward by the school boards, about the length of time and the costs associated with these types of hearings?

MR. PALLOTTA: Yes. And base it on the statistics that we have in our testimony, which

shows dramatic improvements. And, just by not being able to say to a teacher, "You're going to rubber room," it's incredible.

That is an incredible --

SENATOR FLANAGAN: Yeah. I mean, I would not, certainly, take any issue whatsoever with what's been accomplished with the UFT and the city.

But in that context, listening to the people before you, and I have read the testimony of the people that will be coming after, I wanted to speak directly to this concept of mutual discovery.

And I want to preface it by, Carol, referencing conversations that I had with Mr. Mulgrew, and in particular, looking at the documents that you had sent me, the letter of April 15th, the --

ATTORNEY GERSTEL: The agreement.

SENATOR FLANAGAN: -- I think the agreement that goes with that. And, at least superficially, it looks like there is some step forward to mutual discovery.

But, how do you respond to the idea that you are, essentially, the only group that doesn't have to provide reciprocal discovery?

It would seem to me that, in a basic fairness

level, that if the school district is coming forward, and one of the complaints, is that they come forward with legions of things to say. And part of the reason they say they have to do that is because they're waiting to hear from the union and the employee.

How is it not fair to have reciprocal discovery?

ATTORNEY GERSTEL: Well, you're right, that, in the city, we've tried to streamline that process, but we have not agreed to complete mutual discovery. We don't find, frankly, in the city, that this holds things up very long.

As long as we're all holding to statutory timelines, the fact that the teacher does not have to produce a list of witnesses until after the department of education finishes their case, has not really held things up.

The other thing, which I think -- there are two issues.

One: If we're trying to settle a case -- and this was raised before -- if there are settlement discussions, while the teacher may not be required to give full discovery, if the teacher is interested in settling the case, they're certainly going to

share, their attorney is going to share, whatever documents they have that will help to get us to that settlement.

The other thing is, that -- and I think Steve will probably back me up on this -- which is, that while these aren't criminal cases, obviously, there are some similarities, in the sense that, the school district has been preparing the case for a number of years before the teacher even knows that they're being charged.

So, it's not exactly equal footing when you walk in. And our -- the attorneys who represent our teachers have a very short time frame on -- especially under our agreement, to pull their case together, and they often don't have everything by the time that -- you know, that the city has to give discovery, or the department of education.

So -- but we don't find it, at least in the city, as any delay -- major delay problem.

SENATOR FLANAGAN: I would just respectfully suggest to you, that everything I've listened to verbally, and everything I've read in writing, you will be unique in your assessment of that; that, there is just the concept of --

ATTORNEY GERSTEL: And the city does not

agree with us. I acknowledge that.

They would like --

SENATOR FLANAGAN: No, because, looking at the agreement, it speaks to compiling witness lists, and certain things, affidavits for identification of certain records. But, it also leaves intact, the notion that all of this can be done, arguably, at the last minute.

So, I'm just trying to think, from the fairness standpoint, if we're going to make judgments about how to make this better, those who are -- you know, the school boards, the school superintendents, all of them very strongly believe that having this information would make it more efficient, because, as you talked about, the strength of the employer's case has a direct relation to the evidence that will be forthcoming from the employee.

ATTORNEY GERSTEL: Right, we did. And you see it in the agreement.

We did go through, and we had a lot of discussions about it in the negotiations. And we did try and accommodate as many things as we felt, or as our attorneys who do these cases, felt, it was fine, that they could give, at the time, mutually.

But, we did not go the full way because there was -- there is a distinct feeling that they were not able to at that point. They did not know exactly what they were going to do.

And that was developed while the city was -- the board was putting its case on.

But, we went pretty far, in trying to identify documents that could be shared at the time of the pre-hearing conference.

SENATOR FLANAGAN: Steven, you look anxious.

MR. ALLINGER: Well, I'd say there's many instances where a teacher may not even have access to the school. The district has, most likely, a big monopoly on all the documents.

And I don't think that it would be -- in many instances, it would be -- it would hinder an adequate defense, and do a full-blown discovery, when you're at such a disadvantage in terms of access of records, and such a short timeline to respond, given the lengthy time the administration has to prepare.

And I believe that -- I would ask that you look at other judicial process, and criminal being one of them, rather than just civil, in looking at this issue.

The other thing that I want to add, that --

SENATOR FLANAGAN: But if you look at the criminal, you would be obligated to disclose everything a heck of a lot sooner.

I mean, if the complaint is about lack of access to information, and you're not on equal footing, if we -- it would seem to me, it would be relatively easy to come up with language that would be suitable, to address your concern about access to information, as long as it's contained as part of the whole idea of, everybody kind of puts their cards on the table.

MR. ALLINGER: All we're saying is, that, right now, in many cases, it would be -- the teacher would be at a distinct disadvantage. And we would like the opportunity to discuss it further with you.

SENATOR FLANAGAN: Okay.

MR. ALLINGER: The other thing is, that we have found that there's a 46-day delay at the commencement of 3020-a charges that have nothing to do with teachers or their unions.

SENATOR FLANAGAN: Could you pull that mic in closer?

MR. ALLINGER: Yes.

We found in our data that there's an average

of a 46-day delay at the commencement of 3020-a cases; problems with getting the lists from the state education department. And, so, that then builds in a significant delay that has nothing to do with a mutual discovery.

SENATOR FLANAGAN: And I would absolutely agree with you. I would not ignore the concept of mutual discovery.

But, as Ms. Grey and her staff testified, they're under the gun, for some reasons that have to do with some of us sitting up here, but that's another subject for another day.

Senator Saland?

SENATOR SALAND: Just a question: Are any of the three of you a lawyer?

ATTORNEY GERSTEL: I am.

SENATOR SALAND: Then you appreciate the fact that, in every other area of endeavor, civil or criminal, disclosure, transparency, avoidance of surprises, is what the system is based upon.

ATTORNEY GERSTEL: Right.

SENATOR SALAND: And the criminal case, the failure to disclose is fatal for the prosecution.

ATTORNEY GERSTEL: Right.

Also in criminal cases, however, the

defendant does -- is able to not list their witnesses until the beginning of their case, which is [inaudible].

But, yes, otherwise I would agree.

SENATOR SALAND: Okay.

Let me premise my remarks by saying -- and I, probably, in my prior life as chair of this committee, have made it perfectly clear -- that, I cannot tolerate a situation in which a teacher, who is at the mercy of a school board, the whim of a school superintendent, and find themselves, because, for example, somebody had a relative, a friend, or an axe to grind with the teacher, that person was in jeopardy.

I firmly believe in due process.

You heard my earlier remarks, I'm sure. And I wouldn't care at what stage the school board has to disclose in one these hearings. The sooner, the better.

Any additional information that comes to light, should immediately be turned over to whomever it is that's representing a teacher in one of these cases. But, the converse should be true as well.

And, I'm truly astounded.

I mean, I chair the codes committee now. And

if this bill were in the codes committee, I would flag the bill because of the lack of discovery.

Now, you can put whatever spin you want on it, but the reality is, is that, if you want to get these things done, and despite the reference to the school board's numbers, this is what SED gave us. These are their numbers.

And for whatever the reasons, be they fiscal or otherwise, and I believe the process itself -- the selection of the arbitrators, the ability to delay the selection, the ability for arbitrators to adjourn willy-nilly, and a host of other things -- account for the delays. But, this is SED's number.

What's supposed to happen, is, you're supposed to have a pre-hearing conference within 65 days. And, assumingly, by that time, you've had discovery.

What happens, in reality, 279 days before the pre-hearing conference, and 529 days before the final hearing. This is SED, not school boards.

There's something dramatically wrong with that kind of system.

MR. ALLINGER: Senator, our testimony contains numbers based on a very large sample, that shows --

SENATOR SALAND: May I just ask that you pull your mic a little closer.

MR. ALLINGER: Our testimony contains numbers, that are significantly different, based on, I think, a 160-size sample, which is very significant, about the length of time.

And if you throw out, say, 5 percent of the egregious outliers, it's, you know, off the top of my head, maybe, 227, 230 days.

And a lot of that delay, again, is the delay in producing the list.

And, by the way, the correct -- to correct the record, the commissioner has the authority, and is supposed to select the chair in case the parties are not able to select that chair, I think, within ten days.

ATTORNEY GERSTEL: Well, that's for the three --

MR. ALLINGER: For the three-party.

ATTORNEY GERSTEL: The three-party, yeah.

SENATOR FLANAGAN: That's just for the three-member panel?

MR. ALLINGER: Yes.

SENATOR FLANAGAN: Okay.

SENATOR SALAND: Let me not belabor this; so,

I'll just conclude by saying: Going back to my opening comments, I would not be part of, nor would I recommend, that anything be done to compromise the protection of someone who's subject to one of these hearings. But, by the same token, I think the field is badly tilted, and should be leveled.

If it's about justice, then justice should be done as expeditiously as possible.

And, we've had discussions in other issue areas, when I chaired this committee, when I praised, justifiably, as Chairman Flanagan has, the fact that the vast, overwhelming number of people in classrooms do their best to deliver the best product that they can deliver, in terms of their services.

And because of the small percentage, in whatever context the issue may arise, whether it -- and I won't rehash any old history -- but, in this particular case, it's the same thing: everybody agrees it's a small number.

Everybody agrees it's a small number. And there is no reason why these cases can't be expedited in a swift fashion, and justice provided, with due process assured, and the matters moved far more quickly than they're being moved now.

MR. ALLINGER: Senator, I appreciate the

fairness you've shown in past years when we've worked together.

I just want to point out, that, in the -- was it, Chapter 103, that was signed last year, there is an expedited process for the incompetence cases.

And those cases, by the way, are the ones that take more time, are more complex. And -- and I believe that --

SENATOR SALAND: There's always been an expedited process, that's never been expedited.

MR. ALLINGER: There's specific language that we hope will improve the situation.

SENATOR SALAND: Thank you.

SENATOR FLANAGAN: Senator Marcellino?

SENATOR MARCELLINO: I would be curious as to what that specific language is; because, you heard what I said earlier?

I apologize for having to leave, and missing the first part of your testimony. I had something else to do, and I had to come back. I'll be leaving shortly again.

But, the -- as Senator Saland has said, the process is supposed to be expedited.

What will -- in your mind, will change, by either the city's proposal, or the bill that is

before the committee -- or, that proposal which is the state ed.'s proposal?

What will make it go quicker?

ATTORNEY GERSTEL: Talking about the situation in the city, I think we've already made it go -- well, we've reached a point where we are conforming to the statutory guidelines. In fact, we're beating them, where, cases going to decision now take an average of 93 days, and cases that are settled are taking an average of 33 days.

So, in that sense, we think that we have really taken care of most of those delay points.

The city is a little different, obviously, because it's one big school district and not numerous ones.

The department of education's proposal, as I think you raised in many questions, we've heard this proposal before, and we don't agree with it. We don't think that hearing officers, who are employees of the city of New York, are ones that are our members would feel comfortable that they were getting an impartial decision.

We think that a fair and expeditious process can be had using, impartial arbitrators, hearing officers, as we are doing in the city right now.

We've created a panel. It's a rotating panel. It's mutually chosen.

And, as I said, we actually have, after getting rid of our backlog, and now moving cases at this time, we have arbitrators who are, basically, sitting and waiting for cases because the DOE, you know, hasn't filed that many cases.

So, we're really right on top of this at this point. And we think that leaves us with a very fair system, which is also expeditious; fair to everybody.

SENATOR MARCELLINO: So, the system that Chancellor Walcott described is not something that you feel will work?

ATTORNEY GERSTEL: Right. We don't think that that -- well, he not only described using OATH officers, but he also described changing the standard that the hearing officer applies, from just cause, which is really a preponderance of the evidence, to arbitrary and capricious.

And as far as we're concerned, that's no standard, or that's not due process in this kind of a case.

And, that, what he would get, which he is looking for, is he would get consistent decisions,

because everybody would get terminated; because, the people who are bringing the charges will be upheld, unless they're arbitrary or capricious, a very difficult standard to reach.

So --

MR. PALLOTTA: The law --

I'm sorry, Carol.

ATTORNEY GERSTEL: Go ahead.

MR. PALLOTTA: Just reading from the law itself:

"The hearing shall be conducted before a single hearing officer in an expedited hearing which shall commence within 7 days after the pre-hearing conference, and shall be completed within 60 days after the pre-hearing conference."

SENATOR MARCELLINO: And what if it doesn't?

MR. PALLOTTA: "No adjournments may be granted that would extend the hearing beyond such 60 days, except that the hearing officer may, for exten- -- "substantially beyond this, due to some very extenuating circumstance."

So, it's -- it's in the law.

MR. ALLINGER: Meaning, the expedited hearing also tightens up adjournments, in Chapter 103 laws of 2010.

And we believe it should be -- we should allow it to unfold, because it is a significantly tighter standard for those cases which tend to be much more complex, and have historically taken a greater amount of time, which are the competency cases.

ATTORNEY GERSTEL: You know, I think that -- and, again, we're a little bit different, but I think there's a parallel.

In our agreement, if arbitrators are not holding to the timelines, they will be removed from our panel.

And, every year, the chancellor and the president of the union meet with the arbitrators and make that clear. Because we have chosen them on the panel, so we have that ability to just knock them off.

I think that SED also has that ability, if arbitrators are not -- you know, if they're not holding to the timelines that are in the statute, that they could be removed from the list of arbitrators that SED proposes to the -- to both sides in the hearings outside the city.

SENATOR MARCELLINO: Thank you.

SENATOR FLANAGAN: One other question, and

just following up back on that whole concept: I think the expedited time frames almost exacerbates; so, the situation that we were talking about, relative to the discovery, because, in speaking with counsel to the city, I think this would be applicable to school attorneys, I think we would probably concur with this: That, as you tighten the time frame, and you look for an adjournment, the adjournment is held against you, in terms of delay.

And, I don't think that makes the situation better.

But, let me ask, specifically, and in fairness, I have every intention of asking the school boards and the other parties, the departmental bill loosely say, they have issues relating to funding; its sources of funding and streams of revenue that are legitimate, real.

We need to deal with those, perhaps in this context, but certainly in the context of the budget. But, I'm giving you my own, sort of, unvarnished opinion.

I think the concept of people having "skin in the game," is laudable. And, if you look at how these other procedures are done, and I looked at contractual references and the statutes for CSEA and

PEF, they share the cost.

And, to me, it's like a co-pay on a health plan. If, you know, you're getting a little bit of a pinch, you're going to understand the ramifications of it more.

And, there's a whole concept of, you know, school districts have to hire substitutes or the extensive time delays, and things of that nature.

I would like to hear you comment on the idea that the sides should be sharing the costs.

MR. PALLOTTA: Well, we're opposed to sharing the costs.

SENATOR FLANAGAN: And I'm shocked that you're telling me that.

[Laughter.]

SENATOR FLANAGAN: Do you have a second opinion?

ATTORNEY GERSTEL: I actually would like to raise a different point, which is, it is a very expensive system, but it's unnecessarily as expensive as it is.

And one of the things is, that -- and SED kind of mentions it, but not much, which is this idea of arbitrators being paid study days.

And it's something which kind of makes us all

shake our heads, because, in many cases, the arbitrator will charge, not only for a hearing day, but for one or more study days for every hearing day.

SED, right now, has the authority, the regulatory authority, to not pay that. To say to arbitrators, there will be, you know, one study day for every, three hearing days, or five hearing days, or whatever. I mean, I'm not making a specific proposal. But, they could cut the costs substantially. I would say, in half, probably, if they just exercised that authority.

Our -- the arbitrators we have on our panel will not be happy with me saying that, I'm sure. But, that's the reality. And I think that that should be looked into before we start, you know, kind of --

MR. PALLOTTA: Senator, when you referenced those to other union agreements, those are collectively bargained procedures that were traded off for other considerations, in a long collective-bargaining relationship with the state.

There's no precedent for imposing disciplinary costs on a defendant like that. By the legislature, no precedent at all.

And we would be very much opposed to shifting that kind of burden. And it would also just shift a cross-burden at a time when districts and their employees are undergoing austerity.

SENATOR SALAND: Steve, I'm sorry, you tailed off.

MR. ALLINGER: I'm sorry.

SENATOR SALAND: You lost me at the --

MR. ALLINGER: Did you get the first part?

SENATOR SALAND: I got the first part, and then you tailed off and I couldn't get you.

MR. ALLINGER: I'm just saying, SED's proposal would also just shift the cost burden. It doesn't get at the underly- -- we need to get at some of the underlying issues on the delays.

And, again, there is no precedent at all for imposing that.

SENATOR SALAND: I got to "no precedent," and then I lost you.

MR. ALLINGER: Right.

The cost sharing is resulted from collectively bargained processes that were unique to those collective-bargaining units.

It doesn't apply here.

SENATOR FLANAGAN: Steve, on a positive

note --

MR. ALLINGER: Yes?

SENATOR FLANAGAN: -- I'm very happy to tell you that the school boards would absolutely agree with you.

[Laughter.]

SENATOR FLANAGAN: Take it however you can get it. All right?

On that note, thank you very much. We appreciate the time.

And we have been joined by Senator Robach.

And our next group will be the New York State School Boards.

All right, thank you, sir.

At this point, I can say, good afternoon, Mr. Little. Nice to see you here.

MR. LITTLE: Thanks, Senator.

Thanks, Mr. Chairman, Senators, and members of senior staff. We appreciate the opportunity, and particularly your leadership on this issue.

I think it's safe to say that we can kind of cut to the crux of this thing, as soon as I introduce my colleagues here.

On your right, is Quinn Morris, who put together the drafts that are included in this, what

is an essential fiscal reform playbook. One of the bills in there is the 3020-a reform legislation.

And to your left, and my right, is Pat Gould, a counsel on our staff, who created and maintains the 3020-a database for school districts across the state.

So, if you have questions for either one of them, I would be happy to defer.

Initially, I would simply say, that the system, which has been referred to as "being broken," is an abysmal system right now.

Not only do we have astronomical costs and delays, which is justice denied, it creates a tremendous disincentive for school districts, contrary to what my colleagues from NYSUT would postulate.

All across the state, I hear this from one end to the other: We're in a fiscal circumstance right now that requires us, knowing that it costs 520 days and over $200,000 to bring a disciplinary proceeding. That's the equivalent of three to four teachers. And we have people that are laying off teachers all across this state.

And, so, you've got to make a determination as to whether or not a teacher in your classroom is

bad enough, to take the financial responsibility of removing three other teachers from the classroom in order to accomplish that goal.

That's an abysmal system.

When you add to that, the fact that the state of New York is not paying the arbitrators, hasn't paid the arbitrators for over a year, and then you add on top of that, the fact that this is the only place with an American jurisprudence where you get to judge-shop, and figure out which judge is mutually acceptable to both parties, you have an end result that is absolutely unworkable.

And that's why we have come together to address many of the issues that you have been talking about this morning. And I'll just briefly run through them for you, and then we'll just open this up to questions.

The first one is, is just the establishment of a new procedure for the hearing officer.

Now, my own personal preference, quite honestly, irrespective of what's here, is, I believe that the state of New York should simply have, just like they do at encon, labor, taxation, state of New York ought to have hearing officers. And, you simply get the next one on the list. This ought to

be an immediate determination.

I wish Senator Marcellino were still in the room, because I have been waiting to respond to his question about whether or not anyone else is qualified to hear these hearings.

And the fact of the matter is, that nowhere else in American jurisprudence do you require the judge to be an expert on every matter that comes before them.

The fact of the matter is, these people have to prove their case to a judge. And the judge is the presiding officer that hears the evidence, and is educated based on the evidence within the case, and makes a determination based on what they hear in that case.

So, I believe that having a hearing officer an impartial hearing officer from the state, would be appropriate.

Secondarily to that, and what's listed here, is the fact that we would continue to maintain a list, but the education commissioner would just say, You're next.

This business of having to have both the defendant in the 3020-a case and the school district agree on one person, who is mutually acceptable

based upon their history, that, quite honestly, leads them to "split the baby" in the past, rather than to what's the just determination in any prior decision, just so that that they can continue to be employed as a hearing officer in these cases is not equitable. It's not just.

And, so, you ought to have a hearing officer that's simply placed on the list, the next one up.

The delays that we've been talking about all morning long, and how long it takes, and how much money that is, the delays all result from the fact that you're waiting on a couple of people that everyone in the state, on both sides, know, and agree, are the appropriate people to hear these things.

It takes an inordinate amount of time to get to them, off the list.

And if you'll look at the statistics that Pat has put together over the years, you'll find that about 85 percent of school-district costs of this $217,000, on average, about 85 percent of that is the cost of substitutes and paying the teacher who is already in place.

Only about $30,000 of that is legal fees. Okay?

And, you're absolutely right; we're not particularly interested in having additional skin in the game beyond $217,000 in the middle of a fiscal crisis.

So, accurate assessment on your part.

This process, the establishment of a hearing officer, would expedite this process beyond, I believe, any other thing that we're talking about.

The fact that you have so much time, that happens before you ever get to hear this thing, is the key reform that I think should be addressed in all of this.

And secondarily to that, I think your issue about -- and that drops down here, to Number 3 on ours -- the mutual discovery, and the participating in the investigation, I believe is absolutely appropriate.

I agree with Senator Saland, that it is outrageous. And, quite honestly, it leads to further delay. Not only do you wait an inordinate amount of time to have an agreement upon, who is going to hear this case, but when they finally do get into the hearing, the very first thing that happens is, the school district has to ask for an adjournment, because they're learning for the first

time what the defense is in this case.

It's delay upon delay. And, simply, not workable.

I want to drop back just to Number 2, just for a second, and that is, that we firmly believe that there is no convicted felon who is an appropriate role model to be in front of a classroom for students in the state of New York. Okay?

I've heard from other legislators, when we have discussed this, that there may be instances where somebody is accused of some white-collar crime that has nothing to do with their performance in the classroom; that that should exempt them from that kind of a determination.

And, quite honestly, we aren't talking about kids with a lack of perception. Right?

They know who people are. And they know what people's reputation is.

And we shouldn't have convicted felons teaching in the state of New York.

Capping the length of time of suspension with pay, that leads us to this issue of a disincentive.

And, quite honestly, we have been talking about disincentives to being expeditious all morning long.

And, quite honestly, at least in my estimation, we need to focus less on incentives or disincentives, and just make some legal timelines here. We need to make some determinations of things that will very clearly lead us to a determined amount of time that is, both, fair, just, and expeditious in all of this.

And then, finally, requiring the nature of the defense at the time, is a standard part of jurisprudence; allows the school district to spend less time to bring the matter quickly, to determine whether they even have a case.

I can't imagine a school district who wants to take this type of time, money, and administrative focus away from other things within the school district, to try and focus in on something that should never have been brought in the first place.

So, there needs to be a level of cooperation.

And it's probably true, that a good number of teachers who are informed that they may have charges brought against them, they may, in fact, resign.

I would assume that to be the case, because there's, obviously, a stigma attached to having charges been brought against you. And if you want to work someplace else, that would make perfect

sense.

On the other hand, our statistics are based on what remains on those that continue to have a disincentive, and to be tremendously costly.

The part I'd like to focus on, is that, this isn't just a cost issue for school districts in the midst of a fiscal crisis. The cost issue relates to the larger issue, which is, that school districts aren't bringing the charges, because they don't have the money to take away from elsewhere within their school system to be able to allocate these kind of resources.

That's a real Hobson's choice. And you're talking about kids' futures either way.

So, that's why we proposed these reforms.

SENATOR FLANAGAN: Dave, thank you very much.

I do have questions on, specifically, you reference on the dismisser of tenured personnel without Section 3020-a proceedings. It says here:

"Since school districts should no longer employ such individuals, their dismissal should not require an elaborate termination proceeding."

Are you saying that there should be some nominal proceeding? Or, just, black-and-white, you're in, you're out?

MR. LITTLE: No, I think there can be, as you referred to it, a "nominal proceeding."

The classic example that we've always heard, is that, the Dave Little that's brought up on 3020-a charges may not be the Dave Little that sits here before you today, at that hearing.

And, so, if it truly is mistaken identity, that shouldn't take a full-blown hearing.

There are other instances, where, if someone has lost their certification, either from a Part 83, or for some other reason, if they have not obtained their certification within the requisite number of years, per the statute, by the law, and therefore, not eligible to teach, that there shouldn't be the requirement of having this attenuated process for something that's a fairly ministerial decision.

SENATOR FLANAGAN: Okay. I'm going to ask a couple of different things now.

State ed. had provided some data. And I think they had many some numbers that were averages from 2009.

If you -- we don't need it at this moment, but if you could forward us, how you conducted your survey, to come to the 502 days, and the 200,000-plus?

Because, obviously, we have you saying one thing. We have SED, probably a lot closer to what you're saying. And then we have NYSUT/UFT on the other side saying that, you're all wrong.

So, I would like to know the methodology of each of the parties.

MR. LITTLE: Pat can tell you that, very briefly; or, we can give that to.

Your choice.

SENATOR FLANAGAN: Both would be good.

ATTORNEY GOULD: Okay.

Thank you, Senator.

I do feel compelled to respond to the characterization of our information as "skewed" because we don't include the length of time it takes to settle a case.

But, I would respectfully point out that we're not all here today, because of how long it takes to settle one of these cases.

We're here, because it takes too long to get to the point where you have a hearing-officer decision for those cases that can't be settled.

And our data is arrived at two different ways:

We survey our members periodically. We did

it in '94, right after the changes were adopted.

We did it in '97. We did it again in 2004, and 2008.

We ask our members to fill in the date that charges were preferred, the date the hearing officer took the case, the date a hearing officer issues a decision.

And we do the math, how long it takes, to get from the date charges are preferred, to the date the decision is issued.

Our members responded to that questionnaire. We arrived at an average of about 502 days, from the date charges are brought, to the date a hearing officer issues a decision.

That does not include New York City data. New York City is a world unto itself. They have had some success in expediting these cases.

In addition, we also gather from our members, and from SED, copies of hearing-officer decisions.

Many times, but not always, the hearing officer will list in his or her decision, the date charges were preferred, and they date, by their signature, their decision.

We do the math.

After our last survey in 2008, we looked at

the -- about 70 cases for 2008. The average, at that time, was 560 days, from the time charges were brought, to the time a decision was issued.

For the 2009 cases in our database, the average was about 630 days, charges filed, to hearing-officer decision.

It's consistent with what SED is reporting to you. And, that's how we arrived at those numbers.

SENATOR FLANAGAN: How familiar are with the city and the UFTA agreement?

ATTORNEY GOULD: I'm somewhat familiar with it. I wouldn't say --

SENATOR FLANAGAN: Well, in there, they have -- they obviously have expedited time frames, and they've achieved some success.

ATTORNEY GOULD: Yes.

SENATOR FLANAGAN: Actually, significant success, in eliminating that backlog.

ATTORNEY GOULD: Yes.

SENATOR FLANAGAN: But, they have portions in there, where there are periods of suspension without pay.

ATTORNEY GOULD: Yes, they have a probable cause hearing, as to whether or not it's the kind of offense, or allegation, that would warrant an unpaid

suspension.

I believe it caps out at 90-days unpaid suspension.

We are asking that all paid suspensions cap out at 120 days.

If the statutory time frames were adhered to -- and, I'm sorry, David, if you'd, please, feel -- and Quinn, join in.

If the statutory time frames were adhered to, it should take, ballpark, about 120 day, start to finish, for one of these hearings.

That's why we arrived at the 120 days cap-out for a paid suspension. That's where we got that number.

New York City, I think, is 90 days.

SENATOR FLANAGAN: So, your thrust is not suspension without pay immediately; but, rather, cap?

ATTORNEY GOULD: Yeah.

Yes, we -- our recommendation is, that, if that matter has not been resolved at the end of 120 days, that the unpaid suspension end -- excuse me, I'm saying "unpaid." I mean, "paid."

Paid suspension would end at 120 days.

SENATOR FLANAGAN: And, Dave, go back to

something that you referenced before, on the selection of the arbitrators.

I think you heard me ask about, sort of the random pick. Just to go to the next person in line, or pick a name out of a hat.

Is that very similar to what you're advocating?

MR. LITTLE: It is.

Either, if there were a state panel of hearing officers, or, if you continued to use the AAA list, random selection of the next available hearing officer just ameliorates the delay problem substantially.

SENATOR FLANAGAN: Okay. And one last question before my colleagues.

Just, the school attorneys; there's reference in the testimony, that, you know, a lot of the problem stem from the fact that SED is not meeting statutory guidelines, and the, quote/unquote, school attorneys, who are, ostensibly, your agents, are the agents of delay.

Can you respond to that?

MR. LITTLE: I'll plead guilty, to the extent, that when the incidents that I mentioned, when they first get there, the first thing they have

to do is adjust to simply learning about what the defense is going to be when they get there.

That's not the standard cause of delay throughout the hearing, is that the school district is exacerbating the problem.

SENATOR FLANAGAN: Okay.

SENATOR OPPENHEIMER: I have a question.

SENATOR FLANAGAN: Senator Oppenheimer.

SENATOR OPPENHEIMER: David, what we heard from the chancellor about using the OATH, the administrative law judges, using an Article 78 proceedings, is that something that you would support?

MR. LITTLE: I think it works for the city, and to extent that the state education department would mimic that process.

I've heard Val Grey's comment, that the reason that they didn't pursue that was, quite honestly, they didn't believe that they had the ability to secure the funding necessary to initiate that type of a program.

If we're going to pay these people, then I think that it's incumbent on us to do it in the most effective way possible. And, quite honestly, that's the most effective way possible.

I understand the concern of NYSUT and UFT, that city employees making a determination when the city is one of the parties, you shouldn't have people that are affiliated, on one side or the other, with the judge.

But, quite honestly, the state of New York is the entity that's responsible for public education, and the state of New York could hire the hearing officers, and be impartial.

SENATOR OPPENHEIMER: Just to follow up on that: Would not the MTA employees or unions, and the Triborough Bridge unions, have certainly made their displeasure known with the system, if the system was not working?

In other words, that has been the system that's been used, the OATH --

MR. LITTLE: Right.

SENATOR OPPENHEIMER: -- system has been used for those employees.

It just would seem, that if it was so unsatisfactory to the unions, in each case, that they would have, I think, at some point, expressed their displeasure with the system.

MR. LITTLE: I can't imagine that there's a school district out there that has any interest in

bringing a disciplinary action against a teacher, that -- just gratuitously.

I understand what the history was, and the politics, and why we were brought to tenure, and why we established the procedure. But given the procedure and the history that we have now, quite honestly, there's such a financial consequence, there's such a programmatic consequence, and disruption to the educational program, that I don't believe that school districts would do this gratuitously.

The problem we have, is that, the process that we have chosen, in virtually every aspect of it, is no longer workable, either from a financial or, again, a programmatic standpoint.

And, so, these reforms that we've suggested, we believe, maintain due process, foster due process, and at the same time, lead to a much more workable system, which, quite honestly, will allow the vast majority of school districts to participate in that system.

SENATOR OPPENHEIMER: Thanks.

SENATOR FLANAGAN: Thank you, Senator Oppenheimer.

Senator Robach?

SENATOR ROBACH: Yeah, thank you.

David, let me ask you: You know, everybody knows there has to be a process.

I guess I was interested in what you said before, in terms of money.

You had given something; you said, this is the equivalent of 3 1/2 teachers, or something along that, for the process.

How do school districts budget for the current process? And, is there a tax cost, statewide, of what they think -- you know, I saw for New York City, they said, $30 million, for this group of teachers.

Is there a statewide figure?

MR. LITTLE: No, there's really not. And that's because it's such a -- a random occurrence, you know. And some of the statistics that have been brought before, luckily, thankfully, 3020-a cases are rare, the fact that school districts are dissuaded from bringing them as a problem. But, even if they brought everyone that they had, it would still be a relatively rare occurrence, thankfully.

The difficult problem is, that it's never within your budget, until you learn about it, until

you know whether or not you may be proceeding with one. And, then, in the next budget, initially, you would use reserves, if you have them.

And, secondarily, you would budget for it in the next year, knowing that you were moving forward.

But, it really is an individual district response.

SENATOR ROBACH: So, they're not prevalent enough, where there's a line item to cover that type of activity, then?

MR. LITTLE: I think in the fiscally conservative environment that school districts are in, they would be hard-pressed to put a couple hundred thousand dollars aside in a line item just in case they got a 3020-a.

SENATOR ROBACH: Thank you.

SENATOR FLANAGAN: Thank you, Senator.

Any other questions?

Dave, just one last quick question.

You reference the idea that school districts are not bringing cases, for reasons that are, in large part, understandable.

I know it's like a crystal ball-type question, but can you sort of ballpark what that is?

Are there, you know, 25 percent of cases that

you wish were brought or...

Am I making any sense?

MR. LITTLE: You're making perfect sense.

And it's absolutely unknowable with any degree of certainty.

You would have to talk to every district and find out, you know, what their circumstances were, and how strong the case was; and, yet, Were you still dissuaded from doing that?

All I can tell you is, that I do an awful lot of traveling in the work that I do. I talk to local school-boards' associations, and individual school-board members and superintendents.

And I'm hard-pressed to go to an event, that I don't have people coming up to me, either before or afterwards, to talk about this as an issue; to talk about the fact that they would, in fact, be going forward if this weren't such a marais.

SENATOR FLANAGAN: Okay. Thank you very much.

Next is the school superintendents.

MS. McCAULEY BELOKOPITSKY: Senator Flanagan, and honorable members of the senate education committee, thank you for having us here today.

I'm Kyle McCauley --

Kyle McCauley Belokopitsky. I'm the assistant director of government relations for the school superintendents.

With me is Dr. Sally Sharkey, superintendent of the Cairo-Durham School District.

And, Mr. James Dexter. And I'm going to read the BOCES that he represents, because it's very, very long.

It is: The BOCES of Washington, Saratoga, Warren, Hamilton, and Essex Counties.

I will briefly share ten ideas that we have about how to reform this system. You have our extensive testimony, which we will not read from. And, then, I'll turn the thing over to my two superintendents for further discussion.

And, first of all, I'm really privileged to represent superintendents here in Albany. And, equally, they're privileged to work with an amazing set of educators and teachers in their districts.

What we're here to talk about today is only a very small, small percentage of teachers. And -- however, the current 3020-a process makes it very difficult to remove educators that aren't living up to their colleagues' goals and commitments.

The 3020-a process is inordinately expensive

and timely. And I offer these ten ways that we see you can improve the system.

I'll also comment, briefly, on SED's proposal.

First, the parties really should be able to mutually agree on the hearing officer or arbitrator that they would like to pick.

The current process is, that they have to pick off a list generate by SED.

What we see, sometimes, is that list itself may be flawed. That list sometimes will include arbitrators from areas of the state nowhere near the school district.

I've had superintendents tell me that they are in the western half, or the Buffalo area, of our state. And arbitrators on their list are from New York City. So, that can create, again, unnecessary delays.

We also think that parties, once they agree on a hearing officer or an arbitrator, the arbitrator is contacted, and they often decline the case.

This, again, starts the process over again, where the parties then have to re-agree on another arbitrator, again delaying the arbitrator selection

process.

Again, the SED list sometimes can include arbitrators who are no longer actually performing the work or are retired.

I heard from a few superintendents that their recent list, when they contacted the hearing officer, they informed them that they were retired and no longer taking cases.

Again, prolonging the time period.

The initial time lag between, when the 3020-a charge is brought, and, really, when we have a list from SED, or a re-list if there's problems, is really, really too long.

So, that's something that we really need to talk about.

We also think that hearing officers and arbitrators, in general, should have some sort of common guidelines or standards in adjudicating these cases.

Whether they be standards on a fixed time frame, standards on a minimum punishment, this is, really, one of the only court-like processes that has no rules of evidence. And, really, no guidelines on arbitrators or hearing officers.

So, we often see, as Chancellor Walcott

discussed earlier this morning, very different outcomes in very similar sets of circumstances and cases.

And I think that uniformity should be important in this process.

We also agree with almost everyone, that we should have full and open discovery among the parties. We think that's one big weakness of our current system.

And, again, we should have some sort of rule of evidence that would apply to these hearings.

We also think that it's important, that, you know, unlike the, quote/unquote, rubber rooms that UFT and Chancellor Walcott discussed, we still think it's important that districts have the ability to use the, you know, non-tenured-area talents of the subject of a 3020-a hearing, in different tasks; whether it be, administrative functions.

You know, districts are paying, you know, teachers full salaries and benefits while these hearings are proceeding.

So, we think that, maybe, they can use their, you know, administrative talents, or other things, in other areas of the school, maybe that's not in contact with children.

So, I think that's something that should be explored as well.

With respect to the department bill, we are fully supportive of almost every provision of the bill; however, we do have concerns with the cost-sharing and cost-shifting portion of the bill.

I think, at a time when SED is looking for funds, and they don't have enough funds, you know, this is the, almost, largest state-aid cut that school districts have faced.

And, you know, I have some superintendents that would say: Well, if the SED regulation and new bills would create a much, you know, less-costly process, then maybe cost sharing wouldn't be the worst thing.

But I -- we don't really know what, you know, in actuality, the SED regulation and bill is going to happen.

So, we, as a council, cannot recommend that we would support something that would put more -- you know, more financial burden on our schools districts.

So, that's our initial comments.

And I'm going to let Dr. Sharkey speak, and then Mr. Dexter.

DR. SHARKEY, Ed.D: Senators, and staff, thank you.

The examples from my district aren't different from all the districts experienced; however, I think we offer a unique perspective.

I was a teacher for 18 years; school board president for 10 years; and currently a superintendent, for the last 6.

My focus remains child-center in each role that I've played.

Teachers who aren't skilled waste valuable time, hold back our youth and the progress they could have made. This isn't anything that no one else understands. These students get farther behind from where they could be. And, often, never catch up.

Teachers who are not skillful, and are abusive and neglectful, cause damage that our students are going to know for a lifetime.

They waste time, stunt growth and creativity, and take valuable resources away from where they should be.

The amount of time spent during the process is one of most egregious examples of waste that New York has, in my opinion.

Time is dragged out by the deadlines. We've heard that throughout the morning. And deadlines -- lack of deadlines, there is no incentives for ending this process.

I believe districts do their jobs by removing these teachers, and sending them home, or to places where they do less damage. Sometimes they're called "rubber rooms." We often make up tasks for them to do, to keep them busy.

The damage continues, however, to the school system, as these people are paid.

I'll offer a few personal examples to see how it hits a small rural district.

We had an elementary-class teacher who, besides not instructing, would tell a student inappropriate things. I'll leave those details out.

Frequently leave the class unsupervised for long periods of time. Consistently violated individual education plans for students.

Held personal fund raisers during the class, from which she personally benefited. And, often slept during class.

Forget about the fact that no instruction, no increase in reading ability or math ability, was ever witnessed in this classroom, the teacher, as we

were going through the proceedings, was paid for two years while she stayed home.

Cost the district, in salaries, of a person we had to replace 130,000 over 2 years, plus attorneys fees and wasted district-personnel time.

Money is better spent. I think we all recognize that.

My second example is a high school core teacher, whose students were frustrated, and complained they would just read to themselves in class. No lessons. Silent reading occasionally. "Write something in your journal" was never checked.

After a year, no assessments, no class instruction, no dialogue.

This was a class that was preparing to take a regents.

It took a year, two months; another double salary. And, the teacher ended up resigning.

Again, add attorneys' fees and a waste of district-office time.

Over the last two years, my district's cut 11 positions, which I know is not as bad as other districts. But, to me, those -- every single one of those positions hurt.

Another, third example I'll provide, is an

incompetent special ed. teacher who didn't follow the IEPs over the course of two years, during the transition of two PPS directors.

Teacher placed on leave, was paid for a year, and a couple of months. Was paid $48,000, to go.

And the reason that happened is because, when we did a cost analysis, it was much cheaper to do that than it would be to go through the entire process.

Unfortunate, very frustrating, but a choice we had to make, to save some more resources.

What's even more disappointing, is that, these are teachers who have serious infractions.

One of my personal concerns, is that we're not doing anything about mediocre teaching.

Teacher's are allowed to be mediocre, or even a little bit less. And I think, at a time when we really need teachers to be creativity and support our students, and get them through tough times, and help them create skills -- skill sets for jobs that we don't even know exist yet, we have no -- no more -- no tools against mediocre teachers. We're just going for the really bad ones. And even those are hard.

So, I don't think we can accept mediocrity.

We don't do it in any other business.

So, I'm asking you to consider some of the changes that Kyle brought to you, and I'll defer to Dr. Dexter.

SUPERINTENDENT DEXTER: Thank you, Dr. Sharkey.

I'll keep my comments short.

But, I do believe that most teachers are truly excellent, and that's the way I approach every day. I believe most come to the job, wanting -- come to school, or come to work, wanting to do their job well.

One of the things that I've always thought of: One should only pursue 3020-a charges when absolutely necessary; when all other things have been exhausted.

So, as you had mentioned: Are there situations where school superintendents and school boards choose not to pursue charges? There are.

But I do also think that part of that is, you exhaust everything you can before you go down that road, not only because of the expense, but, also, it is difficult on the person, it's difficult on the people who has a lot of time involved, there's a lot of money involved, and it's not something you want

to do without, pretty much, knowing that you are going to be successful.

I will say, from a person who has done these proceedings, been involved in these proceedings before, that time limit is a great issue.

I think one of the things I've heard throughout the testimony today, is that, the process we have in place right now does not lead to timely resolutions of 3020-a.

So, I think, whatever occurs out of these hearings, that we try to define what we think of as "success."

And one of the things I haven't yet today, is: Do we consider "success," meeting the timelines? beating the timelines? or --

I'm still not sure how we classify "success."

So, I think that's one of the things that we may want to do, and try to determine what we consider to be "successful," and then measure ourselves against those, to see what -- how we're doing.

And the other thing that I clearly have gleaned from today's conversations, is, we don't have really great data. And that might be something, as a state, we might want to look at.

I know that's not the purpose of these hearings, but just something that I've noticed.

And I also think that mutual discovery makes sense.

I have found that, in these proceedings in the past, that there are some attorneys that are very reasonable in this process.

I have been on the side where somebody decided to buried the district in discovery. It was not a group that testified at this point today.

But, I do think that mutual discovery just makes common sense, to me.

And, that's all my comments at this time.

MS. McCAULEY BELOKOPITSKY: We would be happy to take any questions that you might have, Senator.

SENATOR FLANAGAN: I would make a comment, and, Mr. Dexter, you just made the point, you know: If we accomplish the goal of it here, in the statutory guidelines, but we have a lousy result, maybe we're really not doing anything as well as we should.

So, I think your points are extremely well taken.

And the consistency of the comments is, I think, very helpful.

And it's, you know, in a situation like this, it's not going to be any one thing in isolation that fixes this.

If we -- for example, if the arbitrators, who are even not getting paid now, if their rates are reduced to the point where you're not going to attract them anyway, then, what's the point?

If we adhere to a guideline, but nobody's happy with the procedural parts or the substantive parts of the process, then, what are we doing?

And I think, corny though it may sound, I'm going to repeat it, because, obviously, all of you believe this, that, ultimately what effect does this have on children?

When I hear the term "mediocrity," I certainly concur. And I don't like mediocrity in any aspect of life; certainly, in an educational component.

But, a teacher, a school-board member, and superintendent, you just can't get away from this stuff, can you?

What did you teach?

DR. SHARKEY, Ed.D: I taught, music, and computer science. You know, a band teacher.

MS. McCAULEY BELOKOPITSKY: Now I'm going to

embarrass Dr. Sharkey.

She was my elementary school teacher.

SENATOR FLANAGAN: I didn't know they certified teachers at age nine.

[Laughter.]

SENATOR FLANAGAN: One last question: I assume, the cost sharing, is something that you just --

MS. McCAULEY BELOKOPITSKY: It can be discussed.

I think the problem that the council has with it, is that, you know, our schools don't have money for most of anything right now.

And to put more and more burden, and as many superintendents commented on, this was another unfunded mandate that they didn't have the money to come up with.

So, I think we really have to talk with SED. And we've talked with SED on this -- on their bill, in particular, and about our concerns with of that provision.

And they were going to get, you know, the stakeholders, also the school board, some information on how this might -- the other provisions of the bill might reduce costs in the

long-term.

But I think, right now, it's problematic for us because our schools cannot absorb another cost.

SENATOR FLANAGAN: Yeah, one of the things -- you may not have had the opportunity to see this -- but, literally, at the end of SED's presentation, they put in there that they want to work in earnest in a real negotiation with people.

And I think, whether you have a hearing like this, or you advance the departmental bill, because I put my name on it, that engenders discussion.

So, we are contemplating putting that on an agenda, which I know will -- to quote my children, will freak some people out. But, if we do, it's for trying to find out ways that we can make something that's on the table, workable for everybody.

But, thank you very much. I appreciate you coming.

MS. McCAULEY BELOKOPITSKY: Thank you, Senator.

SUPERINTENDENT DEXTER: Thank you, Senator.

DR. SHARKEY, Ed.D: Thank you.

SENATOR FLANAGAN: Okay, next is the Big 5.

I should be a little bit more professional. Excuse me.

The Conference of Big 5 School Districts.

MS. ASCIUTTO: Good afternoon.

SENATOR FLANAGAN: Good afternoon.

MS. ASCIUTTO: Thank you, Chairman Flanagan, for the opportunity today, and for bringing the attention to this critical issue.

I am Georgia Asciutto. I'm the executive director of the Conference of Big 5 School Districts.

I am joined today by Superintendent Daniel Lowengard from the Syracuse City School District.

We have resubmitted our testimony to you. It has been revised. And it includes very specific comments that came in late, but they're there for you, from the Rochester City School District.

At the point of sounding, or echoing, the others in the room, the majority of the presenters today, we have a very common focus about this issue, and we need to address it.

And given the state's fiscal crisis and the cuts that our school districts have already

absorbed, it is critical that we look at all of our operating expenses, with an eye towards preserving the instruction and the integrity of our school systems.

With that said, and with the backdrop of our new 3012-c teacher-principal violation system, it's a critical time for our schools.

And, so, we appreciate your leadership on this issue.

We have -- I have four points I want to make, and then Dan will speak to the specifics about the Syracuse City School District.

One: In concert with many of those who spoke before you, we need to shorten the process.

Our school districts tell us that the process is anywhere from 1 1/2 to 2 years to resolve the cases -- to fully resolve the cases.

And whether an expedited process that would include mutual discovery, or disclosures, we have written, is one way of doing that, or adhering to the timelines in the law.

We need to do a better job of moving these cases through the system.

Your idea about using the process similar to the independent hearing officers in

special education, where they're taken off of an approved prior list, is something I think we should seriously explore. It seems to be working well in that system.

Secondly: If we do shorten the process, we reduce our costs.

On average, we agree with the school boards association, the costs are running at about $200,000 per case.

Superintendent Lowengard has very specific information to share with you.

And, so, we would be in agreement with the numbers that the state education department and school boards association have issued.

And, our core mission is -- the previous superintendent spoke about it -- is about maintaining the structural integrity of our systems.

We need to minimize the impact that the lengthy procedures have on classroom instruction.

These teachers are on assignment. They're out of the classroom, substitutes are in.

We need to do everything within our power to minimize instruction, particularly in our districts.

We have another item, which is unique to the Big 4, and that is, that we have a different statute

of limitations, and when we can bring a 3020-a proceeding, regarding criminal cases.

The current law for all school districts outside of the Big 4 allows a 3020-a proceeding after the statute of limitations has expired, after the three years, when there is a criminal charge against an individual.

But, in the Big 4 districts, you have to have a criminal conviction, which exceeds the time, obviously; expands the time even longer, in order to bring 3020-a proceeding.

So, we'd ask you to look at that as you move forward in the process in legislation, and bring our Big 4 districts in line with all other districts in the state.

SENATOR FLANAGAN: Can I ask you two quick questions?

MS. ASCIUTTO: Sure.

SENATOR FLANAGAN: You referenced "mutual discovery."

MS. ASCIUTTO: Uh-huh.

SENATOR FLANAGAN: Reciprocal discovery; however we want to describe it.

MS. ASCIUTTO: Yes.

SENATOR FLANAGAN: Are you in support of

that?

MS. ASCIUTTO: Yes.

SENATOR FLANAGAN: Okay.

And, then, the last point: This is a good indication. These are the things that legislators don't like to admit, but, in reading your testimony yesterday, in advance, I did not realize the anomaly with the Big 4 relative to the statute of limitations.

And I don't think I'm oversimplifying it: If this is about putting the best teacher in front of kids in the classroom, it strikes me as ridiculous that we don't have a uniform standard, particularly, when it relates to something like that.

So, I appreciate the education on that issue in particular.

MS. ASCIUTTO: Thank you.

SUPERINTENDENT LOWENGARD: Thank you for doing this. I know you've outlasted your colleagues, but you did a great job with the discussion, too. Hopefully, this will go further; that, this is a critical issue.

Four quick points:

I think SED should appoint the hearing officers. There's definitely judge-shopping going

on.

If I'm a judge, and I find for the administrators, the odds are, I'm not going to get picked again.

It's a ridiculous waste of time. Let SED appoint the arbitrators.

Second: I'm all right with sharing the costs.

The costs are about --

SENATOR FLANAGAN: I'm sorry, could you repeat that?

SUPERINTENDENT LOWENGARD: I will.

[Laughter.]

SUPERINTENDENT LOWENGARD: Because I'm going to save on the $200,000 end.

We are spending -- it's funny, but it almost came out exactly as the other reporter, when, our five cases that we've done recently, all have been, a year and a half, and $200,000.

So, I would share the cost, a third, a third, and third, up to the $21,000 that is what the average cost of these hearings are costing, and so everybody's got a little bit of skin in the game.

Third: The discovery has to be.

It's ridiculous, what happens. At the last

moment, people ask for a lot of things. Let's get the cards out on the table.

And, I love the earlier idea: If 120 days is the limit, then stop paying after 120 days.

I have, like all superintendants' cases, they're very small, in relation.

I think this is a tenth of a percent of the people, but it shocks the conscience of school-board members, the public, when you hear of a teacher with three convictions.

We finally went to this; year and half, paid $200,000.

The arbitrator said, "Well, it didn't happen in the school, so it's a 15-day suspension."

We had another one that was, having a gun; brandishing a gun. All of this.

Same kind of decision: 30 days; after we spent $200,000, and a year and a half.

It's just ridiculous.

And, like the former speaker said, we haven't started to concentrate on the mediocre yet. And it's because the bottom is so small, but it pervades the culture.

And people do say: If I can't get canned for this, then even concentrating on the mediocre.

You also alluded to the fact that the new teacher evaluation will dovetail into this.

If we don't streamline this system now, then we can't expect the new teacher evaluation system; which I think is going to have trouble, because you try 100-point system. It is subjective. It's going to be very difficult.

And in the final piece: In Syracuse, we're laying off 350 people. They are the last hired.

I would not say to you, that, if you let me pick 350, that I have 350 incompetent teachers.

I don't.

But I can tell you, that those last 20 or 30 teachers that I'm letting go, should be taking the places of people that should not be in front of kids.

And we have to have a system that will say, to the whole community, we're taking care.

Because I really believe, all of this discussion on teacher evaluation is because, we, as a system, haven't taken care of our very lowest performers.

SENATOR FLANAGAN: Can I ask you a question on, you referenced a case with an individual brandishing a gun?

SUPERINTENDENT LOWENGARD: Yeah -- not in school.

It was outside of school. It was a dispute with his wife, or ex-wife, or something like that. And it got messy, and what actually happened; but, we took it.

And they said: Well, it didn't happen in school.

So, that was a 30-day suspension, after a year-and-half out.

SENATOR FLANAGAN: Was there any criminal charge or criminal conviction in this case?

SUPERINTENDENT LOWENGARD: Well, what people haven't said is, there's a lot of horse trading going on while this whole thing is going on.

So, while the person is saying, well, I might resign, I might do this, I want lower charges, and all that, so, really what you have to do, is, you have to be in touch with the DA, and try to have them take some steps, to say, just get the license for us, and all that.

I mean, you don't want to know all of this.

But, basically, what happens, in some of these awful cases that happen outside of school, we would have conversations and, say, get the license

for us, and then you, plea bargain whatever you want.

And, so, to us, like people have said, is, the whole felony-conviction thing can take, a year and a half, two years. So, you can't wait for the felony conviction, to decide what to do with your teacher.

SENATOR FLANAGAN: In looking at some of the agreements, or the statistics, relative to the city, it appears that, in large part, when there are criminal matters involved, that the DOE defers to law enforcement, through, I guess, the pendency of the case.

So, you sort of do a hybrid. You watch, and you listen --

SUPERINTENDENT LOWENGARD: Exactly.

SENATOR FLANAGAN: -- but, you can't always wait.

SUPERINTENDENT LOWENGARD: Exactly.

And because we're so small; where they'll have a couple hundred, we'll have one or two or three a year. But, we do watch.

We cannot wait until the convictions come on. You know, there are delays in the criminal justice.

So, if we think it has risen to that level,

we suspend them. And, so, we eat the cost, for as long as it takes, if we wait until that trial to end, and then we start ours.

Or, if it's serious enough, you know, we'll try to weigh in, and see if we can get the license before the -- and, sometimes, the DAs will say: Well, if we get the license, that's punishment enough.

And, then, they'll plea bargain other things down.

I mean, we've have thefts, we've had things. But if it happens outside the schools, people tend to say: Well, that's outside the school. There still may be a good teacher.

SENATOR FLANAGAN: Okay. Thank you very much.

SUPERINTENDENT LOWENGARD: Thank you.

SENATOR FLANAGAN: Appreciate your patience.

MS. ASCIUTTO: Thank you.

SENATOR FLANAGAN: Next is the Council of Supervisors & Administrators.

MS. RODRIGUEZ-ROLON: Good afternoon, Chairman Flanagan.

SENATOR FLANAGAN: Pull that mic in nice and tight, please.

MS. RODRIGUEZ-ROLON: Okay.

Good afternoon, Chairman Flanagan.

My name is Alithia Rodriguez-Rolon. I'm the assistant director for governmental affairs with the Council of School Supervisors & Administrators.

Joining me here today is Bruce Bryant, general counsel for CSA.

Thank you for the opportunity to present testimony.

I'm actually going to turn it over to Bruce, who is our expert, and has been part of the 3020-a process.

SENATOR FLANAGAN: You know you're in trouble when you're identified as expert. A lot of pressure.

ATTORNEY BRYANT: Good afternoon, Senator Flanagan.

SENATOR FLANAGAN: At this point in the afternoon, there's not much new to be said, but I do want to hit on some of the points that have been covered, responding, and hit on what I believe are the critical factors that need to be looked at in considering any modifications.

I have been counsel to the CSA for many years. During the course of that service, I have

tried many, many 3020-a cases, and I have settled many, many more.

It is a system that we all understand is flawed, and would like to -- and we would all like to improve it, move the process more quickly. But, there are -- and there are some things that need to be addressed.

I believe every speaker and every senator this afternoon -- today, has emphasized the importance for maintaining due process.

There are two critical elements to due process that I would ask the senate to, and your committee to, remember.

Two critical, and absolutely necessary, elements of that of that are:

The maintenance of an impartial, independent hearing officer.

The arbitrators from AAA that are selected are experienced specialists in labor-relations and employment law. This is their job. They -- some of them -- and many of them, and many of the ones that do 3020-a's have a great deal of experience hearing labor-relations matters and education. They understand the school systems very well.

Chancellor -- the chancellor's comments --

Chancellor Walcott's comments regarding the substitution of an OATH -- a city-appointed OATH hearing officer for an independent impartial arbitrator is completely unacceptable to our organization.

The problem is, they are not impartial. They are city-appointed. I believe Chancellor Walcott indicated they are subject to reappointment every five years. And only the most naive among us could believe that their record in ruling in favor of the city or in favor of employees against the city would not be a criteria in their reappointment.

The other element that is absolutely necessary to continue is the just-cause standard.

Just cause is fundamental fairness.

Just cause is -- means that there is a legitimate, valid reason for a person's discontinuance or removal.

That standard must be maintained.

Putting an arbitrary and capricious standard in its place simply will not work.

I would like to -- I know the time restrictions in -- or, the time that it takes to do a 3020-a is critical.

I would like to stress again, in the

agreement reached between the UFT and the New York City Department of Education, I think is something that should be looked at very seriously.

When the parties want the system to work it has it working.

It's phenomenal what that agreement has accomplished.

Hundreds of cases were cleared up in just a few months. And they've gone from a horrendous, awful backload into being caught up. As I believe Ms. Gerstel said, they now have arbitrators waiting for cases.

They have -- and when both sides, the department of ed. and the union work together to expedite that, it worked.

And that was a modified negotiated system as permitted by 3020 in the law, and it has worked very well.

Similarly, several years ago, CSA entered into a modified agreement for 3020-a cases, in which we put a five-month limitation on the completion of the cases. That has worked very well.

In looking around the rest of the state, looking at our -- looking at CSA's experience, where we have a far smaller number of cases proceeding, we

may be more indicative of what some of the smaller districts around the state could do.

We work from -- we choose arbitrators, that are selected from mutually agreed upon, within a day or two of the charges being brought. We get on the phone and find an arbitrator.

And the first question we ask an arbitrator that we're mutually and concerned in using, is: Do you have the time to do this? Can you get it done in the allotted time?

If he or she says, no, we go to the next arbitrator.

If he or she says yes, we work in that commitment, and we've been able to stay within that time limit very successfully.

The issue of, mutual, or reciprocal, discovery has been brought up over and over again.

I would submit that's a red herring.

And I think whether that was granted or not would have little impact on the efficiency of the system.

The school district, in preparing its case, knows most of what is out there and looks at it.

If there is some secret document that the employee or his lawyer is holding, at least, in my

case, if I've got a secret document that is going to make my case, the employer is going to know about it very quickly because I'm going to use that as leverage to get the case resolved and settled without a hearing.

I don't think there's a lot of secret documents. And I don't think the failure to have reciprocal discovery is delaying the process at all.

If, on the other hand, whatever discovery proceedings, as long as there was some reasonable time frame for the parties to -- and reasonable flexibility for the arbitrator to work with the parties and make sure that everything is done expeditiously, I think it's the arbitrator's authority to move that issue.

Lastly, I would like to talk a little bit about 3012-c and the teacher effectiveness and administrative effectiveness law that has just been passed.

Trying incompetence cases in a 3020-a process is very different from trying misconduct cases.

I know there has been a lot of discussion today about whether the hearing officer should be an educator or not.

I would submit the example that, most judges,

most juries, are not experts in whatever the subject of a case; however, they are learned and educated by the witnesses that each side presents.

I think each side needs to be able to go forward with educational experts, to educate the arbitrator, and let the arbitrator know what the considerations are from both sides.

And I think in that factor, the misconduct case -- or, excuse me, the incompetence cases, which, as several people have said, are the most difficult and time-consuming to try, can be moved more quickly and more efficiently.

I'll answer any questions that I may.

SENATOR FLANAGAN: Yeah, if I could; so, you are not adverse to, reciprocal, or mutual, discovery as long as some type of flexibility in it? Is that --

ATTORNEY BRYANT: I think the problem, from a practitioner in this area, I think it -- and it's something that falls on both sides -- quite often, particularly when we're in an expedited process to move the case as quickly as possible, there's information that the lawyers on either side may not be aware of at the outset of the case, that they learn throughout, so long as the arbitrator has the

authority to let that in, so that there's a full and fair hearing.

I think reasonable discovery procedures are appropriate.

SENATOR FLANAGAN: Okay.

Cost sharing?

I don't know that --

ATTORNEY BRYANT: With the exception --

SENATOR FLANAGAN: -- I see your testimony, but...

ATTORNEY BRYANT: With the exception of Syracuse, that's one issue that all of the districts and all of the unions can agree on.

I can't support it for our organization, no.

SENATOR FLANAGAN: Okay.

I was looking at your testimony last evening, and you made comments in here, which I focused on pretty clearly, because, really, you're the only ones that talk about this:

"Critical component of the amendments of 3020-a enacted in '94 were provisions that specifically authorize school districts and labor unions to bargain for alternative disciplinary procedures."

I'm assuming that's something you warmly

embrace?

ATTORNEY BRYANT: Yes.

Yes. And I think that's the way that the New York City teachers' union and city school district were able to address a horrendous problem, and do a miraculous job of cleaning it up.

It's the way in which CSA and New York City School System came up with a system that works very well, and very quickly for us.

I think, giving districts and the local unions ability to come up with modifications that are appropriate for their districts are -- is the best way to approach this.

What's legislated, essentially, may work pretty well in some places, and may not work so well in other places.

I think the best solutions can be worked out locally.

SENATOR FLANAGAN: Yeah, I would agree with you, but I would just close on this point: I think we have obligation to have some general framework, general structure, that there is some due-process protections, irrespective of what a collective-bargaining agreement may entail.

So, maybe I'll go back to the term "hybrid"

that achieves some appropriate resolution.

But I know, CSA, having met with your representatives before, really had taken more bolder steps -- or bolder steps, in terms of what they were willing to agree to.

I think, because I was educated that Mr. Lowengard feels very strongly, that, someone who's not worthy of employment, they don't want to prolong that process either.

ATTORNEY BRYANT: We don't want to protect the incompetent.

We want to make sure everyone gets a fair day, a fair hearing.

SENATOR FLANAGAN: Okay.

ATTORNEY BRYANT: And that's why our two main points -- maintaining an independent, impartial arbitrator, and maintaining a just-cause standard -- are the most critical elements to us.

SENATOR FLANAGAN: Thank you very much. Appreciate you coming in.

We have been joined by my pal, and colleague, Senator LaValle.

SENATOR FLANAGAN: And we have our last group to testify, certainly not least, the New York State School Attorneys Association.

Good afternoon.

MS. GRANELLI: Good afternoon.

Thank you so much for having us here today.

And thank you very much for holding these hearings to talk about what we feel is an extremely critical topic.

My name is Laura Granelli. I'm the president of the New York State Association of School Attorneys, also known as "NYSASA."

Our members are school lawyers. We have over 130 members. And we represent, virtually, every school district in BOCES, outside of New York City, that's in the state.

We truly appreciate being here, in large part, because we feel we bring a very important perspective to this discourse.

Our members are the ones that are tasked with providing daily advice and counsel to the school districts and BOCES on this issue. Collectively, they have decades of experience.

And, I differ with my colleagues from NYSUT, perhaps, not surprisingly; that we've witnessed,

firsthand, the inordinate amount of time and expense that districts are forced to expend in order to address an unfit teacher.

As David Little so aptly stated, districts are frequently put in the position of having a Hobson's choice, between addressing a teacher or administrators' misconduct and the incredible costs that comes with that.

And that's money that could be applied toward programming. And, that's invaluable time of districts' staff that our students are owed.

With 3012-c, we've heard a lot of discourse lately about striving to have highly effective teachers in our schools.

I suggest to you, that that discourse is extremely incomplete without a comprehensive examination of the disciplinary process.

Districts have to be able to swiftly and economically discipline a tenured teacher or administrator in order to promote the effectiveness of the school environment.

Again, not surprisingly, I take issue with the fact that NYSUT is stating that the delays of the hearing on the fault of myself and my colleagues.

And I know that my colleagues here today will have something to say about that as well.

The fact is, that there's every incentive for teachers to delay the process, because they are almost always paid during the course of the hearing time, and pending the completion of the hearing.

In contrast, school districts have every incentive to get this hearing done.

As an advocate for school districts, we have every incentive to make sure that the hearing proceeds in an expedited manner.

You'll see from our testimony that the things that we offer up as proposals are all geared with an eye towards streamlining the tenure process and reducing costs.

My colleagues, Greg Guercio, to my right, and Tom Volz, to my left, practice extensively in this area.

We feel that there are a lot of areas of 3020-a that are right for reform, but we're going to focus on four key areas, in the interest of time.

First, we're going to talk a little bit about the use of state-employee judicial hearing officers, that we're calling "JHOs," instead of using outside arbitrators.

We're going to talk about having final determination of ineffective on two consecutive evaluations to serve as prima facie proof of incompetence in a hearing.

Third, as we've heard lot about today, we're going to advocate for the use of reciprocal discovery.

And, fourth, we're going to advocate for the permission to terminate hearings -- excuse me, terminate teachers and administrators if they have any felony conviction; or, at very least, have a felony conviction that affect the safe and efficient operation of the school.

Similarly, we advocate for termination without a hearing if a teacher has inadequate certification, which would include, lacking appropriate certification, not obtaining certification in a timely manner, or allowing certification to expire, or having certification revoked.

And we will begin with Mr. Guercio.

MR. GUERCIO: Thank you very much.

Good afternoon, Senators.

First, I'd like to offer my personal thanks to the Chair for inviting our organization to be

present, and participate in this proceeding.

I've been practicing law in this area for over 38 years. And this is the first time, I think, that our organization has appeared before this committee.

I know that, to a very large extent, that's our fault. And we are making an effort to make our profile higher, so that, those of us who actually do this work every day are heard before decisions that affect our clients are made.

You've heard several witnesses talk about judicial hearing officers as opposed to arbitrators, but I want to make the case to you today, from a practical lawyering standpoint.

I read the testimony given by the NYSUT representatives, and I noticed, with appreciation, that it wasn't mentioned in the presentation that was made here today by them, but that you asked a question based upon the transcript, where, to a very large degree, the delay was -- the finger was pointed at school lawyers.

I want to point out that all the management people that have appeared before you today have taken the position, that we should take the steps to make the process move more quickly. And the people

who appear on behalf of the labor unions are all saying, it's moving quickly enough as is.

And I think therein lies the truth as to who wants to move these cases along.

Now, a couple of things haven't been mentioned about judicial hearing officers.

First, meeting regionally, and hearing cases on consecutive days.

If you practice law outside of our world, and you have to go to a courthouse, you don't meet once a month.

And, that's what happens in these cases, you get one hearing a month.

Why?

Well, it's because, there are -- there's a small cadre of arbitrators who are mutually trusted by both sides. You can count them on your hands in each region.

And those six or eight people in each region are the only ones who both sides believe are, both, competent and fair.

You can get an arbitrator who will meet every day, but that's because that arbitrator is not busy. And he or she is not busy, is because nobody wants them.

So, to get the advocates on both sides of the ledger to agree that this arbitrator will give both sides of a fair -- a fair shake, that's based upon the experience you've had with them.

Well, guess what? Those people are as busy as busy can be. They only give you one day a month.

Putting the pressure on them, like 3012-c, and the arbitration -- the expedited arbitration procedure that's set forth in the new 3020-a amendments, will not make those six or eight or ten people work faster. It will make them drop out of the process.

All you have to do is ask them.

You already owe them hundreds of thousands of dollars, each, because the state is out of money. And they're already turning cases down because of that problem.

Tell them they have to hear a case in, 60 days, or 90 days, where, they're hearing private-sector cases, they're doing mediation, they're doing fact-finding, they're doing grievance arbitration. Sometimes many hearings a day at their daily rate.

No one who anybody wants will take those cases.

The city of New York's situation is no answer. In fact, it contributes to the problem, because the city of New York has arranged -- has reached an agreement with that cadre of arbitrators, where they guarantee them a certain number of days per month.

They're required to attend, and they get paid.

And, so, they drain off -- the city drains off those same people who, we on Long Island and in Westchester, and so on, deal with, making the time that they have available for us even less.

So, to say that what we're going to do, is, keep the arbitration process, and simultaneously make it harder for the arbitrators who anybody wants to do the work, is no answer at all. The problem will only be worse.

And the decisions that you hear about, anecdotally, that you heard about from the first people who testified here this morning, will multiply exponentially, because, both, NYSUT, the UFT, and school boards have been avoiding those people who you will foist on us, for 30 years.

They're still around, they're still looking for work, and now they'll be the only ones who take

it.

A judicial hearing officer, somebody testified that, with regard to the city of New York, there's a built-in bias because they work for the city.

Well, that's not what we're looking for.

On a statewide basis, we are looking for people who are employed by the state, either the education department or PERB.

PERB, by the way, has this system in place already, and it works well.

Use the same kind of people, require that they work every day, and that you work every day, and cases will settle in droves.

The reason -- the principal reason why cases don't settle today, gentlemen, is, teachers are home with full pay, for months, and even years.

The minute the pay dries up, that's when the settlement starts to talk.

If you look around, if you want to see anecdotal evidence of that, there are school districts around, who, 20 years ago, were able to negotiate limitations on suspension with pay.

I represent four of those districts.

In 20 years, in those four districts, I've

never gone to trial, because, as soon as we get within reasonable striking distance of that deadline, the settlement offer, the real settlement offer, from labor comes out, and the case gets settled.

Without that, that 505 days that the school board association is talking about, that includes all those cases that settle.

When you talk about cases that go through to their completion, you're talking about three and four years, and more, during all of which time, two salaries, two health insurances, two benefit packages.

It's even cheaper for the state to hire those people, because you're paying $1,800 a day downstate, plus expenses to those arbitrators.

There are a half a dozen of them who have outstanding invoices to you for over a year, right now, of, in the two hundred and fifty to three hundred thousand dollar zone.

So, we save money, you save money.

The process moves along the way it does anyplace else: You start your trial on day one, and you finish -- you keep going until you finish.

Under that circumstance, everybody should be

happy, except those who want to delay the system.

I only want to speak very briefly on prima facie proof.

3012-c requires that we negotiate an appeals process before a finding of inefficiency is in your personnel file.

Two: Before you can go to a 3020-a case, two consecutive years, and both of those final evaluations, subject to the appeals process, left to be negotiated between the parties.

It's our position that, if that process is in effect, once it's been negotiated -- and there is even talk coming out of the commissioner's office that a model appeals process is going to be issued as part of their updated regulations -- that, once that process is complete, and you've exhausted your appeals, and your finding has been two consecutive years of incompetence, that should be prima facie proof of incompetence.

What do I mean by that?

You to go the hearing, you put the evaluations into evidence, and you rest.

And at that point, the burden shifts to the respondent.

If the respondent does not put on a case, or

the respondent does not prove his case, you need not have called all of the witnesses, that take months and months and months, because you've been through that process already.

Eliminate the two bites of the apple, bring in JHOs who will hear this case -- these cases, from day one, and through completion, and you'll never have to worry about the 3020-a process costing way too much money or taking too much time, again.

Thank you.

MR. VOLZ: Good afternoon, Senators.

Thank you for having us here.

I want to -- before I comment on the reciprocal discovery, much about has been said already, I just want to dovetail off of a remark that Mr. Guercio made in regard to the New York City resolution to this problem, and the resulting effect it's had on other portions of the state.

In addition to the hearing officers who are committed, pursuant to that agreement, to dedicate certain days to New York City cases, so, too, are the lawyers that the New York State United Teachers employ to handle these cases.

So, the lawyer that's trying the New York City case with me, out on Long Island, is

also trying the cases in New York City.

And when you attempt to schedule cases, you are blocked from -- there are blackouts in their calendars that they are obligated to devote to New York City cases, which make it next-to-impossible to get consecutive days.

And that has become a problem for us in the field. And I think that needs to be recognized, in terms of the delay that has been attributed to the parties in connection with that.

The other comment that I'd make is along the practical lines of something that I experienced last week, and is very common place.

Charges are brought. And the union lawyer reviews the case, and calls me, and says: We're willing to settle this case. We'll resign.

I say, "Wonderful. What next?

"Pay us for three years.

"Pay you for three?

"Well, it's going to take us that long to get to the hearing. And my client knows that he can remain out on suspension with pay, and resign at any time, up to that point, and, essentially, trump the process."

That's the practical reality. That's the

discussion that occurs with us and our clients in closed session, when we're assessing the case for them, and telling them whether they should bring it, and what the conversation is going to be like once they do.

With regard to the reciprocal-discovery issue, there has been a lot of discussion about that.

And I would say to you, that, the 1994 amendments were supposed to achieve efficiency and maintain fairness.

In my judgment, they have accomplished neither, with regard to the reciprocal discovery.

Any civil proceeding that we handle under the New York State law has discovery. Even criminal procedural law, Section 230.40, provides a degree of discoveries.

Certainly, I do not believe the legislature had intended to extend in this civil proceeding, albeit disciplinary, that there would be greater rights to the respondent than would be to a defendant in a criminal case.

The byproduct of creating reciprocal discovery would be:

Number one: To eliminate the unnecessary

motion practice that occurs throughout the process, by the lawyers on the school side attempting to get it, and the lawyers on the other side attempting to block it.

Secondly: When the discovery is not granted, the resulting adjournments that occur due to the surprises that arise during the course of the hearing.

And, so, you will -- I experience this often; where, I am in a trial. The respondent offers documentation that could have been offered beforehand. And the witness, my client, who I might need to authenticate those documents, or speak to me about those witnesses, are not present.

I request, at times, an adjournment to deal with that, so as to avoid a lengthy rebuttal case. And, you're dealing with, weeks, if not months, of gaps, in terms of getting that hearing back on track.

It will also shorten the rebuttal; and, thus, create greater efficiency in the process.

What do the opponents to reciprocal discovery say?

Number one: It's not in the statute.

Well, I submit to you, you can solve that

one. That's easy.

Second: They say, it forces the employee to testify.

That is not true.

The statute is clear, that the employee does not have to testify. And reasonable parameters for discovery don't change that.

What protects the employee in that instance? The burden of proof.

We understand we own that, and we'll continue to have that burden throughout the process.

The burden of proof protects the employee from the perils, or what are articulated to be perils, of reciprocal discovery.

We need to balance efficiency with just and fair. And reciprocal discovery would do that.

This morning, I forwarded cases to your office. Those are unreported. These cases, many of them, never make it to the court.

So, you don't have a body of case law to turn to, but those cases are collected by New York State School Boards Association, and we draw upon those to get guidance.

Those are the cases that were at the forefront of the discovery dispute. And I think

those arbitrators who handled them, did so in way that recognized actually what the legislature was intending to do, but didn't accomplish.

Thank you.

SENATOR FLANAGAN: Can I ask you a question specifically on the motions?

I mean, obviously, we've heard a lot of comments about the discovery process.

But, relative to the motions, and I think I understand it correctly: You go before the arbitrator, and you make a motion to get certain evidence or certain data available to you.

Generally, what's your success rate?

Is it like, shooting fish in a barrel? Or is it like, 1 out of 100?

Do you --

MR. VOLZ: I'll tell you, that, you generally know, because the small groups of -- that small group of arbitrators who handle these cases, you know who they're going to be.

So, I know, if I have a certain hearing officer, he's not going to do it.

And I know, if I have another hearing -- in which case, I'm planning to deal with the requests for extra time if I don't get it in advance.

There are others who will say, at the close of the district's case: I'll require a certain amount of discovery at the close of the case.

So, that, in essence, the employee is not revealing the case and making the district case easier to prove.

SENATOR FLANAGAN: Okay.

MR. GUERCIO: If I might add, there are actually arbitrators of sufficient stature to be hearing these cases all the time, the group I've been talking about, who say: I don't care what the law says. There's going to be mutual discovery.

And when the union attorney complains, he says, or she says: Then I won't take the case.

And we get mutual discovery in those cases.

MR. VOLZ: And there are some who will say that, the statute, if the legislature had intended to provide for it, the -- they would have put it in there.

The problem is, sometimes, as this list shrinks -- this list of hearing officers who are acceptable to both sides shrink, you make a calculated decision to select someone who might not provide reciprocal discovery to you, because you get further and further away from the cream of the crop.

And you're more concerned about the outcome of your case than the motion practice that precedes it.

SENATOR FLANAGAN: Do you have a question?

SENATOR LAVALLE: No.

SENATOR FLANAGAN: Listen, I really do appreciate you coming in.

Mr. Guercio and I joked a little bit before the hearing.

I got a chance to read the testimony yesterday. And it seems to me, that you actually gave him some latitude, in, perhaps, writing some of this.

But, the expertise is extremely helpful.

And I'm glad, that, if this is your first opportunity in a while to be at a hearing, let it certainly not be the last.

And, with that, that concludes the formal portion of what we're doing today.

I want to -- there are a couple of other groups that will be submitting written testimony. We will put together a packet that details everything that's been obviously spoken, as well as written, for everyone's review.

I have met with the arbitrators last week. I think they're going to be submitting written

testimony.

The school administrators will be submitting written testimony as well.

And I met a gentleman this morning, who is accomplished attorney, Mr. Mazzarello (ph.), if I'm saying it correctly, will be -- it's actually practiced on both sides.

So, he's, perhaps, more confused than all of us.

[Laughter.]

SENATOR FLANAGAN: But, he's very good at what he does. He will also be submitting written testimony.

And, I very much appreciate everyone's patience.

And, enjoy the rest of your day.

Thank you very much.

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(Whereupon, at 1:49 p.m., the Senate Standing Committee on Local Education hearing concluded.)

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