



# School District Practice Group Information Memo

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## Bond, Schoeneck & King, PLLC

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## BOARD OF REGENTS ADOPTS NEW RULES REGARDING INSTRUCTIONAL SUPPORT SERVICES POSITIONS

On April 21, 2009, the Board of Regents adopted new rules to address tenure and seniority rights for teachers employed in instructional support services positions in public school districts and boards of cooperative educational services (“BOCES”). The new rules became effective on May 1, 2009. Prior to the adoption of these new rules, teachers employed in instructional support services positions who did not spend at least 40 percent of their time in classroom instruction in a recognized tenure area were not entitled to accrue seniority in any tenure area. This gap in the tenure rules became apparent when the Commissioner of Education issued his decision in Appeal of deVente & Jesenof (Decision No. 15,822) on August 14, 2008.

In the Appeal of deVente case, the Commissioner of Education considered the appeal of one BOCES employee who had her position as a Professional Development Specialist reduced and another BOCES employee who had her position as a Professional Development Specialist abolished. Both employees had been granted tenure in the elementary education tenure area, and argued that they had more seniority in that tenure area than two other employees who were retained in full-time positions.

The Commissioner of Education denied their appeal on the ground that the two employees did not accrue any seniority in the elementary education tenure area because they did not spend at least 40% of their time in classroom instruction. The Commissioner of Education also held that the BOCES did not have the authority to appoint these two employees to tenured positions as Professional Development Specialists because such positions did not fall within a recognized tenure area under Part 30 of the Board of Regents rules.

The new rules adopted by the Board of Regents do not establish a new tenure area for instructional support services positions. Instead, the new rules provide that employees who are appointed to instructional support services positions may accrue seniority in any tenure area in which they are certified, regardless of whether they spend at least 40 percent of their time in classroom instruction. The rules define “instructional support services” to include a wide variety of responsibilities, including professional development, pedagogical support, technical assistance, program coordination, training, coaching, and mentoring provided by teachers to other school personnel.

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In order for an individual to be appointed to an instructional support services position, the individual must hold a valid teaching certificate and must meet the minimum education and experience qualifications set by the employing school district or BOCES for such positions. In addition, the individual must either have at least three years of satisfactory experience as a teacher, or must hold an advanced degree beyond a bachelors degree that the superintendent of schools or district superintendent finds sufficient to qualify the individual to provide instructional support services.

The rules also set forth the following circumstances under which employees in instructional support services positions as of May 1, 2009 either will or will not receive tenure and seniority credit for past service:

- If a teacher was appointed to tenure or a probationary period in a tenure area, but was then re-assigned prior to May 1, 2009 to an instructional support services position without providing knowing consent to an assignment outside his or her tenure area, the teacher will receive tenure and seniority credit for both past and future service in the tenure area in which he or she served immediately prior to the re-assignment.
- If a teacher was assigned prior to May 1, 2009 to an instructional support services position, and was appointed to an improper or non-existent tenure area with the teacher's consent, the teacher will receive tenure and seniority credit in a proper tenure area in which he or she is certified.
- If a teacher was employed prior to May 1, 2009 in an instructional support services position, and was not appointed to tenure or a probationary period in a tenure area, the teacher is not entitled to retroactive tenure or seniority credit in any tenure area. If the employing school district or BOCES intends to continue to employ the teacher in the instructional support services position, the school district or BOCES must appoint the teacher to a probationary appointment **prior to July 1, 2009** in any tenure area in which he or she is certified.

Employees who are appointed to instructional support services positions after May 1, 2009 are entitled to receive tenure and seniority credit as follows:

- If a teacher was appointed to tenure or a probationary period in a tenure area prior to May 1, 2009, and is appointed to an instructional support services position after May 1, 2009, the teacher will continue to accrue tenure and seniority credit in the same tenure area in which he or she was initially appointed.
- If a teacher is newly hired by a school district or BOCES into an instructional support services position after May 1, 2009, the teacher must be appointed to a probationary period in a tenure area in which he or she is certified.

If you have any questions regarding the new rules or need assistance complying with the new rules, please contact:

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