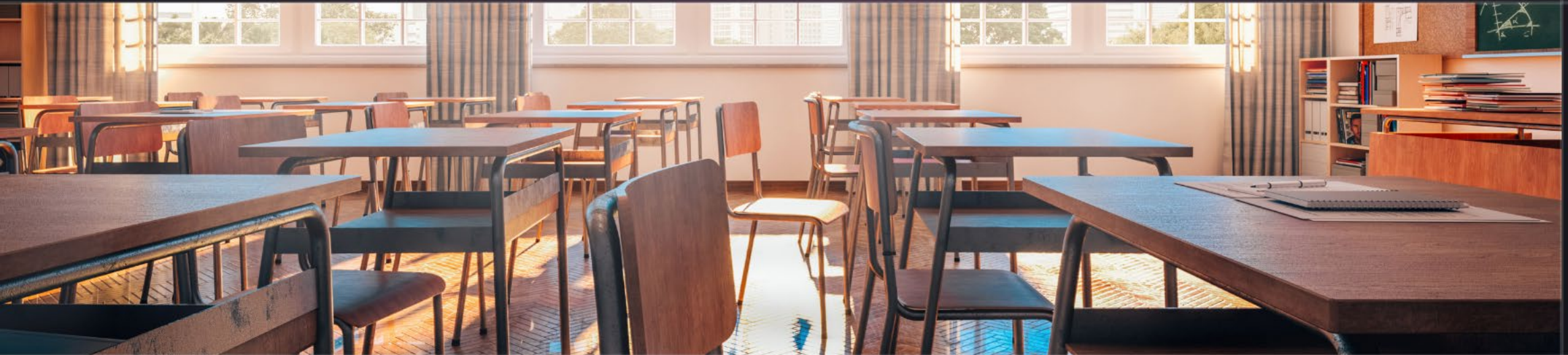


# Hodgson Russ



## School Client Conference

JANUARY 16, 2026



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# 2025 Case Law Update

January 16, 2026

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**Agenda**

- PILOT Agreements
- Impactful New Laws
- Case Updates



## **PILOT Agreements**

- Payment in Lieu of Taxes.
- Property is granted a real property tax exemption.
- Property owner enters into an Agreement to make Payments in Lieu of Taxes (“PILOT”).
- Parties to PILOT Agreements – Town or City, School District, County.
- There must be a New York State law authorizing PILOT Agreement for the property and proposed use.



## Three Types of PILOT Agreements

- Solar or Wind Energy projects.
- Affordable Housing Projects.
- County Industrial Development Agencies.
- Each of three types of PILOT Agreements have their own guidelines.
- Generally, no significant financial benefit to not agreeing to a PILOT Agreement.



## Solar and Wind Energy Projects

- The Real Property Tax Law § 487 Exemption
  - Applicants file exemption form with local assessor by taxable status date (usually March 1 in most jurisdictions).
  - Provides a 15-year real property tax exemption for certain renewable energy systems, including wind and solar.
  - Amount of the exemption is equal to the increase in value of the property caused by adding the system i.e., the improvement value.



## Overview of the RPTL § 487 Exemption

- Does not exempt these systems from special assessments or ad valorem levies.
- Municipalities and School Districts may opt out of the exemption.
  - To opt out, a local law, ordinance, or Board of Education resolution must be filed with the Commissioner of the NYS Department of Taxation and Finance and the president of NYSERDA. Make assessor aware, too.
  - A local government that does not opt out can still benefit financially through payment-in-lieu-of-taxes (“PILOT”) agreements.



## PILOT Agreements

- Real Property Tax Law § 487 (a)(a)

“A county, city, town, village or school district, that has not acted to remove the exemption under this section may require the owner of a property which includes a solar or wind energy system which meets the requirements of subdivision four of this section, to enter into a contract for payments in lieu of taxes. Such contract may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the exemption under this section. If the owner or developer of such a system provides written notification to a taxing jurisdiction of its intent to construct such a system, then in order to require the owner or developer of such system to enter into a contract for payments in lieu of taxes, such taxing jurisdiction must notify such owner or developer of its intent to require a contract for payments in lieu of taxes *within sixty days of receiving the written notification.*”

- No PILOT mandated for standalone storage systems.



## Typical PILOT Agreements

- Payment per megawatt, not assessed value or actual production.
- Terms of payment.
- Adjustments for system changes.
- Assignment clause.
- Defense/indemnification provisions.
- Remedies on default.
- Termination conditions.
- Payment of school district costs to negotiate PILOT.
- Allocation of payment based upon Town, School District, and County tax rates.



## **Demanding a PILOT Agreement**

- For jurisdictions that have not opted out of the RPTL § 487 exemption, they can demand a PILOT Agreement up to, but not to exceed, full taxes.
- 60-day window upon receiving RPTL § 487 notice from developer.
- Strict deadline. Failure to make a timely demand waives right to PILOT Agreement, so project will be exempt for 15 years.
- Act promptly upon receipt of notice.



## Host Community Agreements

- Intended to compensate the Town or District, for any impacts brought about by the project or off set the consumption of certain town services.
- Often in addition to a PILOT.
- Not mandated by statute.
- Methodology and valuation dealt with on a case-by-case basis in negotiations.
- Payments could be over a term and track a PILOT (15 years) or be a lump-sum payment.



## **New York State has mandated how Town's can value wind and Solar Projects**

- Real Property Tax Law section 575-b.
- Prevents Town Assessor from putting high assessment on wind or solar property.
- Appraisal formula set by State tax department.
- Eliminates benefit of opting-out of exemption.
- PILOT Payment only for wind or solar project. Underlying land still and also taxable to owner.
- Solar and Wind projects – land taxes plus PILOT payment for project installation.



## County Industrial Development Agencies

- Industrial Development Agencies (“IDAs”) can provide an alternative route to an exemption for solar and wind projects.
  - Opt out irrelevant; an IDA does not need local permission to grant a PILOT, but many IDAs have policies that require local approval.
  - No time limit; can be longer than 15 years.
  - Can also provide sales tax and mortgage recording tax exemptions.
  - Charge a fee 1%-2% of total project cost.
  - IDA PILOTs for solar and wind projects have become less advantageous with the dawn of the RPTL § 575-b State Valuation Model since taxes can now be projected.
- IDA PILOT, also available for wide array of commercial and industrial projects.



## County Industrial Development Agencies, cont.

- Each IDA must adopt a Uniform Tax Exemption Policy – New York State General Municipal Law § 874.
  - Must be posted on their website.
  - PILOT payment policies vary depending on type of project – industrial, retail, housing, etc., and length of PILOT Agreement.
  - Cannot exclude School District or County from PILOT Payments unless notice to District and County, specific reasons provided and after public hearing.



## Affordable Housing Projects

- Towns can grant property tax exemption for up to 50 years.
  - Normally 15 years, renewable for another 15 years.
- New York State Private Housing Finance Law.
  - Limited Dividend Housing Companies – Article 4.
  - Housing Development Fund Companies – Article 11.
  - Tax Exemptions – PHFL § 93, 577.
  - PILOT Payment – set by statute based upon rents and expenses.
- Real Property Tax Law § 581-a.
  - Must assess the properties based upon actual income, not like market rate housing.
  - Denying tax exemption won't lead to high tax assessment on affordable housing project.
- PILOT Agreement will have schedule of payments with annual cost of living increases.



## Real Property Tax Assessment Challenges

- Real Property Tax Law Article 7 Challenges.
  - Excessive assessments.
  - Unequal assessments – compared to similar properties
  - Illegal assessments – denial of tax exemptions – charitable, etc.
- Service of Petition.
  - On Superintendent.
  - Late July or early August.
  - Challenge July 1st to June 30th.
  - Cities – can be served at different times of year.
- Evaluate each petition.
  - Size of initial assessment.
  - Requested reduction.
  - Number of years pending, e.g. recent case – five years pending \$25,000,000 assessment
- Intervention by District
  - No settlement without consent of District.
  - Notice of any proposed settlement.



## Real Property Tax Assessment Challenges, cont.

- Establish a Tax Certiorari Reserve – NYS Education Law § 3651.
- Town or City uses either Town or City Attorney or outside counsel.
  - Is their counsel knowledgeable in tax assessment matters?
  - Settlements may waive Town tax refunds but not School District tax refunds if no appearance or intervention by District.
- Should intervene first year.
- Other types of tax challenges.
  - Challenges to entire assessment roll where revaluation.



## Impactful New Law: Desha's Law

- On July 24, 2025, Governor Hochul signed Bill S.5539A/A.785A also referred to as Desha's Law, into law.
- Requires school safety plans to include a cardiac emergency response plan (“CERP”) that addresses the use of appropriate personnel and measures to respond to incidents involving any individual experiencing sudden cardiac arrest or another similar life-threatening emergency on any school site owned or operated by a school or at a location of a school sponsored event.
  - CERP requirement went into effect immediately



## **Impactful New Law – Desha’s Law**

- Minimum requirements for a district’s sudden cardiac arrest response plan:
- In writing;
- Include specific procedures for responding to sudden cardiac arrest that are venue specific;
- Integrate nationally recognized, evidence-based core elements; and
- Consider and integrate, to the extent feasible, community EMS responder protocols.
- N.Y. Educ. L §2801-a(2)(n)



## Impactful New Law – Desha’s Law

### Sample Cardiac Emergency Response Plan (CERP):

#### Cardiac Emergency Response Annex

All staff know where Automatic External Defibrillators (AEDs) are located and how to call for help. AED cases should contain supplies for first responders including gloves, CPR barrier device, and scissors. Staff outside or off school property should always carry communication devices and emergency contact information for assistance.

**Warning signs or signs of a Sudden Cardiac Arrest (SCA) or similar life-threatening emergency:**

- Racing heart, palpitations, or irregular heartbeat
- Dizziness, lightheadedness, or extreme fatigue with exercise
- Chest pain or discomfort with exercise
- Excessive shortness of breath during exercise
- Excessive unexpected fatigue during or after exercise
- History of recurrent fainting or unusual seizures
- Sudden collapse or "passes out"
- Not responsive
- Abnormal breathing
- No pulse

#### Steps to take in school building, on school grounds, or at athletic events

1. **Ensure scene safety**
  - Survey the area to protect victim, yourself, and anyone else nearby (e.g., remove victim from water or unstable surface to a stable level surface, cease athletic play, move bystanders from area etc.)
2. **Shout for help. If alone, call for Emergency Medical Services (EMS) via 911 or in accordance with district policy and obtain Automatic External Defibrillator (AED)**
  - Follow 911 emergency dispatcher's instructions.
  - Call for any Certified Cardiopulmonary Resuscitation (CPR)/Automatic External Defibrillator (AED) school personnel and notify administration or designee\*.
3. **CPR by CPR/AED certified school personnel**
  - Check for breathing- if none or person gasping begin CPR immediately.
4. **Defibrillation by CPR/AED certified school personnel**
  - Use an AED to restore the heart to its normal rhythm.
5. **EMS assumes lead upon arrival.**
  - If a student is the person needing care, school administration or designee should accompany the student to the hospital until the parent/guardian arrives.
  - Be prepared to download the school's AED data onto flash drive to provide to EMS to give to the emergency department's physician.
6. **School administration or designee notifies**
  - parent/guardian or staff member's emergency contact in accordance with district policy.
7. **Document**
  - In accordance with district policy, document event including observations, all steps taken and by whom, who was notified, and information reported to EMS.
8. **Hold a post event debriefing**

#### \*Emergency contact numbers for obtaining help:

Number to call for help in school building  
 Number to call for help on school grounds  
 Number to call to notify if SCA occurs at offsite location  
 Secondary contact number if primary not available

#### CPR/AED Certified School Personnel

Staff Name	Title	Telephone Number	Location	Availability
				<input type="checkbox"/> Before School <input type="checkbox"/> After School <input type="checkbox"/> School Day <input type="checkbox"/> Athletic Events <input type="checkbox"/> School Events <input type="checkbox"/> Other
				<input type="checkbox"/> Before School <input type="checkbox"/> After School <input type="checkbox"/> School Day <input type="checkbox"/> Athletic Events <input type="checkbox"/> School Events <input type="checkbox"/> Other
				<input type="checkbox"/> Before School <input type="checkbox"/> After School <input type="checkbox"/> School Day <input type="checkbox"/> Athletic Events <input type="checkbox"/> School Events <input type="checkbox"/> Other
				<input type="checkbox"/> Before School <input type="checkbox"/> After School <input type="checkbox"/> School Day <input type="checkbox"/> Athletic Events <input type="checkbox"/> School Events <input type="checkbox"/> Other

#### Automated External Defibrillator (AED) Locations

Note: All AEDs should be clearly labeled and stored in appropriate storage containers, cabinets, or go bags/cases.

Number of AEDs needed inside the building and at each athletic practice and event:

AED Locations:



## Impactful New Law – Desha’s Law

- Notable Places/Events for which a district is required to have a CERP:
- School buildings:
  - This includes both during regular school hours as well as any before or after-school hours if there are school-sponsored extra curriculars being held on the property.
- School Sponsored Events:
  - Athletic events, both districts participating may have their own CERP, but assuming the game is played on school property, the host district would also be required to have an AED on-site.
  - In addition to sporting events, this language likely requires CERPs to be developed for field trips and school internship programs.



## Impactful New Law – Desha’s Law

- Difference between CERP requirements and AED requirements under Desha’s Law
- CERP: Must have a plan addressing cardiac arrest on “any school site owned or operated by a school or at a location of a school sponsored event including but not limited to all athletic programs.”
  - N.Y. Educ. L §2801-a(2)(n)
- AED: every “school district, board of cooperative educational services, county vocational education and extension board and charter school shall provide and maintain on-site in each instructional school facility functional cardiac automated external defibrillator equipment for use during emergencies.”
  - 8 N.Y.C.R.R. §136.4(b)
  - Instructional School Facility – “a building or other facility maintained by a school district, a board of cooperative educational services, a county vocational education and extension board or a charter school where instruction is provided to students.”
    - 8 N.Y.C.R.R. §136.4(a)



## Impactful New Law – Desha’s Law

- Difference between CERP requirements and AED requirements under Desha’s Law (cont)
- What do these differing definitions mean?
  - CERPs are required in a much broader range of circumstances and almost any school event will need to have a CERP in place.
  - AEDs are only required in buildings maintained by a school district where instruction is provided.
- Unlike with CERPs discussed previously, an AED is not required at:
  - School field trips;
  - School buses; nor
  - School sponsored work programs in which the student works at a local business.



## Impactful New Law: Desha's Law

- Other notable provisions of Desha's Law
- Amended N.Y.S. Education Law §§ 917 and 2801-a(2) regarding AED equipment, AED maintenance and signage, and school safety training regarding cardiac emergency response plans in district-wide school safety plans.
  - These Amendments require:
    - Response training for sudden cardiac arrest events for students and staff; and
    - Compliance with new AED implementation and maintenance procedures.
  - Additionally, a district may provide voluntary first aid, CPR and AED training to school staff.
    - If a district opts to provide this training, all training must be completed in accordance with N.Y.S. Pub. Health L §3000-b.



## New Commissioner's Decisions

- Appeal of Sadam, Decision No. 18,565 (May 19, 2025)
- Facts of the Case:
  - Arose out of the denial of transportation for a student to a non-public school.
  - In August of the prior year, the Student's parent requested transportation to a non-public school for the Student.
    - The District used Google Maps (routing resource used in general practice) to determine the distance between the Student's residence and the requested non-public school.
      - This calculated the distance to be 15.3 miles, just outside of the radius required to provide transportation to a non-public school pursuant to Education Law §3635.
    - At a School Board Meeting in December, the parent of the Student presented the District with MapQuest directions that provided a route to the non-public school that was less than 15 miles.



## New Commissioner's Decisions

- Appeal of Sadam, Decision No. 18,565 (May 19, 2025)
- Facts of the Case (Cont):
- The superintendent of the District investigated the route provided by the parent by attempting to drive the route.
  - During this drive, the superintendent discovered that the route suggested a left-hand turn that traffic was not allowed to make.
  - Moreover, after conferring with the District's transportation provider, the superintendent learned that District buses would not be able to travel along one of the roads set forth in the parent's route because of an overpass that hung too low for buses to receive clearance.
- As a result of these findings, the District informed the parent by letter that it would not be providing transportation to the Student because the residence was more than 15 miles from the school.
  - The parent of the Student then appealed to the Commissioner of Education.



## New Commissioner's Decisions

- Appeal of Sadam, Decision No. 18,565 (May 19, 2025)
- Opinion:
  - Standard of Review: the Commissioner will uphold a district's transportation decision unless it is arbitrary, capricious, unreasonable or an abuse of discretion.
  - Parent of the Student did not meet their burden of proof
    - Merely claimed that they drove the route themselves and the measurement came out to less than 15 miles.
    - Provided no supporting evidence.
    - Failed to provide any evidence or reasoning that the MapQuest route was more reliable or should be substituted for the information the district obtained from Google Maps.
- Holding:
  - The Commissioner dismissed the appeal, noting that the Commissioner's office has previously declined to utilize impassable or unsafe routes in calculating distance stating that impassable or unsafe roads cannot be deemed "available" for use.



## New Commissioner's Decisions

- Appeal of K.R. and M.F., Decision No. 18,547 (February 11, 2025)
- Facts of the Case:
  - Arose out of a district's refusal to provide transportation from a student's private school when student's school day ended at 4:30 p.m. because the District's dismissal times ranged from 2:24 p.m. – 2:50 p.m.
  - Prior to the start of the school year, the District provided the parents of student with a transportation schedule conveying that the student would be picked up from their private school at 2:45 p.m.
  - The parents requested a later pickup time noting that the student did not finish their school day until 4:30 p.m.
    - The District obliged saying they could accommodate them by providing a 3:15 p.m. pickup time.



## **New Commissioner's Decisions**

- Appeal of K.R. and M.F., Decision No. 18,547 (February 11, 2025)
- Position of the Parties:
  - The Parents alleged that the District's decision not to provide transportation to the student at the end of the Student's school day was arbitrary and capricious.
  - The District responded by claiming the Parents' request was unreasonable as it did not offer after school transportation at or around the time the Student's school day ended.
    - Providing such transportation would impose significant labor, fuel and operation costs.



## New Commissioner's Decisions

- Appeal of K.R. and M.F., Decision No. 18,547 (February 11, 2025)
- Opinion:
- Commissioner referred to the provisions of Education Law relating to transportation of students to convey that a board of education is not required to transport children attending nonpublic school in all circumstances.
- The Commissioner found that the parents did not meet their burden of proving “a clear legal right” to the requested transportation.
  - Highlighted the difference in dismissal times from the District and the private school to aid in concluding the District acted reasonably.
  - Ruled that the parents failed to refute the District’s reasonable allegation that it would require significant resources to arrange for transportation.



## **New Commissioner's Decisions**

- Appeal of K.R. and M.F., Decision No. 18,547 (February 11, 2025)
- Holding:
- The Commissioner dismissed the appeal ruling that the varying dismissal times and the almost 2-hour difference between the District's dismissal time and the pickup time requested by the parents made the District's denial reasonable.
  - The Commissioner also noted that providing transportation at a specific time in the previous year does not create a legal entitlement to those seeking similar transportation services in the following year.



**Questions?**



## Contact for More



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# Ethics for School Board Members and Administrators

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## Agenda

- Statutory Ethics
  - Conflicts of Interests
  - Disclosure Requirements
  - Reimbursement of Expenses
  - Code of Ethics
  - Other Compelled Ethical Behaviors
  - Penalties for a Violation
- Common Law Ethics
  - The Standard
  - Disclosure
  - Recusal
- Hypotheticals
- Takeaways



## Source of Law for Ethics

- 2 sources that create the rules governing ethics for public officials, including school board members:
  - Statutory
    - New York State General Municipal Law
      - Article 18 – Conflicts of Interest
  - Common Law
    - “Judge-made” law
    - Based on cases, advisory opinions, etc.
    - Gray areas, determined based on a judge and arguments made in court
      - AKA why you call us



## Statutory Ethics: Conflicts of Interest

### Key Terms

- Interest - “A direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as a result of a contract with the municipality which such officer or employee serves.”
  - N.Y.S. Gen. Mun. L §800(3)
- Contract – Any express or implied claim, account or demand against or agreement with a municipality.
  - N.Y.S. Gen. Mun. L §800(2)
- Municipality – “A county, city, town, village, **school district**, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governments units.”
  - N.Y.S. Gen. Mun. L §800(4)



## Statutory Ethics: Conflicts of Interest

### The Legal Standard for Conflicts of Interest

- No municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer, or employee, when such officer or employee, individually or as a member of a board, has the power or duty to:
  - Negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder;
  - Audit bills or claims under the contract; or
  - Appoint an officer or employee who has any of the powers or duties set forth above.

– N.Y.S. Gen. Mun. L § 801



## Statutory Ethics: Conflicts of Interest

When does a Conflict of Interest exist?

- An employee or officer is deemed to have an interest in any municipal contract with:
  - Their spouse, children or dependents have contracted with the municipality (unless it's an employment contract);
  - Any firm, partnership, or association of which the district officer or employee is a member or employee;
  - A corporation of which the district officer or employee is an officer, director or employee; and
  - A corporation of which the district officer or employee owns or controls, directly or indirectly, any stock.
- N.Y.S. Gen. Mun. L §800(3)



## Statutory Ethics: Conflict of Interest

### Exceptions:

- Conflicts of Interest prohibitions don't apply to:
  - A contract with the employer of a district officer or employee if the officer or employee's remuneration is not directly affected as a result of the contract, and the officer or employee's duties of employment do not directly involve procurement, preparation or performance of the contract;
  - Purchase of real property of an officer or employee, provided the Board receives approval upon petition to the Supreme Court;
  - A contract with a membership corporation or other voluntary non-profit corporation or association (including a union);
  - A contract with a corporation in which the officer or employee owns or controls less than 5% of outstanding stock;
  - Designation of a bank as a depository or for investment of funds;
  - Certain purchases or public works contracts of less than \$5,000 in a fiscal year;
  - A contract of less than \$750; or
  - Lawful compensation or necessary expenses.
- N.Y.S. Gen. Mun. L §802



## **Statutory Ethics: Disclosures**

### Mandatory Disclosures:

- A district officer or employee must disclose any interest (even if not a prohibited interest) in any actual or proposed contract with the district.
- Disclosures must be in writing, must detail the nature and extent of the interest, and must be made as soon as the officer or employee has knowledge of such actual or prospective interest.
- Written disclosures must be entered into the official records of School Board proceedings.
- Notwithstanding an interest in the contract, in certain limited circumstances disclosure is not required:
  - Less than 5% holding in corporation.
  - Contract value of less than \$750 per year.
  - N.Y.S. Gen. Mun. L §803



## Statutory Ethics: Disclosures

### Prohibited Disclosures:

- A district officer or employee may not disclose “confidential” information acquired in the course of official duties.
- A district officer or employee may not use confidential information to further personal interests.
  - N.Y.S. Gen. Mun. L §805-a(1)(b)



## Statutory Ethics: Reimbursement

- District officers and employees may be reimbursed for attendance at a conference or convention.
  - The School Board by a majority vote, or through a designee of the Board, may authorize any district officer or employee to attend a conference conducted for the betterment of the district prior to such conference.
    - The attendee shall be reimbursed for all “actual and necessary” expenses.
  - A district may advance funds for estimated expenditures.
    - N.Y.S. Gen. Mun. L §77-b



## Statutory Ethics: Code of Ethics

- Each district **must** adopt a Code of Ethics setting forth “standards of conduct reasonably expected” from officers and employees.
- A Code of Ethics **must** address standards respecting:
  - Disclosure of interests;
  - Holding investments in conflict with official duties;
  - Private employment in conflict with official duties;
  - Other standards which the Board deems advisable.
- A Code of Ethics may regulate or prohibit conduct not expressly prohibited by statute, but **may not** authorize conduct which is expressly prohibited by statute.
- A Code of Ethics **cannot** be inconsistent with General Municipal Law Article 18 addressing Conflicts of Interest.

– N.Y.S. Gen. Mun. L §806



## NY ABO Model Code of Ethics

### – Responsibility of Directors and Employees

- Directors and employees shall perform their duties with transparency, without favor and refrain from engaging in outside matters of financial or personal interest, including other employment, that could impair independence of judgment, or prevent the proper exercise of one's official duties.
- Directors and employees shall not directly or indirectly, make, advise, or assist any person to make any financial investment based upon information available through the director's or employee's official position that could create any conflict between their public duties and interests and their private interests.
- Directors and employees shall not accept or receive any gift or gratuities where the circumstances would permit the inference that: (a) the gift is intended to influence the individual in the performance of official business or (b) the gift constitutes a tip, reward, or sign of appreciation for any official act by the individual. This prohibition extends to any form of financial payments, services, loans, travel reimbursement, entertainment, hospitality, thing or promise from any entity doing business with or before the Authority.
- Directors and employees shall not use or attempt to use their official position with the Authority to secure unwarranted privileges for themselves, members of their family or others, including employment with the Authority or contracts for materials or services with the Authority.
- Directors and employees must conduct themselves at all times in a manner that avoids any appearance that they can be improperly or unduly influenced, that they could be affected by the position of or relationship with any other party, or that they are acting in violation of their public trust.
- Directors and employees may not engage in any official transaction with an outside entity in which they have a direct or indirect financial interest that may reasonably conflict with the proper discharge of their official duties.
- Directors and employees shall manage all matters within the scope of the Authority's mission independent of any other affiliations or employment. Directors, including ex officio board members, and employees employed by more than one government shall strive to fulfill their professional responsibility to the Authority without bias and shall support the Authority's mission to the fullest.
- Directors and employees shall not use Authority property, including equipment, telephones, vehicles, computers, or other resources, or disclose information acquired in the course of their official duties in a manner inconsistent with State or local law or policy and the Authority's mission and goals.
- Directors and employees are prohibited from appearing or practicing before the Authority for two (2) years following employment with the Authority, consistent with the provisions of Public Officers Law.



## Statutory Ethics: Other Notable Provisions

### Receipt of Gifts:

- No district officer or employee may “directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.”

– N.Y.S. Gen. Mun. L §805-a(1)(a)

### Receipt of Compensation for Services Rendered:

- A district officer or employee is generally prohibited from receiving compensation as a result of any work involving a contract with or matter before the district, or from entering into a contingent arrangement for compensation for any matter before the district.

– N.Y.S. Gen. Mun. L §805-a(1)(c) – (d)



## Statutory Ethics: Conflict of Interest Analysis

- **Step 1:** Is there a “contract”
  - Claim account or demand against or agreement with another party.
- **Step 2:** Does the officer/employee have an “interest” in the contract
  - Or his/her spouse, minor children and dependents, firm, partnership or association of which such officer or employee is a member or employee, a corporation of which such officer or employee is an officer, director or employee, and a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.
- **Step 3:** Does the municipal officer/employee have “control” over the contract
  - Does the officer/employee:
    - Negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder;
    - Audit bills or claims under the contract; or
    - Appoint an officer or employee who has any of the powers or duties set forth above.
- **Step 4:** Is there an exception to the conflict rules?
- **Step 5:** Was there disclosure?
  - Was disclosure required?



## **Statutory Ethics: Effect on Violative Contracts**

What happens when a contract violates statutory ethics provisions?

– Any Contract that is willfully entered into by or with a municipality in which there is a prohibited interest is null, void and unenforceable.

– N.Y.S. Gen. Mun. L §804



## Statutory Ethics: Penalties

- Any district officer or employee who “willfully and knowingly” violates the General Municipal Law ethics provisions is guilty of a misdemeanor, and is subject to disciplinary action.
  - N.Y.S. Gen. Mun. L §805
- Any officer or employee violating the statutory restrictions on receipt of gifts, disclosure of confidential information, or receipt of compensation for matters before the district, may be fired, suspended or removed from office, in addition to any other penalty provided by law.
  - N.Y.S. Gen. Mun. L §805-a(2)
- Failure to disclose an interest in any matter in violation of General Municipal Law will subject the individuals to the penalties provided by law, but will not necessarily invalidate an action if all procedural requirements have been satisfied.
  - No guaranteed invalidation of a contract if the only violation is a employee or officer’s failure to disclose.



## Common Law Ethics

### The Common Law Standard:

- Even if statutory ethics provisions are not violated, certain actions by municipal officers and employees have been nullified because they violated the "spirit and intent" of the statutory proscriptions against conflicts of interest, or "were inconsistent with public policy, or suggest self-interest, partiality or economic impropriety." Upon review, Courts will determine whether private actions or circumstances might "impair the judgment or discretion" of an officer or employee in performing public duties.



## Common Law Ethics: Avoiding a Conflict Finding

### Disclosure

- Aimed at closing any gaps or loopholes to ensure that disclosure is made in the spirit of the law.
- Ask the following questions:
  - Would disclosure promote transparency?
  - Is this something that, if undisclosed, could be interpreted by an ordinary person to point towards a “back-room” deal or corruption?
  - “Would I be upset if this wasn’t disclosed to me?”
- Look to promote openness, transparency and honesty.
  - But don’t disclose confidential information.
- **JUST BECAUSE SOMETHING IS NOT EXPRESSLY PROHIBITED IN THE LAW DOES NOT MEAN IT IS LEGAL!**



## Common Law Ethics: Avoiding a Conflict Finding

Notable Findings on Disclosure relating to School Board Members:

- A school board member who entered into a contract with the school district in his capacity as corporate vice-president prior to his election to the school board does not have a prohibited conflict of interest in that contract; however, written disclosures of that interest is required in the minutes of the board.
  - Opinion of the State Comptroller, 441 (1964)
- There is no prohibited interest where a school board member owns stock in the bank designated as depository of funds of the school district, but he must make a disclosure of interest.
  - Opinion of the State Comptroller, 387 (1964)
- A school board member would not have a prohibited conflict of interest under the General Municipal Law if he or she also served as a trustee on the board of trustees of a not-for-profit foundation that raises money and makes gifts to the school district but the school board member should not participate in school board discussions or decisions relating to gifts from or other matters involving the not-for profit foundation and should disclose his or her relationship with the not-for-profit entity.
  - Opinion of the State Comptroller, 2008-1 (2008)



## Common Law Ethics: Avoiding a Conflict Finding

### Recusal

- The best course of action for an officer or employee with a conflict of interest on a proposal would be to remove themselves from the decision making process.
  - “Where a village trustee has an actual or perceived conflict of interest in taking action . . . He should recuse himself from such matters.”
  - 1985 N.Y. Op. Atty. Gen. (Inf.) 111 (N.Y.A.G.), 1985
  - A member of a county board of supervisors should recuse himself from participating in any matters affecting the salary and terms and conditions of employment of his wife with the county.
  - 1987 N.Y. Op. Atty. Gen. (Inf.) 53 (N.Y.A.G.), 1987
- *But See* Opinion of the State Comptroller 2000-12
  - Stating that the General Municipal Law does not prohibit a town board member from voting on salaries for family members who are elected or appointed town officials, but a town board may require abstention in its own code of ethics. To avoid even the appearance of impropriety board members should recuse themselves from discussions and votes on matters related primarily to salaries of relatives.



## Hypo 1:

- Sally Schoolboard sits on the school board for Springfield School District. Sally lives in Springfield with her husband. Recently, her husband started landscaping service but is having trouble getting business. To help him out, Sally brings to Springfield's schoolboard a proposed bid to for her husband's company to take over the district's landscaping contract, but does not inform the members that it's her husband's company as she assumed they would know. The board votes and by unanimous decision with participation from all members the landscaping contract is awarded to Sally's Husband.
- At the same time the board approves a contract that officially hires Sally's daughter as the HR director for Springfield School District
- Which of these actions, if any, were wrongful? Why?
  - If there was wrongful action, what is the remedy?



## Hypo 2:

- Brett Boardman was recently elected to the local schoolboard. As part of the district’s local practice, all newly elected board members must attend a training seminar that is held out of state. Per school board policy, the board held a vote and decided to reimburse Brett for expenses incurred as a result of attending the training conference.
- Brett submitted the following expenses:
  - 2-way business class airfare;
  - the bill for a two-night stay in a suite at the Marriott;
  - A dinner receipt from Gordan Ramsey’s steakhouse totaling \$280;
  - A lunch receipt from Wendy’s totaling \$12;
  - A bar tab for two beers that were ordered at a happy hour hosted by the conference organizers totaling \$14;
  - A bill from a local nightclub for a private table and bottle service totaling \$2500
- Should any expenses be rejected? Why?



## Hypo 2 (Cont):

- While he was attending the conference, Brett was introduced to Bob, a construction magnet who specializes in designing and constructing school buildings. Brett and Bob had a friendly conversation about their shared love of whiskey. When Brett returned home, he found a \$200 bottle of whiskey with a note attached from Bob that read “Congratulations on your new position, it was a pleasure meeting you” with a business card attached. Brett was so excited he brought the bottle to his friend’s house that night where they drank the entire bottle.
  - What, if anything about Brett’s behavior was in violation of the law?



## Hypo 3:

- Emily Executive serves on her local schoolboard while also holding the position of Chief Information Officer (CIO) for a large technology corporation headquartered in the Town. The school board recently announced that they would be accepting bids for a company to be the exclusive computer provider of the District.
- Emily’s Company, looking for an avenue to boost their corporate image, submitted a low bid to the District. Emily had no idea that her company had submitted a bid until it came before the school board for approval.
- Once Emily was made aware of the conflict, she immediately provided written notice informing the other school board members of her conflict. Emily further stated that she would recuse herself from the vote on the proposal.
- The other board members were intrigued by the offer brought forth by Emily’s company, but thought that it might be “too good to be true” and asked Emily if she could provide assurances. Emily had a very busy week at work and didn’t have time to get general assurance documents together. Instead, Emily provided the board members with unreleased financial reports from the company.



## Hypo 3 (Cont):

- When it came time to vote on the company’s proposal, Emily stood by her word and abstained from the vote. However, the board ended up in a deadlock without Emily’s vote.
- Emily not wanting to miss out on a great opportunity for the school and her company quickly jumped in and voted in favor of the proposal allowing it to be approved by one vote.
- Was Emily’s participation in the vote wrong?
  - Would your answer change if the school board’s bylaws required an individual who recused themselves to participate in the event of a tie?
- If Emily’s participation in the vote was wrongful, what should happen to the contract?
  - Does your answer change if the contract is 25% below what any other company had offered?
- Any other issues you think are concerning in this fact pattern?



## Final Thoughts

- Be cognizant of potential conflicts of interest especially when it comes to contracting for services.
- Where a conflict of interest exists, consider appropriate actions to cure the conflict including disclosure and recusal.
- Develop a robust code of ethics that addresses member conduct and provides a suggested course of action during frequently faced ethical dilemmas.
- When in doubt, contact an individual trained in ethics compliance.
  - Your School Attorney or District HR representative.



**Questions?**



## Contact for More



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# Capital Projects – Piggybacking, Bidding and Handling Disputes

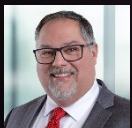
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## Purpose of Competitive Bidding in New York – General Municipal Law § 103

- Guard against favoritism, improvidence, fraud, and corruption, allowing interested vendors a fair and equal opportunity to compete.
- Foster honest competition to obtain the best goods and services at the lowest possible price.
- Ensure the prudent and economical use of public monies for the benefit of the taxpayers.
- Facilitate the acquisition of goods and services of maximum quality at the lowest possible cost.
- When done right, can realize greater monetary benefits and product satisfaction because of the time invested.





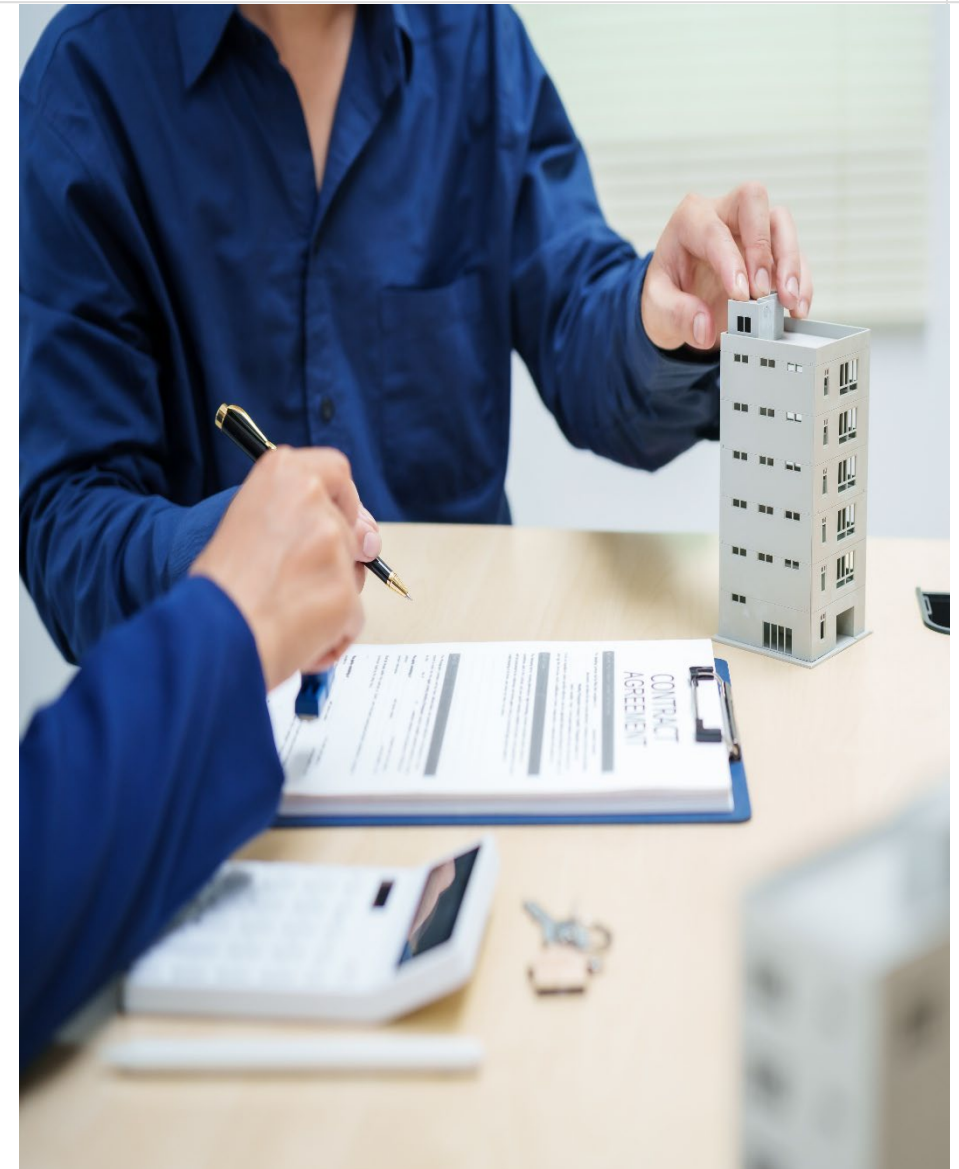
## “Best-Value” Procurement

- Amended Section 103 of the General Municipal Law to provide an alternative to the lowest responsible bidder requirement. See Ch. 608, Laws of 2011.
- A contract is awarded based on best-value when the responsive and responsible vendor’s contract optimizes *quality, cost, and efficiency*.
- Awarding contracts based on best-value must rely on objective and quantifiable analyses (i.e., cost-benefit analysis). See, State Finance Law § 163.
- Only applies to **purchase contracts**.
  - Excludes any purchase contract necessary for the completion of a public works contract pursuant to Article 8 of the Labor Law.



## Piggybacking Procurement

- In 2012, the state authorized qualifying municipalities to procure certain goods and services by **piggybacking** onto existing municipal contracts both within and outside New York State. See *Ch. 308, Laws of 2012*.
- **Section 103(16)** of the General Municipal Law authorizes piggybacking for “*purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies.*”





## Piggybacking Prerequisites

**Prerequisite 1:** The contract onto which the school district piggybacks must have been let by the United States or any agency thereof, any state or any other political subdivision or district therein.

- Political subdivisions include a county, city, town, village, school district, BOCES, or other district corporations.
- This definition of qualifying entities includes political subdivisions and districts both within as well as outside New York State.



## Piggybacking Prerequisites

**Prerequisite 2:** The contract must have been made available for use by other governmental entities.

- The underlying contract must include specific language that makes clear that the contract will be made available to other municipal entities, under the same terms and conditions as are included in the underlying contract.
- A contracting vendor cannot unilaterally offer to extend existing municipal contract terms to another municipal entity using piggybacking authority in the absence of explicit language in the underlying contract authorizing such an extension of contract terms.



## Piggybacking Prerequisites

**Prerequisite 3:** The contract must have been let to the lowest responsible bidder or on a basis of best value *in a manner consistent with* GML § 103.

- If the contract is a non-New York contract, the competitive bidding procedure of the contracting state or political subdivision must be consistent with the competitive bidding procedure of GML § 103:
  - Public solicitation of bids or rfp
  - Submission of sealed bids or offers, or similar procedures designed to protect the integrity and confidentiality of the process
  - Preparation of specifications
  - Award to the lowest bidder or on best-value



## Piggybacking and Capital Projects

– *Appeal of Crisorio*, Dec. No 18,405 (2024).

- The Commissioner held that a school district may use piggybacking if the underlying contract satisfies the requirements of § 103(16).
- The Commissioner stated that any reliance on the exclusion of purchase contracts from best-value bidding is misplaced because piggybacking is exempt from the typical competitive bidding requirements of § 103(1).



## Piggybacking and Capital Projects

– *Appeal of Crisorio*, Dec. No 18,405 (2024).

– The Commissioner focused on the expansive language of Section 103[16]:

Notwithstanding the provisions of subdivisions one, two and three of this section ... any officer, board or agency of a political subdivision or of any district therein authorized to make purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, may make such purchases, or may contract for such services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, as may be required by such political subdivision or district therein through the use of a contract let by the United States of America or any agency thereof, any state or any other political subdivision or district therein if such contract was let to the lowest responsible bidder or on the basis of best value in a manner consistent with this section and made available for use by other governmental entities.



## Piggybacking and Capital Projects

- *Lynch v. Maine-Endwell CSD* (Sup. Ct., Broome Cty. February 13, 2025):
  - The Court ruled that a piggybacking procurement arrangement under N.Y. General Municipal Law § 103[16] cannot be used to award contracts for school district capital project construction.
  - The Court focused on the language from Section 103[16] providing that piggybacking can be used to award a “contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies,” and found that, since this phrase does not specifically recognize the award of such a contract for “public work,” it is not available to be used to award construction contracts.



## Piggybacking and Capital Projects

- *Lynch v. Maine-Endwell CSD* (Sup. Ct., Broome Cty. February 13, 2025):
  - The Court seemed to suggest that Section 103[16] allows for piggybacking to buy “things,” without explaining how “installation” somehow constitutes a “thing” that is distinct from a contract for capital project construction.
  - Incidentally, the Court also held that, even in circumstances where piggybacking is available, the underlying contract must have been competitively bid, notwithstanding that Section 103[1] allows for both competitive bidding and “best value” procurement.



## Piggybacking and Capital Projects

- *Lynch v. Maine-Endwell CSD* (Sup. Ct., Broome Cty. February 13, 2025):
  - The Court’s decision applies only to the parties to that proceeding, and does not currently legally prohibit any other school district from continuing to utilize a piggybacking arrangement to procure capital project construction work. This is in contrast to the Commissioner’s decision in *Crisorio*, which serves as guidance to all public-school districts in New York State.
  - The use of piggybacking for capital work could ultimately be confirmed through the appellate court process, or by legislative fix.



## Piggybacking and Capital Projects – Practical Considerations

- Assess whether the benefits of piggybacking outweigh the potential risks.
- Be sure to explain the current state of the law, and the potential risks, of undertaking capital work using a piggybacking arrangement.
- In any event, school districts should check with SED regarding any state aid implications.





## Piggybacking and Capital Projects – Due Diligence

- Confirm the procurement procedure that was used to award the underlying contract.
- Confirm all the terms of the underlying contract.
- Confirm the actual parties to the underlying contract.
- Confirm that the proposed contract will be directly with the vendor/contractor holding the underlying contract.
- Confirm that the party to the underlying contract is a qualifying governmental entity.





## Common Construction Contract Disputes

- Contractor “Responsibility”
- Time of the Essence
- Substantial Completion Deadlines
- Notice Requirements
- Project Delays
- Force Majeure
- Change Orders and Construction Change Directives
- Contractor Claims for Additional Cost or Time
- Contractor Performance Issues and Remedies
- Termination for Cause
- Public Improvement Liens—Contractors and Subcontractors
- Insurance Requirements
- Surety Bonds

*\*\*\*The identification and discussion of specific provisions in this presentation is based on the standard A101-2017 Contract form and A201-2017 General Conditions form, without modifications.\*\*\**



## Lowest “Responsible” Bidder

- General Municipal Law § 103 requires public entities to award contracts to the “lowest **responsible** bidder.”
  - Difference between “lowest bidder” versus “lowest **responsible** bidder”
  - “I knew these guys were going to be a problem”—foresight is often 20/20
- “In determining the responsibility of a bidder, an administrative agency or municipality should consider the bidder's skill, judgment and integrity and where good reason exists, the low bid may be disapproved.” *Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136, 143 (2011).
- Disqualification of a bidder for non-responsibility is subject to review in court under CPLR Article 78. Bidder, however, bears burden to meet the high standard of proving that there was “no rational basis” for the determination.
- Proper vetting of contractors **at the bidding stage** is important, and may avoid costly and time-consuming disputes.
- The public entity should make a record of having conducted a responsibility assessment and determination



## Some Grounds for Non-Responsibility

- Failure to comply with bidding requirements
- Past work practices
- Inadequate performance of prior public works contracts
- Unprofessional conduct and behavior of personnel in performing prior contracts
- Quality of work on prior projects
- Failures to perform post-contract obligations, such as warranty work
- Dishonesty, criminal convictions, or unresolved investigations of potential criminal activities, associations, or corruption
- Debarments by State or federal agencies
- False responses, material omissions, or non-disclosures in submissions, applications or questionnaires
- Lack of candor in financial and ownership disclosures
- Failure to meet MWBE and SDVOB utilization requirements/submissions
- Non-compliance with prevailing wage requirements, unemployment insurance, labor laws, violations of environmental or safety and health laws, etc.



## Responsibility Questionnaire

- Does your contract process include an appropriate responsibility inquiry, with due process for the contractor?
- Is there enough time built into the bidding and awarding phase to evaluate the responsibility of the low bidder?
- Was a responsibility questionnaire, or list of topics to be considered as part of the responsibility analysis, included with the bid materials?
- Are you asking bidders the right types of questions?





## Responsibility Questionnaire

- Are the questions phrased in a direct, appropriate, and unambiguous manner? Or do they give the contractor enough wiggle room to avoid disclosing relevant information?
- Have you verified or vetted the information provided?
- Have you required disclosures about other public projects and the contractor's performance and timeliness?
- Have you made inquiry to references as well as other districts who have had prior experience with the contractor?





## Time of the Essence

### § 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

- School district capital projects are time sensitive, with the bulk of work most often being scheduled during summer breaks.
- Errors or looseness in defining Substantial Completion dates can lead to significant problems, delays, and impairment of practical remedies (i.e., stating a Substantial Completion date for the Project as opposed to a Substantial Completion date for this contract, or failure to set interim dates for milestones or phased work)
- *Care needs to be taken in defining time limits, work schedules, Saturday/holiday work, and expectations for individual contracts, particularly when the project involves different phases or components of Work, each with different anticipated Substantial Completion dates.*
- Contract definitions also important to understanding responsibilities
  - Substantial Completion Date(s) versus milestones
  - Construction Schedules versus contract requirements



## AIA Contractual Notice Requirements

### § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by **notice to the other party and to the Initial Decision Maker** with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

### § 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be **provided in writing to the designated representative** of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered **in person, by mail, by courier, or by electronic transmission** if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served **only if delivered to the designated representative** of the party to whom the notice is addressed by **certified or registered mail, or by courier providing proof of delivery**.

*\*\*\*Important to follow notice requirements exactly as applicable to the particular circumstance. Failure to do so could affect contractual rights, remedies, or ability to hold Contractor accountable.\*\*\**



## Project Delays

- Generally, delays in performance is the most common issue on school district projects
- Capital Projects often experience some form of delay that will need to be managed. In many situations, the impacts of delays can be mitigated and absorbed.
- Many reasons for delay:
  - Contractor’s own delays
  - Contractor or subcontractor impeded by other’s delay
  - Poor coordination of work and subcontractors
  - Owner/district-caused delays or changes in scope
  - Material unavailability
  - Equipment unavailability
  - Labor unavailability
  - Weather
  - Request for Information (“RFI”) process to clarify requirements
  - Change Orders
  - Unknown and unexpected field conditions
  - Defective work and correction time
- Important to monitor schedule carefully and initiate actions to protect the District sooner, rather than later, when a project is falling behind schedule.
- Recovery schedules and coordination



## Force Majeure — What Is It?

- A *force majeure* clause is one in which the Contractor is excused from performance by virtue of an unanticipated event (e.g., hurricane, flood, earthquake) that is beyond the Contractor’s control and which prevents the Contractor from performing or timely performing as otherwise required by the contract. Such clauses are narrowly construed. Example:

### § 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; **(3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control;** (4) by delay authorized by the Owner pending mediation and binding dispute resolution; **or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay,** then the Contract Time shall be extended for such reasonable time as the Architect may determine.

- “Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance will that party be excused.” *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902-03 (1987). The specific risk must either be identified or be found to fall with a catch-all provision such as “or other similar causes beyond the control of the parties.” *Id.* (citing 18 Williston, Contracts § 1968, at 209 [3d ed. 1978]).
- Big issue during COVID where clauses did not mention “pandemic” or “endemic.”



## Change Orders and Construction Change Directives

- In the course of any given project, there may be unanticipated field conditions, changes to the Work, or other factors that require Work to be performed that may not be outlined in the Contract Documents.
- Change Order process allows the parties to make agreements relating to changes in the Work and time of performance, including as may relate to delays.
- Where the parties can reach agreement on the scope of the work, time for performance, and pricing for the work, they can enter into an appropriate Change Order.
- Change Orders should be addressed and resolved promptly. ***When Change Orders are left to be resolved at the end of a project, they can become a source of dispute that delays project closeout, or become more costly to resolve.***



## Construction Change Directives

- A Construction Change Directive (“CCD”) is used to compel the Contractor to perform additional Work or modifications that may be disputed, with any changes to Contract Sum or Contract Time being reserved for later resolution either by agreement or through a formal Claim submission process.
- Sometimes CCDs are used to compel a contractor to perform in the wake of a significant dispute over alleged defective construction work and liability for the costs of correction.
- Article 7 of the A201 outlines the procedure for CCDs, including a process for an interim determination to be made by the Architect pending final resolution, as well as a mechanism for valuing compensation for the work.
- CCDs serve an important function to keep a project moving.
- But ***CCDs that are not timely resolved often become loose ends at the conclusion of a project and a source of significant dispute. Unresolved CCDs can result in the initiation of formal claims that can potentially delay closeout and final cost reporting to SED.***



## Claims for Additional Cost or Time

A “**Claim**” in AIA parlance refers to a formal claim initiated by either party under Article 15 of the General Conditions to seek relief or resolve a dispute. Can arise when proposed change orders for additional time, compensation, or cost relief are denied.

- ***Districts must also be mindful that the Claim procedure applies to them as well. Notice and timing requirements must be followed when the District has a Claim against a Contractor.***

### § 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, ***notice as provided in Section 15.1.3 shall be given*** before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

### § 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, ***notice as provided in Section 15.1.3 shall be given***. The Contractor’s Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

***\*\*\*Notice is important both as a procedural defense and to ensure that timely investigation is conducted on the Claim, when information is fresh.\*\*\****



## Claims for Additional Cost or Time

### § 15.2 Initial Decision

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, **shall be referred to the Initial Decision Maker for initial decision**. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. **If an initial decision has not been rendered within 30 days** after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The **Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions**: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

*\*\*\*The role of Initial Decision Maker is an important one in collecting information, identifying potential defenses, resolving disputes, and staging the Claim for future dispute resolution proceedings (i.e., mediation, arbitration, litigation).\*\*\**



## Contractor Performance Issues & Remedies

Contractor Performance issues come in many forms. [Common examples include the following:](#)

- Failure to adhere to construction schedule or deadlines
- Failure to provide supervision and direction of the Work
- Failure to coordinate progress of work or subcontractor work
- Failure to timely submit pay applications or pay subcontractors
- Failure to perform work in accordance with contractual requirements or specifications
- Failure to maintain safe work or follow safety requirements
- Failure to obtain permits or required approvals
- Failure to make submittals
- Defective work
- Failure to correct defective work
- Failure to execute change orders, certificates, or other documents
- Failure or delays in completing punchlist or closeout obligations
- Failures to perform warranty work
- Failure to maintain insurances during or after project completion



## Responding to Contractor Performance Issues

- Obtain appropriate legal advice sooner rather than later
- AIA Contracts use loose wording when setting standards. This is designed to provide flexibility and facilitate cooperation, but often requires tighter policing with problem contractors
- Your Construction Manager is the District's voice as its agent/representative in administering the construction process. A Construction Manager is not the District's lawyer.
- Your Architect/Engineer is usually the AIA "Initial Decision Maker," not the District's lawyer
- Monitoring and managing contractual rights from the legal perspective and issuing appropriate legal notices and demand letters are often important to compliance, enforcement, or laying groundwork for Claims or the exercise of termination rights
- Some AIA contract rights that are designed to protect the District must be exercised by or in conjunction with the Construction Manager and/or Architect



## Stop Work Orders

### § 2.4 Owner's Right to Stop the Work

***If the Contractor fails to correct Work*** that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 ***or repeatedly fails to carry out Work*** in accordance with the Contract Documents, the ***Owner may issue a written order to the Contractor to stop the Work***, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

-Construction Manager and Architect are usually involved in this process.





## Owner's Right to Carry Out the Work

### § 2.5 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and ***fails within a ten-day period after receipt of notice from the Owner*** to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect. Such action by the Owner and amounts charged to the Contractor are both ***subject to prior approval of the Architect*** and the Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure....

- Functional process is to give notice and demand cure before District can take action. District can't act immediately, or independently, given this notice process.
- District's right is based on Contractor default or neglect, so important to understand the details and circumstances, and consult with counsel before exercising this provision.



## Withholding Certifications for Payments

### § 9.5 Decisions to Withhold Certification

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, ***to the extent reasonably necessary to protect the Owner***, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1.... The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent ***as may be necessary in the Architect's opinion to protect the Owner from loss*** for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

1. defective Work not remedied;
2. third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;
3. failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
4. reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
5. damage to the Owner or a Separate Contractor;
6. reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
7. repeated failure to carry out the Work in accordance with the Contract Documents.



## Terminations for Cause

### § 14.2 Termination by the Owner for Cause

#### § 14.2.1 The Owner may terminate the Contract if the Contractor

1. repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
2. fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or suppliers;
3. repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
4. otherwise is guilty of substantial breach of a provision of the Contract Documents.

#### A few important takeaways:

- No instantaneous right to terminate—certain notices must be followed
- Grounds are typically not satisfied with a single instance of failure; standard contract uses the term “repeatedly”
- Termination standard is somewhat subjective—“fails to supply enough”; “repeatedly disregards”; guilty of a “substantial breach” of the contract
- Surety (i.e., bonding company) needs to be given notice, as it may have rights
- While the District has the right to terminate a construction contract for cause, that right must be carefully evaluated and exercised with input from counsel, the Construction Manager, and the Architect



## Termination for Cause

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, **and upon certification by the Architect that sufficient cause exists** to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, **seven days' notice**, terminate employment of the Contractor and may, subject to any prior rights of the surety:

1. Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
2. Accept assignment of subcontracts pursuant to Section 5.4; and
3. Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.





## Insurance Requirements

- Contractors are typically required by Article 11 of the A201 to carry many forms of required insurances when performing capital projects.
- Contractors usually required to carry and name upstream parties (including District) as additional insureds on:
  - Commercial General Liability Insurance
  - Commercial Automobile Liability Insurance
  - Workers' Compensation and Employers Liability (AI coverage not appropriate)
  - Excess or Umbrella Insurance
- Specialized coverages sometimes required:
  - Products and Completed Operations insurance – common District requirement for contractors to carry for 1-2 years after project completion to cover liabilities arising post-project from completed work
  - Contractors Pollution Liability Insurance – for contractors performing work with potential environmental risks
  - Professional Errors & Omissions Liability Insurance – for contractors providing professional services like design, surveying, engineering, testing
  - Builder's Risk – to protect against loss of the construction work in progress
  - Inland Marine – covers property in transit or storage that District may directly purchase for project
  - Wrap Insurance – broad GL coverage for entire project and all contractors and entities involved
- Types and nature of insurances and appropriate limits to be required should be vetted with an appropriate insurance professional in light of the nature and scope of the project



## Public Improvement Liens and the Lien Book

- A payment dispute between the District and the Contractor or between a Contractor and a Subcontractor may result in the filing of a Public Improvement Lien
- Notify counsel immediately to determine rights and generate notice letters to Contractor and surety
- A Public Improvement Lien places a lien against the monies the District appropriated for the project to the extent due to the Contractor; it is not a lien on the District's real estate or improvements
- District or other public entity must record the lienor's lien notice in its "lien book" as required by the NY Lien Law § 12
- District must withhold monies due the Contractor to satisfy the lien in the event of foreclosure, or Contractor's surety may "bond off" the lien
- AIA 201 General Conditions may permit District to withhold up to 2X value as protection
- Satisfaction or discharge of liens must also be recorded in the "lien book", though Public Improvement Liens expire in one year unless renewed





## Common Insurance Considerations

- Additional insured status
  - District typically should be named as an “additional insured” on certain lines of coverage and required to be given notice of insurance that is cancelled
  - Important to ensure District has actually been named as an additional insured
  - Additional insured by express endorsement versus additional insured “as required by contract”
  - If full policies not available for District review, obtain copies of applicable endorsements
  - Verification of additional insured status requires review of construction contract and insurance policy provisions in tandem
  - Insured v. Insured Exclusion - avoid having District named as additional insured under policies that may provide you with recovery (like Professional E&O) or it can negate the benefit of the coverage





## Common Insurance Considerations

- Certificates of Insurance and proof of coverage
  - Contracts should require District be provided with proof of required insurance
  - Common contractual requirement is for Certificates of Insurance (COI)
  - COI should be reviewed for compliance with contractual insurance requirements and additional insured designations, not just filed away
  - Be wary – COI is not “proof” of coverage – best evidence that the required coverage has been procured are copies of the policies themselves
  - Helpful to build into contract specifications a right to copies of policies
  - Some Contractors may try to cancel or allow coverages to lapse if not monitored, especially any required post-closeout coverages.
  - Good practice to confirm that the District will be given notice of any cancellations and require the COI to so indicate
- Breach of Insurance Procurement Obligation
  - Limited to out-of-pocket damages (typically replacement policy cost, deductibles, co-payments, and increased future premiums where damaged party was independently insured for applicable claim)
  - In rarer case where obligee goes without insurance due to breach, all resulting damages, including liability to plaintiff, will be available



## Common Insurance Considerations cont'd

- Notice of claim
  - Insurance policies require notice of claim or loss to carrier “as soon as practicable” – in certain cases late notice may compromise coverage
  - Important to ensure all applicable carriers have actually been put on notice following accident or claim against District – do not rely on contractors to do this for you
- Waiver of Subrogation
  - Liability insurance typically allows an insurer to pursue responsible parties following indemnification via subrogation to insured’s rights
  - Problematic in construction project context -- where intent is to transfer risk to insurers, not desirable for a carrier to pursue downstream contractors following payment of loss on behalf of owner or contractor
  - Subrogation waived in construction contract, and via endorsement to insurance policy



## Surety Bonds

- Contractors are typically required to provide Performance Bonds and Payment Bonds on School District projects
- Performance bonds are not always a fast or effective remedy for addressing Contractor performance issues:
  - Procedural requirements and notice to surety of declaration of material default
  - May need to give notice of intent to declare a default before declaring a default, and participate in a conference with the surety
  - Time required for bonding company to evaluate
  - Surety must act with reasonable promptness
  - Surety steps into shoes of contractor and can assert the substantive and procedural defenses of the contractor
  - Surety may not act if there is an Owner default or dispute over one
  - Surety can select “replacement” contractor
  - Turnover of remaining project funds to surety is typically required
- Payment bond protects against non-payment claims and liens asserted by subcontractors



**Questions?**



## Contact for More



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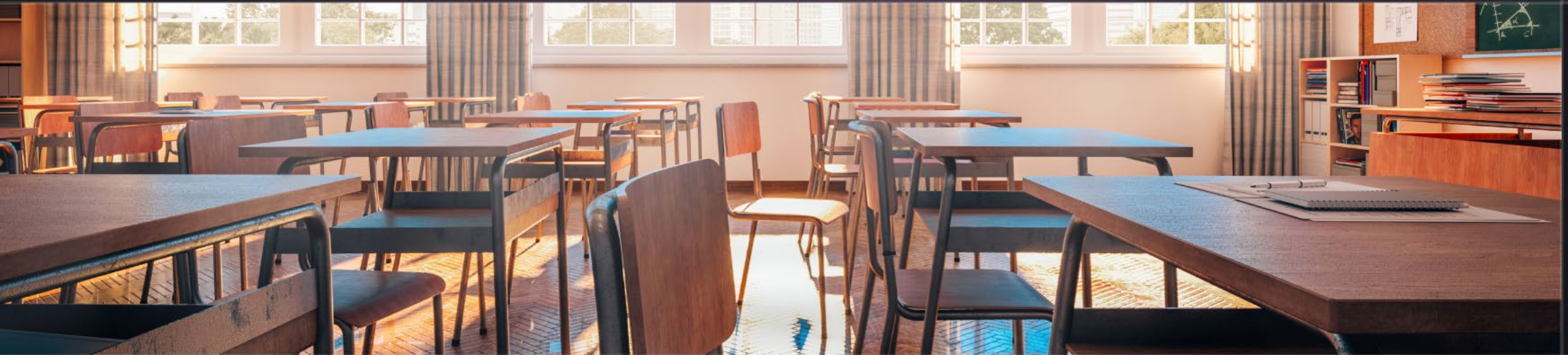
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# Hodgson Russ



## School Client Conference

JANUARY 16, 2026



[HODGSONRUSS.COM](http://HODGSONRUSS.COM)