



NEW YORK
CITY BAR

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**COMMITTEE ON
EDUCATION AND THE LAW**

March 11, 2014

Hon. Bill de Blasio
Office of the Mayor
City Hall
New York, NY 10007

Hon. Zachary Carter
Corporation Counsel
NYC Law Department
100 Church Street
New York, NY 10007

Hon. Carmen Fariña
Commissioner
NYC Department of Education
Tweed Courthouse
52 Chambers Street
New York, NY 10007

Dear Mayor de Blasio, Mr. Carter and Commissioner Fariña:

We write on behalf of the Education and the Law Committee of the New York City Bar Association. The City Bar is a voluntary association of more than 24,000 attorney and law student members and more than 150 committees. Founded in 1870 in response to growing public concern over corruption among judges and lawyers, the City Bar's mission includes "harnessing the expertise of the legal profession to identify and address legal and public policy issues in ways that promote law reform, ethics and the fair and effective administration of justice." Through reports, amicus briefs, testimony, statements and letters drafted by committee members, the City Bar has taken positions on and educated the public about important public policy issues and legislation. Our committee addresses legal issues surrounding education from pre-kindergarten through higher education, including education finance, governance, legislative proposals and special education.

THE USE OF PUBLIC SCHOOL BUILDINGS FOR RELIGIOUS WORSHIP SERVICES

A particular focus of the Committee's recent efforts has been the issue of churches using public school buildings for religious worship services. The City Bar has filed amicus briefs in support of the City in the *Bronx Household of Faith v. Board of Education of the City of New York*¹ and has opposed legislation that would prevent the Department of Education (and other New York state school districts) from enforcing policies that prohibit the conduct of worship

¹ In its most recent incarnation, the case is docket No. 12-2730 (2d Cir.).

services in public school facilities.² The constitutional arguments made by the City (and supported by the City Bar) are correct and should continue to be supported by the City.

The City's policy of allowing churches and other religious groups to use school facilities for the same sorts of activities for which they are used by other civic and social groups, but disallowing churches to use school facilities as houses of worship, is a sensible and constitutional limitation designed to avoid violating the Establishment Clause.³ The City's policy is not intended to be hostile to religion or faith communities; rather it is an important continuation of the City's long history of ensuring that its schools are neutral institutions welcoming to all community members.

The contrary position—requiring the City to allow churches to hold worship services in public school buildings—has a host of negative consequences including the appearance (and, likely, the fact) of a constitutional violation.⁴ Allowing churches to use public school buildings as houses of worship has the practical effect of preferring the Christian faith over all others because, as a factual matter, school facilities are less available to the public during the traditional worship times for other faiths.⁵ Additionally, based on the factual record established in the *Bronx Household* case, the churches use such large spaces in the schools, and for such amounts of time, that they dominate the public forum, which creates the impression that the government endorses the churches' messages. Finally, because the churches do not pay rent or utility fees to the City, the City subsidizes the costs of the worship services. For all these reasons, the City's policy of disallowing churches to hold worship services in public school buildings is a sensible and permissible rule that does not unfairly or unconstitutionally favor or discriminate against religion.

THE CITY BAR'S EDUCATION POLICY RECOMMENDATIONS

In April 2013, the Bar Association issued Policy Recommendations for New York City's Next Mayor.⁶ That report was not intended "to cover the entire landscape of issues facing the

² Section I.Q of Chancellor's Regulation D-180 prohibits the conduct of religious worship services in City public schools, i.e. using schools as "houses of worship" during non-school hours. The policy has been permanently enjoined pending appeal in the Court of Appeals for the Second Circuit.

³ The Establishment Clause of the First Amendment to the United States Constitution provides that the government must "make no law respecting an establishment of religion." The Establishment Clause prohibits laws whose purpose is to promote religion, and those whose principal or primary effect is one that advances religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

⁴ This is the effect of the district court's permanent injunction of Section I.Q of Chancellor's Regulation D-180, which is currently on appeal.

⁵ Certain churches also exclude some members of the public (e.g., those who have not been baptized homosexuals), which violates the criteria for the limited public forum that the City has allowed to exist in public school buildings. Thus, by permitting churches to hold worship services that are not open to all members of the public, the City also prefers churches over all secular activities, which must permit access to all members of the public.

⁶ See www.nycbar.org/images/stories/pdfs/mayoralreport04302013.pdf. Unless noted, all quotations are taken from this City Bar report. We also encourage you to consider the school and youth-related recommendations of other City

next Mayor,” but to look “at the Mayor’s opportunities through a legal lens, befitting a bar association, and from the perspectives of lawyers who work daily on a variety of issues vital to the City’s welfare.” The City Bar’s report began with recommendations on “Educating New York City’s Youth” championed by our Committee. During his campaign and since, Mayor de Blasio has emphasized his commitment to many of the issues our Committee had also stressed. He has appointed a Chancellor with long and broad experience addressing many of these issues. While we recognize that Mayor de Blasio’s administration is already addressing many of our shared concerns, we take this opportunity to again highlight the concerns of the City Bar in the critical area of education. We hope you will consider the following issues, which are the focus of our present efforts, and which we believe are critically important to improving New York City’s public school system.

Continue and Enhance Mayoral Control of Schools

The City Bar has emphasized its commitment to mayoral control of the schools and, more broadly, to “the values of accountability, transparency and parental involvement that are fundamental to the success of the New York City schools.” We acknowledge and commend the Mayor’s oft-stated commitment to continuing and enhancing mayoral control and particularly to improved parental involvement.

Reevaluate and Improve Upon Existing School-Related Policies

Improve School Closure Policies to Achieve Better Outcomes

In our 2013 report, we emphasized that the “next Mayor needs to work towards improving the City’s school closure policies and the implementation of those policies by addressing all of the issues surrounding a school closure, including what will happen after a school is closed,” with the ultimate goal of improving student achievement. As we noted last year:

Studies of school closures indicate that there have been mixed results with regard to whether school closures improve student performance. Some evidence suggests that certain populations (special education and English Language Learners) are not adequately served when schools are closed. On the other hand, a study of New York City’s school closing policy found that closing failing schools and replacing them with small schools “has led to actual improvements in measures that point directly to increased attainment, graduation rates, and college-readiness.”

We acknowledge the Mayor’s commitment to a moratorium on school closings and share the hope that the new focus on targeted and intensive assistance to failing schools is effective. Whether closures resume or not, we encourage the Mayor and Chancellor to work with principals, teachers, and others from successful public and charter schools, as well as researchers who study schools, to develop and implement best practices for all of New York’s schools.

Bar Committees, including developing humane education programs (pp. 10-11) and addressing the burdens of student loans (pp. 42-43).

Should closures be necessary in the future, we recommend the following improvements to the City's school closure policy:

- Provide community members and affected families with meaningful information about any closure that includes data on student performance, dropout rates, attendance, violent incidents, teacher turnover, standardized test results and the process the City uses to determine school closures.
- Improve transparency in transitioning students to other schools by educating families and the community in various languages about post-closing options (including the availability of ESL and bilingual programs and access to special education services). Additionally, ensure that the closure process does not leave any students without a school option. Policies should seek to avoid transferring students from one failing school to another low-performing school.
- Ensure that special education and English language learner populations are adequately served during and after school closures. Schools being closed must have necessary support to serve the students who remain as a school is phased out. Schools that accept more students, especially from at-risk populations, must have the resources to provide those students with the services to which they are entitled. If small or charter schools are to replace the larger schools, those schools must have the resources to attract, enroll, assess and support those who attended the schools that are closed.

Improve the quality of the school environment through the Dignity for All Students Act (“DASA”), the Respect for All Initiative and the Disciplinary Code

We recognize that, as Public Advocate, Mayor de Blasio was a strong advocate for these reforms, and we anticipate that Chancellor Fariña's team will devote itself to reducing bullying and harassment of New York City students, including the LGBT students who have been particularly victimized.

The City Bar encourages the Department to consider several steps to enhance implementation of DASA: First, we ask for your leadership in improving accuracy, reliability, and compliance with DASA reporting requirements. Reporting incidents to the state is required under the law, and is an integral part of measuring its successful implementation. Second, we hope you will commit appropriate resources and attention to training both adults and students, which is the best way to prevent bullying. Educators and support staff must be trained on cultural competence, bullying prevention and diversity, and students should receive in-class “training” through the adoption of diversity curriculum.

Further Reform Special Education

Based upon research indicating that special education students who attend school with general education peers have better outcomes, the DOE in 2010 announced a reform requiring

most of its 164,908 students with disabilities to attend the schools located in their home zones. The City Bar recommends increased transparency with respect to the implementation of the reform, its measures of success, and the rights of parents. Moreover, safeguards against the inappropriate placement of students with disabilities need to be put into place and maintained.

Reform the Teacher Disciplinary Hearing Process

In New York and elsewhere, disturbing and highly-publicized reports of inappropriate contact between teachers and students have put a spotlight on teacher sexual misconduct. In New York City, these cases have exposed a flaw in the disciplinary process. Under State law, tenured teachers accused of misconduct face a hearing before an arbitrator chosen by the school district and teachers' union. If the arbitrator finds that the teacher committed sexual misconduct, he or she is automatically terminated. If the misconduct is not found to be "sexual," lesser sanctions may be imposed. Some have argued that arbitrators feel that they must please both sides in order to secure future assignments, incentivizing them to punish teachers less harshly than may be appropriate.

Some have proposed legislation that would permit the chancellor to reverse arbitral decisions (which are binding under current law) in sexual misconduct cases, but this does not reach the root of the problem. If the arbitrator selection process is leading to unjust outcomes, then reforming that process presents a better opportunity for reform than a law specific to sexual misconduct. Choosing arbitrators by lottery or first availability from an approved list created by a neutral third party would remove any threat that arbitrators are pressured to try to please both sides, and would also expedite the hearing process. The practice of both sides agreeing to an arbitrator is common in arbitrations of all types, but for districts outside of New York City, State law imposes a 15-day deadline for the parties to agree, or the commissioner chooses the arbitrator from an American Arbitration Association list. The City has no such rule; a union-DOE agreement provides that the parties must agree on each arbitrator in the panel and again on the arbitrator for a specific case.⁷ This process, under which arbitrator selection can take months, creates a problem that can be fixed.

The City Bar recommends that the administration should work toward revising the agreement with the union in order to place arbitrator selection in the hands of a neutral third party, such as the American Arbitration Association, that will select arbitrators fairly and efficiently.⁸

⁷ Under the collective bargaining agreement between the parties, there is an alternative selection process that may be available to select arbitrators to the panel when the two sides cannot agree to a full panel, but as the recent lawsuit between the City and the union makes clear, even that process is not truly mandatory, and does not appear to apply to the selection of an arbitrator in a specific case. *See Board of Educ. v. United Federation of Teachers*, No. 451734/2013 (Sup. Ct. N.Y. Cnty.)

⁸ This recommendation would apply equally to the selection of arbitrators in teacher incompetence cases.

Create New Educational Programming to Address Current Issues

Implement Teen Dating Violence Education and Safety Policies

According to the United States Department of Justice, girls ages 16 to 24 are more vulnerable to intimate partner violence than any other age group – at a rate almost triple the national average. The President recently established a “White House Task Force to Protect Students from Sexual Assault.” While the White House Task Force focuses on sexual assault at institutions of higher education, the issue is at least equally critical for younger students. In New York City, one in three teens experiences some kind of abuse in romantic or sexual relationships.

Each year, teen dating violence creates negative consequences that go far beyond the individuals in the relationship – it exacts a societal cost through the increased truancy, alcohol and drug use, and mental and physical health problems experienced by victims of intimate partner abuse. Teenage relationship abuse can also turn fatal. We recommend the administration implement educational programming that will teach young people how to strive for and create healthy relationships free of violence. We believe it is the best tool to stop domestic violence and dating abuse. Specifically, we recommend that the DOE:

- Incorporate education on building healthy relationships and respect for all people into the annual curriculum framework for kindergarten through sixth grade.
- Incorporate dating violence education into the annual curriculum framework for students in grades seven through twelve.
- Ensure that all administrators, teachers, nurses, counselors, school safety officers, and health staff at each school receive teen dating violence training.
- Provide opportunities for parent trainings on the signs and ways to prevent teen dating violence.
- Create a model school policy on dating violence to assist schools in creating dating violence policies for dating violence reporting and response, including: (1) how to protect individual targets of abuse and harassment, (2) how to enforce civil and criminal orders of protection, (3) how to protect against violations of orders of protection, and (4) how to give notice to students of available resources and remedies. The policy should, subject to appropriate safeguards to the accused student’s due process rights under the law, also include a provision authorizing a student or administrator to request the perpetrator of the violence be transferred to another school.

Strengthen Comprehensive, Medically-Accurate Sexuality Education

Under the prior administration, the DOE mandated that sexual health education be taught during health education courses in both middle and high school. We urge the Mayor and Chancellor to strengthen the City’s commitment to medically accurate sexuality education in

public schools. The DOE recommended, but did not require, the use of two curricula: *HealthSmart* and *Reducing the Risk*. Because principals have discretion to determine the curriculum, New York needs strong standards to ensure that alternate materials are in compliance with the City's mandate and do not reflect biased viewpoints. All curricula must also comply with DASA's non-discrimination mandate.

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We would be happy to discuss any of these issues in further detail with the appropriate member of the administration.

Sincerely yours,



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⁹ Committee chair Jeffrey Metzler and member J.G. Toth recused themselves from all aspects of this letter.