



# House of Delegates Materials

 January 19, 2024



**GENERAL ASSEMBLY  
FRIDAY, JANUARY 19, 2024 – 8:30 A.M.  
TRIANON BALLROOM, THIRD FLOOR  
NEW YORK HILTON MIDTOWN**

**AGENDA**

**ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION**

**8:30 a.m.**

**Richard C. Lewis, Esq.  
President, presiding.**

1. Call to order and Pledge of Allegiance – Richard C. Lewis, Esq.
2. Approval of the minutes of the January 20, 2023, Annual Meeting
3. Report of Nominating Committee and election of elected delegates to the House of Delegates – Scott Karson, Esq.
4. Report of Treasurer – Susan Harper, Esq.
5. Report and recommendations of Committee on Bylaws – Robert Schofield, Esq.
6. Adjournment

**THE NEW YORK BAR FOUNDATION ANNUAL MEETING**

**9:00 a.m.**

(The members of the House of Delegates also serve as members of The New York Bar Foundation)

**Carla M. Palumbo, Esq.  
President, presiding**

1. Approval of the minutes of the January 20, 2023, Annual Meeting
2. Report of the officers, and ratification and confirmation of the actions of the Board of Directors since the 2023 Annual Meeting – Carla M. Palumbo, Esq.
3. Report of the Nominating Committee – Hon. Cheryl E. Chambers
4. CCS Foundation Report – Thomas Kissane, Vice Chair CCS Fundraising
5. Adjournment

**HOUSE OF DELEGATES MEETING****9:15 a.m.****Domenick Napoletano, Esq.****Chair, presiding**

1. Approval of minutes of November 4, 2023, meeting 9:20 a.m.
2. Report and recommendations of Nominating Committee and election of officers and members-at-large of the Executive Committee – Scott Karson, Esq. 9:25 a.m.
3. Informational Report of New York State Bar Association Civics Convocation Task Force – Gail Ehrlich, Esq., Christopher Riano, Esq., and Jay Worona, Esq. 9:35 a.m.
4. Report and recommendations of the Task Force on Combating Antisemitism and Anti-Asian Hate – Vincent Chang, Esq. and Brian S. Cohen, Esq. 9:45 a.m.
5. Presentation of Ruth G. Schapiro Award to Judge Edwina G. Richardson – Richard C. Lewis, Esq. 10:05 a.m.
6. Report and recommendations of Committee on Diversity, Equity, and Inclusion - Ninth Edition of the NYSBA Diversity Report Card – Jocelyn E. Lupetin, Esq. and Lillian Moy, Esq. 10:20 a.m.
7. Report of the Committee on Membership – Clotelle L. Drakeford, Esq. and Michelle H. Wildgrube, Esq. 10:35 a.m.
8. Report of President – Richard C. Lewis, Esq. 10:50 a.m.
9. Address by Hon. Rowan D. Wilson - Chief Judge of the State of New York 11:10 a.m.
10. Report of the Strategic Planning Committee – Taa R. Grays, Esq., Christopher R. Riano, Esq., and Dr. Ramona Hill. 11:30 a.m.
11. Report and recommendations of the Task Force on Medical Aid and Dying – Mary Beth Morrisey, Esq. 11:45 a.m.
12. Report and recommendations of Trusts and Estates Section – Proposed Legislation – Equity for Surviving Spouses Act (ESSA) - Albert Feuer, Esq., Anna Masilela, Esq. and Cheryl Lynn Katz, Esq. 12:05 p.m.
13. Report and recommendations of Committee on the New York State Constitution – Christopher Bopst, Esq. and Justin Teff, Esq. 12:20 p.m.
14. Administrative items – Domenick Napoletano, Esq.  
New business 12:30 p.m.
15. Date and place of next meeting:  
Saturday, April 6, 2024  
Bar Center, Albany, and Remote Meeting



# Staff Memorandum

**ANNUAL MEETING  
Agenda Item #1**

REQUESTED ACTION: Not applicable.

President Richard C. Lewis will call the meeting to order and lead the attendees in the Pledge of Allegiance.



# Staff Memorandum

## **ANNUAL MEETING Agenda Item #2**

REQUESTED ACTION: Request for corrections, amendments, or objections.

President Richard C. Lewis will present the January 20, 2023, meeting minutes and ask if attendees have any corrections or amendments. If there are no corrections, amendments, or objections, the meeting minutes will be accepted as distributed.

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF ANNUAL MEETING  
NEW YORK HILTON MIDTOWN, NEW YORK  
JANUARY 20, 2023**

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**PRESENT:** Ahn; Aidala; Alcott; Alomar; Arenson; Baum; Beecher; Beltran; Berman; Block; Braverman; Brown; Bucki; Buholtz; Campbell; Chandrasekhar; Chang; Christian; B. Cohen; D. Cohen; O. Cohen; Cohn; Davidoff; Degnan; Doyle; Dubowski; Effman; Feal; Fernandez; Fogel; French; Gerstman; Gilmartin; Gold, Grays; Gross; Haig; Harper; Heath; Jackson; Jacobson; Jaglom; James; Jamieson; Jones; Kamins; Karson; Kenney; Kiernan; Klass; Kobak; Koch; Kohlmann; LaMancuso; Lara-Garduno; LaRose; Lathrop; Lau-Kee; Leber; Lenci; Lessard; Levin Wallach; Lewis; Lisi; Loyola; Lustbader; Lynn; Madigan; Marinaccio; Markowitz; Maroney; Martin; Matthews; May; McCann; McGinn; McKeegan; McNamara; C. Miller; M. Miller; Minkoff; Moretti; Morrissey; Muller; Mulry; Napoletano; Nowotarski; Petterchak; Quay; Riano; J. Richardson; Richter; Riedel; Rothberg; Russell; Santiago; Sargente; Seiden; Sen; Sharkey; Silkenat; Simon; Skidelsky; Sonberg; Stephenson; Sunshine; Swanson; Sweet; Tambasco; Vaughn; Wesson; Westlake; Wolff; Woodley; Yeung-Ha; Younger

Ms. Levin Wallach presided over the meeting as President of the Association.

1. The meeting was called to order and the Pledge of Allegiance recited.
2. Approval of minutes of the January 22, 2022, meeting. The minutes, as previously distributed, were accepted.
3. Report of the Nominating Committee and election of elected delegates to the House of Delegates. Sharon Stern Gerstman, in her capacity as alternate member-at-large of the Nominating Committee, reported that the Committee had nominated the following individuals for election as elected delegates to the House of Delegates for the 2023-2024 Association year:

First District: James B. Kobak, Stephen Charles Lessard, and Diana S. Sen, all of New York City;

Second District: Hon. Barry Kamins, Aimee L. Richter, and Anthony Vaughn, all of Brooklyn;

Third District: Mara Afzali, Hermes Fernandez, and Colleen R. Pierson, all of Albany;

Fourth District: M. Elizabeth Coreno, Margaret E. Gilmartin, and Connor Reale, all of Saratoga Springs;

Fifth District: Stuart LaRose and John T. McCann of Syracuse, and Jean Marie Westlake of East Syracuse;

Sixth District: Alyssa M. Barreiro and Rachel Ellen Miller of Binghamton, and Jeri Ann Duvall of Cortland;

Seventh District: Duwaine T. Bascoe of Penfield, Stephen M. Kelley of Geneseo, and Amy E. Schwartz-Wallace of Rochester;

Eighth District: Sophie I. Feal of Buffalo, and Norman P. Effman and Leah Nowotarski of Warsaw;

Ninth District: Claire J. Degnan, Hon. Linda S. Jamieson, and John A. Pappalardo, all of White Plains;

Tenth District: Harvey B. Besunder of Islandia, Justin M. Block of Central Islip, and Peter H. Levy of Jericho;

Eleventh District: Kristen J. Dubowski and Arthur N. Terranova of Queens, and Hon. Karina E. Alomar of Kew Gardens;

Twelfth District: Samuel Braverman, Renee Corley Hill, and Steven E. Millon, all of the Bronx;

Thirteenth District: Allyn J. Crawford, Hon. Edwina Frances Martin, and Sheila T. McGinn, all of Staten Island.

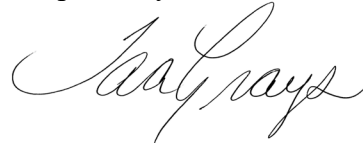
There being no further nominations, a motion was made and carried for the Secretary to cast a single ballot for the elected delegates to the House of Delegates.

4. Report of President. Ms. Levin Wallach highlighted the items contained in her written report, a copy of which is appended to these minutes.
5. Report of Treasurer. Domenick Napoletano, Treasurer, reported on the 2022 operating budget, noting that through December 31, 2022, the Association's total revenue was \$18.6 million, a decrease of approximately \$293,000 from the previous year, and total expenses were \$18.3 million, an increase of approximately \$3.8 million over 2021, for a surplus of \$262,619, a decrease of approximately \$4.1 million compared to 2021. The report was received with thanks.
6. Memorial for John J. Yanas, Sr. Past President Justin L. Vigdor offered a memorial for Mr. Yanas, Association President from 1989 to 1990, who passed away on January 8, 2023. A moment of silence was observed in memory of Mr. Yanas and his contributions to the Association and the profession.
7. Report and recommendations of Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, presented the Committee's proposed amendments to the Bylaws. First, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section

1(F)(1). Second, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6. Third, to correct an internal citation error at Article IV, Section 7. After discussion, a motion was adopted to approve the Bylaws amendments.

8. Adjournment. There being no further business, the Annual Meeting of the Association was adjourned.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Taa R. Grays".

Taa R. Grays  
Secretary





# Staff Memorandum

## **ANNUAL MEETING Agenda Item #3**

REQUESTED ACTION: A) Closure of nominations and B) that a single, unanimous ballot be cast by the Secretary for the election of the elected delegate nominees to the House of Delegates.

Article XI of the Bylaws requires that the elected delegates to the House of Delegates shall be elected at the Annual Meeting. (The number of such delegates is fixed at three from each judicial district by Article V, Section 3 of the Bylaws. Terms of office begin on June 1, 2024).

The list of candidates for the office of elected delegate from each of the thirteen judicial districts is attached.

Nominating Committee chair, Scott Karson will present the report.

**ANNUAL MEETING**  
**Agenda Item #3**

**Election of 2024-2025**  
**Elected Delegates to the House of Delegates**

1 <sup>st</sup> District	Stephen Charles Lessard, New York City Susan B. Lindenauer, New York City Diana S. Sen, New York City
2 <sup>nd</sup> District	Hon. Barry Kamins, Brooklyn Aimee L. Richter, Brooklyn Hon. Joanne D. Quiñones, Brooklyn
3 <sup>rd</sup> District	Mara Afzali, Albany Hermes Fernandez, Albany Colleen R. Pierson, Albany
4 <sup>th</sup> District	Mary Elizabeth Coreno, Saratoga Springs Margaret E. Gilmartin, Saratoga Springs Connor Reale, Saratoga Springs
5 <sup>th</sup> District	Karl E. Manne, Herkimer John T. McCann, Syracuse Jean Marie Westlake, East Syracuse
6 <sup>th</sup> District	Alyssa M. Barreiro, Binghamton Jeri Ann Duvall, Cortland Rachel Ellen Miller, Binghamton
7 <sup>th</sup> District	Eileen Buholtz, Rochester Kimberly Fox Duguay, Lyons Langston D. McFadden, Rochester
8 <sup>th</sup> District	Sophie I. Feal, Buffalo Giovanna (Joanne) Macri, Buffalo Karen L. Nicolson, Buffalo
9 <sup>th</sup> District	Clare J. Degnan, White Plains Hon. Linda S. Jamieson, White Plains John A. Pappalardo, White Plains

10 <sup>th</sup> District	Harvey B. Besunder, Islandia Justin M. Block, Central Islip Peter H. Levy, Jericho
11 <sup>th</sup> District	Kristen J. Dubowski, Queens Zenith T. Taylor, Jamaica Arthur N. Terranova, Queens
12 <sup>th</sup> District	Samuel Braverman, Bronx Renee Corley Hill, Bronx Susan McElwreath, Bronx
13 <sup>th</sup> District	Hon. Edwina Frances Martin, Staten Island Sheila T. McGinn, Staten Island Karen B. Soren, Staten Island



# Staff Memorandum

**ANNUAL MEETING  
Agenda Item #4**

REQUESTED ACTION: None, as the report is informational.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, and Capital Items Approved and Purchased for the period ending December 31, 2023.

The report will be presented by NYSBA Treasurer, Susan L. Harper, Esq.

**New York State Bar Association  
2023 Operating Budget  
For the period ending September 30, 2023**

**REVENUE**

	<b>2023 BUDGET</b>	<b>UNAUDITED 2023 September YTD</b>	<b>% RECEIVED</b>	<b>2022 BUDGET</b>	<b>UNAUDITED 2022 September YTD</b>	<b>% RECEIVED</b>
<b>Membership dues</b>	9,000,000	8,634,954	96%	9,372,690	8,957,575	96%
<b>SECTIONS:</b>						
Section Dues	1,181,350	1,067,650	90%	1,219,400	1,104,973	91%
Section Programs	2,587,528	1,676,361	65%	2,841,555	960,475	34%
<b>Investment Income</b>	494,215	395,520	80%	486,225	312,083	64%
<b>Advertising</b>	319,500	146,635	46%	218,000	196,809	90%
<b>Continuing legal education program income</b>	2,390,000	2,011,175	84%	2,950,000	1,574,330	53%
<b>USI Affinity</b>	2,000,000	1,500,000	75%	1,912,000	1,500,000	78%
<b>Annual Meeting</b>	895,000	865,857	97%	400,000	444,011	111%
<b>House of Delegates &amp; Committee</b>	36,700	56,127	153%	47,500	44,519	94%
<b>Royalties</b>	308,000	277,427	90%	213,500	252,363	118%
<b>Reference Books, Formbooks Products</b>	1,309,350	217,716	17%	1,247,000	704,301	56%
<b>TOTAL REVENUE</b>	<b>20,521,643</b>	<b>16,849,421</b>	<b>82%</b>	<b>20,907,870</b>	<b>16,051,439</b>	<b>77%</b>

**EXPENSE**

	<b>2023 BUDGET</b>	<b>UNAUDITED 2023 September YTD</b>	<b>% EXPENDED</b>	<b>2022 BUDGET</b>	<b>UNAUDITED 2022 September YTD</b>	<b>% EXPENDED</b>
<b>Salaries and Fringe</b>	8,759,290	6,399,908	73%	8,588,946	6,265,873	73%
<b>BAR CENTER:</b>						
Building Services	325,500	341,933	105%	342,000	259,208	76%
Insurance	206,000	169,923	82%	190,000	161,772	85%
Taxes	93,750	66,887	71%	167,250	133,204	80%
Plant and Equipment	791,000	586,317	74%	862,000	635,238	74%
Administration	546,900	493,943	90%	610,750	633,458	104%
<b>Sections</b>	3,739,828	2,679,021	72%	4,039,155	1,722,882	43%
<b>PUBLICATIONS:</b>						
Reference Materials	131,500	62,954	48%	121,500	75,180	62%
Journal	250,300	209,408	84%	265,000	194,235	73%
Law Digest	52,350	39,332	75%	47,000	39,199	83%
State Bar News	122,300	107,093	88%	100,300	99,044	99%
<b>MEETINGS:</b>						
Annual meeting expense	383,100	540,562	141%	360,100	37,535	10%
House of delegates	442,625	388,823	88%	505,750	438,386	87%
Executive committee	44,550	38,546	87%	55,800	61,649	110%
<b>COMMITTEES AND DEPARTMENTS:</b>						
CLE	372,150	262,470	71%	370,700	112,614	30%
Information Technology	1,741,700	1,670,574	96%	1,564,850	1,489,600	95%
Marketing Department	483,000	201,423	42%	424,500	241,819	57%
Membership Department	606,000	283,987	47%	481,250	256,695	53%
Media Department	285,750	179,023	63%	290,000	200,848	69%
All Other Committees and Departments	1,094,970	700,197	64%	1,399,575	693,058	50%
<b>TOTAL EXPENSE</b>	<b>20,472,563</b>	<b>15,422,325</b>	<b>75%</b>	<b>20,786,426</b>	<b>13,751,496</b>	<b>66%</b>
<b>BUDGETED SURPLUS</b>	<b>49,080</b>	<b>1,427,096</b>		<b>121,444</b>	<b>2,299,943</b>	

*New York State Bar Association  
Statement of Financial Position  
For the period ending September 30, 2023*

<u>ASSETS</u>	UNAUDITED <u>September YTD 20</u>	UNAUDITED <u>September YTD 2022</u>	UNAUDITED <u>December YTD 2022</u>
<u>Current Assets:</u>			
General Cash and Cash Equivalents	16,051,553	15,958,639	20,224,069
Accounts Receivable	19,397	-2,016	81,146
Prepaid Expenses	1,244,467	984,856	1,754,912
Royalties and Admin Fees Receivable	500,000	500,000	768,684
Total Current Assets	<u>17,815,417</u>	<u>17,441,479</u>	<u>22,828,810</u>
<u>Board Designated Accounts:</u>			
Cromwell - Cash and Investments at Market Value	2,865,852	2,635,060	2,778,996
	<u>2,865,852</u>	<u>2,635,060</u>	<u>2,778,996</u>
Replacement Reserve - Equipment	1,118,133	1,118,021	1,118,049
Replacement Reserve - Repairs	794,768	794,689	794,709
Replacement Reserve - Furniture	220,061	220,039	220,044
	<u>2,132,962</u>	<u>2,132,749</u>	<u>2,132,802</u>
Long Term Reserve - Cash and Investments at Market Value	30,504,226	27,204,934	28,907,317
Long Term Reserve - Accrued Interest Receivable	0	0	163,465
	<u>30,504,226</u>	<u>27,204,934</u>	<u>29,070,782</u>
Sections Reserve - Cash and Investments at Market Value	3,909,120	3,806,899	3,846,571
Section - Cash	64,990	342,566	203,122
	<u>3,974,110</u>	<u>4,149,465</u>	<u>4,049,692</u>
<u>Fixed Assets:</u>			
Building - 1 Elk	3,566,750	3,850,000	3,566,750
Land	283,250	0	283,250
Furniture and Fixtures	1,483,275	1,473,566	1,480,650
Building Improvements	1,003,540	0	898,571
Leasehold Improvements	0	871,624	-1
Equipment	3,173,311	3,220,527	3,006,400
	<u>9,510,126</u>	<u>9,415,717</u>	<u>9,235,620</u>
Less: Accumulated Depreciation	4,431,549	3,939,368	3,976,267
	<u>5,078,577</u>	<u>5,476,349</u>	<u>5,259,354</u>
Operating Lease Right-of-Use Asset	47,368	0	129,472
Finance Lease Right-of-Use Asset	7,698	0	21,208
	<u>55,066</u>	<u>0</u>	<u>150,680</u>
Total Assets	<u><u>62,426,210</u></u>	<u><u>59,040,035</u></u>	<u><u>66,271,115</u></u>
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable and Other Accrued Expenses	690,596	905,028	771,399
Post Retirement Health Insurance Liability	18,241	0	18,241
Deferred Dues	2,530	0	6,167,778
Deferred Grant Revenue	16,998	18,103	17,150
Other Deferred Revenue	448,733	390,330	1,077,024
Payable to TNYBF - Building	3,428,025	3,639,456	3,597,110
Payable to TNYBF	300	0	12,250
Operating Lease Obligation	47,368	0	101,506
Finance Lease Obligation	4,712	0	14,221
Total current liabilities & Deferred Revenue	<u>4,657,503</u>	<u>4,952,917</u>	<u>11,776,680</u>
<u>Long Term Liabilities:</u>			
LT Operating Lease Obligation	0	0	27,966
LT Finance Lease Obligation	3,095	0	7,102
Accrued Other Postretirement Benefit Costs	6,484,759	8,426,910	6,214,759
Accrued Defined Contribution Plan Costs	250,759	248,484	303,263
Total Liabilities & Deferred Revenue	<u>11,396,115</u>	<u>13,628,311</u>	<u>18,329,770</u>
<u>Board designated for:</u>			
Cromwell Account	2,865,852	2,635,060	2,778,996
Replacement Reserve Account	2,132,962	2,132,749	2,132,802
Long-Term Reserve Account	23,768,708	18,529,540	22,389,295
Section Accounts	3,974,110	4,149,465	4,049,692
Invested in Fixed Assets (Less capital lease)	5,078,577	5,476,349	5,259,354
Undesignated	13,209,886	12,488,562	11,331,207
Total Net Assets	<u>51,030,095</u>	<u>45,411,724</u>	<u>47,941,346</u>
Total Liabilities and Net Assets	<u><u>62,426,210</u></u>	<u><u>59,040,035</u></u>	<u><u>66,271,115</u></u>

**New York State Bar Association**  
**Statement of Activities**  
**For the period ending September 30, 2023**

	<u>September YTD</u> <u>2023</u>	<u>September YTD</u> <u>2022</u>	<u>December</u> <u>2022</u>
<b>REVENUES AND OTHER SUPPORT</b>			
Membership dues	8,634,954	8,957,575	9,060,075
<b>Sections</b>			
Section Dues	1,067,650	1,104,973	1,112,055
Section Programs	1,676,361	960,475	1,264,530
Continuing legal education program income	2,011,175	1,574,330	2,266,156
Administrative fee and royalty revenue	1,773,628	1,747,134	2,349,960
Annual Meeting	865,857	444,011	446,281
Investment Income	831,972	747,369	1,393,587
Reference Books, Formbooks Products	217,716	704,301	1,182,198
Other Revenue	215,093	369,034	535,827
Total revenue and other support	17,294,405	16,609,202	19,610,670
<b>PROGRAM EXPENSES</b>			
Continuing Legal Education Program Expense	1,402,227	750,618	1,210,191
Print Shop and Facility Support	536,432	840,929	1,001,577
Government relations program	191,950	212,932	294,697
Lawyer assistance program	124,185	50,105	85,632
Publications and public relations	465,628	480,279	624,280
Business operations	2,106,302	1,848,173	2,499,203
Marketing and membership services	1,306,393	1,194,732	1,834,420
Probono program	84,073	56,591	95,313
House of delegates	388,823	438,386	536,024
Executive committee	38,546	61,649	70,688
Other committee	223,235	169,347	252,271
Sections	2,679,021	1,722,882	2,173,463
Newsletters	190,923	193,030	254,776
Reference books and formbooks expense	458,901	442,264	609,087
Publications	355,832	332,478	384,028
Annual meeting expense	540,562	37,535	37,545
Total program expenses	11,093,034	8,831,928	11,963,195
<b>MANAGEMENT AND GENERAL EXPENSES</b>			
Salaries and fringe benefits	1,888,592	2,486,345	3,026,728
Pension plan and other employee benefit	513,587	511,552	(1,629,086)
Equipment costs	616,163	647,010	837,398
Consultant and other fees	532,650	591,006	751,505
Depreciation and amortization	513,000	558,900	595,798
Operating Lease	97,136	-	102,913
Other expenses	84,706	124,755	115,846
Total management and general expenses	4,245,834	4,919,568	3,801,101
<b>CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS</b>			
Realized and unrealized gain (loss) on investments	1,955,537	2,857,706	3,846,373
Realized gain (loss) on sale of equipment	1,162,799	(10,406,303)	(8,652,105)
	(29,587)	(136,142)	(349,385)
<b>CHANGES IN NET ASSETS</b>	<b>3,088,749</b>	<b>(7,684,738)</b>	<b>(5,155,116)</b>
Net assets, beginning of year	47,941,347	53,096,463	53,096,463
Net assets, end of year	51,030,096	45,411,725	47,941,347



# Staff Memorandum

## **ANNUAL MEETING Agenda Item #5**

REQUESTED ACTION: Approval of Bylaws amendments proposed by the Committee on Bylaws.

Attached is a memorandum from the Committee on Bylaws proposing amendments to the association Bylaws. The proposed changes to the Bylaws are necessary in order to implement the “Subscription Model.”

Under procedures established in the Bylaws, the proposed amendments were subscribed to by a majority of members of the House of Delegates at the November 2023 meeting. They are now before you for approval and addition to the Bylaws.

The report will be presented by Robert T. Schofield, IV, Chair of the Committee on Bylaws.





**COMMITTEE ON BYLAWS**

**ROBERT T. SCHOFIELD, IV**  
Chair  
Whiteman Osterman & Hanna LLP  
One Commerce Plaza, 19<sup>th</sup> Floor  
Albany, NY 12260  
518-487-7616  
[rschofield@woh.com](mailto:rschofield@woh.com)

**October 12, 2023**

**To: Members of the House of Delegates**

**Re: Report on Proposed Bylaws Amendments**

**INTRODUCTION**

The stated purpose of the Committee on Bylaws is to examine and report on proposed amendments to the Bylaws of the Association and to observe the activities of the Association under the present Bylaws and, from time to time, report to the Executive Committee and the House of Delegates on such amendments as, in its opinion, will promote the efficiency of the Association.

This report proposes amendments to the Bylaws to implement the resolution of the House of Delegates on June 10, 2023, endorsing a subscription dues model and adopting the report of the Committee on Membership on that topic.

Also, during the course of this year, the Committee has studied proposed amendments to clarify (1) the order of succession with respect to who presides over meetings of the House of Delegates and Executive Committee in the absence of the President and President-elect, and (2) the manner in which service on the Executive Committee is counted towards the maximum allowed service. Finally, the Committee is in the midst of a comprehensive review the Bylaws to ensure that they conform to the requirements of the New York Not for Profit Corporations Law. The work on these projects is on-going and will likely be presented to the House as an interim report in Spring, 2024.

**SUBSCRIPTION MEMBERSHIP MODEL AMENDMENTS**

**Proposed amendments to Article III, Sections 1 (A) and (B), 2 (A)(2), 3, and 6 (A) and Article X, Section 5.**

The Association Bylaws presently refer to dues generically, leaving the issue of the nature and amount of dues to the province of the Membership Committee and House of Delegates.

At its June 10, 2023, meeting, the House of Delegates adopted a resolution and report from the Committee on Membership recommending the endorsement of a “subscription” dues model and referring the adopted Report to this Committee “so that appropriate Bylaws amendments can be drafted as necessary for consideration and subscription at the November 5, 2023 meeting of the

House. By adopting the report, the House has chosen to pursue a subscription dues model which is described as plan by which “members will pay a recurring fee at regular intervals, typically monthly[, for an annual] plan that offers certain benefits, such as access to exclusive content, CLE programming, digital publications and forms, and additional partner benefits.” The Committee on Membership’s report and resolution, as adopted by the House of Delegates, is attached as Exhibit “A” to the report.

The Committee on Bylaws accepted its charge to develop Bylaws amendments to implement this House action. After considering the issues, we have recommended several minor changes to the Bylaws to facilitate the new subscription model. It is noteworthy that the relative silence of the Bylaws on the topic of the nature and amount of dues, resulted in few proposed amendments. Those which are proposed focus on clarifying terms and reconciling them to the new model being put forth. For example, whereas the Bylaws currently speak to “applicable” dues, we are suggesting replacing that term with the term “annual” dues. Further, in the section on “Dues” (Article III, Section 3), our edits are focused on describing a dues payment schedule that more flexibly accounts for the fact that a subscription-based dues system allows members to have membership years that run from when they join, rather than a set date on the calendar. Finally, to account for that portion of the new model that alters how Sections are paid for their members participation, we proposed amending Article X, Section 5 to reflect the Sections’ receipt of “Royalties” from the Association, rather than “Dues.”

Our proposed amendments are as follows:

### III. MEMBERS AND AFFILIATES

**Section 1. Membership.** There shall be five classes of membership in the Association: Active, Associate, Honorary, Sustaining and Law Student, and the members shall be divided among such classes according to their eligibility.

**A. Active Members.** Any member of the legal profession in good standing admitted to practice in the State of New York may become an Active member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the ~~applicable~~annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all responsibilities of membership.

**B. Associate Members.** Any member of the legal profession in good standing admitted to practice in any state, territory or possession of the United States or another country but not in New York may become an Associate member by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the ~~applicable~~annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities of membership, with the exception of being an officer of the Association, being a member of the House of Delegates or Executive Committee, or serving as a Section Chair; provided, however, that upon the request of a Section Executive Committee and with the consent of the Association Executive Committee, an Associate member may serve as a Section Chair.

\* \* \*

**E. Sustaining Membership.** The House of Delegates shall have the power to establish Sustaining memberships in the Association and to fix from time to time the amount of dues therefor. Sustaining membership shall be available to such members of any class as are willing, for the support of the general work of the Association, to pay such amount as annual dues in any year, in lieu of the dues prescribed pursuant to Section 23 of this Article. A member who elects to be a Sustaining member in any year shall not be obligated thereby to continue as such in any subsequent year. Sustaining members shall have the same rights and privileges as pertain to the class of which they are a member. Subject to the provisions of this Article, the House of Delegates shall have power to make appropriate regulations as to such Sustaining membership and the collection of sustaining dues therefrom.

\* \* \*

## **Section 2. Non-attorney Affiliates.**

### **A. Any person:**

1. holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals or who is employed by a bar association, or

2. who is not admitted to practice in any state, territory or possession of the United States or another country and is a legal assistant or paralegal, qualified by education, training or work experience, who is employed by an attorney, law office, corporation, governmental agency or other entity, and who performs specifically delegated substantive legal work for which an attorney is responsible,

may become a Non-attorney Affiliate of the Association by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable annual dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities as if such person were a member, except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee. Non-attorney Affiliates are not entitled to hold themselves out as members and their status as Non-attorney Affiliate does not authorize them to practice law unless they otherwise have standing to do so.

**Section 3. Dues.** The annual dues of all members shall be in such amounts as may be fixed and determined from time to time by the House of Delegates. All such dues shall be payable at the beginning of ~~the fiscal~~ their membership and on each subsequent anniversary of their membership in year of with the Association. ~~The House of Delegates upon recommendation of the Executive Committee and the Finance Committee shall have the power to prorate the annual dues for the current year of those who become members during the year;~~ to suspend the accrual and

payment of the dues of any member during the term of such member's service with the Armed Forces of the United States; and to waive, in whole or in part, the dues of any member or former member of the Association that may be in arrears or may thereafter become payable, or both.

\* \* \*

**Section 6. Termination of Membership.**

A. If any member fails to pay ~~yearly~~annual dues within the period designated by the Association for payment of dues, it shall be the duty of the Treasurer to send a notice to the member stating that unless said dues are paid the member shall cease to be a member of the Association. If the dues are not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

\* \* \*

**X. SECTIONS AND DIVISIONS OF SECTIONS**

\* \* \*

**Section 5. ~~Dues~~Royalties.** ~~The executive committee of a section or if there be none, the members at an annual meeting of the section may, subject to the approval of the Finance Committee, fix the amount of annual dues, the payment of which shall be a condition to membership in the section.~~ Sections shall receive royalties from the Association in lieu of dues charged to the section's members.

**CONCLUSION**

Our committee proposes the foregoing amendments to the Association to implement the changes previously requested by the House of Delegates and the Membership Committee. We commend them to you for your consideration and subscription at the November 4, 2023, meeting of the House of Delegates. If subscribed, the above amendments will be presented for discussion and adoption at the 2024 Annual Meeting of the Association.

\* \* \*

Respectfully submitted,

COMMITTEE ON BYLAWS

Robert T. Schofield, IV, Chair

Anita L. Pelletier, Vice Chair

Eileen E. Buholtz

David A. Goldstein

Nicole S. Green

LaMarr J. Jackson

Steven G. Leventhal

A. Thomas Levin

Joshua Charles Nathan

David M. Schrauer

Justin S. Teff

Dena J. Wurman

Oliver C. Young

Executive Committee liaison: Richard C. Lewis

Staff liaison: David P. Miranda



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #1**

REQUESTED ACTION: Request for corrections, amendments, or objections.

President-Elect Domenick Napoletano will present the November 4, 2023, meeting minutes and ask if attendees have any corrections or amendments. If there are no corrections, amendments, or objections, the meeting minutes will be accepted as distributed.

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
BAR CENTER, ALBANY, NEW YORK, AND REMOTE MEETING  
NOVEMBER 4, 2023**

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**PRESENT:** Abneri, Afzali, Ahn, Alcott, Antongiovanni, Arenson, Aversa, Babbie, Barreiro, Baum, Beltran, Berlin, Besunder, Bladykas, Bonina, Braunstein, Bray, Broderick, Brown, Bucki, Buholtz, Burke, Burner, Campbell, J.R. Carter, R. Carter, Chambers, Chandrasekhar, D. Cohen, O. Cohen, Cohn, D’Angelo, Davidoff, Degnan, Dennis-Taylor, Doyle, D’Souza, Dubowski, DuVall, Effman, Feal, Fellows, H. Fernandez, Filabi, Finerty, Forster, Frenkel, Galler, Gerstman, Getnick, Gilbert, Gilmartin, Glover, Gold, Graber, Grande, Grays, Greenberg, Griesemer, Gutierrez, Haig, Harper, Heath, Henderson, Hill, Houth, Islam, Jackson, Jacobson, Jaglom, James, Jamieson, Jimenez, Jones, Kamins, Karson, Kaufman, Kelley, Ko, Kobak, Koch, Kohlmann, Lamb, LaRose, Lathrop, Lau-Kee, Levin, Levin Wallach, Levy, Lewis, Liebman, Livshits, Loyola, Mack, Madigan, Malkin, Manne, Marinaccio, Maroney, Marotta, Martin, Mason, Matos, May, McCann, McCormick, McElwreath, McFadden, McGinn, McKeegan, McNamara, McPherson, Messina, Meyer, C. Miller, M. Miller, R. Miller, Minkoff, Montagnino, Morris, Morrissey, Murphy. Napoletano, Nasser, Nielson, Nimetz, Nowotarski, D. O’Connor, O’Donnell, A. Palermo, C. Palermo, Pappalardo, J. Parker, Perlman, Petterchak, Pierson, Quaye, Randall, Reale, Riaño, Richter, Rosner, Russell, Ryan, Safer, Samuels, Santiago, Schraever, Schwartz-Wallace, Seiden, Sen, Sharkey, Silkenat, Skidelsky, Soren, Starkman, Stoeckmann, Strong, Strenger, J. Sunshine, N. Sunshine, Sweet, Taylore, Terranova, Treff, Triebwasser, Vaughn, Walsh, Waterman-Marshall, Welden, Wesson, Westlake, Whittingham, Yeung-Ha, Young, Younger

Mr. Napoletano presided over the meeting as Chair of the House.

1. The meeting was called to order and the Pledge of Allegiance was recited.
2. Approval of Minutes of June 10, 2023, meeting. The minutes were deemed accepted as distributed.
  1. Report of Nominating Committee. Scott Karson, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2024-2025 Association year: President-Elect – Kathleen Sweet of Buffalo; Secretary – Taa R. Grays of New York City; Treasurer – Susan Harper of New York City; District Vice-Presidents: First District – Bridgette Ahn of New York City and Michael McNamara of New York City; Second District –Pauline Yeung-Ha of Brooklyn; Third District – Jane Bello Burke of Albany; Fourth District – Cynthia Feathers of Albany; Fifth District – Hon. James P. Murphy of Syracuse; Sixth District – Michael R. May of Ithaca; Seventh District – Jon P. Getz of Rochester; Eighth District – Vacant; Ninth District – Karen Beltran of Yonkers; Tenth District – Michael A. Markowitz of Hewlitt; Eleventh District – David Louis Cohen of Kew Gardens; Twelfth District – Michael A. Marinaccio of White Plains; Thirteenth District – Orin J. Cohen of Staten Island.

The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2024: Vincent Ted Chang of New York City

(Diversity Seat); Jacqueline Drohan of New York City; Andrew Jaglom of Mount Vernon; Leah Nowotarski of Warsaw; Alyssa Zuckerman of Melville

Nominated as Young Lawyer Member-at-Large was Lauren E. Sharkey of Schenectady. Nominated as Section Member-at-Large was Gregory Arenson of New York City.

The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2024 – 2026 term: Jacob Petterchak of New York City (Young Lawyer Delegate); Sharon Stern Gerstman of Buffalo; Hank Greenberg of Albany; T. Andrew Brown of Rochester; Richard Lewis of Binghamton; Kathleen Sweet of Buffalo.

The report was received with thanks.

3. Report of Treasurer. Susan Harper, treasurer, reported that through September 30, 2023, the Association's total revenue was \$16,849,421, an increase of approximately \$797,982 from the previous year, and that the Association's total expenses were \$15,422,325, an increase of \$1,670,829 from the previous year. The report was received with thanks.
4. Report and recommendations of Finance Committee re proposed 2024 income and expense budget. Michael J. McNamara, chair of the Finance Committee, reviewed the proposed budget for 2024, which projects revenue of \$21,011,410, expenses of \$20,956,930, and a projected surplus of \$54,480. After discussion, a motion was adopted to approve the proposed 2024 budget.
5. Report of President. Mr. Richard Lewis highlighted items contained in his written report, a copy of which is appended to these minutes. President Lewis' report was received with thanks.
6. Chief Administrative Judge Joseph A. Zayas. Judge Zayas addressed the House of Delegates. His remarks were received with thanks.
7. Memorial for Past President James Moore. Presented by Past-President A. Vincent Buzard.
8. Report of the Committee on Membership. Committee on Membership Co-Chairs Clotelle Drakeford, Esq. and Michelle Wildgrube, Esq. provided an update on the Association's membership engagement and retention efforts, including membership renewal for the 2024 dues year. The report was received with thanks.
9. Report and recommendations of the Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, outlined proposed bylaws amendments: Article III, Section 1 (A) and (B), 2 (A)(2), 3, and 6 (A) and Article X, Section 5 regarding the adoption of the subscription dues model. The proposed amendments received the required subscriptions to permit their consideration at the 2024 Annual Meeting

Susan Kohlmann abstained.

10. Report of the Task Force on Advancing Diversity. Secretary Jeh Johnson and Brad Karp, task force co-chairs, outlined the report and its recommendations for advancing diversity in the



aftermath of the *SFFA* decision. After discussion, a motion was adopted to approve the report and recommendations.

David Perlman abstained.

11. Presentation of the 2023 Root/Stimson Award to Stephen E. Diamond, Esq. Presented by President Richard C. Lewis.
12. Report of the Working Group on Facial Recognition Technology and Access to Legal Representation. Ronald Minkoff, Working Group Member, will present the report and its recommendations regarding policy and ethical considerations regarding facial recognition and other biometric technology, a proposed amendment to the Civil Rights Law, and support of the Biometric Privacy Act. After discussion, a motion was adopted to approve the report and recommendations.

Ronald Minkoff, Bennett Liebman, and Glenn Lau-Kee abstained.

13. Report of the Task Force on Post-Pandemic Future of the Profession. John Gross and Mark Berman, Task Force co-chairs, outlined the report and its recommendations regarding the short- and long-term impacts of the COVID-19 pandemic on the legal profession. After discussion, a motion was adopted to approve the amended report and recommendations.
14. Report of the Committee on Gala. John Gross, committee chair, provided an update about the 2024 Gala. The report was received with thanks.
15. Report of The New York Bar Foundation. Carla Palumbo, Chair of the Foundation, updated the House members on the ongoing work and mission of The Foundation. The report was received with thanks.
16. Administrative Items. Mr. Napoletano urged members and colleagues to register for the 2024 Annual Meeting and advised of the ongoing Member Referral Program. Member renewal encouraged.
17. New Business.

1. Past-President Michael Miller presented a resolution condemning the terrorist acts perpetuated in Israel on October 7, 2023, as follows:

WHEREAS, on October 7, 2023, the terrorist group known as Hamas made a surprise, unprovoked attack in Israel, in which more than 1,400 people were brutally butchered; and

WHEREAS, on October 7, 2023, children were decapitated, people were burned beyond recognition, women were brutally raped, hundreds of people were massacred at a music festival, and hundreds of people, mostly civilians, were taken hostage by Hamas terrorists; and

WHEREAS, the murder and kidnapping of civilians, and the use of sexual violence and separation and torture of children, amongst the other atrocities perpetrated by Hamas, are abominable, unforgivable, and flagrantly violate the United Nations Charter, Helsinki Accords, established norms and principles of international law, and the laws of war.

NOW THEREFORE, the New York State Bar Association unequivocally condemns the terrorist acts and atrocities perpetrated by Hamas in Israel on October 7, 2023, and calls for the immediate return of all hostages. In the face of these abhorrent attacks, the New York State Bar Association, like the State of New York and many others, stands steadfast in support of Israel and its right to defend its sovereignty.

Ronald Minkoff proposed the following amendment to the resolution to be added at the end of the “therefore clause”: “in accordance with the established norms and principles of international law and the laws of war.”

After discussion, the motion to amend the resolution failed.

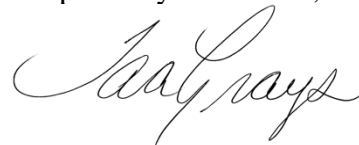
Amanda Henderson, Maxine S. Broderick, Clare Degnan, Jonah I. Triebwasser, Jacob Petterchak, and Hon. Cheryl Chambers abstained.

After discussion, a motion was adopted to approve the initial proposed resolution.

Austin D’Souza, Maxine S. Broderick, Jonah I. Triebwasser, Jacob Petterchak, and Hon. Cheryl Chambers abstained.

18. Date and place of next meeting. Mr. Napoletano announced that the next meeting of the House of Delegates would take place on Friday, January 19, 2024, at the New York Hilton Midtown in New York City.
19. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Taa R. Grays  
Secretary



**RICHARD C. LEWIS, ESQ.**

President

Hinman Howard & Kattell, LLP

80 Exchange Street PO Box 5250

Binghamton, NY 13901-3400

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[rlewis@hhk.com](mailto:rlewis@hhk.com)

November 3, 2023

Dear Colleagues:

You have heard me say that I have chosen ‘Standing Up for the Practice of Law’ as the theme of my presidency and to that end, I have spent the past 150 days working on issues that confront our profession, our judiciary, and our educational system. I traveled around the state and beyond, attending so many events that I have lost count. I met with affinity groups and local bar associations. I have met with the Chief Judge and Chief Administrative Judge and have joined them with other distinguished members of the judiciary on a panel that listened to testimony from a dozen civil legal services organizations. I met with young lawyers. I want to add that Domenick, Susan, and Taa have also been very busy attending events, as has our Executive Director, Pam.

At the Third Department’s Bar Admissions Ceremony this past spring, I heard young lawyers’ growing concerns about student-loan debt, work-life balance, and gender equity. We need to address their concerns because they are our leaders of tomorrow and the ones who will promote our values going forward.

I have also met with leaders from Hong Kong, Pakistan, Argentina, Israel and Great Britain and multiple other states.

We must tackle the issues that confront us as today’s leaders.

We are faced with deeply rooted, 21st century challenges that threaten the rule of law, which is why our Task Force members are working diligently on such matters as hate crimes, anti-Asian hate, antisemitism, homelessness, equal access to education, dignity in end stages of life, and an ever-evolving technological environment. In addition, we are trying to confront the issue of civility and debate which is essential to Democracy.

Our Task Force on Advancing Diversity’s substantive report was turned out in a little more than a month following the Supreme Court’s decision on affirmative action. We actually began working on it prior to the Decision. We are seeking your approval of this report today. It recommends that higher education institutions as well as businesses, law firms, and the courts, take a holistic approach in their admission processes with a focus on how an applicant enhances their goals and values and defines the post Harvard/N.C. landscape for the courts, businesses, law firms, and institutions of higher learning to move forward in pursuing DEI programs.

We were fortunate to get input from experts throughout the country and will continue to monitor the landscape to determine what our response should be as the inevitable lawsuits to follow are filed challenging diversity programs. I am so thankful to Jeh Johnson, Brad Karp, and Loretta Lynch for chairing this Task Force.

I have met with New York's Chief Judge Rowan Wilson to talk about his priorities, which include making sure that tenants and landlords in Housing Court are represented. He wants to provide incentives for lawyers who take on housing cases so that tenants – especially those who live below the poverty line – may stay in their homes. We intend to work with him to achieve the fairness to both tenants and landlords.

I also met with Chief Administrative Judge Joseph Zayas who will address us this morning. This has laid the foundation for further collaboration regarding court rules, e-filing in all courts, including District Courts in Nassau and Suffolk counties, and other issues that impact lawyers.

As you probably know, the 2023 legislative session was one of our most successful in memory. We accomplished a great deal by advocating for the practical concerns of lawyers. We lobbied legislators and the governor to raise the pay of court-appointed 18-B attorneys for the first time in nearly 20 years and our hard work paid off. We continue to advocate for future financing of this program. We also urged the Legislature to repeal antiquated Judiciary Law Section 470, which requires admitted New York practitioners who reside out-of-state to maintain a physical office within state boundaries. The bill passed the state Senate and Assembly, and we are continuing to encourage the governor to sign it. We also pushed for passage of the Clean Slate Act and the state Equal Rights Amendment, both of which were approved by the Legislature.

We succeeded in getting Bill S5162/A5772 passed and signed by the governor. The bill removes barriers to New Yorkers in civil, housing, and family court matters allowing litigants in these cases to swear to a statement without having to have the statement notarized. This is a win for access to justice because it helps urban New Yorkers who might not be able to take off from work to get a document notarized, suburban New Yorkers who might have to spend significant time riding on public transportation to locate a notary, and rural New Yorkers who might have to travel long distances in areas where notaries are difficult to find.

My travels took me to Denver this past August to attend the ABA Annual Meeting where we, along with the California Lawyers Association, introduced a resolution to urge local and state governments and the federal government to forgive some or all of the student loans of young lawyers who practice in rural areas. I am happy to report that our resolution was overwhelmingly approved and adopted as ABA policy. It is our hope that our lobbying efforts on behalf of young lawyers will be successful, and that loan forgiveness will incentivize young lawyers to work in rural areas where it is now extremely difficult to find a lawyer.

Just this past week, I had the honor of testifying on behalf of our Association before the New York State Commission on Legislative, Judicial, and Executive Compensation Public Hearing – and at a hearing before the Senate Standing Committees on the Judiciary and on Children and Families.

I shared our support for increased judicial compensation because a properly funded judiciary is the cornerstone of a democratic society, and the operation of the justice system depends upon the

confidence of all involved parties. Salary stagnation is an impediment to retaining qualified and experienced judges and attracting the best to the bench. In short, the justice system's ability to function properly depends upon the judges who serve it.

My testimony to the Senate Committees on Judiciary, and Children and Families reiterated what our published reports have said – that there is a myriad of challenges that need to be addressed for an under-resourced and overburdened court system. We need more judges, we need to update the court's infrastructure, and we must ensure that our judges and staff are well-trained in e-filing systems, digital technology, and virtual proceedings. And, we need to keep our courts safe.

Our Annual Meeting is approaching.

I am looking forward to seeing you at the New York Hilton Midtown for a full slate of robust in-person discussion, professional development, and the opportunity to set aside being adversaries in the courtroom and at the negotiating table, and engage each other as partners and friends.

The Presidential Summit will focus on the impact that A.I. is having and will continue to have on our profession. We will hear from two world-renowned experts: Bridget Mary McCormack who is President and CEO of the American Arbitration Association-International Centre for Dispute Resolution, and past Chief Justice of the Michigan Supreme Court, and Katherine Forrest who is a Partner and Co-Chair of the Digital Technology Group at Paul, Weiss and former District Court Judge in the Southern District of New York. In addition, members of our own Task Force on A.I., chaired by Vivian Wesson, will discuss the ever-changing issues surrounding A.I.

Our Task Force on Medical Aid in Dying is addressing a controversial topic, and we are looking for legislative solutions. We are looking at this subject in a balanced way, taking all stakeholders' concerns into consideration.

Legislators are seeking our recommendations on this issue and on regulatory oversight of A.I., which our Task Force on Artificial Intelligence is discussing.

In May, we will be hosting a Civics Convocation at the Bar Center that is shaping up to be an exceptional event that will include judges, attorneys, teachers, and students who will participate in a vigorous discussion about the future of our democracy. We need to zealously guard our democratic principles to ensure that we are teaching them to the next generation. We cannot accomplish that unless we engage in civil debate.

I have been consulting with our Task Forces on Combating Antisemitism and Anti-Asian Hate, A.I., Medical Aid in Dying, and Homelessness and the Law. Homelessness continues to grow as a national disgrace, and I am looking forward to seeing the report of our Task Force.

The other tragedy that we are dealing with is the issue of antisemitism, which has become overt and dangerous, in our country and throughout the world, following the barbarism that occurred on October 7th in Israel. As your President, I immediately condemned that barbarism, and disregard for human life. As leaders in the legal community, we have an obligation to strongly and directly condemn this hatred and evil and continue to urge respect for the rule of law and the sanctity of human life throughout the world.

I have been working closely with our Task Force on Combating Antisemitism and Anti-Asian Hate and thank them for their guidance in the strong public statements we have made.

In light of the atrocities we have seen in Israel this past month, I have called upon our Task Force to redouble its efforts and produce an interim report and recommendation by the next meeting of this House, so that the principles that we all firmly believe can become policy of our Association. Even in the darkest days, and these recent days have been very dark for all humanity, our Association should be a clarion voice for our profession and the public. And I call upon our Task Force to rise to that occasion and provide us a clear, strong, thoughtful report and policy that we can proudly bring forth to the world. I am confident they will do so with all necessary deliberation and that this great House will support it.

In closing – there is plenty of work to do. However, nobody said it was going to be easy. As the great Muhammad Ali once said: “The fight is won or lost far away from witnesses – behind the lines,” and I could not be more grateful for the support of those working behind the lines; our Executive Director Pam McDevitt, and all the NYSBA staff who have been so dedicated to me and the good causes of our great Association.

Thank you.



# Staff Memorandum

**HOUSE OF DELEGATES**  
**Agenda Item #2**

REQUESTED ACTION: Approval of the Nominations.

Presentation of the Nominations of the Nominating Committee for 2024-2025.

This report will be presented by past-president Scott Karson, Esq.

**HOUSE OF DELEGATES  
Agenda Item #2**

**ELECTION OF 2024-2025  
OFFICERS AND MEMBERS-AT-LARGE  
OF THE EXECUTIVE COMMITTEE**

**PRESIDENT-ELECT**

Kathleen M. Sweet, Buffalo

**SECRETARY**

Taa R. Grays, New York City

**TREASURER**

Susan L. Harper, New Jersey

**DISTRICT VICE PRESIDENTS**

**FIRST:**

Michael McNamara, New York City  
Bridgette Ahn, New York City

**SECOND:**

Pauline Yeung-Ha, Brooklyn

**THIRD:**

Jane Bello Burke, Albany

**FOURTH:**

Cynthia F. Feathers, Albany

**FIFTH:**

Hon. James P. Murphy, Syracuse

**SIXTH:**

Michael R. May, Ithaca

**SEVENTH:**

Jon P. Getz, Rochester

**EIGHTH:**

Norman P. Effman, Warsaw

**NINTH:**

Karen T. Beltran, Yonkers

**TENTH:**

Michael A. Markowitz, Hewlett

**ELEVENTH:**

David Louis Cohen, Kew Gardens

**TWELFTH:**

Michael A. Marinaccio, White Plains

**THIRTEENTH:**

Orin J. Cohen, Staten Island

**AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE**

Gregory K. Arenson, New York City (Section Seat)  
Vicent Ted Chang, New York City (Diversity Seat)  
Jacqueline Jamin Drohan, New York City  
Andrew R. Jaglom, New York City  
Leah Rene Nowotarski, Warsaw  
Lauren E. Sharkey, Schenectady (Young Lawyers Seat)  
Alyssa L. Zuckerman, Melville





# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #3

REQUESTED ACTION: None, as the report is informational.

Gail Ehrlich, Esq. and Jay Worona, Esq., co-chairs of the NYSBA Civics Convocation Task Force will present about the Convocation on Civics Education that will be taking place at the Bar Center on May 9, 2024, titled *To Safeguard our Democracy: Making the Case for Civics Education*. The presenters will provide an overview of the history and mission of the task force, objectives regarding civics education, statistics about the current state of civics knowledge, the role of lawyers in civics education, and what the future holds for civics. The report concludes with an outline of the program agenda.

# New York State Bar Association Civics Convocation Task Force

## Informational Report

### ***“To Safeguard our Democracy: Making the Case for Civics Education”***

Convocation on Civics Education  
NYSBA Bar Center May 9, 2024

*Civics Convocation Task Force:*  
*Co-chairs* Gail Ehrlich, Jay Worona, Christopher Riano

*Members* T. Andrew Brown  
Kathleen DeCataldo  
Hon. Patricia Fahy  
Patricia C. Foster  
Seth Gilbertson  
Hannah H. Hage  
Allen Hecht  
Scott Karson  
Lisa Eggert Litvin  
Alexander Paykin  
Hon. Edwina G. Richardson  
George E. Riedel, Jr.  
Jennifer L. Smith  
Hon. Jonah Triebwasser  
Mark Ventrone  
Oliver Young  
Shannon Logan (non-attorney  
member NYSED)

*Executive Committee Liaison:*  
NYSBA President Richard C. Lewis

January 19, 2024

## **I. Introduction Why is NYSBA holding a Convocation on Civics Education “To Safeguard our Democracy: Making the Case for Civics Education”?**

*“We have come to take democracy for granted, and civic education has fallen by the wayside ... In our age, when social media can instantly spread rumor and false information on a grand scale, the public’s need to understand our government, and the protections it provides, is ever more vital.*

*“Civic education, like all education, is a continuing enterprise and conversation...“Each generation has an obligation to pass on to the next, not only a fully functioning government responsive to the needs of the people, but the tools to understand and improve it.”*

**Chief Justice John Roberts 12/31/19<sup>1</sup>**

Chief Justice Roberts’ words were a call to action. Civics education is crucial to the survival of rule of law. The lack of a civically educated and involved citizenry is a threat to judicial independence, separation of powers and constitutional principles. Civility in public discourse is a value we must teach and model for our children and one another. NYSBA has a long history of involvement in civics education programming in New York state. For example, the Law, Youth and Citizenship Committee’s Mock Trial program is in its 41st year, and reaches thousands of students in hundreds of schools around the state, helping to teach high school students all aspects of courtroom procedure and decorum. We presume that the students in that program are educated in the fundamentals of civics. However, many students, and adults, do not know the basics of how our government is meant to work. We find ourselves facing a crisis in which the lack of fundamentals of civic knowledge is threatening dire consequences for our nation. As the largest voluntary state bar association in the nation, NYSBA has an obligation to face this crisis and offer solutions.

## **II Creation of the Civics Convocation Task Force**

A few months prior to the start of the Covid 19 Pandemic then Chief Justice of the Court of Appeals, Janet DiFiore and then NYSBA President Hank Greenberg agreed to hold a

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<https://www.uscourts.gov/news/2019/12/31/chief-justice-roberts-issues-2019-year-end-report>

joint convocation on civics focusing on the roles of the bar and the bench.

Consequently, under the leadership of then President-elect Scott Karson, we began planning jointly with Judge DiFiore's staff. However, shortly thereafter, the pandemic put an abrupt end to our efforts.

As we know, large public gatherings gave way to Zoom meetings, which became the standard way to convene. But over time, as restrictions began to ease, we could once again consider holding an event such as the one that was conceived in 2019. Like his predecessors, President Dick Lewis had civics on his mind, and specifically the problem of incivility in public discourse - when he approached Gail Ehrlich, chair of the Law, Youth & Citizenship Committee, at the 2022 annual meeting. A discussion of what NYSBA could do to address this crisis was underway. The idea of holding a civics convocation was re-ignited.

**III Mission of the Civics Convocation Task Force** In January 2023, then President -elect Lewis began work on establishing a task force of NYSBA members, many of whom are members of the Law, Youth & Citizenship committee, to create this convocation. We were tasked with identifying the specific issues to be discussed, the speakers to address them, and the composition of the panels. Our aim is to address pressing issues in civics from national, as well as New York state perspectives. We have marshaled our resources and contacts. As a result, on May 9, 2024, we will gather at the Bar Center in Albany with expert speakers and panelists who are leading lights from the worlds of education, government and law to discuss and debate problems and solutions in civics education.

**Our Audience** We aim to reach a wide group of lawyers, judges, teaching professionals, students and parents. This will be a live in-person gathering. Student voices in particular will be highlighted. For all who are not in attendance, a recorded version of the proceedings will be made widely available.

#### **IV Questions to be posed at the Convocation**

- What is the national landscape for civics education?
- How did we get to this crisis point?
- What specific initiatives is New York state working on?
- What steps are we taking to improve civics education for students of every background?
- What does "civic readiness" mean?
- In an endless sea of misinformation, how are we preparing not only children, but ourselves, to think critically about what we see and hear from online sources - to become "media literate"?
- How can young people, and moreover adults, learn to engage in productive civil discourse?

- How do students feel about the current state of civics?
- What are the roles of the bar and the bench?
- and how can the New York State Bar Association help lead the effort?

**Final Report: To Feature Results of the Civics Convocation** The task force will create and publish a report of findings from the Convocation with recommendations for moving forward.

## V Background: Objectives of Civics Education; a Refresher

*Democracy has to be born anew every generation, and education is its midwife.—John Dewey<sup>2</sup>*

- **Why is a foundational education in civics essential for every citizen?** The foundation of a thriving constitutional democracy lies not only in its legal and institutional frameworks but also in the informed and active participation of its citizens. Civics education serves as the bedrock for cultivating an understanding of democratic principles, fostering civic engagement, and ensuring the preservation of our constitutional democracy. It is indispensable in shaping responsible and informed citizens who are essential for the continued success of our democratic system. A civics mindset must continue through college, career and one's adult life.
- **To Understand Democratic Principles:** One of the primary objectives of civics education is impart a comprehensive understanding of democratic principles to students. Through a structured curriculum, students should learn about the key tenets of democracy, such as the philosophical and historical foundations of American political thought, the rule of law, separation of powers, checks and balances, and the protection of individual rights and liberties. Study of the Declaration of Independence and the US Constitution, our nation's founding documents is a necessary part of every education. This foundational knowledge equips students with the tools to critically analyze current events, make informed decisions, and actively participate in the democratic process.

Matthew Levendusky, Professor of Political Science at the Annenberg Public Policy Center puts it plainly "...if you don't know the three branches of government and their roles, then you won't know why President Biden and Congress are sparring about spending, immigration, green energy, etc. If you don't know what rights are protected by the First Amendment or what they mean, then you won't understand why the government can't censor the New York Times, but Facebook can make you take down a post that violates its community standards policy. If you don't know which branch has

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<sup>2</sup>Self-Realization as the Moral Ideal, "The Philosophical Review (1893)

the responsibility of determining whether a law is constitutional, you won't understand why the Supreme Court and its rulings are so important and influential. In short, without some basic civic knowledge, you can't even follow the news of the day to be an informed citizen.<sup>3</sup>

- **To Promote Critical Thinking and Media Literacy** In an era of information overload, the ability for critical evaluation of information on social media is crucial for a functioning democracy. It is more important than ever to teach students and adults to discern between reliable and unreliable sources, and navigate misinformation and disinformation by fostering media literacy and critical thinking skills. This skill set is essential for citizens to navigate the complexities of the modern information landscape, make informed decisions, and resist media manipulation. By developing these skills early on, students are better equipped to participate meaningfully in civic discourse, choose their leaders with informed intention, and hold those in power accountable.
- **To Cultivate Respect for Diversity.** Democracy thrives on the principles of diversity. Civics education plays a vital role in cultivating an appreciation for the diverse perspectives that enrich our democratic society. Students should learn to respect differing opinions, understand and embrace cultural diversity. Civics education should foster a sense of unity among citizens, reinforcing the idea that democracy is a collective effort that thrives on the contributions of individuals from all walks of life.

In a recent WSJ article "*A Free-Speech Fix For Our Divided Campuses*" Suzanne Nossel describes the problems of schisms between campus groups, where speakers are banned based on political views. She suggests there is an opportunity here for improvement in civil discourse. "It requires a comprehensive rethinking of how American universities can fulfill their role as a free market of ideas and a factory of pluralism, teaching students the values and skills they need to resist polarization and ensure the survival of our teetering democracy" And further..."A crucial element in this effort has to be educating students, faculty and staff in the principles of free speech and academic freedom. These precepts are enshrined in the First Amendment of the Constitution, and they have been adopted as policies by virtually every major private university. But on campus they largely receive lip service, not sustained instruction. A survey this fall revealed that two-thirds of college students believe it is sometimes acceptable to shout down a controversial campus speaker and that a quarter think it is sometimes OK to use violence to stop someone from speaking on campus." (emphasis added)<sup>4</sup>

- **To Foster Civic Engagement** Civics education is not merely an academic pursuit; it is a catalyst for civic engagement. By instilling the importance of civic responsibility

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<sup>3</sup><https://www.salon.com/2023/09/26/how-you-lose-your-democracy-shocking-new-research-shows-americans-lack-basic-civic-knowledge/>

<sup>4</sup><https://www.wsj.com/us-news/education/a-free-speech-fix-for-our-divided-campuses-b9919e9c>

and active participation, civics education encourages students to become informed and involved citizens. Learning about the mechanisms of government, the electoral process, and the role of citizens in shaping public policy empowers students to take an active interest in the issues that affect their communities and the nation at large. In turn, this engagement strengthens the democratic fabric by ensuring a well-informed and active citizenry.

## **VI The Sorry State of Civic Knowledge: How We are Failing; Some Stunning Statistics**

Here are some excerpts from a Constitution Day study by the Annenberg Public Policy Center at the University of Pennsylvania:<sup>5</sup>

- \* ***Only one in four (26%) can name all three branches of the government. (In 2011, 38% could name all three branches.)***\* ***One in three (33%) can't name any branch of government.***
- \* ***More than one in three people (37%) could not name a single right protected by the First Amendment.***
- \* ***When respondents are asked to name the rights guaranteed by the First Amendment, the only right with widespread recognition is freedom of speech:***
  - ***Three-quarters (77%) name freedom of speech.***
  - ***Less than half (40%) name freedom of religion.***
  - ***A third (33%) name the right to assembly.***
  - ***Just over a quarter (28%) name freedom of the press.***
  - ***And less than 1 in 10 (9%) know the right to petition the government.***
- ***A large number of respondents, over 1 in 5 (22%), listed the right to bear arms, which is a right under the Second Amendment, as part of the First Amendment .***
- ***A majority (53%) believe the Constitution affords undocumented immigrants no rights***

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<sup>5</sup>[https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/?utm\\_source=news-release&utm\\_medium=email&utm\\_campaign=2017\\_civics\\_survey&utm\\_term=survey&utm\\_source=Media&utm\\_campaign=e5f213892a-Civics\\_survey\\_2017\\_2017\\_09\\_12&utm\\_medium=email&utm\\_term=0\\_9e3d9bcd8a-e5f213892a-425997897](https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/?utm_source=news-release&utm_medium=email&utm_campaign=2017_civics_survey&utm_term=survey&utm_source=Media&utm_campaign=e5f213892a-Civics_survey_2017_2017_09_12&utm_medium=email&utm_term=0_9e3d9bcd8a-e5f213892a-425997897)

- **Half of U.S. adults (50%, up from 35% in 2019) feel that Supreme Court justices “are just like any other politicians ”and “we cannot trust them to decide court cases in a way that is in the best interest of our country.”**
- From a Pew Research study in 2010 **only 28% of respondents were able to identify John Roberts as chief justice of the U.S. Supreme Court.**<sup>6</sup>
- Also from the Pew study-**Must we live in a democracy? 51% of Americans think not - because they say it doesn’t work. Almost the same number would accept a government ruled by a single individual.**
- **In the most recent National Assessment of Educational Progress (NAEP) only 22% of 8th graders scored “proficient in civics ”**<sup>7</sup>
- **VII Causes for the Dearth of Civic Knowledge**

*“... civic education must give each student the sense that they belong to this country and that the country belongs to them. **Dr. Tamara Mann**  
Tweel Program Director of Civic Initiatives at the **Teagle Foundation**<sup>8</sup>*

- **Why has Civics Education Fallen by the Wayside?** The lack of emphasis on civics education in the United States in recent decades can be traced back to various factors. It's important to note that these reasons are interconnected, and their impact on civics education is complex.
- **Focus on STEM (Science, Technology, Engineering, and Mathematics) Education:** As the world has become more interconnected and the job market evolved to favor the tech sector, educational priorities shifted. The increasing emphasis on STEM fields in response to the demand for a technologically skilled workforce has resulted in a de-emphasis on humanities, including civics education. For decades, and for millennial students in particular, education has been steeped in subjects like STEM (Science, Technology, Engineering, Math) which received over \$50 in federal dollars per student per year, compared to civics education, which received less than 50 cents per student. Lots of science and math. Little to no civics education. This STEM-centric focus may lead to a neglect of the importance of a well-rounded education that includes civic knowledge. The reduced emphasis on the importance of civics has resulted in students unprepared for responsible citizenship.
- **Emphasis on Standardized Testing:** The No Child Left Behind Act (NCLB) and subsequent education policies prioritized standardized testing in subjects like math and reading. This led to a narrowing of the curriculum, with schools focusing more on

<sup>6</sup><https://www.pewresearch.org/politics/2010/07/15/well-known-twitter-little-known-john-roberts/>

<sup>7</sup><https://www.nationsreportcard.gov/highlights/civics/2022/>

<sup>8</sup><https://www.chalkbeat.org/2020/10/21/21526202/teaching-civics-belong-america/>



subjects that are directly tested. As a result, subjects like civics and social studies were put on the back burner.

- **Budget Cuts in Education** Financial constraints have forced many schools to make difficult choices regarding which subjects to prioritize. In some cases, non-tested subjects such as civics have been among the first to face budget cuts. Schools may allocate resources to subjects perceived as more critical for standardized testing success.
- **Insufficient National Standards** The absence of consistent national standards for civics education contributes to disparities in what is taught across different states and school districts. Without clear guidelines, civics education may be overlooked or taught inconsistently.
- **Lack of Teacher Training and Resources** Teachers may not receive sufficient training in civics education, and there may be a lack of resources available for teaching the subject effectively. Inadequate professional development opportunities and a shortage of qualified teachers in this field can contribute to a diminished focus on civics.
- **Political Polarization and Controversial Topics** Civics education involves discussions of government, politics, and societal issues. In an increasingly polarized political climate, there is increasing reluctance by educators to take on controversial topics, leading to a more cautious approach in teaching civics. This can result in a watered-down curriculum that avoids critical discussions.

## VIII The Imperative Role of Lawyers in Advancing Civics Education

*[Civics education is about] “engaging people in being active participants in change, with knowledge and with passion, without hatred. And I say that because too much of that conversation in our nation is centered on the negative and too little on the positive of what we share in common.”*

Hon. Sonya Sotomayor, Associate Justice US Supreme Court<sup>9</sup>

Lawyers, as guardians of justice, champions of the rule of law, and stewards of the legal system, hold a unique position to contribute significantly to the promotion of civics education. Lawyers have a unique responsibility to ensure that civics education serves as a powerful instrument in shaping individuals who understand, appreciate, and actively participate in the democratic principles that underpin our society. Lawyers should work alongside educators and legislators at every level to instill an understanding and respect for our democratic principles and our understanding of what constitutes civic knowledge.

- **Lawyers as Role Models of Civil Behavior** Role models for inappropriate civil behavior abound in our society. 85% of respondents to an ABA civic literacy survey thought that civility was worse compared to 10 years ago, and blamed it mostly on social media (29%), media (24%), public officials (19%), and the educational system (8%).<sup>10</sup> Lawyers can play a pivotal role in shaping the moral and ethical fabric of society. But beyond their legal responsibilities, lawyers hold a unique position as role models for students, representing ideals of civil behavior, respect, and integrity. Lawyers must actively model such behavior emphasizing the far-reaching impact such role modeling can have on the development of responsible and ethical citizens. By volunteering their time to speak at schools, mentor students, coach mock trial, moot court, and speech and debate, lawyers can model reasoned debate and argument.
- **Lawyers Promoting Effective Communication** Civil behavior is closely linked to effective communication, a skill at the heart of successful legal practice. Lawyers, by modeling clear, respectful, and persuasive communication, provide students with a template for navigating conversations and debates. These communication skills are not only crucial in legal settings but also in everyday interactions, helping students build strong interpersonal connections and resolve conflicts peacefully.
- **Lawyers Shaping Professionalism and Respect** The legal profession places a premium on professionalism, respect, and decorum. Lawyers, through their interactions with colleagues, clients, and the public, serve as exemplars of these principles. Modeling civil behavior fosters an environment of mutual respect and constructive dialogue, demonstrating to students that professionalism is not only a requirement within the legal field but a cornerstone of successful interpersonal relationships

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<sup>9</sup><https://www.edweek.org/teaching-learning/supreme-court-justices-call-for-more-civics-education-amid-risk-from-domestic-enemies/2021/04>

<sup>10</sup> <https://www.americanbar.org/content/dam/aba/administrative/news/2023/2023-civic-literacy-survey.pdf>

- **Lawyers Instilling Respect for the Rule of Law** The active involvement of lawyers in civics education is paramount to the cultivation of an informed, engaged, and justice-oriented citizenry. Lawyers, by virtue of the profession, are champions of the rule of law. Actively engaging in civics education allows lawyers to instill in students a profound respect for the rule of law as a foundational element of a just society. Understanding the legal framework of democracy empowers citizens to navigate the complexities of the legal system, fostering a sense of accountability and responsibility in the broader community.
- **Lawyers Promoting Legal Literacy and Critical Thinking** Lawyers are trained to understand complex legal documents, analyze arguments, and apply critical thinking skills. These skills are essential components of legal literacy, which is vital for an informed citizenry. By actively participating in civics education, lawyers can contribute to the development of educational programming that emphasize legal reasoning, critical analysis, and the ability to assess the validity of legal and political information.
- **Lawyers Inspiring Future Advocates for Justice** Lawyers serve as inspirations for the next generation of legal professionals and advocates for justice. Modeling civil behavior not only reinforces the values essential for a successful legal career but also motivates students to pursue paths of service and social responsibility. The impact of positive role modeling can be profound, influencing students to aspire to make positive contributions to society.
- **Lawyers' Influence on Ethical Standards** Lawyers are perceived as arbiters of ethical conduct, entrusted with upholding the highest standards of professional and moral integrity. By modeling civil behavior, lawyers not only reinforce ethical standards within the legal profession but also set an example for students to emulate. This influence extends beyond the courtroom, contributing to the cultivation of ethical decision-making and responsible behavior in all aspects of life.
- **Lawyers Fostering a Culture of Inclusivity** Lawyers, in their pursuit of justice, often encounter diverse perspectives and individuals from various backgrounds. Modeling civil behavior involves embracing and respecting this diversity, fostering a culture of acceptance. By doing so, lawyers contribute to creating an environment where students learn to appreciate differences, value diverse opinions, and understand the importance of engaging with others respectfully in a pluralistic society.
- **Lawyers Building Trust in the Legal System** Trust in the legal system is contingent on the perception that those within the profession embody principles of fairness, impartiality, and ethical conduct. Lawyers, as representatives of the legal system, have a responsibility to model civil behavior to build and maintain public trust. By doing so, they contribute to the creation of a society where individuals have confidence in the fairness and integrity of the legal institutions.

**IX. What does the Future Hold for Civics?** Efforts are underway across the country, as well as in our own state of New York, to improve civics education for all. Our speakers and panelists are working on the front lines of programs and initiatives to reach not only students, but adults. The late Sandra Day O'Connor, the first woman appointed to the U.S. Supreme Court, was the founder of a movement to revitalize civic education - *iCivics* - which provides online interactive programming for students from K-12. This excellent organization will be represented on our National Perspectives Panel by Executive Director Louise Dubé, New York State Education Commissioner Dr. Betty Rosa will be our guest on the New York panel, to educate us all about a recent initiative to bring a "Seal of Civic Readiness" diploma program to schools throughout the state. These are just a few of the of the many educational leaders belonging to organizations of similar stature who will join us, as you can see from the program below.

**Conclusion** We have discussed in this informational report why civics education is of utmost importance, why it has been neglected, some of the consequences of that neglect leading to a crisis in civic affairs, and finally, what our role as lawyers should be to address the crisis. By undertaking this convocation, we hope NYSBA can make a difference to our state, and to our nation.

## **X Civics Convocation Program Agenda**

Here is the anticipated agenda (in progress) for our Convocation.

**“To Safeguard our Democracy: Making the Case for Civics Education”**

NYSBA Bar Center, Albany, New York  
May 9, 2024 8:00 - 4:00pm

**Panels and Speakers**

**Introductory Keynote Speaker** NYSBA President Richard Lewis

**Keynote Speaker** Hon Mae D’Agostino, US District Court Northern District New York

**Panel 1- The National Landscape for Civics Education**

How is the federal government addressing issues in civics education for K-12? What progress has been made at the national level to invest in this critical work, and what needs to happen going forward to keep building on that momentum? What non-profit resources are available nationally? How is the national field of civic education building momentum around the diversity of approaches represented here, and how does that mold into the future of the field? How does the legal profession have a role to play in this critical work?

**Moderator Christopher Riano** - CEO, Center for Civic Education

*Panelists:*

**David Bobb (CEO)** - Bill of Rights Institute

**Louise Dubé (CEO)** /Julie Silverbrook (Dir of Civic Partnerships)- iCivics

**Liz Clay Roy (CEO)** Generation Citizen

**Vernee Green (CEO)** Mikvah Challenge

**Panel 2 -Civics Education in New York State**

How are we educating our youth to be civics ready? media literate? What steps is New York State taking to improve civics education? What does “civics readiness” mean, and how can we achieve it? How are current and future teachers being prepared to teach civics at all grade levels? How is New York state leading the nation in our efforts?

**Moderator: Susan Arbetter**, TV anchor “Capitol Tonight ”Spectrum News

*Panelists:*

**Dr. Betty Rosa** Commissioner of Education NYS

**Dr. Lester Young** Chancellor, NYS Board of Regents

**Hon Shelly Mayer** Chair, NYS Senate Education Committee

**Dr. Jonathan E. Collins**, Associate Director, Center for Educational Equity, Teachers College, Columbia University

**TBD** additional invitees, not yet confirmed

### ***Keynote Speakers***

**Hon Rowan D. Wilson** Chief Judge of the Court of Appeals, New York State

**Justin T. Hubbard**, Social Studies Teacher Salamanca High School and Winner of American Civics Education Teacher Award 2022

**Special Guest Jurist** whose name will be released closer to the date of the event

**Panel 3 - Students** This panel will be *primarily* students along with a few representatives from the ranks of teachers, administrators, school board members and the bar to pose questions to our special guest

**Panel 4 Moderator Jay Worona** Wrap-Up Reactions to the Day and Next Steps- Panelists **TBD**: Students, Teachers, Administrators, legislators, morning panelists - Feedback/wrap-up to today's panels and speakers-where do we go from here? are the initiatives discussed effective? sufficient? what are goals for the future?



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #4

REQUESTED ACTION: Approval of the Report and Recommendations of the Task Force on Combating Antisemitism and Anti-Asian Hate.

The Task Force on Combating Antisemitism and Anti-Asian Hate was created by NYSBA President Richard C. Lewis in June 2023 in response to increases in antisemitic and anti-Asian hate crimes, particularly in New York.

The report outlines the history of antisemitism and anti-Asian hate and provides background and recommendations regarding four (4) focus areas: proposed statutory changes, addressing internet hate speech, improving hate crime reporting, and enforcing the Dignity for All Students Act (DASA).

### **Recommendations**

Proposed Changes to New York’s Hate Crimes Statute, the Hate Crimes Act of 2000 (HCA), Article 485 of the New York Penal Law (NYPL)

1. Expansion of the crimes that can be predicate acts for HCA to include all offenses and support adoption of the proposed Hate Crimes Modernization Act which is pending in the NYS legislature, and support of similar bills that accomplish this purpose.
2. Inclusion of affirmative guidance of circumstances from which hate crimes can be inferred in the HCA.
3. Deletion of the word “substantial” in the HCA so that any crime that is committed in which the defined animus is a factor can be considered a hate crime if that animus played any role in causing the offense.

### Address Deficiencies in the Reporting of Hate Crimes

1. New York should align itself with 26 states including Oregon and New Jersey and require mandatory local collection of hate crimes data and reporting of such data to the state, in New York to the DCJS. To accomplish such reporting, the state should condition the receipt of state funds on local adherence to mandatory hate crime data and reporting standards.
2. New York and other states should require local law enforcement agencies to collect and submit data and enroll in the FBI Uniform Crime Reporting Program.

3. Improvement of law enforcement training.
4. Create written law enforcement policies and procedures to help to increase law enforcement responsiveness and effectiveness.
5. Implementation of hate crime hotlines. The recently enacted federal Jabara-Heyer NO HATE Act State-Run Hate Crime Reporting Hotlines program provides grants to state agencies for their implementation of hotlines to support victims who might be reluctant to report hate crimes to law enforcement authorities.
6. Law enforcement authorities should give due consideration to reports of hate crimes from community organizations. In many cases, hate crime victims are reluctant to directly approach law enforcement authorities. Encouraging victims to report hate crimes to community organizations and encouraging those organizations to, in turn, report hate crimes to law enforcement authorities could help address the underreporting problem.

#### Enactment of the Stop Hiding Hate Act, Which Can Help Stop Hate Speech on the Internet

1. Passage of the Stop Hiding Hate Act (S895/A06789), and support of similar bills that accomplish this purpose. The Stop Hiding Hate Act would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation was passed by the New York Senate and is pending in the Assembly. The legislation is modeled after a similar law in California.

#### New York Should Enforce the Dignity for All Students Act (DASA)

1. Support measures to increase compliance with New York State's Dignity for All Students Act, which aspires to provide the state's public elementary and secondary school students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying on school property, a school bus and/or at a school function.

This report will be presented by task force co-chairs Brian Cohen, Esq. and Vincent Chang, Esq.





NEW YORK STATE  
BAR ASSOCIATION

# Report and Recommendations of the New York State Bar Association **Task Force on Combating Antisemitism and Anti-Asian Hate**

January 2024

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

**Report and Recommendations of the New York State Bar  
Association Task Force on Combating Antisemitism and Anti-Asian  
Hate**

**January 2024**

## **Members of the Task Force on Combating Antisemitism and Anti-Asian Hate**

### **Task Force Co-Chairs**

Vincent T. Chang, Esq.  
Brian S. Cohen, Esq.

### **Members**

Dina Bakst, Esq.  
Mayo G. Bartlett, Esq.  
Matthew C. Butler, Esq.  
Elaine M. Chiu, Esq.  
Catherine A. Christian, Esq.  
David M. Cohn, Esq.  
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Mary Beth Morrissey, Esq., Ph.D.  
Lillian M. Moy, Esq.  
Sapna Vinay Raj, Esq.  
Tejash V. Sanchala, Esq.  
Hon. Adam Seiden  
Vivian D. Wesson, Esq.  
Pauline Yeung-Ha, Esq.

### **Executive Committee Liaison**

Richard C. Lewis, Esq.

### **NYSBA Staff Liaisons**

Ernesto Guerrero  
Moe Whitcomb

## **Subcommittee Members**

### Statutory Proposals

Dina Bakst, Esq.  
Mayo G. Bartlett, Esq.  
Vincent T. Chang, Esq.  
David M. Cohn, Esq.  
Christopher M. Kwok, Esq.  
Lillain M. Moy, Esq.

### Disclosures/Reporting Hate Crimes

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Sapna Vinay Raj, Esq.  
Tejash V. Sanchala, Esq.

## **Acknowledgements**

We would like to thank NYSBA President Richard Lewis for appointing us to serve as co-chairs, for entrusting us with this important initiative, and for lending his time, effort, and support to make it a success. Thanks for everything, Dick, we really appreciate it.

We would also like to thank the esteemed members of the task force for their hard work, commitment, and valuable contributions. Representing a diverse cross-section of the legal profession, this collegial group came together, dedicated countless hours, and shared their advice, sincere opinions, and a plethora of information. Your work will make a significant impact, and we're extremely grateful.

Finally, many thanks to Maureen (Moe) Whitcomb, NYSBA Assistant to the Executive Offices, for all of their assistance in operating the task force.

It has been an honor and a pleasure to work with all of you.

Vincent T. Chang, Esq. and Brian S. Cohen, Esq.  
Co-Chairs, NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate

## **Section 1. Introduction**

*"Hate crimes . . . leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself. . . ."*

President Clinton made the foregoing speech 16 years ago. Today, the situation has only worsened with antisemitic hate crimes spiking on the heels of years of increased anti-Asian hate crimes. In October 2023, the FBI released data that shows hate crimes in the U.S. at their highest since data collection began in 1991. The Anti-Defamation League reported 2,000 antisemitic incidents in the U.S. through July 2023 and a 337% uptick in incidents after Hamas' October 7th attack on Israel.<sup>1</sup> Similarly, from 2020–21, anti-Asian hate crimes spiked 339%.<sup>2</sup> Almost daily, the headlines are filled with stories like the gunfire in front of an Albany synagogue in December 2023.

Despite these dire statistics and reports, bar associations have not systematically studied this problem, a void which led NYSBA President Richard Lewis to convene this task force to examine the problem of hate crimes with a focus on those directed at the Asian American and Jewish communities. As President Lewis stated: "Antisemitic and anti-Asian bias in America is overt and disturbing, and it is increasing exponentially. . . We have launched this task force because we are at a crossroads, and left unchecked, we can only expect that crimes against these two vulnerable groups will continue to spiral out of control." The task force has been grappling with the scourge of hate crimes, which present a clear and present danger to many, but most strikingly to New Yorkers.

The members of our task force worked hard to put these recommendations together in the last several months. We held dozens of meetings, scoured the available literature, and met with prominent officials in the law enforcement and educational sectors. The dedication and talent of the task force has enabled us to put together the concrete recommendations contained in this report.

Like bar associations, society as a whole has devoted insufficient attention to hate crimes despite the gravity of the problem. As a result, the statutory framework governing hate crimes contains gaps in the definition of hate crimes and in the coverage of the hate crime statute – deficiencies that are addressed in our report. Equally problematic are the mechanisms for reporting hate

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<sup>1</sup> Toni Morales Pinales, *How Reports of Hate Crimes in the U.S. Were Already at Record Highs, in 4 Charts*, CNN, Oct. 29, 2023, <https://www.cnn.com/2023/10/29/us/hate-crimes-antisemitism-anti-muslim-dg/index.html>.

<sup>2</sup> Kimmy Yam, *Anti-Asian Hate Crimes Increased 339 Percent Last Year, Report Says*, NBC News, Jan. 31, 2022, <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-339-percent-nationwide-last-year-repo-rcna14282>.

crimes, including the lack of a requirement that law enforcement in New York report hate crimes to a central state authority.

We did not write this report to languish on a shelf. Instead, we provide concrete solutions carefully elicited from the universe of potential proposals. We intend this report to provide guideposts for the legislature and regulators in devising solutions to these problems. And we intend to follow up on this report with efforts to advance the proposals contained herein.

To be sure, we have no illusions that our task force alone can solve the problem of hate crimes. In this larger war against bigotry, as a bar association, all hands must be on deck. We believe that we are not alone and that all stakeholders will come together and take a stand to combat all forms of hate.

## **Section 2. Executive Summary**

Our report follows the commendable work of the 2020 NYSBA task force on Domestic Terrorism and Hate Crimes. This groundbreaking report was focused on federal laws addressing acts of domestic terrorism.<sup>3</sup> Not long after its publication, the wave of hate crimes against Asian Americans and the spike in antisemitic hate crimes ensued, necessitating our task force and this report.

This report begins with analyses of antisemitic and anti-Asian hate crimes, including the history of antisemitism and anti-Asian hate – two forms of bias that have deep and disturbing roots. Far from a new phenomenon, antisemitism is as old as civilization itself. And anti-Asian hate crimes in the U.S. span the history of our country. *See* pages 9-10 below.

Our report focuses on the recent waves of hate crimes ignited by exogenous catalysts: the COVID-19 pandemic in the case of anti-Asian hate crimes and the Hamas attacks of October 2023 in the case of antisemitic hate crimes. Our report addresses the disturbing increases in the rates of hate crimes during these recent troubled times.

Our task force has already condemned antisemitic hate and praised Governor Hochul’s efforts to address the problem. In October 2023, our task force released this statement:

The NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate is saddened and dismayed by what can only be termed hate speech in our own backyard in New York City and in certain colleges and universities on the part of pro-Hamas demonstrators. These individuals have held up swastikas and praised the massacre of innocent civilians

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<sup>3</sup> <https://nysba.org/app/uploads/2020/07/Final-Report-Task-Force-on-Domestic-Terrorism-Hate-Crimes.pdf>.

in Israel. New York Gov. Kathy Hochul called these demonstrations “abhorrent” and “morally repugnant.” Mayor Eric Adams told the protesters: “Do not use our streets to spread your hate.”<sup>4</sup>

The leaders of our task force also participated in a later statement:

The chants and slogans of the supporters of Hamas are no different from the words of the Ku Klux Klan or the Nazis,” Lewis added. “They are a deviation from our American values, and protecting our citizens is part of preserving our democracy. The New York State Bar Association joins Gov. Hochul in condemning these deplorable acts.”<sup>5</sup>

Looking ahead, our report turns to proposals to address the scourge of hate crimes, building upon constructive proposals already pending in the New York State Legislature. We focus on the following areas:

- **Proposed Statutory Changes.** We urge certain statutory changes that we believe will make the New York hate crimes law easier to enforce:
  - The current Hate Crimes Act, NY Penal Law, Section 485.05, provides a lengthy list of crimes that can be subject to enhancement as a hate crime, but leaves out certain offenses like graffiti, criminal obstruction of breathing and rape in the third degree. We urge that all offenses be predicate acts for hate crime. As a first step, we urge adoption of the proposed Hate Crimes Modernization Act pending in the New York state legislature which would add to the list of predicate acts in the hate crime statute. Senate Bill S773.
  - New York law only provides “negative guidance” by defining what is not a hate crime. We advocate changing the law, or issuing model jury instructions, to permit jurors to consider the totality of the circumstances or to provide more examples in the statute of what constitutes a hate crime, including the actions of a defendant before and during an attack.
  - The Hate Crimes Act of 2000 currently covers only crimes that were committed in “substantial” part because of the presence of the forbidden animus. We urge deletion of the word “substantial” so that any crime that is committed because of that animus can be considered a hate crime if that animus played any role in causing the offense to occur.

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<sup>4</sup> Susan DeSantis, *New York State Bar Association Decries Hate Speech Supporting Repugnant Attacks*, N.Y. St. Bar. Assoc., Oct. 11, 2023, <https://nysba.org/new-york-state-bar-association-decries-hate-speech-supporting-repugnant-attacks>.

<sup>5</sup> Susan DeSantis, *New York State Bar Association President Decries Rise in Antisemitic Incidents, Thanks Governor for Combating Hate Crimes*, N.Y. St. Bar. Assoc., Oct. 11, 2023, <https://nysba.org/new-york-state-bar-association-president-decries-rise-in-antisemitic-incidents-thanks-governor-for-combating-hate-crimes>.



- **Addressing Internet Hate Speech.** To address Internet hate speech, we urge the passage of the Stop Hiding Hate Act (S895/A06789) – legislation that has passed the New York Senate and is pending in the Assembly. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in California.
- **Improving Hate Crime Reporting.** The current situation is a patchwork of inconsistent laws that result in severe underreporting of hate crime in some states. New York’s reporting system has made substantial strides, but we urge adoption of some elements of the reporting requirements of Oregon and New Jersey.<sup>6</sup> Oregon’s law, for example, requires all police agencies to document reports of alleged hate crimes – whether or not they result in arrest – and share information with the state criminal justice division. District Attorneys must track their hate crime caseloads and report on outcomes, sentences, and recidivism.
- **Enforcing the Dignity for All Students Act.** We advocate measures to stop hate before it begins through education, especially in schools. We support measures to increase compliance with New York State’s Dignity for All Students Act, which aspires to provide the state’s public elementary and secondary school students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment and bullying on school property, a school bus and/or at a school function.

We regard these proposals as a starting point for what must be a sweeping attack on the problem of hate crimes. To be sure, some of these measures are untested and, if adopted, they need to be constantly reevaluated. These concrete and achievable proposals are a first step and build upon the earlier work of the 2020 task force on domestic terrorism and hate crimes.

### **Section 3. Background**

#### **A. Antisemitism**

##### ***Antisemitism and Hate Crimes: A Stain Throughout History and a Current Crisis Sweeping the Country***

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<sup>6</sup> See O.R.S. 137.676, 678. The New Jersey reporting regime was ordered by former New Jersey Attorney General Gurbir Grewal. [https://www.nj.gov/oag/dcj/agguide/Bias-Invest-Standards\\_040519.pdf](https://www.nj.gov/oag/dcj/agguide/Bias-Invest-Standards_040519.pdf)

We recount here in detail the terrorist acts that took place on October 7<sup>th</sup> and thereafter in Israel. These acts formed the backdrop for the wave of antisemitic hate crimes that followed in the U.S. and abroad.

The missions of the Nazis in the early 20th century and the terrorist group Hamas today are the same: extinguish all Jews. In 2019, Fathi Hamad, a senior member of Hamas, encouraged Palestinians across the world to kill Jews: “Seven million Palestinians outside, enough warming up, you have Jews with you in every place. You should attack every Jew possible in all the world and kill them.”<sup>7</sup>

On Oct. 7, Hamas terrorists heeded that call when they slaughtered as many as 1,200 Jews, the deadliest day for Jewish people since the Holocaust, and kidnapped more than 200 women and children, including the elderly and Holocaust survivors. On that dark day, among other inhumane acts:

- Hamas raped, mutilated, and tortured women and young girls, just because they thought they were Jewish.<sup>8</sup>
- Hamas burned people of all ages alive – including infants - just because they thought they were Jewish.
- Hamas murdered over 300 people attending a concert celebration, just because they thought they were Jewish.

That day, a Hamas terrorist boasted to his parents about killing 10 Jews as he spoke to them on one of his victims’ phones: “Look how many I killed with my own hands! Your son killed Jews!”<sup>9</sup>

### ***Antisemitic Hate Crimes Following the Hamas Attacks***

Making matters much worse, these barbaric and unthinkable acts of evil and depravity are being celebrated worldwide, including in New York, which has the largest Jewish population outside of Israel, and throughout America, including by certain antisemitic members of Congress.

Even before this year, in 2021, 817 antisemitic hate crimes were reported to the FBI by law enforcement agencies. From 2020 to 2021, reports of antisemitic hate crimes increased by 20%, according to the same data.

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<sup>7</sup> *Hamas Official Condemned After Calling on Palestinians to Kill Jews*, VOA, July 15, 2019, [https://www.voanews.com/a/middle-east\\_hamas-official-condemned-after-calling-palestinians-kill-jews/6171870.html](https://www.voanews.com/a/middle-east_hamas-official-condemned-after-calling-palestinians-kill-jews/6171870.html).

<sup>8</sup> . <https://www.nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html>

<sup>9</sup> Alyssa Guzman, *Hamas Terrorist Brags About Killing Jews While Talking to Parents on Victim’s Phone: ‘Killed 10 With My Own Hands!’*, N.Y. Post, Oct. 24, 2023, <https://nypost.com/2023/10/24/news/hamas-terrorist-brags-to-parents-about-killing-jews>.

But the numbers this year are far worse. According to data released by the Anti-Defamation League (ADL), in the month following Hamas' terror attack on Israel, antisemitic incidents in the U.S. increased by 316% compared with the same time period last year. In addition, in the one-month period between October 7 and November 7, 2023, the ADL documented 832 antisemitic incidents of assault, vandalism, and harassment across the U.S., an average of nearly 28 incidents a day.<sup>10</sup>

Sadly, while Jews account for only 2.4% of the U.S. population, they are the victims of at least 63% of reported religiously motivated hate crimes. And recent polling conducted by the Louis D. Brandeis Center for Human Rights Under Law found that 65% of college students active in Jewish organizations felt unsafe on campus because of physical or verbal attacks, and half felt the need to conceal their Jewish identity or support for Israel for the sake of their safety.

But the recent situation is far worse. This fall for example, at New York University, a student held up a sign that read: "Keep the world clean" of Jews.<sup>11</sup> A recent study found that 73% of Jewish college students and 44% of non-Jewish students have experienced or witnessed antisemitism since the start of the 2023–2024 school year.<sup>12</sup> The dark cloud of antisemitism that has hovered over the Jewish people consistently throughout history is surging -- and combating this growing, violent hate must be prioritized as a fundamental human rights issue, backed with the greatest sense of urgency.

### ***The Jewish People and Antisemitism: A Brief History***

"As a Jew I carry with me the tears and sufferings of my grandparents and theirs through the generations. The story of my people is a narrative of centuries of exiles and expulsions, persecutions and pogroms . . . . Jews knew that they or their children risked being murdered simply because they were Jews. Those tears are written into the very fabric of Jewish memory, which is to say, Jewish identity." – Rabbi Jonathan Sacks, "The Dignity of Difference"

The Jewish people have always lived in the land of Israel, but over many years, they dispersed throughout the Middle East and beyond. In Rome and Greece, their loyalty was questioned

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<sup>10</sup> *One Month Following Hamas Massacre, ADL Documents Dramatic Surge in Antisemitic Incidents in the U.S.*, ADL, Nov. 13, 2023, <https://www.adl.org/resources/press-release/one-month-following-hamas-massacre-adl-documents-dramatic-surge-antisemitic>.

<sup>11</sup> Jen Smith, *NYU Investigating 'Repugnant' Students Who Held Antisemitic 'Keep the World Clean' Signs at Washington Square Park Protest*, Daily Mail, Oct. 25, 2023, <https://www.dailymail.co.uk/news/article-12672281/NYU-investigating-repugnant-students-held-anti-Semitic-world-clean-signs-Washington-Square-Park-protest.html>.

<sup>12</sup> *Campus Antisemitism: A Study of Campus Climate Before and After the Hamas Terrorist Attacks*, ADL, Nov. 29, 2023, <https://www.adl.org/resources/report/campus-antisemitism-study-campus-climate-and-after-hamas-terrorist-attacks>.

because they rejected polytheism, which engendered antisemitic rhetoric. Later, a genocide in Alexandria wiped out the Jewish population of Egypt. Jews were also blamed for the crucifixion of Jesus Christ, despite the fact that the Romans were responsible.

During the Middle Ages, antisemitism and the persecution of Jews continued. Jews were blamed for the Black Death and accused of killing Christian children and using their blood for Passover rituals. Several countries created Jewish ghettos to separate Jews from society, and Jews were expelled from many countries, including England (1290), France (1306), and Spain (1492). More recently, in 1894, a serious injustice known as the Dreyfus Affair led to an irreversible wave of antisemitism in France, with people calling for the death of Jews.

All of these waves of antisemitism culminated in Hitler's deadly regime. While the systematic extermination of the Jewish population in Europe is well known, perhaps the greatest atrocity in human history, but the smaller atrocities, those which led inexorably to the death camps, cannot be forgotten or bypassed. To prevent current events from cascading into something even more horrific, the lesson must be that addressing the smaller, interim horrors in real time is essential. Only in this way – relentlessly addressing antisemitic acts when they happen - can this steroidal wave of antisemitism be stanchied.

By way of example, in Nazi Germany, the terror began with such steps as the boycotting of Jewish businesses, the public burning of Jewish-authored books and Kristallnacht (the “Night of Broken Glass”), one of the largest pogroms in Jewish history, resulting in the destruction of 200 synagogues and 7,500 Jewish shops. Jewish children were prohibited from returning to school, all Jewish businesses had to be handed over to the German government and Jews were required to wear armbands or Jewish stars for identification. These measures preceded Hitler's deportation of millions of Jews to concentration camps. The disturbing images of emaciated Jews in striped uniforms, and piles of corpses in mass graves, have been seared in the world's consciousness.

Jews are still too often scapegoated for problems throughout the world and, since the Holocaust, many of the same hateful antisemitic narratives and tropes persist, such as that Jews are greedy and deceive others to get ahead. But today, such vitriol is much easier to promote on social media by influencers with hundreds of thousands, if not millions, of followers. Notably, certain conspiracy theories, like “the Jews control Hollywood,” came about after Jews immigrated to the U.S. and were forced to become entrepreneurial and create opportunities for themselves in

certain industries, like entertainment, and professions, like law and medicine, in which they were denied employment.<sup>13</sup>

***The Working Definition of Antisemitism: An Important  
and Useful Tool for Guidance and Education***

The International Holocaust Remembrance Alliance is the only intergovernmental organization mandated to focus solely on Holocaust-related issues. The alliance’s Committee on Antisemitism and Holocaust Denial built international consensus around the following non-legally binding working definition of antisemitism, which many institutions and organizations worldwide have endorsed and adopted:

“Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”<sup>14</sup>

Per the alliance, “antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for ‘why things go wrong.’” In addition, antisemitism “is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.”<sup>15</sup>

The alliance also provides 11 examples of contemporary antisemitism “in public life, the media, schools, the workplace, and in the religious sphere” including, among others: calling for, aiding or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion; making mendacious, dehumanizing, demonizing or stereotypical allegations about the power of Jews as a collective, such as the Jews controlling the media, economy, government or other societal institutions; accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews; denying the Holocaust; or holding Jews collectively responsible for the actions of the state of Israel.<sup>16</sup>

As explained by the ADL, the world’s leading organization fighting antisemitism and hate in all forms, “these examples are important, because while certain longstanding myths animating

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<sup>13</sup> Jay Michaelson, *There Are a Lot of Jews in Hollywood. Let a Rabbi Explain Why*, Rolling Stone, Dec. 11, 2022, <https://www.rollingstone.com/tv-movies/tv-movie-features/jews-in-hollywood-kanye-west-dave-chappelle-rabbi-explains-1234645366/>.

<sup>14</sup> *What Is Antisemitism?*, International Holocaust Remembrance Alliance, <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

antisemitism have stood the test of millennia, manifestations of antisemitism do change, sometimes significantly, over time and place. It is important to provide guidance built on the knowledge of experts in the field, as well as the lived experience of large segments of the Jewish population.”<sup>17</sup>

In addition, the alliance’s definition is intended to be utilized by various government and non-government agencies and institutions, such as college administrators, law enforcement and others, as an important tool for education and guidance on antisemitism. As the ADL further explained: “As antisemitic incidents have increased worldwide, governments and civil society have sought ways to speak out against antisemitism and ensure that there is awareness of its real-life manifestations and impact. The definition should not be viewed as a substitute or replacement for existing laws, and it is not a ‘charging authority,’ but [n]onetheless, it is critical as guidance...to better enable [institutions and organizations] to identify antisemitism and gather and analyze relevant data.”<sup>18</sup>

Finally, according to the alliance, “antisemitic acts are criminal when they are so defined by law...” and “criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews.”<sup>19</sup>

## **B. Anti-Asian Hate**

### ***Hate Crimes Against Asian-Americans Before, During and After the COVID-19 Pandemic***

For decades, the dominant narrative about Asian-Americans has been that they are a “model minority,” not subject to the same discrimination and other tribulations to which other diverse groups are subject.<sup>20</sup> This oversimplified stereotype was shattered during the pandemic when hate crimes against Asian-Americans soared by 800% in 2020-2021.<sup>21</sup> As a result, the U.S. Congress stated: “Following the spread of COVID-19 in 2020, there has been a dramatic

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<sup>17</sup><https://www.adl.org/resources/backgrounders/about-ihra-working-definition-antisemitism>

<sup>18</sup> *About the IHRA Working Definition of Antisemitism*, ADL, Feb. 19, 2021, <https://www.adl.org/resources/backgrounders/about-ihra-working-definition-antisemitism>.

<sup>19</sup> *What is Antisemitism*, *supra* note 20.

<sup>20</sup> “Though sometimes understood as a positive preconception, the model minority stereotype erases lived experiences and collapses members of heterogeneous groups into an inauthentic, Pan-Asian caricature.” U.S. Commission on Civil Rights, *The Federal Response to Anti-Asian Racism in the United States* (Sept 2023), citing Robert G. Lee, *Orientalism: Asian Americans in Popular Culture*, Philadelphia: Temple University Press (1999); *see also*, Yuko Kawai, *Stereotyping Asian Americans: The Dialectic of the Model Minority and the Yellow Peril*, *Howard Journal of Communications*, vol. 16, no. 2, 2005.

<sup>21</sup> *Rep. Grace Meng: How to Stop the Hate*, Clinton Foundation Podcast, Mar. 18, 2021, <https://www.clintonfoundation.org/podcast/rep-grace-meng-how-to-stop-the-hate/>.

increase in hate crimes and violence against Asian Americans and Pacific Islander....[An] alarming surge in anti-Asian hate.”<sup>22</sup>

### *The History of Anti-Asian Hate Crimes*

The 2021 legislation followed centuries of inattention to hate crimes against Asian-Americans.

As Second Circuit Senior Judge Denny Chin and Kathy Hirata Chin emphasized: “This is nothing new, for there is a long history of hostility and violence against Asian Americans in this country, a history that is not well known.”<sup>23</sup> Harvard’s Courtney Sato explained that Asians have often been scapegoated during times of national distress: “This is really not an exceptional moment by any means...But it’s really part of a much longer genealogy of anti-Asian violence that reaches as far back as the 19th century.”<sup>24</sup> As Judge Chin and Kathy Chin documented,<sup>25</sup> anti-Asian hate crimes took such forms as:

- The Oct. 24, 1871, lynching of at least 18 Chinese Americans (10% of the Chinese American population of Los Angeles at the time) by a mob of hundreds.
- The murders of 28 Chinese coal miners on September 2, 1885, in Rock Springs, in what was then the Wyoming territory.
- The 1887 massacre in Hells Canyon, Oregon, in which at least 31 Chinese miners were murdered, their gold stolen, their camps burned, and their bodies thrown into the Snake River.
- The brutal murder of Vincent Chin in 1982 in Detroit at a time when American auto companies in Detroit were threatened by competition from Asian companies.

### *Specific Instances of Recent Anti-Asian Hate Crimes*

The foregoing instances of anti-Asian hate are not often taught in our nation’s classrooms. Before the pandemic, hate crimes against Asian Americans were generally underreported and under-recognized. However, recent hate crimes perpetrated against Asian Americans have been so widespread and so brutal that they have been impossible to ignore. From New York to San Francisco, hate crimes against Asians erupted nationwide, accompanied by denunciations of

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<sup>22</sup> S. 937 – COVID-19 Hate Crimes Act, <https://www.congress.gov/bill/117th-congress/senate-bill/937/text>.

<sup>23</sup> Hon. Denny Chin and Kathy Hirata Chin, “*Kung Flu*”: *A History of Hostility and Violence Against Asian Americans*, 90 *Fordham L. Rev.* 1889 (2022), [https://fordhamlawreview.org/wp-content/uploads/2022/04/Chin\\_April.pdf](https://fordhamlawreview.org/wp-content/uploads/2022/04/Chin_April.pdf). See also Gillian Brockell, *The Long, Ugly History of Anti-Asian Racism And Violence in the U.S.*, Wash. Post, Mar. 18, 2021, <https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/>.

<sup>24</sup> Liz Mineo, *The Scapegoating of Asian Americans*, *Harvard Gazette*, Mar. 24, 2021, <https://news.harvard.edu/gazette/story/2021/03/a-long-history-of-bigotry-against-asian-americans>.

<sup>25</sup> Chin and Chin, *supra* note 28.

Asians as responsible for the COVID-19 pandemic.<sup>26</sup> And anti-Asian hate crimes did not stop when the pandemic did. The following is a small sampling of some of the most brutal, and/or most recent, anti-Asian hate crimes in New York City alone over roughly the last two years (Over 40% of the anti-Asian hate crimes in large cities nationwide took place in New York City in 2021.<sup>27</sup>)

- On October 19, 2023, Jasmer Singh, an Indian American Sikh man, was beaten to death in a New York road rage attack. His family seeks hate crime charges against the killer.<sup>28</sup>
- On September 2, 2023, a crime suspect caught on camera in Prospect Park, Brooklyn, yelled anti-Asian remarks at a man, then hit him with a stick repeatedly before running off.<sup>29</sup>
- On August 7, 2023, an Asian woman from Nevada was punched repeatedly as “anti-ethnic remarks” were directed toward her on a Manhattan subway train.<sup>30</sup>
- On March 2, 2023, an 18-year-old woman grabbed Cecile Lai, pulled her to the ground and punched and kicked her, according to the district attorney’s office.<sup>31</sup>
- On February 27, 2022, during a three-hour period, seven Asian American Pacific Islander women were attacked in seven separate incidents in midtown Manhattan.<sup>32</sup>
- On February 22, 2022, GuiYing Ma died from her injuries after she was smashed in the head with a rock in Queens.<sup>33</sup>
- In February 2022, Christina Yuna Lee was followed and then stabbed more than 40 times in her apartment in Manhattan’s Chinatown.<sup>34</sup>

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<sup>26</sup> According to the Bureau of Justice Assistance (BJA), anti-Asian hate crimes rose 164% in 16 of the largest cities and counties in the first quarter of 2021 compared to the same period in 2020. Bureau of Justice Assistance, Dep’t of Justice, *Interrogatory Responses to the U.S. Commission on Civil Rights*, Mar. 16, 2023, at 5.

<sup>27</sup> Forty-seven of the anti-Asian hate crimes in the first quarter of 2021 out of a total of 110 in the nation’s largest cities took place in New York City. [https://www.csusb.edu/sites/default/files/A-API%20City%20Chart\\_As%20of%20May%2028%202021%205%20PM.docx](https://www.csusb.edu/sites/default/files/A-API%20City%20Chart_As%20of%20May%2028%202021%205%20PM.docx).

<sup>28</sup> Amanda Woods, *Sikh Man, 66, Beaten to Death in Road Rage Attack; Family Calls for Hate Crime Charges*, N.Y. Post, Oct. 23, 2023, <https://nypost.com/2023/10/23/metro/sikh-man-66-beaten-to-death-in-nyc-road-rage-attack-cops>.

<sup>29</sup> *Hate Crime Suspect Caught on Camera in Prospect Park, Brooklyn*, KION, Sept. 6, 2023, <https://kion546.com/cnn-regional/2023/09/06/hate-crime-suspect-caught-on-camera-in-prospect-park-brooklyn>.

<sup>30</sup> Allie Griffin, *Teen Girl Allegedly Slugs Asian Woman, Attacks Witness in Possible Hate Crime on NYC Subway*, N.Y. Post, Aug. 7, 2023, <https://nypost.com/2023/08/07/teen-girl-allegedly-slugs-asian-woman-in-possible-hate-crime-on-nyc-subway>.

<sup>31</sup> Peter C. Mastro Simone, *Two Arrests Made in Anti-Asian Attack*, Queens Chronicle, Mar. 16, 2023, [https://www.qchron.com/editions/queenswide/two-arrests-made-in-anti-asian-attack/article\\_f6d97b2c-b916-509d-a4de-233a801312d6.html](https://www.qchron.com/editions/queenswide/two-arrests-made-in-anti-asian-attack/article_f6d97b2c-b916-509d-a4de-233a801312d6.html).

<sup>32</sup> Marlene Lenthang and Tim Fitzsimons, *NYPD Arrests Suspect in 7 Attacks Against Asian Women on Same Day*, NBC News, Mar. 9, 2022, <https://www.nbcnews.com/news/asian-america/man-wanted-7-attacks-asian-women-1-day-nypd-says-rcna18247>.

<sup>33</sup> Amir Vera and Liam Reilly, *Asian Woman Attacked Last Year in New York by Man With Rock Has Died, Family Says*, CNN, Feb. 28, 2022, <https://www.cnn.com/2022/02/28/us/guiying-ma-death-new-york-asian-hate-crime/index.html>.

<sup>34</sup> Stef Manisero, *NYPD: Man Charged With Murder in Stabbing Death of Woman in Chinatown*, NY1, Feb. 13, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/02/13/woman-fatally-stabbed-chinatown>.



- On January 15, 2022, Michelle Go died when she was shoved to her death in front of a moving subway train.<sup>35</sup>
- In July 2021, Than Than Htwe died from head injuries after an attempted robbery caused her to fall down subway stairs.<sup>36</sup>
- On April 23, 2021, Yao Pan Ma was stomped on the head and killed in Harlem.<sup>37</sup>

The foregoing list is, unfortunately, far from exhaustive. Scores of other hate crimes took place before, during, and after the roughly two-year time period covered above.<sup>38</sup>

### *Statistical Analysis of Recent Anti-Asian Hate Crimes*

While hate crimes and hate incidents are notoriously underreported, particularly when committed against Asian Americans,<sup>39</sup> statistical evidence further demonstrates the magnitude of the problem.

One group studied internet activity and reported a rise of 1,662% in anti-Asian hate speech in 2020 compared with 2019. This peaked with the announcement of the COVID-19 pandemic.<sup>40</sup>

At the most basic level, public opinion poll data sheds light on the statistical scope of the hate crime problem, showing that 1 out of 4 Asians has experienced a hate incident.<sup>41</sup> Stop AAPI

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<sup>35</sup> Myles Miller, *Asian Woman Pushed to Her Death in Front of Oncoming Train at Times Square Station*, NBC News, Jan. 15, 2022, <https://www.nbcnewyork.com/news/local/crime-and-courts/woman-killed-after-being-pushed-onto-tracks-at-times-square-subway-station/3497589>.

<sup>36</sup> *Than Than Htwe Dies After Being Critically Injured in Subway Robbery Attempt*, CBS News, July 28, 2021, <https://www.cbsnews.com/amp/newyork/news/family-says-than-than-htwe-woman-critically-injured-in-subway-robbery-attempt-wont-make-it-out-of-this>.

<sup>37</sup> Artemis Moshtaghian, *An Asian Man Injured in an Unprovoked Attack in New York Last April Has Died, Officials Say*, CNN, Jan. 9, 2022, <https://www.cnn.com/2022/01/09/us/asian-man-new-york-attack-death/index.html>.

<sup>38</sup> This list is confined to New York City and thus does not cover crimes such as the 2022 Atlanta spa murders. Alexis Stevens, *Spa Shootings: A Timeline of Events That Left 8 Dead in Metro Atlanta*, Atlanta Journal-Constitution, Mar. 15, 2022, <https://www.ajc.com/news/spa-shootings-a-timeline-of-events-that-left-8-dead-in-metro-atlanta/UH5ZJVXV3FCY3LUPW4T6CUCSC4>.

<sup>39</sup> In 2020, nearly 25% of large cities did not report any hate crimes. This likely reflects an issue with reporting, as it is “a statistical near-impossibility” that none of those cities experienced a single hate crime in that year. *The Federal Response to Anti-Asian Racism in the United States*, U.S. Commission on Civil Rights, at 9 (Sept. 2023). Only about half of states have laws that require the state to collect and analyze data on hate crimes via mandatory reporting from law enforcement agencies. The problem of underreporting is more severe in Asian communities. See Catherine Thorbecke, *Why Anti-Asian Hate Incidents Often Go Unreported and How To Help*, ABC News, Mar. 18, 2021, <https://abcnews.go.com/US/anti-asian-hate-incidents-unreported/story?id=76509072>. The Asian American Bar Association discussed the problem of underreporting of hate crimes in Asian American communities (AABANY Report).

<sup>40</sup> Emma Woollacott, *Anti-Asian Hate Speech Rocketed 1,662% Last Year*, Forbes, Nov. 15, 2021, <https://www.forbes.com/sites/emmawoollacott/2021/11/15/anti-asian-hate-speech-rocketed-1662-last-year>.

<sup>41</sup> *Poll: 1 out of 4 Asian Americans Has Experienced a Hate Incident*, Axios, Mar. 30, 2021, <https://www.axios.com/2021/03/30/poll-1-in-4-asian-americans-experience-hate-incident>.

Hate reported about 11,500 acts of hate between March 2020 and 2022.<sup>42</sup> More than half of Asian respondents report that they know someone who has been victimized.<sup>43</sup>

And these statistics carry over into 2023. Over 2 in 10 Asian Americans and Pacific Islanders (23%) say they were verbally harassed or abused in the last year, and 22% have been called a racial or ethnic slur.<sup>44</sup>

The foregoing data relates to hate incidents, which are not necessarily hate crimes, but the statistics on hate crimes are equally alarming. In 2021, 746 anti-Asian hate crimes were reported to the FBI by law enforcement agencies. Reports of hate crimes against Asian Americans jumped 342% from 2020 to 2021, after an increase of 124% between 2019 and 2020.<sup>45</sup>

The Asian American Bar Association of New York, including our task force members, Professor Elaine Chiu, and Chris Kwok, performed perhaps the most extensive statistical analysis of anti-Asian hate crimes, thoroughly reviewing over 200 New York City cases. Notably, the study found that assault was the most common offense – 58% of all incidents – indicating that hate crimes are generally serious violent crimes. But the study found that prosecution of hate crimes remains difficult. Out of the 64 criminal prosecutions the group studied, only seven resulted in hate crime convictions. At the time, 20 other prosecutions were still pending.<sup>46</sup>

### ***The Profound Effect of Hate Crimes on Asian American Communities***

The surge in hate crimes has resulted in fear and isolation in Asian American communities:

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<sup>42</sup> Data from Momentum and AAPI Data found 10% of AAPIs reported being a victim of a hate crime or hate incident in the March 2021 survey. Their March 2022 survey shows that 15% of AAPI adults had reported the same experience. [aapidata.com/blog/discrimination-survey-2022](https://aapidata.com/blog/discrimination-survey-2022).

<sup>43</sup> Brendan Lantz and Marin R. Wenger, *Anti-Asian Xenophobia, Hate Crime Victimization, and Fear of Victimization During the COVID-19 Pandemic*, Nat'l Library of Medicine, May 11, 2022. Similarly, approximately 30% reported fear or worry about being the victim of a hate incident. Neil G. Ruiz, Khadijah Edwards and Mark Hugo Lopez, *One-Third of Asian Americans Fear Threats, Physical Attacks and Most Say Violence Against Them Is Rising*, Pew Research Center, Apr. 21, 2021, <https://www.pewresearch.org/short-reads/2021/04/21/one-third-of-asian-americans-fear-threats-physical-attacks-and-most-say-violence-against-them-is-rising/>. About 75% of Asians believe that the United States has become more dangerous for their racial/ethnic group (AA & NHPI COVID-19 Needs Assessment Project).

<sup>44</sup> Terry Tang and Linley Sanders, *1 in 3 U.S. Asians and Pacific Islanders Faced Racial Abuse This Year*, AP-NORC/AAPI Data Poll Shows, WNCT, Nov. 14, 2023, <https://www.wnct.com/news/politics/ap-1-in-3-us-asians-and-pacific-islanders-faced-racial-abuse-this-year-ap-norc-aapi-data-poll-shows>.

<sup>45</sup> Rachel Tillman, *Hate Crimes Rose 44% Last Year in Study of Major Cities*, NY1, Feb. 14, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/02/14/hate-crime-increase-2021-asian-american->. See also Kimmy Yam, *NYPD Reports 361 Percent Increase in Anti-Asian Hate Crimes Since Last Year*, NBC News, Dec. 10, 2021, <https://www.nbcnews.com/news/asian-america/nypd-reports-361-percent-increase-anti-asian-hate-crimes-last-year-rcna8427>.

<sup>46</sup> AABANY Report at 5.

“For the Asian American communities that are experiencing this, it just feels like an all-out assault,” said William Ming Liu, PhD, a counseling psychologist and chair of the Department of Counseling, Higher Education, and Special Education at the University of Maryland.

Early research has linked the uptick in anti-Asian discrimination to increases in anxiety, depressive symptoms, and sleep problems among those who are targeted.<sup>47</sup>

A recent study showed that “having experienced or witnessed a hate crime incident was associated with higher levels of serious psychological distress . . . [and] having had to forgo necessary care . . .”<sup>48</sup> As a result of the fear and stress arising from anti-Asian hate, many AAPI persons changed their behavior in response to bias-motivated attacks and harassment, including closing shops early, avoiding community events or public transportation.<sup>49</sup> A nationally representative survey of Asian Americans and Pacific Islanders found that 45% indicated discrimination negatively changed their sense of belonging, and 31% stated that discrimination impacted their behavior, such as causing them to switch schools, jobs or where they shop.<sup>50</sup>

### *Conclusion*

Although the hate crime epidemic of 2020–22 against Asian Americans has subsided somewhat, hate crimes persist, and we should continue to push for measures to address the scourge of hate crimes. As President Biden has stated:

*For centuries, Asian Americans, Native Hawaiians, Pacific Islanders . . . have helped build this nation only to be often stepped over, forgotten, or ignored . . . [they have] lived here for generations, but still considered, by some, the “other” . . . It’s wrong . . . it’s simply un-American.*<sup>51</sup>

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<sup>47</sup> Zara Abrams, *The Mental Health Impact of Anti-Asian Racism*, APA, July 1, 2021, <https://www.apa.org/monitor/2021/07/impact-anti-asian-racism>.

<sup>48</sup> *Id.*

<sup>49</sup> AABANY Report at 12.

<sup>50</sup> *Barriers to Justice: Asian Americans and Pacific Islanders Want Greater Protection of Their Civil Rights*, NORC, May 2023, [https://norc.org/content/dam/norc-org/pdfs/AAPI\\_Civil\\_Rights\\_Report\\_FINAL.pdf](https://norc.org/content/dam/norc-org/pdfs/AAPI_Civil_Rights_Report_FINAL.pdf).

<sup>51</sup> <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/20/remarks-by-president-biden-at-signing-of-the-covid-19-hate-crimes-act/>

## C. The History of Hate Crimes Legislation and Lessons From the Passage of Hate Crimes Legislation in 2021

### *Early Hate Crimes Laws*

The earliest hate crime laws were passed following the Civil War to address racist violence in the years after the war. The first modern federal hate crime law was passed in 1968,<sup>52</sup> and federal law has been expanded and modified many times since.

- In 1968, Congress also made it a crime to use, or threaten to use, force to interfere with housing rights because of the victim's race, color, religion, sex, or national origin.
- In 1988, protections based on familial status and disability were added.
- In 1996, Congress passed the Church Arson Prevention Act, 18 U.S.C. § 247. Under this Act, it is a crime to deface, damage or destroy religious real property, or interfere with a person's religious practice, in situations affecting interstate commerce.
- In 2009, the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act expanded the federal definition of hate crimes.

At the state level today, 46 states, the District of Columbia, and two territories (Puerto Rico and the U.S. Virgin Islands) have hate crime laws,<sup>53</sup> though they also vary in many ways.<sup>54</sup>

### *COVID-19 Hate Crimes Act*

After the March 2021 Atlanta spa murders, in which six Asian spa workers were murdered,<sup>55</sup> on March 18, 2021, for the first time in more than 30 years, a congressional hearing on hate crimes against Asians was held.<sup>56</sup> On May 20, 2021, President Biden signed the COVID-19 Hate Crimes Act in recognition of the dramatic increase in hate crimes against Asian Americans. The

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<sup>52</sup> The 1968 statute made it a crime to use, or threaten to use, force to willfully interfere with any person because of race, color, religion, or national origin and because the person is participating in a federally protected activity, such as public education, employment, jury service, travel, or the enjoyment of public accommodations, or helping another person to do so. In 1968, Congress also made it a crime to use, or threaten to use, force to interfere with housing rights because of the victim's race, color, religion, sex, or national origin; in 1988, protections on the basis of familial status and disability were added.

<sup>53</sup> *Policy Spotlight: Hate Crime Laws*, Movement Advancement Project (2021), <https://www.lgbtmap.org/file/2021-report-hate-crime-laws.pdf>.

<sup>54</sup> Jordan Williams, *Hate Crime Laws Across US Inconsistent, Civil Rights Groups Say*, The Hill, July 28, 2021, <https://thehill.com/blogs/blog-briefing-room/news/565226-hate-crime-laws-across-us-inconsistent-civil-rights-groups-say/>

<sup>55</sup> Nicole Chavez and Natasha Chen, *Assaulted. Harassed. This Is the Reality for Asian Americans a Year After the Atlanta Spa Shootings*, CNN, Mar. 16, 2022, <https://www.cnn.com/2022/03/16/us/atlanta-spa-shootings-anniversary/index.html>.

<sup>56</sup> Lisa Desjardins and Patty Gorena Morales, *Congress Holds First Hearing on Asian American Violence in Decades Amid 'Crisis Point,'* PBS, Mar. 18, 2021, <https://www.pbs.org/newshour/show/congress-holds-first-hearing-on-asian-american-violence-in-decades-amid-crisis-point>.

legislation, introduced by U.S. Rep. Grace Meng and Sen. Mazie Hirono, improved reporting of hate crimes, expedited the review of hate crimes related to COVID-19 and authorized grants to state and local governments to conduct hate crime-reduction programs.<sup>57</sup>

As President Biden remarked, the legislation represented “a significant break” in an otherwise hyper-partisan political climate.<sup>58</sup> The COVID-19 Hate Crimes Act has been described as “the single most significant piece of legislation to improve federal hate crime data since the Hate Crimes Statistics Act of 1990.”<sup>59</sup>

The passage of the COVID-19 hate crimes law provides guidance for bar associations and other organizations, particularly regarding how we might achieve the legislative objectives outlined in later sections of this report. The 2021 hate crimes law, a genuinely bipartisan measure, resulted from the work of a coalition of many diverse groups. Numerous public officials issued statements supporting the Asian American community.<sup>60</sup> In particular, Congresswoman Grace Meng focused on the Atlanta murders, noting “we saw the terrible news about the six Asian women who were shot and killed in the Atlanta area. Our community is bleeding, we are in pain, and for the last year, we’ve been screaming out for help.”<sup>61</sup>

For our purposes, an important lesson is the role of bar associations. Numerous bar associations added their voices in support of the Asian American community. Before the passage of the 2021 legislation, the National Asian Pacific Bar Association and the Asian American Bar Association of New York, the American Bar Association,<sup>62</sup> and the New York County Lawyers Association,<sup>63</sup> as well as a coalition of diverse bar associations,<sup>64</sup> condemned the rise of anti-Asian hate crimes. Notably, the National Asian Bar sponsored a historic resolution in the ABA

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<sup>57</sup> S. 937 – COVID-19 Hate Crimes Bill, <https://apps.npr.org/documents/document.html?id=20784480-bills-117s9>.

<sup>58</sup> Libby Cathey, Biden Signs Anti-Asian Hate Crime Bill Marking ‘Significant Break’ in Partisanship, ABC News, May 20, 2021, <https://abcnews.go.com/Politics/biden-sign-anti-asian-hate-crime-bill-law/story?id=77801857>.

<sup>59</sup> Rhonda Sonnenberg, *One Year Later: COVID-19 Hate Crimes Act a Promising Work in Progress*, SPL Center, May 20, 2022, <https://www.splcenter.org/news/2022/05/20/one-year-later-covid-19-hate-crimes-act-promising-work-progress>.

<sup>60</sup> *A Rising Tide of Hate and Violence Against Asian Americans in New York During Covid-19: Impact, Causes, Solutions*, Asian Am. Bar Ass’n of N.Y. & Paul Weiss (2021) (hereinafter AABANY REPORT), [https://www.aabany.org/resource/resmgr/press\\_releases/2021/A\\_Rising\\_Tide\\_of\\_Hate\\_and\\_Vi.pdf](https://www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf), at 9.

<sup>61</sup> House Hearing on Discrimination and Violence Against Asian Americans Transcript, March 18.

<sup>62</sup> *Statement of ABA President Patricia Lee Refo Re: Bias and Hate Crimes Against Asian Americans*, ABA, Mar. 13, 2021, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/03/statement-of-aba-president-patricia-lee-refo-re-bias-and-hate-c/>.

<sup>63</sup> *NYCLA Statement on Violence Against Asian Americans*, NYCLA, Aug. 1, 2022, <https://www.nycla.org/resource/statement-letter/nycla-statement-on-violence-against-asian-americans/>.

<sup>64</sup> *National Diverse Bars Condemn Recent Acts of Anti-Asian Hate*, Nat’l Native American Bar Assoc., Apr. 2021, <https://www.nativeamericanbar.org/wp-content/uploads/2021/04/20210401-National-Diverse-Bars-Condemn-Recent-Acts-of-Anti-Asian-Hate.pdf>.

House of Delegates urging action on Asian hate crimes.<sup>65</sup> The New York State Bar Association convened this task force partially in response to the rise in anti-Asian hate crimes.

The success of the 2021 effort gives us hope that further measures to address hate crimes will be considered at the state and federal level. Our proposals are set out below.

#### **D. Constitutionality of Hate Crimes Laws**

The Supreme Court has upheld hate crimes laws against First Amendment attacks.<sup>66</sup> Moreover, federal hate crimes statutes have been held to be a proper exercise of the Commerce power.<sup>67</sup> And courts have rejected the argument that hate crime laws are unconstitutionally vague.<sup>68</sup>

### **Section 4. Proposals**

#### **I. Proposed Changes to New York’s Hate Crimes Statute, the Hate Crimes Act of 2000, Article 485 of the New York Penal Law**

The existing set of hate crime laws is an inconsistent patchwork of laws that vary widely from state to state. The following are our task force’s recommendations for changes in New York’s hate crimes law, the principal statute of which is The Hate Crimes Act of 2000 (HCA), codified in Article 485 of the New York Penal Law (NYPL).

One of our recommendations below is partially contained in legislation proposed by Senator Brad Hoylman and Assembly Member Grace Lee.<sup>69</sup> The bill, which will formally be introduced in early 2024, dubbed the Hate Crime Modernization Act, intends to expand what offenses are deemed hate crimes, namely by increasing the total range of eligible charges from 66 to 97. We support this proposal as a first step. In addition, as set out below, the task force recommends an even more expansive addition to the scope of the predicate acts covered by New York’s hate crimes law. We also recommend other proposals that are not addressed in the Hate Crime Modernization Act.

As Senator Hoylman said in introducing the Hate Crime Modernization Act: “As we witness an unprecedented rise in bias-motivated crimes against Jewish, Muslim, Asian American and

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<sup>65</sup> NAPABA Co-Sponsors Resolution on Hate Crimes Adopted by the ABA in Historic First, NAPABA, Aug. 10, 2021, <https://www.napaba.org/news/583940/NAPABA-Co-Sponsors-Resolution-on-Hate-Crimes-Adopted-by-the-ABA-in-Historic-First.htm>.

<sup>66</sup> See *Wisconsin v. Mitchell*, 508 U.S. 47 (1993).

<sup>67</sup> See *U.S. v. Hill*, 927 F.3d 188 (4th Cir. 2019).

<sup>68</sup> See *People v. Fox*, 17 Misc. 3d 281 (Sup. Ct., Kings Co. 2007), citing *People v. Amadeo*, 2001 N.Y. Slip Op. 40190(U) (Sup. Ct., Queens Co. 2001); *People v. Diaz*, 188 Misc. 2d 341 (Sup. Ct., N.Y. Co. 2001); *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992), cert denied, 508 U.S. 974 (1993); *State v. Mitchell*, 163 Wis 2d 652, 473 NW2d 1 (Ct. App 1991).

<sup>69</sup> Lisa Rozner, *Manhattan DA Alvin Bragg, New York Lawmakers Introduce Hate Crime Modernization Act to Close Loopholes*, CBS News, Nov. 9, 2023, <https://www.cbsnews.com/newyork/news/hate-crime-modernization-act-alvin-bragg-new-york-close-loopholes-antisemitism/?s=03>.

LGBTQ people, it's of utmost importance that New York closes the dozens of loopholes in our hate crime statute to send the urgent message that hatred won't be tolerated in our state."

The task force's recommendations look to close the loophole upon which Senator Hoylman focused, but also advocate for more comprehensive changes to the law. It is our hope that New York's enactment of Senator Hoylman's bill and some or all of the recommendations below will serve as a model for other states.<sup>70</sup>

We advocate three principal statutory changes:<sup>71</sup>

First, we support an expansion of the crimes that can be predicate acts for the HCA. We urge that all offenses be listed as predicate acts.

Second, the HCA provides only negative guidance as to what a hate crime is not. We urge the addition of affirmative guidance of circumstances from which hate crimes can be inferred.

Third, the HCA currently covers only crimes that were committed in "substantial" part because of the presence of the forbidden animus. We urge deletion of the word "substantial" so that any crime that is committed because of that animus can be considered a hate crime if that animus played any role in causing the offense to occur.

A markup containing our proposed changes to the HCA is contained at Appendix A.

#### **A. Definition of Hate Crime**

Rather than defining what a hate crime is, New York Penal Law § 485.05(2) only provides negative guidance, defining what it is not a hate crime: "Proof of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim *does not*, by itself, constitute legally sufficient evidence satisfying the people's burden..." (emphasis added).

The task force recommends amending the statute to provide affirmative guidance and examples of what a hate crime *is*.

The task force recommends the following amendment of the HCA to include affirmative guidance regarding certain categories of evidence that support a hate crime prosecution:

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<sup>70</sup> Thanks to the Asian Bar Association of New York and to our task force members Elaine Chiu and Chris Kwok and AABANY executive director Yang Chen for their work on some of these legislative proposals several years ago. Many of the legislative/ proposals in this report are contained in the Asian Bar's report ("AABANY Report") [https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless Tide Report 2022 FIN.pdf](https://cdn.ymaws.com/www.aabany.org/resource/resmgr/aavtf/Endless_Tide_Report_2022_FIN.pdf).

<sup>71</sup> In NYSBA'S 2020 report on domestic terrorism and hate crimes the task force rejected proposals to create rebuttable presumptions that hate crime defendants would have to rebut. The current task force adheres to this recommendation. <https://nysba.org/app/uploads/2020/07/Final-Report-Task-Force-on-Domestic-Terrorism-Hate-Crimes.pdf>.

- Evidence of expressions from the perpetrator that include well-settled slurs, hostile language, or gestures offensive to the protected group, such as references to foreignness, that occur close in time to the conduct, or in explanation of the conduct, should be presumptively legally sufficient evidence that satisfies the People’s burden.<sup>72</sup>
- Evidence that the events preceding the incident drew attention to the victim’s race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation immediately prior to or during the perpetrator’s conduct.<sup>73</sup>
- Evidence that the defendant selected victim(s) due to the defendant’s belief that the victim(s) belonged to a protected group that was more likely to have valuables, less likely to report the crime or other stereotypes.<sup>74</sup>
- Evidence that the defendant was part of a hate group or had a history or pattern making bias-related statements or engaging in bias-related conduct.<sup>75</sup>

In addition to (or possibly in lieu of the statutory changes discussed above), we recommend the use of jury instructions incorporating some or all the above points. We also recommend the use of the following four jury instructions for which we believe no statutory change is necessary:

- That hate crimes can be established by circumstantial evidence considering the totality of the circumstances.<sup>76</sup>

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<sup>72</sup> *E.g.*, *People v. Marino*, 35 A.D.3d 292, 293, 826 N.Y.S.2d 68 (1st Dep’t 2006) (“Defendant’s guilt of menacing as a hate crime was established by evidence that he approached two African-American men for no apparent reason and brandished a box cutter, after his friend had been using racial epithets toward these men, which defendant personally repeated); *People v. Spratley*, 152 A.D.3d 195, 59 N.Y.S.3d 495 (3d Dep’t 2017); *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815, 818 (N.Y. City Crim. Ct. 1988); *People v. Dinan*, 118 Misc. 2d 857, 461 N.Y.S.2d 724 (N.Y. City Ct. 1983); *People v. Moorjaney*, No. 2098/04, 2006 N.Y. Misc. LEXIS 791, at \*4 (Sup. Ct. Mar. 24, 2006) (“[T]here was sufficient evidence for the Grand Jury to conclude that the writer of the offensive words was motivated by a perception of the person or persons who used the third floor female bathroom; that would include, among others, all the people in the school, all the female people in the school, [and] all the black female people . . . .”); *U.S. v. Magleby*, 241 F.3d 1306, 56 Fed. R. Evid. Serv. 951 (10th Cir. 2001) (court properly admitted lyrics to song defendant played shortly before the cross burning).

<sup>73</sup> *People v. Ortiz*, 48 A.D.3d 1112, 851 N.Y.S.2d 784, 784–85 (4th Dep’t 2008) (grand jury evidence established, inter alia, that defendants began to beat the victims after inquiring about the victims’ gay relationship).

<sup>74</sup> *People v. Fox*, 844 N.Y.S.2d 627 (Sup. Ct. 2007) (selection and killing of gay victim because, inter alia, they believed that he would not fight back and would be reluctant to go to the police).

<sup>75</sup> *People v. Alas*, 44 A.D.3d 534, 534–35, 843 N.Y.S.2d 628, 628 (1st Dep’t 2007) (The court properly exercised its discretion in admitting evidence of prior acts of hostility and racial animosity that “evinced” defendant’s intent to focus his aggression because such evidence was highly relevant to hate crimes charge); *People v. Latimer*, 24 A.D.3d 807, 809, 804 N.Y.S.2d 493, 495 (2d Dep’t 2005) (People were entitled to attempt to show defendant’s reason for selecting a store clerk who appeared Indian or Middle Eastern through proof that three of the four clerks involved in these robberies appeared to have that similar ethnic background and that defendant pleaded guilty to the October 2001 robbery as a hate crime); *State v. Davidson*, 225 N.J. Super. 1, 541 A.2d 700, 705–06 (App. Div. 1988) (where defendant being prosecuted for defacing property with racist graffiti, evidence of other similar acts directed at victims relevant to show defendant’s intent and state of mind in targeting the victims).

<sup>76</sup> The biased intent of all Defendants can be inferred from circumstantial evidence. *Kurd v. Republic of Turkey*, 374 F. Supp. 3d 37, 59 (D.D.C. 2019)(citing *Mori v. Dep’t of Navy*, 917 F.Supp.2d 60, 65 (D.D.C. 2013) (explaining that “circumstantial evidence is particularly important in bias” cases); cf. *Brzonkala v. Virginia Polytechnic & State University*, 935 F.Supp. 772 (W.D. Va. 1996) (under the Violence Against Women Act “[j]udges and juries will



- That the prosecution need not show hatred towards an entire racial group but need only show that the perpetrator or perpetrators targeted an individual because of his or her race or religion.<sup>77</sup>
- That hate crimes can be supported by evidence that the victim was in or near an area commonly associated or frequented by members of a particular protected victim class.
- That hate crimes can be supported by evidence of the apparent lack of provocation or non-bias-related “reason for” the offense.<sup>78</sup>

## **B. Removing the “Specified Offenses” Requirement**

The HCA should also be revised to cover all criminal offenses. Currently, the hate crimes statute applies to only offenders who commit a narrow list of “specified offenses.” This list of “specified offenses” is narrow and arbitrary and the official legislative findings under NYPL § 485.00 provide no justification for this list.<sup>79</sup> The list appears at Appendix A as parts of the HCA as to which we urge amendment.

Senator Hoylman’s proposed Hate Crime Modernization Act attempts to address this problem by adding about 30 offenses to the list of offenses eligible for hate crimes prosecution. For reasons set out below, the task force recommends that all offenses be listed as predicate acts for HCA purposes. However, the addition of 30 offenses is a good start. As Manhattan DA Bragg pointed out: “The current list of eligible offenses . . . contain glaring omissions and they do not comport with our practice, what we’re seeing day in and day out.” For instance, “rape in the first degree can be charged as a hate crime, but other sexual assaults like forcible touching cannot,” Bragg said. “That too must be changed.”<sup>80</sup>

That the statute is arbitrarily restrictive can be seen from the case law holding that criminal use of a firearm in the first degree could not properly be charged as a hate crime, as that offense was

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determine ‘motivation’ from the ‘totality of the circumstances’ surrounding the event““Bias, in short, can be proven by circumstantial as well as indirect evidence.””).

<sup>77</sup> *People v. Fox*, 2007 NY Slip Op.27317 (Sup. Ct. Kings Cty, Aug. 2, 2007).

<sup>78</sup> *See, e.g., People v. Ortiz*, 48 A.D.3d 1112, 851 N.Y.S.2d 784, 784–85 (4th Dep’t 2008) (grand jury evidence established, inter alia, that defendants were strangers to the victims; the crime was unprovoked by the victim); *State v. Colella*, 298 N.J. Super. 668, 690 A.2d 156 (App. Div. 1997); *People v. Pirozzi*, 237 A.D.2d 628, 656 N.Y.S.2d 42 (2d Dep’t 1997). *See also* Hate Crime Laws: A Practical Guide 55 (“a court may consider the fact that an attack was unprovoked, that there was no prior history of hostility between the parties and that derogatory or insulting comments were made).

<sup>79</sup> AABANY Report at 49.

<sup>80</sup> Haley Brown, Ben Kochman, Carl Campanile and Jorge Fitz-Gibbon, *Pols, DA Bragg Pitch New Law To Expand NY Hate Crimes Statute and Enhance Sentences*, N.Y. Post, Nov. 6, 2023, <https://nypost.com/2023/11/06/metro/proposed-new-law-would-greatly-expand-nys-hate-crimes-statute>.

not listed as a specified offense in the hate crime statute.<sup>81</sup> Yet, at the same time, the less serious offense of crimes against buildings is included within the purview of the HCA.<sup>82</sup>

Similarly, Rape in the First Degree (NYPL § 130.35) can be a hate crime, but Rape in the Third Degree (NYPL § 130.25(3)) cannot. Notably, the criminal prohibition against graffiti (NYPL § 145.60) cannot be a hate crime even if the graffiti expresses racial slurs. Other excluded offenses include: Criminal Obstruction of Breathing (N.Y. Law Penal § 121.11), Endangering the Welfare of a Child (N.Y. Penal § 260.10), Endangering the Welfare of an Incompetent or Physically Disabled Person (N.Y. Penal § 260.24), Unlawful Dissemination of an Intimate Image (N.Y. Penal § 245.15) or Forcible Touching (N.Y. Penal § 130.52).<sup>83</sup> These crimes could all be bias crimes and should be covered by the hate crime statute.

The proposed Hate Crime Modernization Act would expand the list of crimes eligible for hate crime enhancement. We support these additions. The task force would go further and urge the legislature to revise the HCA to apply to “all offenses” unless the offense is explicitly excluded. This revision will ensure that all crimes committed because of bias or hate are properly designated as hate crimes.

We do not see any reason to stop short of including virtually all offenses within the scope of the HCA. Even if a law is included within the coverage of the HCA, prosecutors must still prove the elements of the underlying covered offense and must prove the requirements for an HCA prosecution.

Including all offenses within the coverage of the HCA would align the New York statute with the federal statute, in which “[t]he hate crime enhancements are available for virtually any serious federal offense, even for violations of statutes generally not considered hate crime laws.”<sup>84</sup> Likewise, adding all offenses to the coverage of the hate crimes statute would put New York in line with the laws of most other states. “Under the majority of state hate crime laws, most or all criminal violations can be classified as hate crimes if they are determined to be motivated by bias or prejudice toward an individual or group of people on the basis of certain traits they possess or are perceived to possess.”<sup>85</sup>

**C. Elimination of the Current Requirement That Hate Crimes Must Be Motivated in “Substantial Part” Because of the Victims’ Protected Characteristics**

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<sup>81</sup> See, e.g., *People v. Spratley*, 152 A.D.3d 195 (3d Dep’t 2017).

<sup>82</sup> See *People v. Assi*, 63 A.D.3d 19 (1st Dep’t 2009), *lv. to appeal granted*, 12 N.Y.3d 912, *aff’d*, 14 N.Y.3d 335 (2010).

<sup>83</sup> AABANY Report at 49.

<sup>84</sup> <https://crsreports.congress.gov/product/pdf/R/R47060>

<sup>85</sup> Michael Shively, Study of Literature and Legislation on Hate Crime in America (June 2005) (federally funded study). The only offenses that may need to be excluded from the HCA would be the hate crimes contained presently in the Aggravated Harassment section of the Penal Law that predate the HCA and already have enhanced sentences.

The HCA enhances the punishment of certain crimes when they are committed with a bias motive. However, the provision is limited only to crimes that are committed in whole or in substantial part because of the bias forbidden by the hate crime statute. The task force recommends that the word “substantial” be removed so that a hate crime is committed if it is committed “in whole or in part” because of a person’s protected characteristic. As set out below, such a change would be supported by some of the case law interpreting the federal statute and by many cases and statutes in other areas of law.<sup>86</sup>

Most important, removing the word “substantial” would comport with the official legislative findings of the HCA itself.<sup>87</sup> Those findings specify that hate crimes are crimes where “victims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation.” The legislative findings use an “in part” standard and do not mention the “substantial” factor standard. They suggest only that the forbidden motivation must “in part” cause the crime to occur.

In addition, the “FBI’s UCR Program defines hate crime as a committed criminal offense which is motivated, in whole or in part, by the offender’s bias(es) against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.” This definition uses the “in part” standard and also eschews the “substantial factor” limitation found in the HCA.

The HCA departs from the legislative findings and the FBI UCR definition. Under the current HCA, a crime may be charged as a hate crime when a person selects a victim or commits a specified crime when they are motivated “in whole or in substantial part” due to a belief or perception about a person’s race, color, national origin, or other protected classes. A charge “as a hate crime” elevates the level of, and the punishment for, the crime. The statute contains no definition of “substantial.” Webster’s Dictionary defines “substantial” in at least five different ways, including “considerable in quantity; significantly great” as well as “being largely but not wholly that which is specified.” In *People v. Fox*, the only case to discuss the definition of “substantial part” in the context of the HCA, the court consulted the dictionary meanings and held this term to mean “a considerable portion or amount.”<sup>88</sup>

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<sup>86</sup> A minority of our task force opposes elimination of the word “substantial” from the statute on the grounds that such a reduction in the standard could lead to over prosecution of hate crimes and possibly selective prosecution against disadvantaged groups. But as explained, hate crime statutes in other jurisdictions have not proved problematic because of the lack of the word “substantial” in the statutes. Additionally, prosecutors have historically been circumspect in their use of hate crimes statutes, likely because judges and juries demand compelling evidence of motive before prosecuting hate crimes. Kiara Alfonseca, Hate Crimes Are Hard to Prosecute, But Why? ABC News, April 13, 2021, <https://abcnews.go.com/US/hate-crimes-hard-prosecute/story?id=76926458>.

<sup>87</sup> <https://www.nysenate.gov/legislation/laws/PEN/485.00>.

<sup>88</sup> Hate Crime Laws: A Practical Guide 55 (“Given the difficulties of proving motive, and the reality that many offenders have multiple motives, hate crimes should allow for next motives. To require that bias be the sole motive would drastically limit the number of offenses that could be charged as hate crime or to which a hate crime penalty enhancement might apply”).

The lack of clarity about the term “in substantial part” creates confusion about when a hate crimes enhancement is chargeable or appropriate. The bright line test of permitting hate crimes enhancement whenever prohibited motivations play any part in the crime would give police and prosecutors more discretion to charge hate crimes in mixed motive situations. Many acts of violence have numerous motives, and hate crimes are no different. Because a defendant has multiple “reasons” to attack another person does not negate that the HCA was enacted to prevent one of them from being based on race, ethnicity, or any of the other protected classes. Cases applying the federal hate crimes statute have recognized that the “presence of other motives...does not make [a defendant’s] conduct any less a violation of 42 USC Section 1361.”<sup>89</sup>

Instead of focusing on whether there are other motives or trying to quantify each motive, this statute should focus simply on whether just one of those reasons is because of the victim’s protected class. Removing the word “substantial” accomplishes that goal. Indeed, the devastating impact of a hate crime is not diminished by the fact that the perpetrator might have other motives in addition to animus.

A test requiring only that the forbidden motivation be one reason for the crime is not unprecedented. The federal statute does not contain the word “substantial” and merely requires that the crime be “because of” the victim’s protected status. Some federal cases have explicitly held that racial animus needs to be only one factor.<sup>90</sup>

Moreover, a test requiring only that animus need be one motivation and not a “substantial” motivation comports with case law in other contexts, including U.S. Supreme Court precedent. Many of these cases involve proof of racial motivation in other settings such as employment

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<sup>89</sup> *United States v. Johns*, 615 F.2d 672, 670 (5th Cir. 1980). *Accord Univ. of Texas Sw. Med. Ctr. v. Nassar*, 00570 U.S. 338, 343, 133 S. Ct. 2517 (2013) (“An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”).

<sup>90</sup> *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012) (citing *United States v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007) (government was not required to prove that racial animus was defendant’s sole motivation but only that victim’s race or identity partially motivated the crimes); *United States v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) (compiling cases and adopting the any factor test).

discrimination.<sup>91</sup> Statutes and regulations in other contexts have also adopted similar standards.<sup>92</sup> However, it is notable that although the federal statute does not contain the word or concept of “substantial factor,” many federal cases have implied a “substantial factor” test to limit the breadth of the various federal hate crime statutes.<sup>93</sup>

Most state statutes contain limitations at least as stringent as the word “substantial,” but in several jurisdictions, the hate crime statute is triggered if the prohibited motive is “a factor,” rather than a “substantial factor.”<sup>94</sup>

We conclude this discussion with two overarching recommendations.

*First*, because of the disparities in the case law the task force recommends that an amendment of the statute to excise the word “substantial” be accompanied by legislative history explicitly stating the intent to permit hate crime prosecution even when the crime is motivated in any part “because of” the animus specified in the statute.

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<sup>91</sup> Cases in other areas of law have also adopted the “at least in part” or “a factor” test. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) (“An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”); *Nat’l Ass’n of African Am.-Owned Media v. Charter Commc’ns, Inc.*, 915 F.3d 617, 622, 626 (9th Cir. 2019) (though racial animus need not be the “but-for” cause. “If discriminatory intent plays any role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the same right as a white citizen . . . the most natural reading of § 1981.”) (citations and quotations omitted); *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir. 1997) (adopting an “at least in part” standard); *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir.2004) (motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant’s actions.”); *Mercado v. Caithness Long Island LLC*, 104 A.D.3d 576 (1st Dep’t 2013) (granting cross motion under Labor Law § 240(1) because plaintiff was only required to establish that his injuries were caused, “at least in part” by the absence of proper protection required by the statute); *Culver v. Gorman & Co.*, 416 F.3d 540, 545 (7th Cir. 2005) (“A causal link between the protected expression and an adverse employment action may be established by showing that the protected expression was ‘a factor that motivated the defendant’s actions.’”).

<sup>92</sup> The Victims of Gender Motivated Violence Protection Act provides a cause of action based on crimes of violence motivated by gender, defined as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” N.Y.C. Admin. Code § 8-901-05. Similarly, New York Labor Law § 249(1) requires only that injury was caused “at least in part” by the absence of proper protection.

<sup>93</sup> The principal federal hate crimes statute is 18 U.S.C. § 245. See *United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999) (“so long as racial animus is a substantial reason for a defendant’s conduct, other motivations are not factors to be considered”); *United States v. Maybee*, 687 F.3d 1026, 1032 (8th Cir. 2012) (requiring that race or national origin was a substantial motivating factor in attack under § 249); *United States v. McGee*, 173 F.3d 952, 957 (6th Cir. 1999) (interpreting causation under § 245 to require that “racial animus is a substantial reason for a defendant’s conduct”); *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984) (affirming trial court jury instructions that clearly implied that under § 245, the victim’s race must be a substantial motivating factor for the defendant’s conduct).

<sup>94</sup> See, e.g., *Commonwealth v. Sinnott*, 30 A.3d 1105, 1110 (Pa. 2011) (“[W]e hold § 2710’s intent element is satisfied if there is evidence that ethnic malice was a motivator for the defendant’s criminal act; it need not be the sole motivator.”); *Commonwealth v. Kelly*, 25 N.E.3d 288, 300 (Mass. 2015) (“[W]e do not construe the language in G.L. c. 265, § 39 (a), to mean that racial hostility must be the ‘sole’ reason or a ‘substantial’ reason for a defendant’s unlawful conduct. . . . All that is required is proof beyond a reasonable doubt that a defendant acted with the specific intent to intimidate a person ‘because of’ race, notwithstanding the presence of any other motive.”),

*Second*, even if the word “substantial” is not removed from the statute, model jury instruction should provide that a “substantial” factor does not require that the crime have been committed exclusively or even mainly because of the prohibited animus.<sup>95</sup>

## **II. Addressing Deficiencies in the Reporting of Hate Crimes**

The current system for reporting hate crimes has drawn substantial criticism because of its lack of uniformity and because many jurisdictions do not collect data on hate crimes and/or do not report that data into the national database. This task force recommends the adoption of increased hate crime reporting along the lines of the measures adopted in Oregon and New Jersey. We also recommend mandatory reporting of hate crimes to the national database and the implementation of training and improved police procedures.

### **A. Deficiencies in National Hate Crime Reporting.**

As an initial matter, several jurisdictions do not collect hate crimes data. According to the FBI, generally, around 85% of law enforcement agencies said that no hate crimes occurred in their jurisdiction. And half of large agencies (100+ officers) reported no hate crimes investigations in 2018.<sup>96</sup>

Brian Levin, director of the Center for the Study of Hate & Extremism at the California State University, San Bernardino, said that the “[t]he FBI’s hate crime data release is so severely hampered by a decline in participating agencies.”<sup>97</sup>

The number of jurisdictions reporting no hate crimes or hate crime investigations likely represents severe underreporting and undercounting of hate crimes:

A representative sample of hate crime victimizations across the United States, collected from the National Crime Victimization Survey, revealed that only a small portion of all hate crimes find their way into official hate crime reporting. An annual average of 243,770 hate crime victimizations of persons 12 or older occurred between 2010 and 2019. In the same period, law enforcement agencies reported an annual average of 7,830

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<sup>95</sup> *In re M.S.*, 10 Cal. 4th 698, 718-20, 42 Cal. Rptr. 2d 355, 896 P.2d 1365 (1995); *People v. Superior Court (Aishman)*, 10 Cal. 4th 735, 741, 42 Cal. Rptr. 2d 377, 896 P.2d 1387 (1995). See generally Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 Yale L.J. 1106, 1170 (2018).

<sup>96</sup> Kaitlyn Sill and Paul A. Haskins, *Using Research To Improve Hate Crime Reporting and Identification*, Nat’l Inst. of Justice, Sept. 14, 2023, <https://nij.ojp.gov/topics/articles/using-research-improve-hate-crime-reporting-and-identification>

<sup>97</sup> Grace Hauk, *Over 7,000 Hate Crimes Were Reported to the FBI in 2021. Here’s Why That Data Is Flawed*, USA Today, Dec. 12, 2022, <https://www.usatoday.com/story/news/nation/2022/12/12/fbi-hate-crime-data-2021-flawed-report/10865550002>.

hate crimes to the FBI's Hate Crime Statistics program. Those figures suggest that roughly 1 of every 31 hate crimes is captured in U.S. federal statistics.<sup>98</sup>

## **B. The Reasons to Improve Hate Crime Reporting**

Enhanced reporting of hate crimes will improve the criminal justice system.

First, to address the problem, it is necessary to know the magnitude of it. "Because the data is so bad, it's hard to make any claims about hate crimes rising or falling," said Michael German, a fellow at NYU's Brennan Center for Justice. "We have such a little slice of the pie to look at, and that slice is changed by the different methodologies used to collect it, so the fact of the matter is we don't know."<sup>99</sup> Accurate data will allow law enforcement to respond to hate incidents and to examine trends in hate incidents and hate crimes, which can position officers to identify escalating offenders and incidents through tracking and analysis.<sup>100</sup>

Second, studies show that more comprehensive reporting can deter hate violence, because better data will assist in proper allocation of police resources and personnel.<sup>101</sup> For example, reporting can reveal the need for such measures as dedicated hate crimes officers or units, additional review procedures for hate crimes, written policy guidelines for hate crimes, and outreach efforts to communities. Research shows that such measures tend to increase and improve the level of reporting of hate crimes.<sup>102</sup>

Third, better reporting will also advance police-community relations. The current gap between the actual number of hate crime victims and the number of reported hate crimes threatens the relationship between law enforcement and targeted communities.<sup>103</sup> Reporting and publishing accurate data will demonstrate that reporting, investigating, and prosecuting hate crimes are high priorities.<sup>104</sup>

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<sup>98</sup> Kaitlyn Sill and Paul A. Haskins, *Using Research To Improve Hate Crime Reporting and Identification*, Police Chief Magazine, Sept. 23, 2023, <https://www.policechiefmagazine.org/using-research-improve-hate-crime-reporting-id>.

<sup>99</sup> Erin Mansfield and Rebecca Morin, *Biden Promised To Address Hate Crime Reporting. 20 Months Later, Here's What's Been Done*, USA Today, Feb. 2, 2023, [https://www.usatoday.com/story/news/politics/2023/02/02/biden-aapi-hate-crime-bill/11106448002\\_](https://www.usatoday.com/story/news/politics/2023/02/02/biden-aapi-hate-crime-bill/11106448002_)

<sup>100</sup> Elainar Rahrig, Arielle Schechtman, Meagan Kenner, Catherine Matous, *Hate Crime Regulation and Challenges*, 24 Geo. J. Gender & L. 573, 576 (2023).

<sup>101</sup> Michael Lieberman, *New FBI Hate Crime Report Sparks Concern, Prompts Action*, SPL Center, Oct. 24, 2023, <https://www.splcenter.org/news/2023/10/24/new-fbi-hate-crime-report-sparks-concern-prompts-action>.

<sup>102</sup> Lisa M. Jones, Kimberly J. Mitchell and Heather A. Turner, *U.S. Hate Crime Investigation Rates and Characteristics: Findings from the National Hate Crime Investigations Study*, Nat'l Institute of Justice, April 2022, <https://www.ojp.gov/pdffiles1/nij/grants/304531.pdf>.

<sup>103</sup> Sill and Haskins, *supra* note 101.

<sup>104</sup> *Id.*

### **C. Experience in New York and Other States**

Only about half of the states have laws that require the state to collect and analyze data on hate crimes via mandatory reporting from law enforcement agencies. An additional four jurisdictions, including New York and the District of Columbia, require the state to collect and analyze such data, but do not require law enforcement agencies to report or participate in this effort.<sup>105</sup>

New York requires only voluntary reporting from local law enforcement agencies but requires the state Division of Criminal Justice Services to collect and analyze statistical and all other information and data with respect to hate crimes reported by law enforcement through the Uniform Crime Reporting (UCR) Program.<sup>106</sup> Per New York State Executive Law § 837(4)(c), the Division of Criminal Justice Services (DCJS) is required to produce an annual report that details hate crime incidents that law enforcement agencies have reported to DCJS, including data on the number of incidents and type of bias reported.<sup>107</sup> One commentator has opined that the lack of mandatory local reporting in New York and other states “means any analysis is limited to voluntarily submitted data, which may not reflect the true scope of hate crime in a given state.”<sup>108</sup>

#### ***Oregon's Reporting System***

Perhaps the most comprehensive reporting system is the one recently adopted in Oregon. The Oregon Legislature passed, and Governor Kate Brown signed, Senate Bill 577. Section 9 of this bill, now codified in ORS 137.678, requires the Oregon Criminal Justice Commission (CJC) to review all data pertaining to bias crimes and non-criminal bias incidents and to report the results annually on July 1.<sup>109</sup> The statute requires law enforcement agencies (LEAs) to submit data on reported crime information motivated by bias against a victim’s actual or perceived protected class to the Oregon State Police (OSP).

Importantly, this statute required the Oregon Department of Justice (DOJ) to establish a staffed hate crimes telephone hotline dedicated to assisting victims, witnesses and other reporters of bias crimes and non-criminal bias incidents. The hotline opened on January 2, 2020 and provides a resource to victims of bias crimes and non-criminal bias incidents by responding to all reports

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<sup>105</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

<sup>106</sup> New York City is experiencing delays in making the transition from the UCR system to the more advanced National Incident Based Reporting System. The FBI has accepted reports that NYC has submitted under the UCR system but New York should expedite the transition to the new system. <https://www.ny.gov/programs/hate-crimes-task-force>; Ames Grawert, *Analyzing the FBI's National Crime Data of 2022—With an Eye Toward 2023 Trends*, Brennan Center for Justice, Oct. 18, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/analyzing-fbis-national-crime-data-2022-eye-toward-2023-trends>

<sup>107</sup> New York State Anti-Hate Crime Resource Guide, <https://www.ny.gov/hate-crimes-task-force/new-york-state-anti-hate-crime-resource-guide>.

<sup>108</sup> *Id.*

<sup>109</sup> *Bias Crimes (2022) Report*, Oregon Criminal Justice Commission, July 1, 2023, <https://www.oregon.gov/cjc/CJC%20Document%20Library/SB577ReportJuly2023.pdf>



received, providing assistance, assisting with safety planning and coordinating with organizations to provide support services. The bill also requires Oregon’s DOJ to provide data on reported bias crime and non-criminal bias incidents. Reports to the Hotline increased by 53% between 2020 and 2021, from 1,101 to 1,683. Bias crimes accounted for 28% of them.<sup>110</sup>

New York has a hotline, but it does not appear that New York devotes the same level of resources as Oregon does to the hotline.

### ***New Jersey Reporting System***

New Jersey is considered a “model state” because of its groundbreaking system for reporting of bias crimes.<sup>111</sup> Under former attorney general Gurbir Grewal, New Jersey created a Uniform Crime Reporting (UCR) System by every law. The system is operated by the State Police to track crime rates in New Jersey. By law, every state, county and local law enforcement agency must submit information to the UCR System on any suspected or confirmed bias incident reported to them.<sup>112</sup> New Jersey’s Electronic Uniform Crime Reporting (eUCR) system maintained by the New Jersey State Police allows for centralized and more accurate statistical reporting of bias incidents throughout the state. All County Prosecutors’ Offices in New Jersey must notify the NJ Attorney General’s Office when pursuing Bias Intimidation charges under N.J.S.A. 2C:16-1. This increases communication between the county prosecutor’s offices and the Attorney General regarding prosecution of these cases.<sup>113</sup>

### **D. Six Recommendations to Improve Reporting.**

*First*, New York should align itself with 26 states including Oregon and New Jersey and require mandatory local collection of hate crimes data and reporting of such data to the DCJS. To accomplish such reporting, the state could condition the receipt of certain state funds on local adherence to mandatory hate crime data and reporting standards.

*Second*, New York and other states should require local law enforcement agencies to collect and submit data and enroll in the FBI Uniform Crime Reporting Program. This could be accomplished by conditioning federal law enforcement funds on compliance with UCR standards. As the ADL has noted: “Especially at a time when our communities are feeling particularly vulnerable to hate crimes and extremist-fueled attacks, it is egregious that major cities and states across the country have failed to report comprehensive data... We urge Congress

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<sup>110</sup> *Id.*

<sup>111</sup> A Policymaker’s Guide to Hate Crimes, Bureau of Justice Assistance, <https://www.ojp.gov/pdffiles1/bja/162304.pdf>.

<sup>112</sup> *2021 Was a Record-High Year for Reported Bias Incidents in New Jersey*, Office of the Attorney General, April 1, 2022, <https://www.njoag.gov/2021-was-a-record-high-year-for-reported-bias-incidents-in-new-jersey/>

<sup>113</sup> *AG Grewal Issues Enhanced Law Enforcement Standards Establishing Best Practices for Investigating & Reporting Bias Incidents in New Jersey*, Office of the Attorney General, April 5, 2019, <https://www.njoag.gov/ag-grewal-issues-enhanced-law-enforcement-standards-establishing-best-practices-for-investigating-reporting-bias-incidents-in-new-jersey-ag-bias-incident-investigation-standards-last-update/>

to make it mandatory for state and local law enforcement agencies that receive federal funding to participate in the FBI's hate crime data collection efforts."<sup>114</sup> States and localities should be required to undergo data auditing for accuracy.<sup>115</sup>

*Third*, law enforcement training should be improved. Only one-third of states require training for law enforcement on how to properly identify, competently respond to and accurately collect and report data on hate crimes. In the absence of such training, law enforcement may fall short in their efforts to collect data and in connecting victims to needed resources.<sup>116</sup> Notably, New York is one of the states that requires hate crimes training.<sup>117</sup> Recently, Manhattan received a \$1.7 million grant from its City Council, part of which was used to improve hate crimes training in Manhattan. In April 2023, the Manhattan DA's office conducted two trainings for 85 rookie officers and 15 field training sergeants that included a review of the state's hate crimes law and approaches to identifying bias-related evidence when responding to potential hate crime incidents. Officials say this was the first time the office conducted formalized hate crimes training of this scale for officers across multiple precincts.<sup>118</sup> Manhattan should continue its training program, which provides a model for jurisdictions in New York and elsewhere.

New Jersey also has an exemplary training program. The state provides a continuing education for law enforcement on bias crimes and cultural sensitivity and requires updating of basic training for police recruits in these subject areas. The AG's Community-Law Enforcement Affirmative Relations (CLEAR) Institute has developed a mandatory course in Cultural Diversity, De-Escalation and Bias Crime Reporting. That course covers police interactions with various faiths and cultures, as well as recognizing and reporting bias crimes. The final section of the standards addresses the CLEAR Institute and academy training. It directs that the Division of Criminal Justice, and law enforcement and community stakeholders, regularly update the curriculum for these mandatory courses.<sup>119</sup>

*Fourth*, the creation of written law enforcement policies and procedures will help to increase law enforcement responsiveness and effectiveness.

Written policy can serve as a bridge between hate crime legislation and implementation of that law by providing officers with information and a standard that the agency expects them to follow. Research supports the positive impact of a written policy, with a study of

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<sup>114</sup> David Nakamura, *Latest FBI Data on Hate Crimes Plagued by Lack of Reporting Nationwide*, Wash. Post, Dec. 12, 2022, <https://www.washingtonpost.com/national-security/2022/12/12/us-hate-crimes/>

<sup>115</sup> <https://www.washingtonpost.com/national-security/2022/12/12/us-hate-crimes/>

<sup>116</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

<sup>117</sup> Training Modules for New York State Uniform Crime Reporting (UCR) Program, [https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/ucr\\_training.htm](https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/ucr_training.htm).

<sup>118</sup> Anna Lucente Sterling, *City Provides 'Historic' Funding for Manhattan DA Hate Crimes Unit*, NY1 News, Aug. 26, 2022, <https://ny1.com/nyc/all-boroughs/news/2022/08/24/city-provides--historic--funding-for-manhattan-d-a--hate-crimes-unit>.

<sup>119</sup> AG Grewal *Issues Enhanced Law Enforcement Standards*, *supra* note 116.

California police agencies finding that the existence of a written policy on hate crime increased reporting by 38 percent. If made publicly available, written hate crime policies might also increase reporting from victims by communicating clearly that the department’s policy includes responding to and investigating these incidents.<sup>120</sup>

Notably, New York has a model policy to provide local guidance regarding hate crimes for local authorities.<sup>121</sup> New York jurisdictions should be required to train personnel on the guidance provided in the model policy and should adhere to the guidelines in that policy.<sup>122</sup>

*Fifth*, the implementation of hate crime hotlines along the lines of those provided in Oregon and New York. The recently enacted federal Jabara-Heyer NO HATE Act State-Run Hate Crime Reporting Hotlines program provides grants to state agencies for their implementation of hotlines to support victims who might be reluctant to report hate crimes to law enforcement authorities.<sup>123</sup>

*Sixth*, law enforcement authorities should give due consideration to reports of hate crimes from community organizations. In many cases, hate crime victims are reluctant to directly approach law enforcement authorities. Encouraging victims to report hate crimes to community organizations and encouraging those organizations to, in turn, report hate crimes to law enforcement authorities could help address the underreporting problem.

### **III. The Task Force Urges Enactment of the Stop Hiding Hate Act, Which Can Help Stop Hate Speech on the Internet**

Much of the world now communicates on social media, with nearly a third of the world’s population active on Facebook alone.<sup>124</sup> However, as the *New York Times* reported, “Antisemitic and Islamophobic hate speech has surged across the internet since the conflict between Israel and Hamas broke out. The increases have been at far greater levels than what academics and researchers who monitor social media say they have seen before, with millions of often explicitly violent posts on X, Facebook, Instagram and TikTok.”<sup>125</sup>

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<sup>120</sup> William Johnson, *The Importance and Structure of a Written Hate Crime Policy*, Police Chief Magazine, Dec. 2023, <https://www.policechiefmagazine.org/the-importance-and-structure-of-a-written-hate-crime-policy>.

<sup>121</sup> Investigation of Hate Crimes: Municipal Police Training Council Model Policy, <https://www.criminaljustice.ny.gov/crimnet/ojsa/standards/MPTC%20Model%20Policy-Hate%20Crimes%20September%202020.pdf>.

<sup>122</sup> Other model guidelines might also provide assistance. *Investigation of Hate Crimes*, IACP Law Enforcement Policy Center, March 2021, <https://www.theiacp.org/sites/default/files/2021-03/Hate%20Crimes%20Formatted%202021-03-23.pdf>.

<sup>123</sup> OVC FY 2023 Jabara-Heyer NO HATE Act State-Run Hate Crime Reporting Hotlines, <https://ovc.ojp.gov/funding/opportunities/o-ovc-2023-171708>.

<sup>124</sup> Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, Council on Foreign Relations, June 7, 2019, <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>.

<sup>125</sup> Sheera Frenkel and Steven Lee Myers, *Antisemitic and Anti-Muslim Hate Speech Surges Across the Internet*, N.Y. Times, Nov. 15, 2023, <https://www.nytimes.com/2023/11/15/technology/hate-speech-israel-gaza-internet.html>.

As a Washington Post article quoting the ADL showed, since October 7, antisemitic content has increased 900% on X, and there have been more than 1,000 incidents of real-world antisemitic attacks, vandalism, and harassment in America.<sup>126</sup> Memetica, a digital investigations firm, has documented 46,000 uses of the #Hitlerwasright hashtag on X since October 7, up from fewer than 5,000 uses per month.<sup>127</sup>

Both before and after this recent surge, internet platforms and political leaders have urged steps to address internet hate speech. The measures taken thus far have not proven entirely effective, but now there are new proposals in the New York State legislature, including the Stop Hiding Hate Act, that would require internet platforms to disclose the steps, if any, that they take to address hate speech. While opponents argue that attempts to regulate internet hate speech run afoul of the First Amendment's guarantee of free speech, the Stop the Hate Act seems to pass constitutional muster.

Adi Cohen, the chief operating officer of Memetic, stated that the rise in antisemitic posts reflected a convergence of goals by far-right and far-left activists.<sup>128</sup> "Some of them explicitly say this is an opportunity to gloat and celebrate the killing of Jews online... They are trying to lure an audience to their content, and this is a huge growth moment for them."<sup>129</sup>

As the popularity of internet platforms has increased, so has the hate speech on those platforms. The ADL recently reported in a survey across all population groups that:

- 33% of survey respondents reported identity-based harassment this year – not a statistically significant change from 35% last year.
- 28% of survey respondents reported race-based harassment, comparable to 25% recorded a year ago.<sup>130</sup>

### **A. The Effect of Internet Hate Speech**

Over the last decade, research has shown that social media can increase actual hate crimes.<sup>131</sup> Researchers have shown that social media can lead to discriminatory attitudes and actual hate

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<sup>126</sup> *Id.*

<sup>127</sup> Elizabeth Dwoskin, Taylor Lorenz, Naomi Nix and Joseph Menn, *X, Israel-Gaza War Have Supercharged Antisemitism Online*, Wash. Post, Nov. 19, 2023, <https://www.washingtonpost.com/technology/2023/11/19/antisemiticism-internet-elon-musk-israel-war>.

<sup>128</sup> Frenkel and Myers, *supra* note 128.

<sup>129</sup> *Id.*

<sup>130</sup> *Online Hate and Harassment: The American Experience 2021*, ADL, 2021, <https://www.adl.org/resources/report/online-hate-and-harassment-american-experience-2021>.

<sup>131</sup> *In the Name of Hate: Examining the Federal Government's Role in Responding to Hate Crimes*, U.S. Commission on Civil Rights, Nov. 13, 2019, <https://www.usccr.gov/files/pubs/2019/11-13-In-the-Name-of-Hate.pdf>.

crimes against people in marginalized groups.<sup>132</sup> Cities with a higher incidence of a certain kind of racist tweets reported more actual hate crimes related to race, ethnicity and national origin.<sup>133</sup> Both online vicarious and individual discrimination were significantly associated with worse psychological well-being among adults of racial/ethnic minorities (e.g., Black Americans, [Latinx?] Americans, Asian Americans).<sup>134</sup>

## **B. Internet Platform Regulation of Hate Speech**

Under pressure from the ADL and other groups, internet platforms have voluntarily adopted measures to regulate hate speech. The ADL described some of the measures that have been taken:

Facebook prohibited Holocaust denial content, hired a vice president of civil rights, changed parts of its advertising platform to prohibit various forms of discrimination, expanded policies against content that undermined the legitimacy of the election and built a team to study and eliminate bias in artificial intelligence. Due to pressure from ADL and other civil rights organizations, Twitter banned linked content, URL links to content outside the platform that promotes violence and hateful conduct. Reddit added its first global hate policy, providing for the removal of subreddits and users that “promote hate based on identity or vulnerability.”<sup>135</sup>

Despite these efforts, one analysis showed that major social media platforms fail to take down more than 80% of antisemitic posts on their platforms. The Center for Countering Digital Hatred (CCDH) reported that 80% of 700 posts containing “anti-Jewish hatred,” which had collectively been viewed 7.3 million times, were not removed. The research covered Facebook, Instagram, TikTok, Twitter and YouTube. Facebook was said to have failed to act on 89% of posts.<sup>136</sup>

## **C. The Constitutionality of New York State Bills Calling for Transparency**

In an attempt to respond to internet hate speech, New York legislators have introduced the Stop Hiding Hate Act, legislation that has passed the New York Senate and is pending in the

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<sup>132</sup> Theresa Davidson and Lee Farquhar, *Prejudice and Social Media: Attitudes Towards Illegal Immigrants, Refugees, and Transgender People*, in D. Nicole Farris, D’Lane Compton, and Andrea Herrera, (eds.), *Gender, Sexuality and Race in the Digital Age*, Springer 2020. See also Nan Yu, Shuya Pan, Chia-chen Yang, Jiun-Yi Tsai, *Exploring the Role of Media Sources on COVID-19 Related Discrimination Experiences and Concerns Among Asian People in the United States: Cross-Sectional Survey Study*, J. Med. Internet Res., Nov. 2020, <https://www.jmir.org/2020/11/e21684/PDF>.

<sup>133</sup> *Hate Speech on Twitter Predicts Frequency of Real-Life Hate Crimes*, New York University News, Jun. 24, 2019, <https://www.nyu.edu/about/news-publications/news/2019/june/hate-speech-on-twitter-predicts-frequency-of-real-life-hate-crim.html>.

<sup>134</sup> Alyan Yang et al., *The Impacts of Social Media Use and Online Racial Discrimination on Asian American Mental Health: Cross-sectional Survey in the United States During COVID-19*, JMIR Form Res., Sep. 19, 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9488547/>.

<sup>135</sup> *Online Hate and Harassment*, *supra* note 133.

<sup>136</sup> *Anti-Semitic Social Posts ‘Not Taken Down’ in 80% of Cases*, BBC, Aug. 2, 2021, <https://www.bbc.com/news/technology-58058428>.

Assembly. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in effect in California.<sup>137</sup> The Stop Hiding Hate Act would require social media companies to disclose the steps they are taking to address hate speech on their platforms.

The Stop Hiding Hate Act presents difficult issues relating to the First Amendment. For reasons set out below, we believe that the act does not violate First Amendment principles as set out in the preponderance of case law. Legislation that establishes disclosure standards rather than content-based regulation generally survives First Amendment standards.

As set out above, internet platforms have adopted a variety of different measures to address the hate speech problem. Their approaches are divergent and often not transparent. Their sufficiency and effectiveness cannot be gauged by the public or by platform users in the absence of transparency-enhancing measures such as the Stop Hiding Hate Act.

As set out more fully below, disclosure regulations are not generally considered content-based and will likely survive First Amendment scrutiny. In a recent decision, discussed more fully below, the Eleventh Circuit has upheld the constitutionality of disclosure requirements directed at internet platforms.<sup>138</sup> And while it took a different approach to most forms of internet platform regulation, the Fifth Circuit also upheld the constitutionality of disclosure standards.<sup>139</sup> The issue may be headed to the U.S. Supreme Court, in that certiorari could be granted in one or both of the *NetChoice* cases. In that event, regardless of the outcome regarding other components of the laws at issue in the *NetChoice* cases, we are confident that the disclosure requirements at issue should survive First Amendment scrutiny.

It is settled that hate speech receives First Amendment protection.<sup>140</sup> And the Supreme Court has held that entities arguably analogous to internet platforms receive First Amendment protection. In *Smith v. California*, for example, the Court said that booksellers could not be strictly liable for obscene content in books they sell, because cautious booksellers would over-enforce, removing both legal and illegal books from the shelves. The resulting “censorship affecting the whole public” would be “hardly less virulent for being privately administered.”<sup>141</sup>

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<sup>137</sup> New Jersey has also worked “to hold social media companies accountable for their role in propagating hate, urging social media platforms like Facebook to adjust their recommendation algorithms that make it easier to share and promote extreme content—and stop providing community to bigots and violent conspiracy theorists.” Gurbir S. Grewal, *Celebrating Heritage and Confronting Hate*, American Constitution Society, May 17, 2021, <https://www.acslaw.org/expertforum/celebrating-heritage-and-confronting-hate>.

<sup>138</sup> *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196 (11th Cir. 2022).

<sup>139</sup> *NetChoice v. Paxton*, 27 F.4th 1119 (5th Cir. 2022).

<sup>140</sup> See *Matal v. Tam*, 137 S. Ct. 1744 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”).

<sup>141</sup> 361 U.S. 147, 154 (1959).

However, legislation like the Stop Hiding Hate Act would likely survive First Amendment scrutiny. The Stop Hiding Hate Act is not content-based and merely requires disclosure. The Supreme Court has opined that there are “material differences between disclosure requirements and outright prohibitions on speech.”<sup>142</sup>

A disclosure requirement like the Stop Hiding Hate Act does not prevent speech; it requires only that regulated parties “provide somewhat more information than they might otherwise be inclined to present.”<sup>143</sup> Thus, *Zauderer* has been applied to uphold disclosure requirements against First Amendment challenges in a variety of contexts.<sup>144</sup>

And apart from the *Zauderer* line of cases, in the election context, where First Amendment protections are at the highest level, disclosure requirements have been upheld against First Amendment attack.<sup>145</sup>

Against this backdrop, the courts have recently considered disclosure requirements analogous to the Stop Hiding Hate Act imposed on internet platforms and in two recent decisions have upheld those requirements.<sup>146</sup> As the *NetChoice* court wrote:

The State's interest here is in ensuring that users – consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum – are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies . . . So, these provisions aren't substantially likely to be unconstitutional.

The Fifth Circuit decided a similar case. While the court applied a dramatically different analysis from the Eleventh Circuit with respect to much of the statute in question, its analysis of the disclosure requirements of the statute was similar to that of the Eleventh Circuit. The Fifth

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<sup>142</sup> *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 650 (1985). *Cf. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“[t]he First Amendment presumptively places this sort of discrimination [content-based burden on speech] beyond the power of the government”).

<sup>143</sup> *Zauderer*, 471 U.S. at 650.

<sup>144</sup> *E.g., CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 850–52 (9th Cir. 2019) (disclosure of radiation levels). *Accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248–53 (2010) (applying *Zauderer* and upholding against First Amendment attack disclosures required of debt relief agencies because such disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information). *See generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (identifying “numerous examples could be cited of communications that are regulated without offending the First Amendment,” including “the exchange of information about securities, and “corporate proxy statements”) (internal citations omitted).

<sup>145</sup> *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (upholding disclosure requirements because they further the state interests of “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering” laws).

<sup>146</sup> *See NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196 (11th Cir. 2022).

Circuit held that the disclosure requirement in question “easily passes muster under *Zauderer*.”<sup>147</sup> The court further explained:

Here, the Platforms do not explain how the one-and-done disclosure requirements – or even the prospect of litigation to enforce those requirements – could or would burden the Platforms’ protected speech...

\* \* \*

...the Platforms have not explained how tracking the other purportedly more difficult statistics would unduly burden their protected speech, as opposed to imposing technical, economic, or operational burdens. So the Platforms are not entitled to facial pre-enforcement relief.

#### **D. Conclusion**

The rise of internet hate speech sets up a potential clash between our country’s cherished values of free speech and the need to address the hate speech that has such a corrosive effect on our society. The legislation enacted in California and proposed as the Stop Hiding Hate Act in New York, would require internet platforms to disclose the measures they take to address hate speech. Under existing precedent, the Stop Hating Hate Act is fully consistent with First Amendment principles.

#### **IV. New York Should Enforce the Dignity for All Students Act.**

##### ***By Creating a State-Level Dignity-for-All-Students-Act Support Team for School Districts, Bullying and Discrimination Can Be Better Addressed and Ultimately Reduced.***

In 2012, New York’s Legislature enacted the Dignity for All Students Act (the “Dignity Act”) to provide K-12 students with “a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying.”<sup>148</sup> The Dignity Act’s framework is excellent, requiring that school districts swiftly investigate and report suspected bullying, as well as attempt to remediate and create a safe school environment, and in combating Antisemitism and Anti-Asian hate – all hate, in fact – in education, K-12, the Dignity Act could be an outstanding tool.

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<sup>147</sup> *NetChoice v. Paxton*, 27 F.4th 1119 (5th Cir. 2022).

<sup>148</sup> <https://www.nysed.gov/content/dignity-all-students-act-dasa>. As State Education Commissioner Betty Rosa has stated, “[s]tudents cannot learn and develop socially and emotionally when they feel disconnected, intimidated, harassed, or discriminated against. We have a responsibility to remove the barriers that stand in the way of success for many students . . . [and] foster a safe, supportive environment where all New York State students feel included and welcome.” *Attorney General James and NYSED Commissioner Rosa Issue Guidance to Promote Diversity, Equity, and Inclusion in New York Public Schools*, NYS Educ. Dep’t, Aug. 9, 2023, <https://www.nysed.gov/news/2023/attorney-general-james-and-nysed-commissioner-rosa-issue-guidance-promote-diversity-equity>; *See also* Attorney General Leticia James’ statement: “Every student in New York is entitled to learn, grow, and discover in an environment free from discrimination or harassment.” *Id.*



But, for a number of reasons, including under-investigating, underreporting, and overall confusion, the Dignity Act has not achieved much of its hoped-for positive outcomes.<sup>149</sup>

Because of under-investigating and underreporting, only a small fraction of incidents is reported:

“For example, at the end of the 2012-2013 school year, when [the Dignity Act] was first implemented, a total of 18,735 reports in schools outside of New York City were logged into the state website. The number of incidents reported over the last decade has gone down each year, to now 2,710 across 2,883 public schools outside of New York City – or an average of less than one incident per school in the 2020-2021 school year. That’s an 85 percent decline.”<sup>150</sup>

Confusion and misunderstanding as to what the Dignity Act requires on the part of districts appear to partially drive the under-investigating and underreporting, such as denying incorrectly assuming that the Dignity Act applies only to multiple acts, and that a single action would not qualify, or that districts should not report unless a physical encounter occurred.<sup>151</sup>

Even more, the law itself can also be challenging for a lay person to understand and apply, having to answer whether a material incident of harassment, bullying and/or discrimination took place? And while explanatory regulations exist, the question is legal in nature, complex, and likely confusing for non-lawyers.<sup>152</sup>

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<sup>149</sup> Specifically, an incident must be written up within 48 hours of learning of it and must be promptly investigated. If the school’s Dignity Act Coordinator (a required appointment) determines that a material incident of bullying, harassment, or discrimination took place, then the Dignity Act requires that “prompt action” be taken, “reasonably calculated to end the harassment, bullying, and/or discrimination,” including, e.g., “creat[ing] a more positive school culture.” 8 N.Y.C.R.R. § 100.2kk(2)(iv). Districts must also annually report the number of material incidents to the State. 8 N.Y.C.R.R. 100.2kk(3)(i).

<sup>150</sup> Wendy Liberatore, *DASA Is Supposed to Track Student Bullying. It’s Questionable if it Does*, Times Union, June 15, 2023, <https://www.timesunion.com/news/article/fewer-bullying-incidents-self-reported-new-york-18090832.php>. As State Education Spokesperson JP O’Hare noted, Dignity Act “reporting has declined significantly since 2013, with many schools reporting zero incidents for several years in a row. In the 2021-22 school year, over 1,800 schools [out of 2,887] reported zero [Dignity Act] incidents.” Jim Roberts, *The State of Bullying: Don’t Ask, Don’t Tell*, River Journal, July 7, 2023, <https://riverjournalonline.com/schools/the-state-of-school-bullying-dont-ask-dont-tell/75624/>.

<sup>151</sup> See, e.g., Statement of NY Comptroller Thomas P. DiNapoli: “There seems to be confusion at the local level over what needs to be reported.” Sara Mosle, *Bullying in New York City Goes Undercounted Due to Confusion About What Incidents to Report, Audit Finds*, Chalkbeat, March 13, 2019, <https://ny.chalkbeat.org/2019/3/13/21107043/bullying-in-new-york-city-goes-undercounted-due-to-confusion-about-what-incidents-to-report-audit-fi>. In addition, a concern of attracting unwanted State attention should numbers be problematic may contribute to under-investigating. [add cite if available]

<sup>152</sup> As an example, the definition of “Harassment or bullying” involves legal terms (e.g., “reasonable,”) the nuances of which may not be known to the lay person: “the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying as defined in Education Law section 11(8), that either: (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (b) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her

When districts don't comply with the Dignity Act, they set students up for failure – too often the most vulnerable students – far beyond academic failure:

“bullying, according to the Center of Disease Control and Prevention, leads students to having low-self esteem, poor school performance, few friends in school and a negative view of school. It also causes students to feel physically ill with headaches, stomach aches and depression, suicidal thoughts and anxiety.”<sup>153</sup>

NY's Attorney General Leticia James recently reported that “despite promptly investigating incidents [alleging racism],” the Mamaroneck School District “failed to engage in necessary responses to limit this behavior in the future. Consequently, the inconsistent and ineffective approaches to the misconduct led to students continuing to be subjected to harassment and bullying from their peers. Students who were victims of this behavior experienced physical, mental, and emotional suffering that interfered with their ability to participate in social and educational activities within the classroom.”<sup>154</sup>

In the worst of news, just this past May, a 10-year-old Peekskill student took his own life because of what his parents say was a failure by the school to address repeated reported bullying of the child.<sup>155</sup>

Families concerned that either a district is not investigating pursuant to the Dignity Act or that the outcome was wrongly decided have little recourse, except to file an appeal with the Commissioner of Education.<sup>156</sup> This appeal process is detailed and can be confusing and daunting, especially to an unrepresented parent or a parent unfamiliar with the legal system or the English language. Appeals to the Commissioner are routinely dismissed due to a failure to properly serve parties, a lack of appropriate affidavits<sup>157</sup> and/or a failure to file within a strict 30-day window.<sup>158</sup> For the vast bulk of families, this practically and effectively means that there is no appeal or resource for help.

To improve the Dignity Act, the task force makes four recommendations:

### **Recommendation 1: Create a Review/Help Board Within NYSED.**

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physical safety. . . (e) Emotional harm that takes place in the context of harassment or bullying means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.” 8 N.Y.C.R.R. § 100.2jj(1)(viii).

<sup>153</sup> Mosle, *supra* note 154.

<sup>154</sup> Jeff Edwards, *AG Makes Deal with Mamaroneck Schools on Discrimination, Bullying*, Patch, July 19, 2023, <https://patch.com/new-york/larchmont/ag-makes-deal-mamaroneck-schools-discrimination-bullying>.

<sup>155</sup> Roberts, *supra* note 130.

<sup>156</sup> <https://www.counsel.nysed.gov/generalinformation>.

<sup>157</sup> <https://www.counsel.nysed.gov/Decisions/volume40/d14472>.

<sup>158</sup> <https://www.counsel.nysed.gov/Decisions/volume62/d18245>.

We support the recommendation from NYSED representatives<sup>159</sup> to establish a state-sponsored Dignity Act “Technical Assistance Center” (TAC) to provide “practical, direct assistance to schools.” This measure would be extremely helpful and has the potential to bring an enormous amount of improvement to implementation and enforcement of the Dignity Act, being a place where districts can go to find out how to address specific incidents of suspected bullying.

Specifically, a Dignity Act TAC could give direct help to districts in:

- Investigating complaints
- Helping students learn more appropriate behaviors
- Improving discipline
- Providing trainings, resources, etc.
- Helping to eliminate any hostile environments
- Creating more positive school culture and climate
- Preventing recurrence of problematic behavior

### **Recommendation 2: Require Head Dignity Act Coordinator To Be a Member of the School’s Student Support Services Team.**

The Task Force fully supports the recommendation of NYS Education Department representatives to enact a statutory change requiring that a district’s head Dignity Act Coordinator be a member of the Student Support Services team (e.g., a social worker), rather than a principal or assistant principal perform. In light of background, training and typical workloads, this arrangement makes more practical sense and will promote efficient enforcement of the Dignity Act.

### **Recommendation 3: Amend the Dignity Act to Create a Private Right of Action for Equitable Relief Only, Including Awards of Attorney’s Fees for Prevailing Plaintiffs.**

Another impediment to full Dignity Act implementation is that it lacks enforcement provisions. A district that fails to investigate or report faces little if any repercussion from the state or the court system. Courts that have addressed the question have found that the Dignity Act does not include a private right of action (PROA) for money damages, as it was designed primarily to be “a preventative, rather than punitive, measure.”<sup>160</sup>

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<sup>159</sup> The task force extends its heartfelt thanks to NYSED representatives Kathleen DeCataldo, Esq., Maribeth Barney, Karen Hollowood, Gwyn Marschman, and Daniel Morton-Bentley, Esq. for their time and efforts in connection with this section of the report.

<sup>160</sup> *The Dignity for All Students Act (DASA) Does Not Create a Private Right of Action for In-School Bullying and Harassment (Second Dept)*, N.Y. Appellate Digest, Dec. 12, 2018, <https://www.newyorkappellatedigest.com/2018/12/12/the-dignity-for-all-students-act-dasa-does-not-create-a->

However, the courts have not addressed whether a PROA could be available for equitable relief, with a provision for the award of attorney’s fees for successful parent litigants.<sup>161</sup> A private right of action for injunctive relief would be consistent with the legislative history stating that the statute is intended to be a “preventative rather than punitive measure.”

A private right of action for Dignity Act injunctive relief would be fully consistent with U.S. Supreme Court case law. While the Court has curbed the use of implied statutory rights of action, even in the absence of a statutory private right of action, courts still recognize *equitable* rights of action, at least some circumstances.<sup>162</sup>

We urge that any private right of action require the moving to comply with traditional requirements for equitable relief.<sup>163</sup>

Adding a PROA for equitable relief would provide some form of teeth for families, especially groups of families, frustrated by what they perceive as a lack of action or failure to follow the law by a district.<sup>164</sup> With the possibility of the award of attorney’s fees, equity is advanced as all parents, regardless of family income, could seek court help in forcing districts to do what the law requires, and attorneys are incentivized to take on these important cases.<sup>165</sup>

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[private-right-of-action-for-in-school-bullying-and-harassment-second-dept](#); Adam I. Kleinberg, and Alex Eleftherakis, *I’ll See You in Court, but Not Pursuant to DASA*, *Touro Law Rev.*, 35: 1 (2019), <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=2949&context=lawreview>

<sup>161</sup> *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988).

<sup>162</sup> *Sierra Club v. Trump*, 963 F.3d 874, 882, 892 (9th Cir. 2020) (“These cases support our holding here that Sierra Club has an equitable *ultra vires* cause of action to challenge DoD’s transfer of funds. Where it is alleged that DoD has exceeded the statutory authority delegated by Section 8005, plaintiffs like Sierra Club can challenge this agency action.” *Id.* at 892.).

<sup>163</sup> *E.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (moving party must show “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest”).

<sup>164</sup> Anecdotally, these families have been faced with pushback from districts, such as Corinth Superintendent Mark Stratton’s statement that he believed incidents “do not need to be reported to the state because the incidents were ‘handled.’” Liberatore, *supra* note 130. Consider Mamaroneck, where the Office of the Attorney General (OAG) addressed multiple claims of racism not being properly addressed by the district: “Black students and other students of color were regularly the targets of racial epithets and sexually offensive harassment. . . . [D]espite promptly investigating these [multiple] incidents, the district failed to engage in necessary responses to limit this behavior in the future.” Edwards, *supra* note 135. In Saratoga Springs, parents “spoke out that their Black and biracial children are the frequent target of racial slurs. They too alleged the district is dismissive, thus discouraging the students from reaching out to teachers, staff and principals to report harassment. Saratoga Springs schools reported zero incidents of bullying in 2020-2021. The district, in response, said it was handling the racism claims with its Diversity, Equity and Inclusion Committee.” Wendy Liberatore, *Parents Complain Racial Slurs Prevalent at Saratoga Springs Schools*, *Times Union*, March 17, 2023, <https://www.timesunion.com/news/article/parents-complain-racial-slurs-prevalent-saratoga-17845784.php>. In each of these instances, had parents had a PROA for equitable relief, with attorney fee provisions, parents could have sought a court order requiring the district to follow DASA’s requirements, all of them, and prevented further bullying.

<sup>165</sup> A minority of our working group opposes the creation of a private right of action, citing potential drains on the public fisc and the possibility of diverting resources from other programs run by schools. If such concerns prove warranted consideration could be given to imposing exhaustion requirements or sanctions provisions for unmeritorious litigation.

## **Section 5. Conclusion.**

*Congress determined that hate crimes have reverberating effects, not only for the targeted community but also for the nation. The Supreme Court has held that the widespread, systemic effects of hate crimes are significant enough to justify the use of enhanced sentences... Additionally, these enhanced sentences for hate crimes are often seen as symbolically important because these laws have a signaling effect in sending a “message to society that criminal acts based upon hatred will not be tolerated.”*

- *U.S. Commission on Civil Rights, The Federal Response to Anti-Asian Racism in the United States (Sept. 2023).*<sup>166</sup>

This task force has addressed the historically unprecedented wave of anti-Asian American hate crimes during the COVID-19 pandemic followed by an even more virulent strain of antisemitic hate crimes, which continues even as this Report is issued. Now is the time for our country to address the disturbing rise in hate crimes, a scourge that victimizes not only Asian Americans and Jewish Americans but every racial, religious, and ethnic group.

While this report presents practical and effective proposals to address the hate crimes problem, the work of this task force may continue into the future, and we may present new proposals. The proposals contained in the report are initial but crucial steps. We will advocate adoption of some of these proposals immediately in the New York State legislature.

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<sup>166</sup> Policy Spotlight: Hate Crime Laws, *supra* note 57.

## APPENDIX A

### 485.05 Hate Crimes.

1. A person commits a hate crime when he or she commits a specified offense and either:

(a) intentionally selects the person against whom the offense is committed or intended to be committed ~~in whole or in substantial part~~ because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or

(b) intentionally commits the act or acts constituting the ~~offense in whole or in substantial part~~ because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

2. Proof of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim does not, by itself, constitute legally sufficient evidence satisfying the people's burden under paragraph (a) or (b) of subdivision one of this section.

3. A “specified offense” is an offense contained within any provision of this chapter. A “specified offense” is an offense defined by any of the following provisions of this chapter: section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.12 (aggravated assault upon a person less than eleven years old); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); subdivision one of section 130.35 (rape in the first degree); subdivision one of section 130.50 (criminal sexual act in the first degree); subdivision one of section 130.65 (sexual abuse in the first degree); paragraph (a) of subdivision one of section 130.67 (aggravated sexual abuse in the second degree); paragraph (a) of subdivision one of section 130.70 (aggravated sexual abuse in the first degree); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.20 (kidnapping in the second degree); section 135.25 (kidnapping in the first degree); section 135.60 (coercion in the third degree); section 135.61 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.10 (criminal trespass in the third degree); section 140.15 (criminal trespass in the second degree); section 140.17 (criminal trespass in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree);

~~section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 150.05 (arson in the fourth degree); section 150.10 (arson in the third degree); section 150.15 (arson in the second degree); section 150.20 (arson in the first degree); section 155.25 (petit larceny); section 155.30 (grand larceny in the fourth degree); section 155.35 (grand larceny in the third degree); section 155.40 (grand larceny in the second degree); section 155.42 (grand larceny in the first degree); section 160.05 (robbery in the third degree); section 160.10 (robbery in the second degree); section 160.15 (robbery in the first degree); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); or any attempt or conspiracy to commit any of the foregoing offenses.~~



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

The Ruth G. Schapiro Memorial Award was established in 1992 by resolution of the Association Executive Committee in memory of Ruth G. Schapiro to commemorate her extraordinary vision and leadership. The Award recognizes a member of the Association who has made a noteworthy contribution to the concerns of women through *pro bono* services, writing, service to bar associations or community organizations, or other such endeavors.

The 2024 Ruth G. Schapiro Memorial Award recipient is Honorable Edwina G. Richardson.

Association president Richard Lewis will present the Ruth G. Schapiro Memorial Award to Honorable Edwina G. Richardson.





# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #6

**REQUESTED ACTION:** Endorsement of the 2023 Diversity Report Card from the Committee on Diversity, Equity, and Inclusion for favorable action by the House.

As part of its mission, the Committee on Diversity, Equity, and Inclusion is charged with conducting biennial surveys to evaluate the level of diversity in Section leadership, membership, and activities. Surveys have been conducted since 2005; this year, the committee conducted its ninth survey. The attached report reviews the results of the 2023 survey and compares those results to the previous surveys. Also included in the report is a review of diversity efforts by eight Association sections selected by the committee, to be used by sections to create and achieve goals. The Sections that were reviewed for the 2023 Diversity Report Card were, Cannabis Law; Dispute Resolution; Entertainment, Arts, and Sports Law; International; Labor and Employment Law; LGBTQ Law; Torts, Insurance and Compensation Law; and Trial Lawyers.

The report contains a series of general recommendations for sections. In addition, the report makes the following recommendations for the Association:

- NYSBA should continue to review the questions utilized in the data collection tool, including using Hispanic/Latinx instead of Hispanic; defining the term “cisgender”; and adding additional choices for gender identity.
- The Committee urges NYSBA to encourage all people nominated to serve on the Nominating Committee, as an Officer, or as a Section Leader to answer all demographic questions and should actively encourage all NYSBA members to provide all demographic data requested.
- NYSBA should use a third-party polling provider to implement a statistical sampling of a portion of membership.
- NYSBA leadership should participate in the Committee’s 21-day DEI challenge.
- NYSBA should make the Diversity Coordinator position full-time by June 30, 2024.
- The Report Card demonstrates the continuing need to encourage that we hear the voices of LGBTQAI+ people and people with disabilities.
- The Committee recommends bolstering current marketing efforts to recruit younger and diverse members and that NYSBA social media and marketing be utilized to urge members and leaders to provide all demographic information requested in the data collection tool.

The report will be presented by Jocelyn E. Lupetin, Esq., Lillian Moy, Esq., Nihla Fathima Sikkander, and Dena DeFazio.

- The Committee on Legal Aid supports the Diversity Report Card and recommendations.

- The President's Committee on Access to Justice supports the Diversity Report Card and its findings and recommendations.
- The LGBTQ Law Section supports the Diversity Report Card and recommendations.
- The Torts, Insurance and Compensation Law Section supports the Diversity Report Card and its recommendations.
- The Women in Law Section supports the Diversity Report Card and its recommendations.
- The Dispute Resolution Section supports the Diversity Card and its recommendations.



NEW YORK STATE  
BAR ASSOCIATION

# Diversity Report Card

from the New York State Bar Association  
Committee on Diversity, Equity, and Inclusion

January 2024

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.



NEW YORK STATE  
BAR ASSOCIATION

**DIVERSITY**  
**REPORT CARD**  
**Ninth Edition**

20  
23

January 2024  
COMMITTEE ON DIVERSITY,  
EQUITY, AND INCLUSION

THE DIVERSITY REPORT CARD IS DEDICATED TO THE MEMORY OF JOHN ERIC HIGGINS, ESQ., A MEMBER OF THE NEW YORK STATE BAR ASSOCIATION FOR OVER 25 YEARS AND AN ACTIVE PARTICIPANT IN MANY AREAS OF THE ORGANIZATION, INCLUDING HIS LEADERSHIP AND SERVICE ON THE HOUSE OF DELEGATES AND THE COMMITTEE ON DIVERSITY AND INCLUSION AS CHAIR OF THE DIVERSITY REPORT CARD SUBCOMMITTEE. JOHN WAS ALSO PAST CHAIR OF THE COMMITTEE ON MINORITIES IN THE PROFESSION, FOUNDER OF THE CONSTANCE BAKER MOTLEY SYMPOSIUM AND THE MOVING FORCE BEHIND THE MILES TO GO REPORT. JOHN RECEIVED THE 2018 DIVERSITY TRAILBLAZER AWARD POSTHUMOUSLY.

BECAUSE OF JOHN'S WORK, WE CONTINUE OUR VISION TO RAISE AWARENESS OF THE NEED FOR A DIVERSE AND VIBRANT LEGAL PROFESSION AND NOTE THAT EVEN IN 2023 THERE ARE MILES TO GO BEFORE WE REST.

## COMMITTEE ON DIVERSITY, EQUITY, AND INCLUSION 2023-2024

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MIRNA M. SANTIAGO, EXECUTIVE COMMITTEE LIAISON  
ERNESTO GUERRERO, NYSBA STAFF LIAISON



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# INTRODUCTION

The New York State Bar Association (“NYSBA” or “Association”) is deeply committed to enhancing diversity at every level of participation within the Association and the profession.

The mission of the Committee on Diversity, Equity, and Inclusion (“Committee”) is to promote and advance the full and equal participation of attorneys of color, women, and other diverse attorneys in the Association, and in all sectors and at every level of the legal profession through research, education, fostering involvement and leadership development in the Association and other professional activities, and to promote knowledge of and respect for the profession in communities that historically have been excluded from the practice of law. Therefore, with the full support of NYSBA leadership, the Association continues to make regular requests that all NYSBA members complete their demographics as part of their membership enrollment and renewal. This data is critically important to evaluating the level of diversity in Section and Association leadership, membership, and activities, and enables the Committee to report those results.

The Committee on Minorities in the Profession (now known as the Committee on Diversity, Equity, and Inclusion) first reported the results of its diversity survey in the 2005 Diversity Report Card. Since the time of the initial Diversity Report Card, the Committee has continued to review the demographic data of the Association, resulting in the publication of several updated versions of the Diversity Report Card. The Association’s 2020 Diversity Plan committed NYSBA to (i) tracking diversity data within its leadership, (ii) following the Mansfield Rule in all its leadership roles, and (iii) promoting diversity through membership marketing and solicitation, CLE and other programming, publications, and a speakers database .



The data reported in the first Diversity Report Card included gender, ethnicity/race, and ancestry status. Since then, the demographic data collected by the Association has grown more granular to include sexual orientation, age, and disability, and has focused on leadership entities within NYSBA. In 2021, the Diversity Report Card focused on eight Sections including the Business Law, Commercial and Federal Litigation, Elder Law and Special Needs, Family Law, Judicial, Real Property Law, Trusts and Estates Law, and Young Lawyers Sections. In 2023, the spotlight on individual Sections continues with a focus on the Cannabis Law; Dispute Resolution; Entertainment, Arts and Sports Law; International; Labor and Employment Law ; LGBTQ Law; Torts, Insurance and Compensation Law; and Trial Lawyers Sections. We thank these Sections for providing the information included in this year's Diversity Report Card.



# MEMBER AND LEADERSHIP PARTICIPATION

An ongoing challenge for NYSBA is the lack of full participation in data collection by all NYSBA members and those in leadership positions. The rates of participation remain low, as evidenced by the percentage of members who declined to answer or failed to provide gender, race/ethnicity, sexual orientation, or disability data. The non-participation rate includes both members who “declined to answer” each and every question and non-responsive members, as noted in the table below.

2023 NYSBA MEMBER DATA								
	Declined to Answer				No Data Provided			
	2015	2017	2021	2023	2015	2017	2021	2023
Gender	0	0	0	0	6.16%	17.84%	10.10%	40%
Race/Ethnicity	1.67%	2.06%	2.80%	2%	54.23%	54.75%	35.90%	61%
Sexual Orientation	3.25%	3.67%	5.00%	4%	68.31%	66.33%	50.10%	69%

2023 NYSBA LEADERSHIP DATA – Declined to Answer										
	Gender		Race/Ethnicity		Sexual Orientation		Disability		Age	
	2021	2023	2021	2023	2021	2023	2021	2023	2021	2023
House of Delegates	0	0	3.40%	0	5.7%	2%	8%	5%	0	0
Executive Committee	0	0	3%	0	9.10%	0	6.1%	7%	0	0
Nomination Committee	0	0	1.80%	0	5.50%	13%	5.50%	15%	0	0
Section Leaders	0	0	1.90%	0	5.70%	0	6.70%	7%	0	0
Standing Committee Chairs	0	0	2.3%	0	2.30%	3%	2.30%	5%	0	0

# MEMBER AND LEADERSHIP PARTICIPATION

2023 NYSBA LEADERSHIP DATA – No Data Provided										
	Gender		Race/Ethnicity		Sexual Orientation		Disability		Age	
	2021	2023	2021	2023	2021	2023	2021	2023	2021	2023
House of Delegates	1.50%	4%	13.80%	26%	29.10%	35%	18%	26%	2.30%	6%
Executive Committee	0	0	9.10%	23%	21.20%	3%	18.20%	10%	0	3%
Nomination Committee	0	2%	18.10%	4%	30.90%	25%	21.80%	15%	1.80%	2%
Section Leaders	0	7%	16.10%	36%	24.80%	36%	20%	29%	0	0
Standing Committee Chairs	0	5%	11.40%	24%	27.30%	39%	21.60%	34%	0	3%

As compared to prior versions of the Diversity Report Card, there has been an increase in non-responsiveness for most categories. Although many members did not provide data for their gender (40%) or their age (38%), the percentage of leaders who provided gender and age data is very high. The non-participation rate for race/ethnicity is at a new high for members, with 63% of members not providing this information in 2023. The data pertaining to leadership in 2023 shows a range of lack of data spanning from 4% (Nomination Committee) to 36% (Section Leaders). Moreover, the membership non-participation rate for sexual orientation in 2023 was 73%. The non-participation rate for members in the disability category also increased to 69%. For leadership, the non-participation rate for sexual orientation ranged from 37% (House of Delegates) to 42% (Standing Committee Chairs) and for disability, from 17% (Executive Committee) to 39% (Standing Committee Chairs).

The Committee continues to note that without accurate data from NYSBA membership and leadership, the Association’s programs and services will not accurately reflect or respond to the needs of its members. Also, data is needed to inform NYSBA staff of areas where additional outreach and training may be needed. The non-responsive data, in the Committee’s view, informs us that both the leadership and the Committee have failed to convince a significant number of NYSBA members of the importance of this information to NYSBA’s work and its ongoing relevance to the profession and our Association. NYSBA leadership must continue to emphasize its need to know the Race/Ethnicity, Sexual Orientation, Gender, Age, and Disability of all its members. In order to get more accurate statistics and increase responsiveness to the demographic questions, the Committee will again recommend additional changes to collecting and reporting data and the role of our leaders.

The Committee hopes this report card will be used as a tool by Section Chairs, along with Diversity Chairs and staff liaisons, to enhance their Sections’ diversity efforts. We challenge the Association to continue to gather and analyze data and to implement constructive change.



# ■ DIVERSITY DATA OVERALL

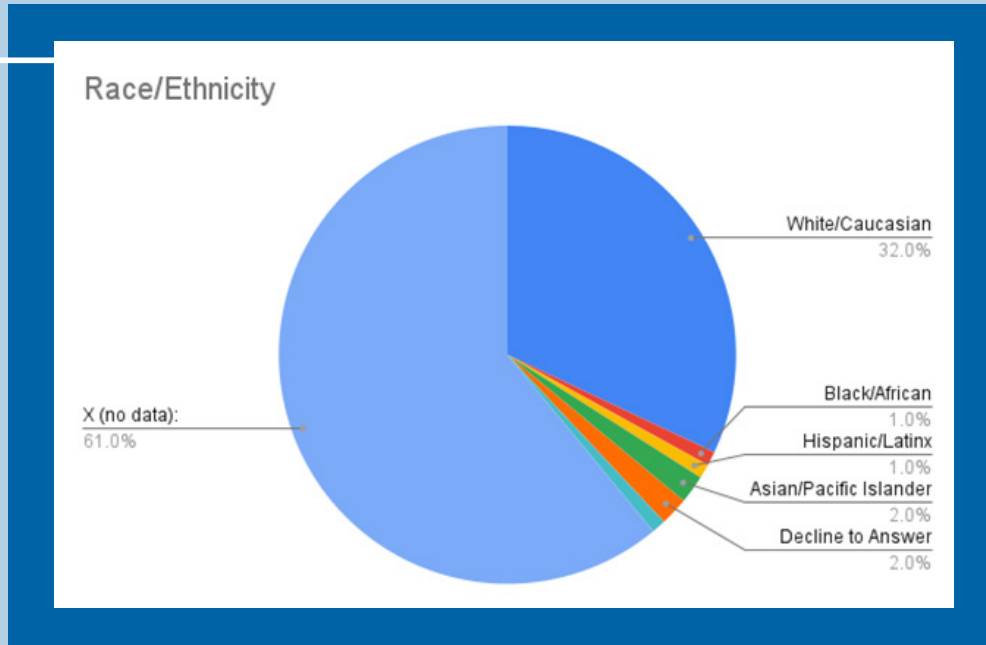
**RACE, ETHNICITY,  
GENDER, SEXUAL  
ORIENTATION,  
GENDER IDENTITY,  
DISABILITY STATUS,  
AGE, NEW ATTORNEYS**



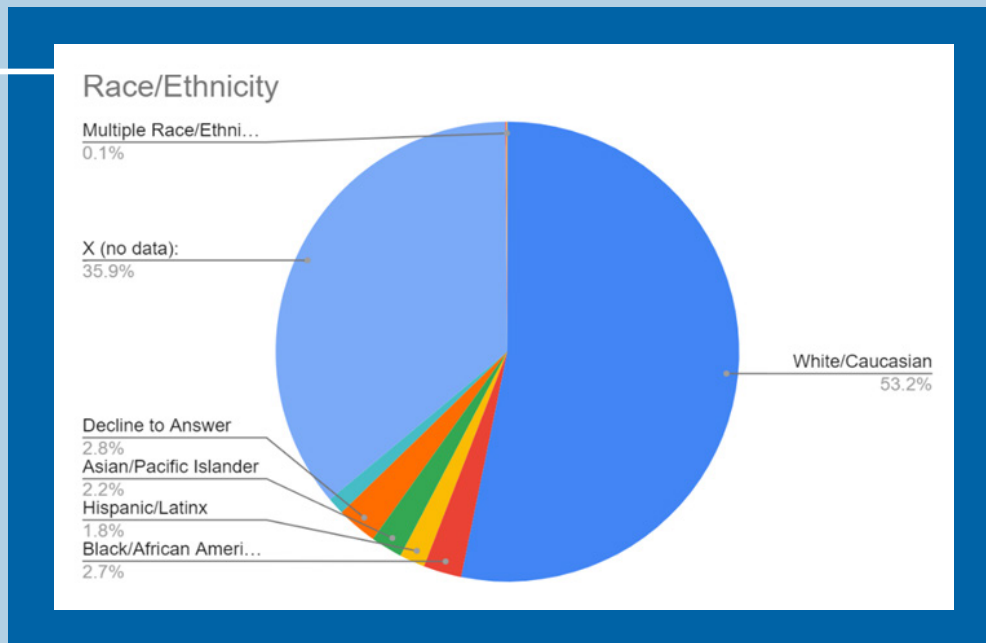
# RACE/ETHNICITY

## 2023 VERSUS 2021

2023



2021



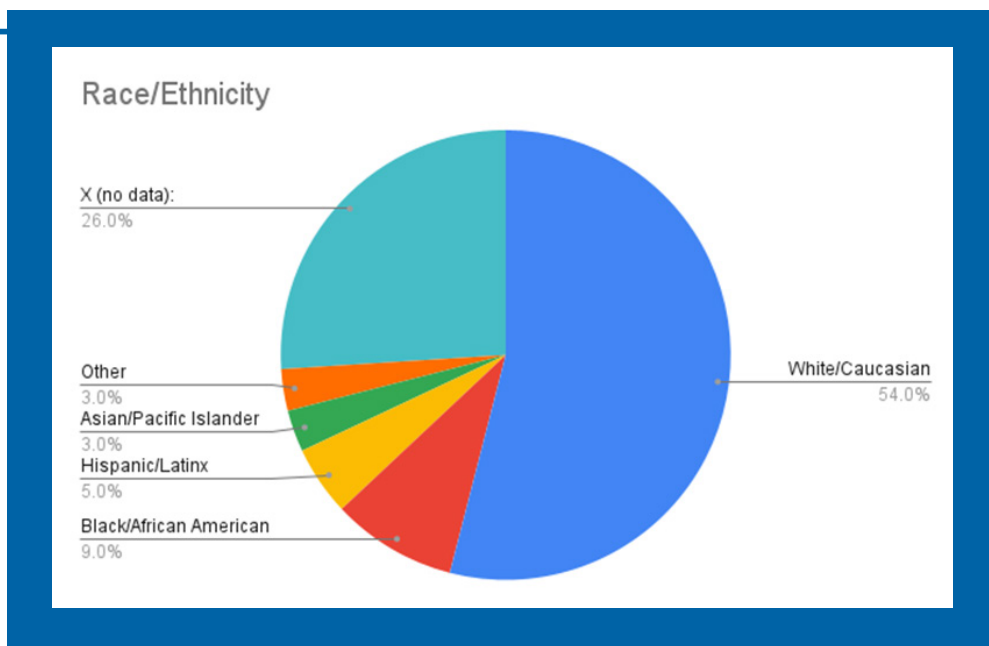
In 2023, we continue to see a drastic decrease in the participation of NYSBA members regarding voluntary providing information related to race and ethnicity. In 2023, a total of 37% of members reported their race and ethnicity, which is a 24.3% decrease in participation from the 61.3% of members who reported this information in 2021. In addition to this decrease in participation, there also appears to be a decrease in the representation of most categories of race and ethnicity in NYSBA's membership. For example, the percentage of members who identify as White/Caucasian dropped significantly to 32% in 2023, as compared to 53.2% in 2021 as White/Caucasian dropped significantly to 32% in 2023, as compared to 53.2% in 2021.

# RACE/ETHNICITY

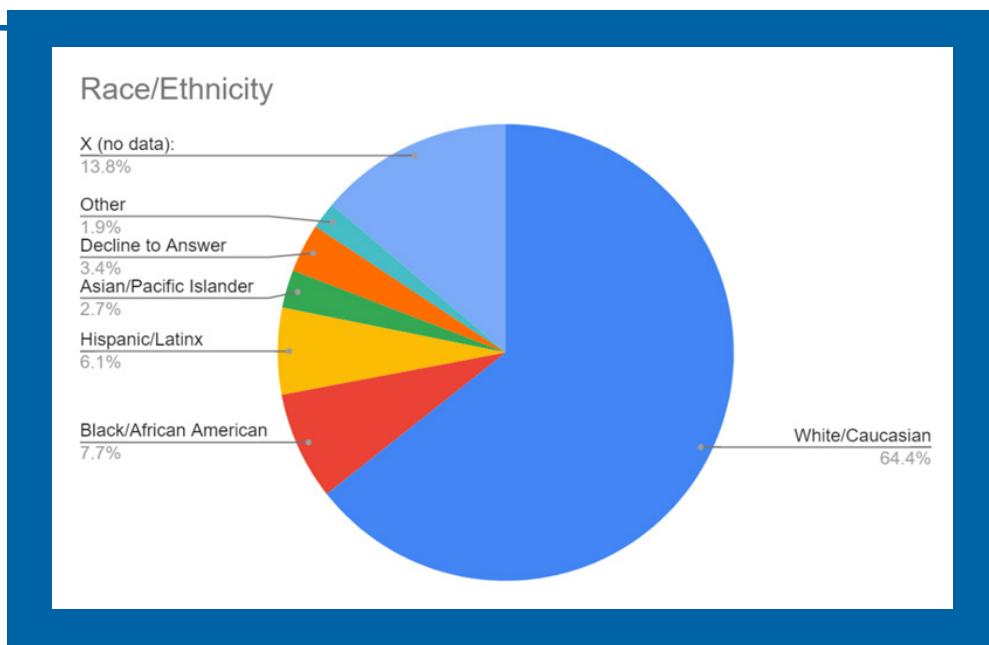
Members who identified as Black/African American also decreased to 1% in 2023 from 2.7% in 2021, and those who identified as Hispanic/Latinx decreased to 1% in 2023 from 1.8% in 2021. Members who self-identified as Asian/Pacific Islander remained relatively the same with 2% being reported in 2023, as compared to 2.2% in 2021. There was a slight decrease in the percentage of members who chose not to self-identify their race or ethnicity, with 2% of members declining to answer, as compared to 2.8% in 2021. There was a slight increase in members who identified as Multiple Race/ Ethnicity from 0.1% in 2021 to 1% in 2023.

## House of Delegates

2023



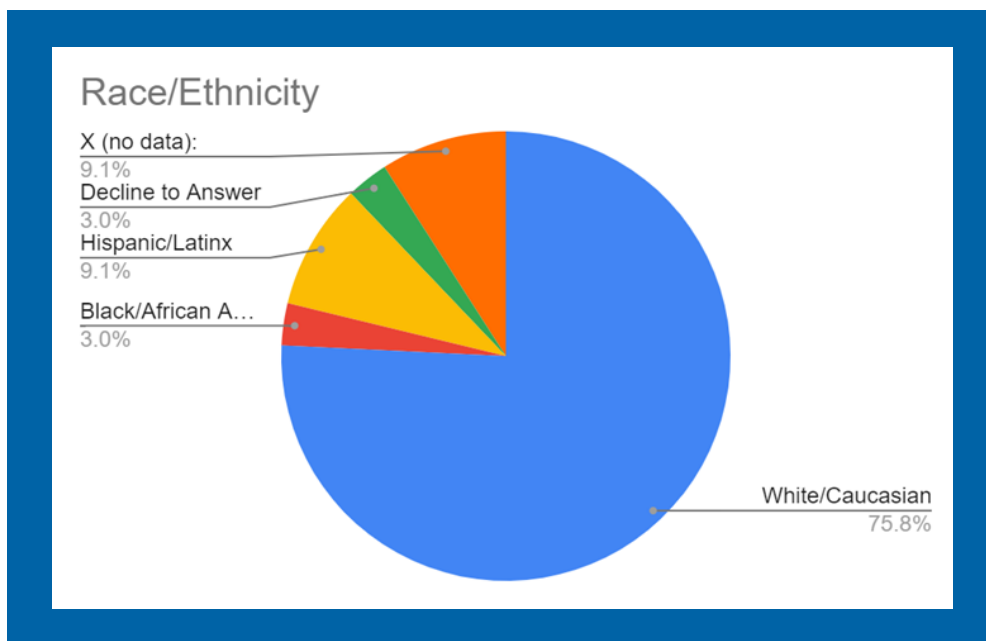
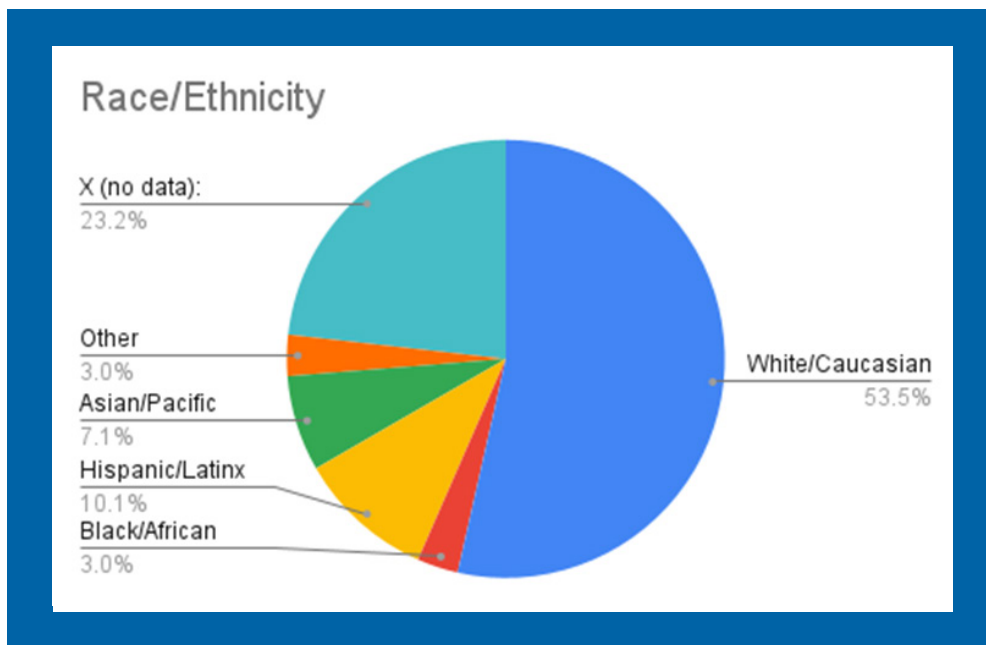
2021



# RACE/ETHNICITY

In the House of Delegates, we see a similar trend in the decline of self-reported information pertaining to race and ethnicity. In 2021, 82.8% of members of the House of Delegates reported race and ethnicity demographic information, compared to only 74% of members in 2023. Among those who did report, 54% self-identified as White/Caucasian compared to 64.4% in 2021. We also saw a decrease in the percentage of House of Delegates members who self-identified as Hispanic/Latinx, with 6.1% of the House of Delegates identifying as Hispanic/Latinx in 2021, and only 5% in 2023. Members who identify as Asian/Pacific Islander remained nearly the same at 3% in 2023, as compared to 2.7% in 2021. Notably, the percentage of House of Delegates members who identify as Black/African American increased to 9% in 2023 from 7.7% in 2021. The percentage of those who identify as Multiple Race/Ethnicity also increased from 1.9% in 2021 to 3% in 2023.

Executive Committee



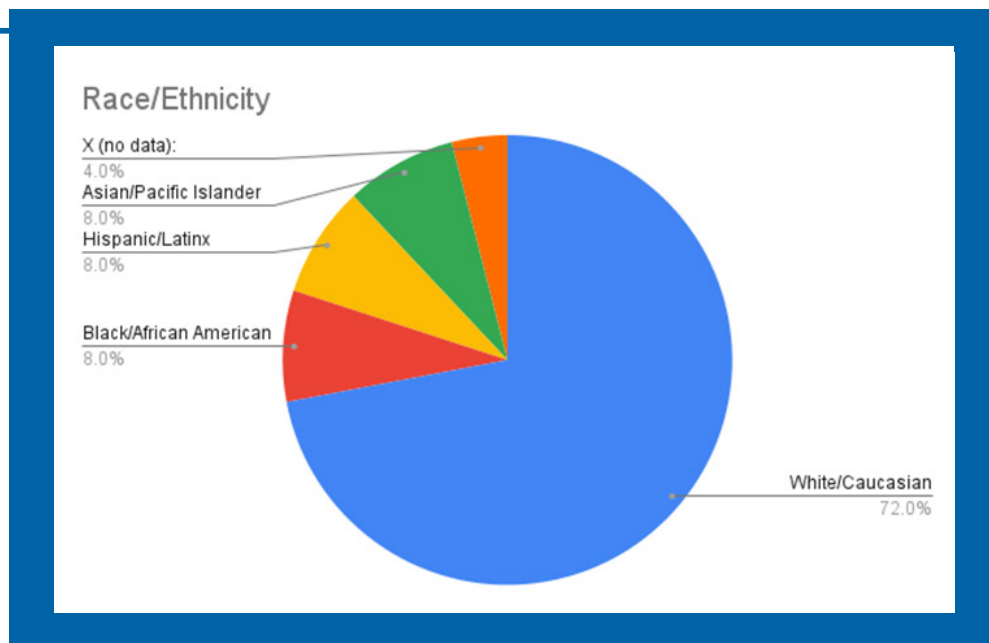
# RACE/ETHNICITY

In the Executive Committee, the percentage of missing data for race and ethnicity almost doubled with 23% of Executive Committee members either declining or failing to report this information in 2023, as compared to only 12.1% of members in 2021. In 2023, 53.5% of the Executive Committee self-identified as White/Caucasian compared to 75.8% in 2021. The number of Executive Committee members who identified as Black/African American and Hispanic/Latinx remained relatively consistent from 2021 to 2023, with 3% of Executive Committee members having identified as Black/African American in 2023, as compared to 3% in 2021, and 10.1% having identified as Hispanic/Latinx in 2023, compared to 9.1% in 2021.

In contrast to the 2021 Diversity Report Card where no member of the Association's Executive Committee identified as either Asian/Pacific Islander or as Multirace/Ethnicity, in 2023, 7% of the Executive Committee identified as Asian/Pacific Islander and 3% identified as Multirace/Ethnicity.

## Nominating Committee

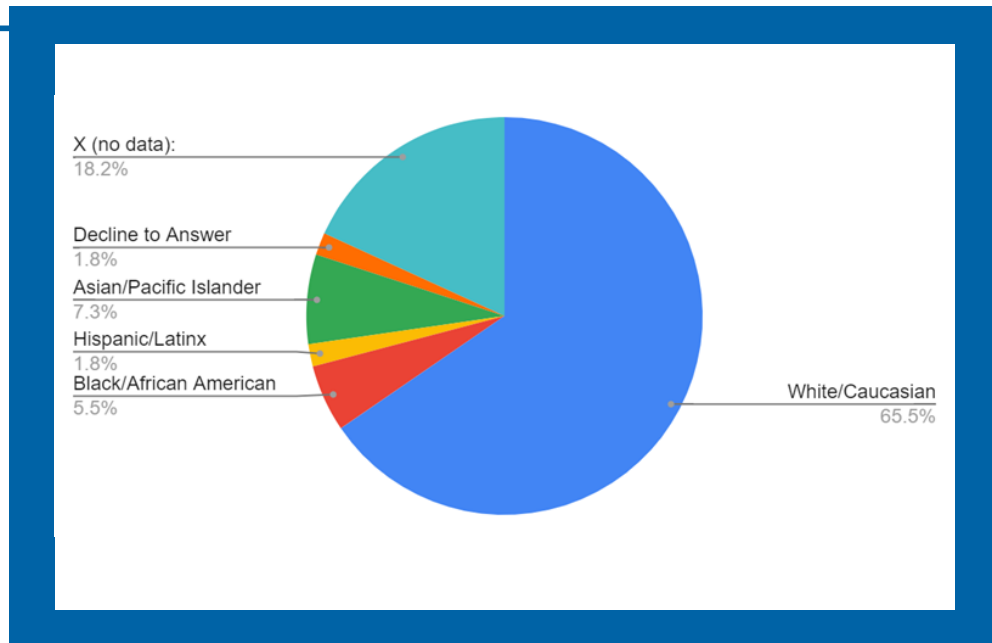
**2023**





# RACE/ETHNICITY

2021



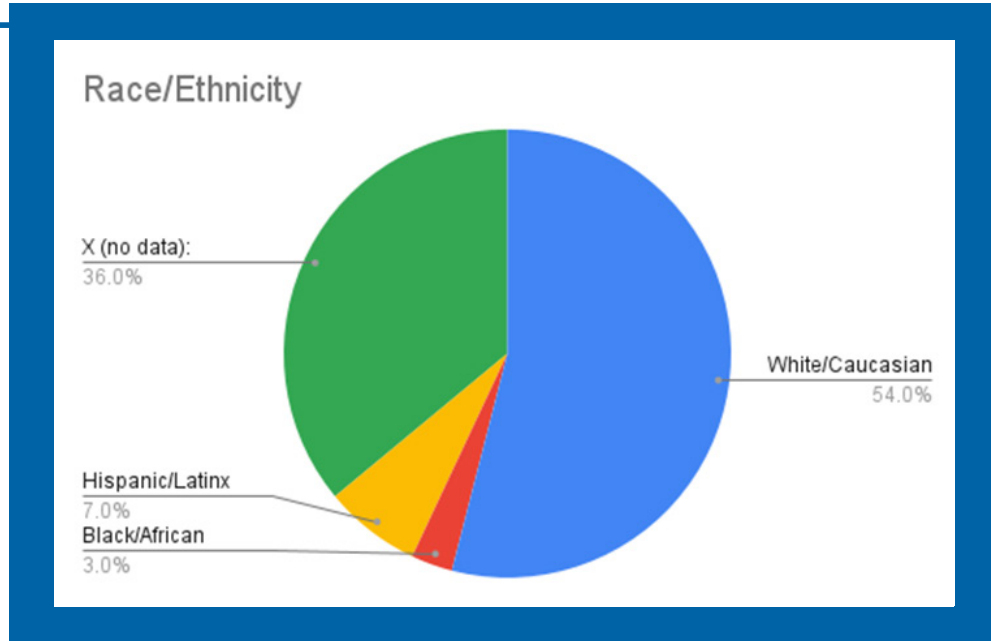
The Nominating Committee improved its reporting on race and ethnicity over the period of 2021 to 2023, with 96% of its members reporting race and ethnicity-related information in 2023, compared to only 80% of its members having reported this information in 2021. In the Nominating Committee, 72% of its members identified as White/Caucasian, which reflects an increase of 6.5% from 2021 reporting.

Members of the Nominating Committee who identify as Black/African American increased to 8% in 2023 from 5.5% in 2021. Similarly, there was a significant increase in the percentage of members who identified as Hispanic/Latinx, with 8% of members having identified as Hispanic/Latinx in 2023, compared to only 1.8% in 2021. Members who identify as Asian/Pacific Islander remained constant over the two years, with 8% having identified as Hispanic/Latinx in 2023, compared to 7.3% in 2021.

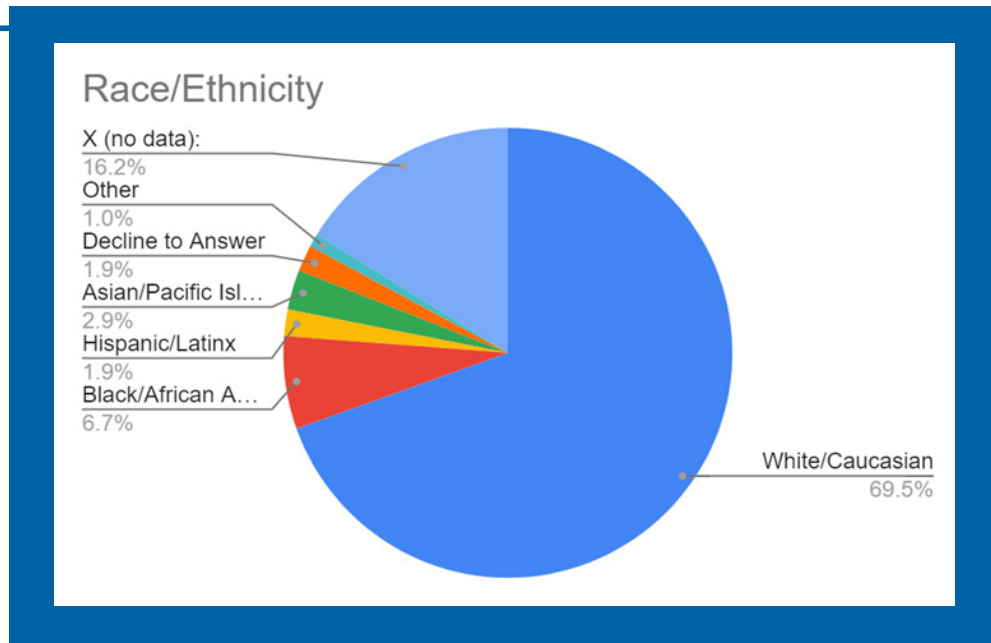
# RACE/ETHNICITY

Section Chairs

2023



2021



# RACE/ETHNICITY

In 2023, Section Chairs identified as 54% White/Caucasian, 7% Hispanic/Latinx, and 3% Black/African American. More than one-third, or 36%, of Section Chairs provided no data on their race and ethnicity. Overall, we saw a decrease in diversity related to race and ethnicity, except for those Section Chairs who identified as Hispanic/Latinx. The number of Section Chairs who identified as White/Caucasian decreased by 15.5% to 54% in 2023, as compared to the 69.5% who identified as White/Caucasian in 2021. The percentage of Section Chairs who identify as Black/African American also decreased from 6.7% in 2021 to 3% in 2023. In 2021, 2.9% of Section Chairs identified as Asian/Pacific Islander and 1% as Multirace/Ethnicity. In contrast, in 2023, no Section Chair self-identified as either of these races/ethnicities. In contrast, the percentage of Section Chairs who identified as Hispanic/Latinx increased to 7% in 2023, compared to 1.9% in 2021.

## **Current Census Data:**

The data contained in the American Bar Association's ABA Profile of the Legal Profession 2022 shows that 19% of lawyers are people of color. In New York State, according to the most recent American Community Survey data, the racial composition of our state's population is 60.73% White, 15.21% Black or African American, 8.65% Asian, 0.42% Native American, 0.05% Native Hawaiian or Pacific Islander, 5.97% two or more races, and 8.99% other race.

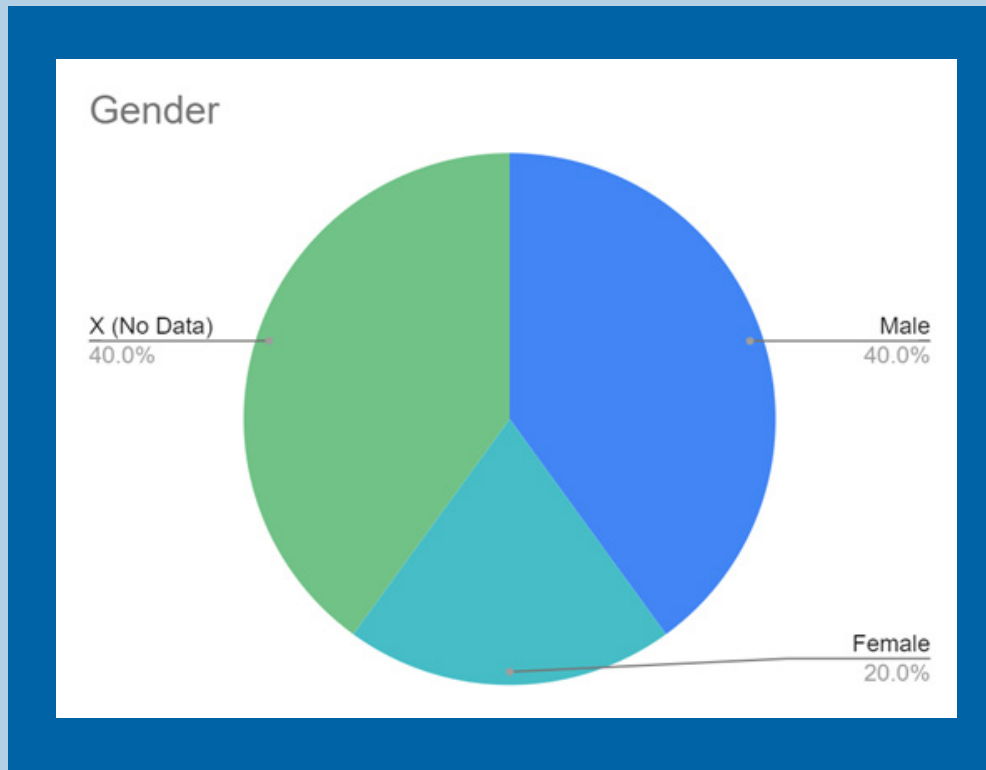
In 2023, only 5% of NYSBA membership who reported their race and ethnicity are people of color, as compared to 6.9% in 2021. With the exception of the Nominating Committee, there were no significant changes or decreases in the number of NYSBA leaders who identify as people of color. This decrease or lack of change is further exacerbated by the decline in reporting among members who identify as White/Caucasian in both 2021 and 2023. Without this data, the Committee cannot accurately identify the racial and ethnic diversity of the Association's membership, and NYSBA cannot adequately assess and respond to the needs of all of its members.

Again, the Committee strongly urges all persons, especially those serving in a leadership capacity, to lead by example in self-identifying as well as strongly encouraging their fellow members to provide race and ethnicity and other data required for this report card. Further, the Committee also recommends that all Nominating Committee members, Association Officers, and Section Chairs be required to respond to all data questions.

# GENDER

## 2023 DATA

### MEMBERSHIP



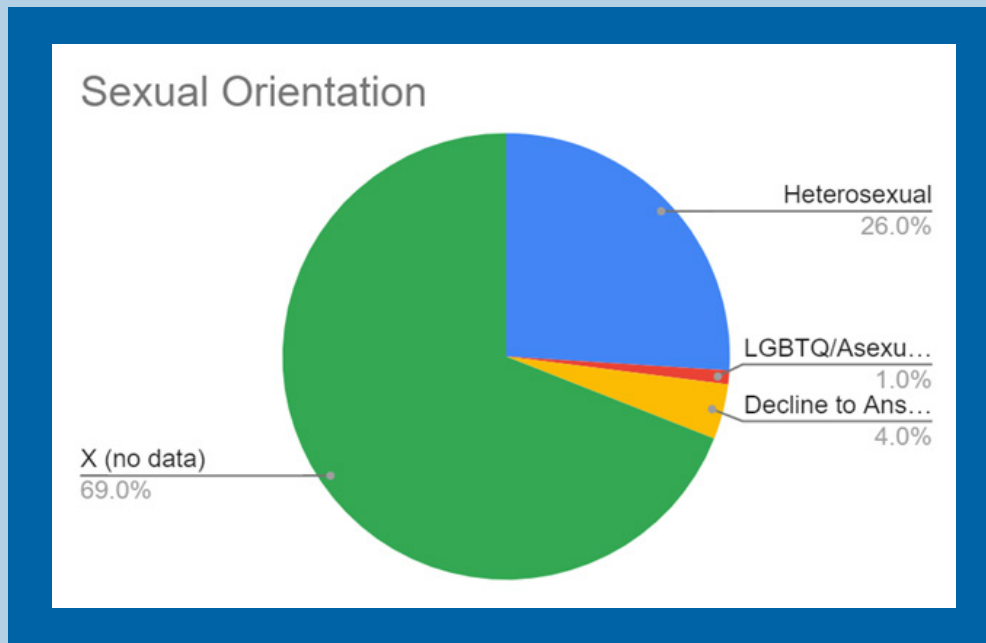
In 2023, NYSBA membership reported a 20% disparity between its male and female members, with males comprising 40% of overall membership, females comprising 20% of overall membership, and 40% of members reporting no data. The current disparity between male and female members within NYSBA's overall membership, the House of Delegates, Executive Committee, Nominating Committee, Section Leaders, and Standing Committee Chairs, collectively and separately evidences smaller disparities between its male and female members. With a substantial history of majority male members, we commend NYSBA for achieving an increase of equity with respect to females in leadership positions.

In comparison to the 10% of members who reported no data in 2021, there was a 30% increase in membership non-response to the demographic questions related to gender. NYSBA should continue to do its due diligence so that more members offer data regarding gender, and so that the gender gap in leadership and overall NYSBA membership will further narrow. Trends over time are evident of a bright future ahead for non-males in the legal profession, as the proportion of non-males in NYSBA leadership are, in some sections, in excess of men. Most notably, Section Leaders are comprised of 50% females, 43% males, and 7% no response. The Executive Committee is also comprised of 50% females and 50% males.

# SEXUAL ORIENTATION & GENDER IDENTITY

## 2023 DATA

### MEMBERSHIP



Since 2021, there has been a significant increase in NYSBA members who identify as transgender, intersex, and gender non-conforming/non-binary. In 2021, four members identified as transgender, and none identified as non-binary, or intersex. Comparatively, 17 NYSBA members identified as transgender in 2023, one member identified as intersex, and eight members identified as non-binary/non-conforming.

In 2023, 17 NYSBA members identified as transgender, which is a substantial increase from zero members in 2021. According to the available demographic information, nine NYSBA members identified as either non-binary/non-conforming or intersex in 2023, which also represents an increase from zero members in 2021.

Overall, and compared to 50.1% in 2021, there is even more missing data regarding sexual orientation. For the general NYSBA membership, 69% of members have not provided sexual orientation demographic information. These numbers are significantly lower for NYSBA leadership, with 35% of the House of Delegates and 3% of the Executive Committee not reporting any data.

# SEXUAL ORIENTATION & GENDER IDENTITY

In addition to the missing data, a notable portion of NYSBA's membership declined to answer the demographic questions related to sexual orientation in 2021. In 2023, 4 % of NYSBA membership, 2% of the House of Delegates, and 0% of the Executive Committee declined to provide responses to this portion of the demographic information. These numbers reflect an improvement from 2021 data.

For those who reported sexual orientation demographic information, the number of NYSBA members who identified as lesbian, gay, bisexual, queer, or asexual has remained relatively unchanged between 2017 (1% of members), 2021 (1.8% of members), and 2023 (1% of members). The same is true for the House of Delegates (3% of delegates in 2017, 3.4% of delegates in 2021, and 3% of delegates in 2023).

There was a significant increase in the number of Executive Committee members who identified as lesbian, gay, bisexual, queer, or asexual in 2023 versus 2021. In 2021, 0% of the Executive Committee identified as lesbian, gay, bisexual, queer, or asexual, as opposed to 23.2% in 2023. Although no data from 2021 is available, in 2023, 4% of the Nominating Committee identified as LGBTQ+/Asexual. Furthermore, 3% of the House of Delegates, 4% of Section Chairs, and 5% of the Standing Committee Chairs also identified as LGBTQ+/Asexual in 2023.

# SEXUAL ORIENTATION & GENDER IDENTITY

Based on the sexual orientation demographic information report, the NYSBA House of Delegates and Executive Committee have significantly more sexual orientation diversity than the general NYSBA membership (3% of the House of Delegates and 23.2% of the Executive Committee, compared to 1% of NYSBA membership). The sexual orientation diversity of NYBSA's membership is notably lower, at 1%, compared to the 3.7% of lawyers who identified as LGBTQ as part of a 2021 American Bar Association survey.<sup>1</sup> Furthermore, in New York State, “[a]n estimated 7.9% of the adult population identify as lesbian, gay, bisexual, or something else/other sexual orientation (LGBO).”<sup>2</sup> According to the 2021 Census Bureau survey, 9.6% of adults aged 18 and over identified as bisexual, gay, or lesbian, or something else.<sup>3</sup> This data also reflects that younger generations are more likely to identify as LGBO (15.6% for 18-24 years old vs 4.5% for 65+ years old) and therefore increasing the number of younger attorneys who are NYSBA members will likely help to increase sexual orientation diversity in the Association.

The percentage of NYSBA members who identified as heterosexual has decreased from 43.1% in 2021 to 26% in 2023. In comparison, 60% of House of Delegates and 73.7% of the Executive Committee members identified as heterosexual in 2023. There was also a significant decrease in the number of members who declined to respond in NYSBA leadership (from 5.7% to 2% for the House of Delegates, and from 9.1% to 3% for the Executive Committee). However, 35% of House of Delegates members and 25% of Nominating Committee members failed to respond and thus, are not included in these statistics. In an effort to be more inclusive and better align with the values of NYSBA, the LGBTQ Section seeks to rename itself to the LGBTQ+ Section. The new name is likely to be approved before this Report Card adopted by the House of Delegates.

<sup>1</sup> Demographics – Chapter Outline, ABA Profile of the Legal Profession 2022, <https://www.abalegalprofile.com/demographics.php#anchor2>.

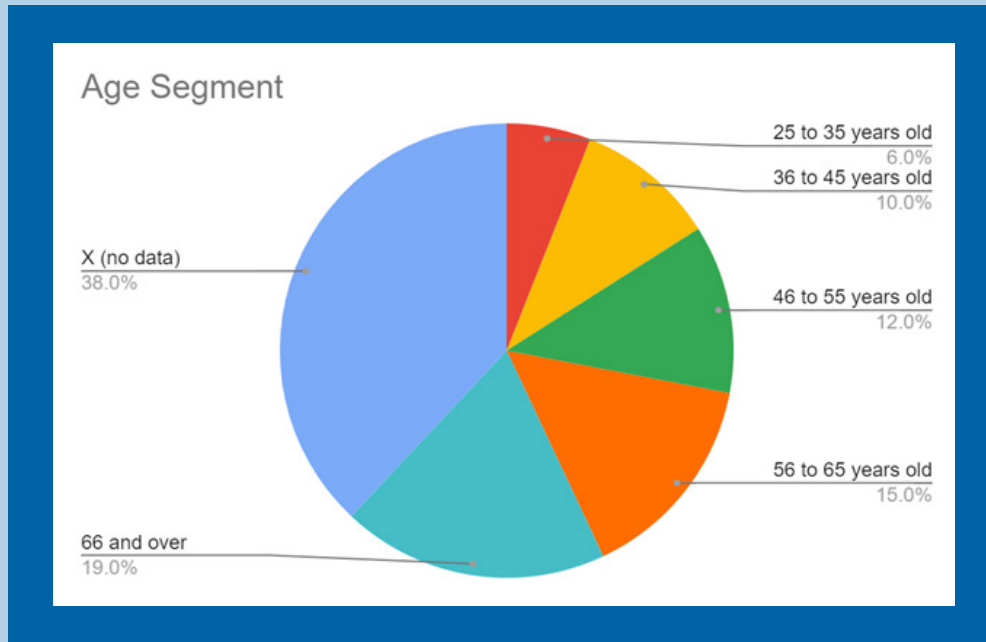
<sup>2</sup> BRFS Brief, THE CENTERS FOR DISEASE CONTROL AND PREVENTION, 2022-16, [https://www.health.ny.gov/statistics/brfss/reports/docs/2022-16\\_brfss\\_sogi.pdf](https://www.health.ny.gov/statistics/brfss/reports/docs/2022-16_brfss_sogi.pdf).

<sup>3</sup> Anderson, Lydia, et al., New Household Pulse Survey Data Reveals Differences between LGBT and Non-LGBT Respondents During COVID-19 Pandemic, CENSUS.GOV (Nov. 4, 2021), <https://www.census.gov/library/stories/2021/11/census-bureau-survey-explores-sexual-orientation-and-gender-identity.html>.

# AGE

## 2023 DATA

### MEMBERSHIP



In terms of age, 38% of NYSBA members failed to provide data regarding age in 2023, as opposed to 9% of NYSBA members who did not provide this demographic information in 2021. Due to the significant absence of data, it is believed that the ages of all NYSBA members have been significantly undercounted.

There was a notable decrease in young attorney NYSBA membership, with members between the ages of 25 and 35 years old decreasing from 9.1% in 2021 to 6% in 2023. There was also a significant decrease in members aged 56 to 65 years old (25% in 2021 to 15% in 2023) and in members aged 66 and over (26.7% in 2021 to 19% in 2023). This decrease is likely explained by members' nonresponse to the data collection tool and also reflects the decline of 16.8% in NYSBA membership.

As NYSBA leadership is already focused on increasing membership, more effort must be made to increase engagement regarding age-related diversity in NYSBA membership. There also must be a continued effort to recruit more young members.



# DISABILITY STATUS

## 2023 DATA

The percentage of members who responded in 2023 to the question of disability status was 34.0%, representing a 20.4% decrease from the percentage which responded either “yes” or “no” to the question of disability status in 2021 (54.4%). The non-participation rate for this demographic increased while those who affirmatively declined to answer in 2023, was 4% less than in 2021, with 4% of members affirmatively declining to answer this question, compared to a declination rate of 8% in 2021.

The data for the House of Delegates, Executive Committee, Nominating Committee, Section Chairs, and Standing Committee Chairs indicates that approximately 5% to 15% affirmatively declined to answer the disability status.

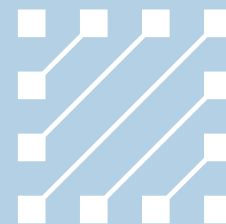
Although NYSBA has more information about disability status than in previous years, there continues to be a high non-participation rate for this data point and a very small percentage of members and individuals in leadership positions reporting as having disability. The numbers are incongruous with data from the Centers for Disease Control and Prevention, which indicates that approximately 43% of adults in New York State have a physical or cognitive disability.<sup>4</sup>

### A Word About the Data

As noted above, the non-response rate in all categories remains dangerously high. Some of the missing data can be attributed to the many new members who receive a one-year complimentary membership to NYSBA when they are admitted to the bar. The membership information is provided by the court, which only provides their name and contact information; but lacks demographics. This does not, however, account for the failure of more seasoned members and leadership to provide the requested information. Our recommendations address both these groups of NYSBA members.

In preparing this year’s Diversity Report Card, we used the information we had available to us, knowing that we are missing this invaluable data from many members and leaders. We hope NYSBA leaders will continue to urge all members to provide this information so we can better tailor our benefits and programs to meet the needs of our members. We also note that since the last Diversity Report Card (2021), the Association has experienced a loss in membership of 10,383 members or about 16.8% of members. We know the Association is trying to stem this loss by piloting a new dues structure (more akin to a subscription service) so our members can choose the programs and services they prioritize. Creative programs and continuing relevance makes the Association a priority for an attorney’s time and money. More accurate data will help us meet the needs of our members, and we hope that each reader will contribute to an improved response rate.

<sup>4</sup> Disability & Health U.S. State Profile Data for New York (Adults 18+ years of age), CENTERS FOR DISEASE CONTROL AND PREVENTION, May 12, 2023, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/new-york.html>.



# DATA ANALYSIS SELECTED SECTIONS

The Committee selected eight Sections in order to extensively review each section's demographic data and individual diversity plans.

**Cannabis Law Section**

**Dispute Resolution Section**

**Entertainment, Arts and Sports Law Section**

**International Section**

**Labor & Employment Section**

**LGBTQ Law Section**

**Torts, Insurance, & Compensation Law Section**

**Trial Lawyers Section**

# CANNABIS LAW SECTION

The Committee on Cannabis Law was converted to the Cannabis Law Section in January 2022. Since that time, the Cannabis Law Section has enjoyed a tremendous increase in membership. The Cannabis Law Section's leadership reflects the overall NYSBA objective to increase diversity. Six women and three persons of color sit on the Section's Executive Committee. The Section Chair is a woman of color, and the immediate past chair is a woman as well.

There is substantial diversity within the Section in terms of age, both in Section leadership and general membership. Although only 1% of Section members are under 24 years of age, the remaining age groups are fully represented, with each age group comprising between 9% and 16% of Section membership. Men are the majority within the Section and make up 35% percent of Section membership. Women make up 24% of the Section according to the reported data.

General membership within the Section is seemingly less diverse in the areas of race /ethnicity, sexual orientation, and disability. The available demographic data indicates that the Section is predominately White/Caucasian (26%). Although there are Section members who identify as Black/African American (3%), Asian-American (1%), Hispanic/Latinx (1%), and "other" (2%), each of the foregoing groups are represented to a lesser degree. Though sexual orientation was the most underreported data point, 3% of Section membership identify as LGBTQ+/Asexual. Only 1% of Section membership has a disability. Insofar as the Section is relatively new, there is no past data that can be used for comparison.

Notably, a considerable portion of the Section's membership did not provide data concerning race, age, gender, disability, and sexual orientation. Approximately 40% of the Section's membership elected not to disclose gender and age. Between 60% and 70% of membership declined to provide information about race, disability, and sexual orientation. The decision not to report such data is consistent with membership in other NYSBA Sections.

Earlier this year, the Section adopted its inaugural Diversity, Equity, and Inclusion Plan. Even before the implementation of the Plan, the Section was diligent in encouraging diversity in leadership and membership. The Section seeks to improve diversity among its membership and to maintain diversity in leadership through the Plan. To the extent possible, the Section aims to create a diverse speaker database for CLE programming. The Section Chair will work collaboratively with the Section's subcommittees on Programming and Social Equity to implement this portion of the Plan.

# CANNABIS LAW SECTION

In addition, the Section plans to partner with the DEI Committee, other NYSBA Sections, and affinity bar associations to promote diversity in Section-sponsored networking events, and these events will be designed to increase overall membership and membership from underrepresented groups in particular. The Section has also committed to identifying and sponsoring membership dues for groups that are underrepresented in its general membership. The Section's Executive Committee is committed to implementing all phases of the current Plan and will conduct an annual review to determine the Plan's effectiveness. Amendments to the Plan will be made as needed.

The Cannabis Law Section's leadership is diverse, and diversity among general Section membership is expected to increase. The Section may benefit from a messaging strategy that encourages full member participation in all NYSBA demographic data collection. This may include, but not be limited to, explaining the importance of providing demographic data to Section membership. Greater participation in data collection will allow the Section to identify those groups that are genuinely underrepresented. The Cannabis Law Section's commitment to diversity, equity, and inclusion is noteworthy. The Section is moving in the right direction.

# DISPUTE RESOLUTION SECTION

The Dispute Resolution Section (“DRS”) has placed and continues to place diversity, equity, and inclusion as one of its top agenda items. Just this year, the Section elected a woman of color as the Section’s Chair-Elect, and a man of color as its Vice Chair. For the past several years, DRS has hosted its Annual Diversity Gala. The Gala celebrates diversity and inclusion in its ongoing efforts to expand diversity within the Section and within the practice of ADR in New York, as well as its commitment to engaging diverse practitioners, strengthening the Section’s demographic, and improving the Dispute Resolution culture. The Gala is underwritten by the Section, with invitations sent to ensure the inclusion of members of affinity and specialty bars with an interest in dispute resolution.

Unfortunately, a large percentage of DRS NYSBA members declined to answer all of the relevant demographic questions, which makes it difficult to gain an accurate and reliable mechanism for determining both a diversity baseline, as well as whether the efforts undertaken by the Section have produced the intended results. The 2023 demographic results for the DRS reflect membership that is 56% male and 26% female, with no data reported by 18% of members. DRS’ members are also 49% Caucasian and 3% Black/African American, with 41% providing no data and 3% declining to answer. Again, 18% of members provided no data with regard to age, with the reporting members falling into the following categories, respectively, 26 to 55 year old (22%), 56 to 65 year old (21%), and 66 and over (39%). There was no data reported by 50% of members regarding sexual orientation and 7% declined to answer. For those members who provided this information, 41% self-identified as heterosexual and 2% as LGBTQ . Although again in 2021, there were a significant number of members who provided no data, the disparity between male and female members was greater at that time than in 2023. The percentages for all of the other categories, when taking the lack of data into consideration, make it difficult, if not impossible, to accurately assess movement.

In 2021, the Executive Committee of the DRS formally approved the Section’s Diversity and Inclusion Plan. The Plan: (i) clarified and restated the Section’s commitment to diversity within its membership, officers, Executive Committee, and programs; and (ii) incorporated the Section’s DEI Mission Statement which, while acknowledging diversity to be an inclusive concept encompassing gender, race, color, ethnic origin, national origin, religion, sexual identity, gender identity and expression, age and differently-abled, recognizes the importance of diversity and inclusion not only within the Section, but within the ADR profession where services are provided to a diverse community of disputants who expect and need diverse neutrals.

The Section’s commitment to promoting diversity, equity, and inclusion throughout all aspects of its work in the dispute resolution field is evidenced through the myriad of actions it has undertaken with regard to membership, leadership, programming, and initiatives.

## **Leadership and Membership**

As to leadership and mentoring, the DRS has emphasized diversity and inclusion in all leadership nominations processes and included participation from members with diverse backgrounds in all nomination processes, including the Section Chair and the chairs of committees, programs, and initiatives. The Section has emphasized diversity and inclusion in leadership training and development

# DISPUTE RESOLUTION SECTION

programs and engaged in outreach with regard to membership, establishing liaisons with specialty and affinity bar associations, and charging new and existing Section liaisons with specifically promoting and improving diversity, equity, and inclusion.

## **Programming**

In its programming, the DRS has implemented strategies to assure diversity and inclusion among Section program chairs, speakers, moderators, and attendees. The Section has mandated a diversity-based speakers' requirement for programs hosted, sponsored, or co-sponsored by the Section. It has specifically directed that all panels have representation from people of diverse backgrounds, with a particular focus on inclusion of people of color. To the extent that any program panel of three or more speakers, including the moderator, does not have a person of color participating, an explanation describing the efforts made must be provided to the Diversity and Inclusion Committee or the Executive Committee, after which the Section will determine whether to continue hosting, sponsoring, or co-sponsoring the program.

The DRS emphasizes that CLE content be geared towards supporting and promoting diversity and inclusion (e.g., How to Jumpstart an ADR Practice - Insights from Diverse Neutrals) and has sought partnership opportunities with specialty and affinity bar associations to attract diverse attendees. The Section ensures that program venues (in person, on Zoom, or hybrid) and materials are accessible to participants with disabilities.

The Section recruits organizers and participants with diverse backgrounds for the various student competitions facilitated by the Section. The Section also works closely with specialty and affinity bars, including the joint sponsorship of both DRS programs as well as programs hosted by specialty and affinity bars. Finally, the Section sponsors joint CLE programs with other sections with an emphasis on diversity in speakers, content, and solicitation for attendance, and soliciting diverse groups to attend and participate in DRS events and programs.

## **Initiatives**

A new initiative instituted by the current Section Chair is geared towards increasing the connection between New York State's 15 law schools and the DRS, reaching out to the tremendous reservoir of diverse law students to enroll them into NYSBA and the Section as free student members, and introducing them to potential careers in dispute resolution.

The Section invests substantial financial support as well. Each year the DRS awards a maximum of five mediation scholarships and five arbitration scholarships to be applied towards NYSBA DRS training programs to encourage greater opportunities for minorities and women in the field of alternative dispute resolution. The Section also offers discounts and complimentary admission to programs

# DISPUTE RESOLUTION SECTION

conducted by the DRS for members (and potential members) with diverse backgrounds. As part of the Section's objective to advance diversity and inclusion within the profession and the Section, the Diversity, Equity, and Inclusion Committee initiated the Mentorship Program to provide mentorship, training, encouragement, and opportunities to attorneys who have been historically underrepresented in the field of alternative dispute resolution. The goal of the Mentorship Program is to increase diversity in the ADR community by providing diverse attorneys with an opportunity for training, support, and connections so as to facilitate active participation in the alternative dispute resolution field. Through the Mentorship Program, mentees work with or "shadow" their mentors to gain first-hand experience and training in alternative dispute resolution, attend seminars on ADR, and network with other professionals in the alternative dispute resolution community. The Mentorship Program duration is two years.

The Section also developed a pilot project linking newly-trained mediators with experienced mediator-mentors on a short-term basis in the Small Claims Mediation Programs in New York City. Lack of mediation experience is often a bar to opportunity for new mediators, and this pilot program is an effort to make it easier for diverse mediators to get initial experience, with guidance and support from more experienced mediators.

The Section co-sponsored a project with the New York City Bar Association to create and promote a directory of neutrals with diverse backgrounds.

# ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

The Entertainment, Arts and Sports Law Section (“EASL”) consists of 1,283 members. The number of members has increased substantially since 2021, when the EASL consisted of only 788 members.

As for the gender, race/ethnicity, sexual orientation, age, and disability status of EASL members, it is difficult to determine the exact numbers for those demographic categories because many members did not report such information. For instance, 644 members did not report their gender (102 members did not report in 2021), 885 members did not report their race/ethnicity (360 did not report in 2021), 556 members did not report their age (96 did not report in 2021), 949 members did not report their sexual orientation (442 did not report in 2021), and 879 members did not report whether they have a disability (344 members did not report in 2021).

The foregoing demonstrates that, in comparison to 2021, a greater number of EASL members are now reluctant to provide demographic information, which is used to assess the overall diversity of EASL. Without such crucial data, it is difficult to fully determine whether EASL is making strides in the area of diversity.

Nonetheless, according to the data that was gathered with regards to gender and race/ethnicity, the following was reported:

Gender	2023	2021
Male	31%	56%
Male, Cisgender	0%	Unknown (Data not collected)
Male; Non-binary	0%	Unknown (Data not collected)
Female	19%	31.1%
Transgender	0%	Unknown (Data not collected)
No Data	50%	12.9%

Race/Ethnicity	2023	2021
White/Caucasian	23%	41.6%
Black/African American	3%	3.9%
Hispanic/Latinx	1%	1.1%
Asian/Pacific Islander	2%	2.7%
American Indian/Native American	0%	0.1%
Multiple Race/Ethnicity	1%	0.1%
Decline to Answer	1%	2.7%
Other	1%	2%
No Data	68%	45.7%



# ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

The following was reported with respect to age, sexual orientation, and disability:

Age Segment	2023	2021
24 and Under	1%	0.9%
25 to 35 years old	15%	13.6%
36 to 45 years old	7%	11.7%
46 to 55 years old	10%	21.6%
56 to 65 years old	12%	20.8%
66 and over	12%	19.3%
No Data	43%	12.2%

Sexual Orientation	2023	2021
Heterosexual	21%	36.9%
LGBTQ/Asexual	2%	2.8%
Decline to Answer	3%	4.2%
No Data	74%	56.1%

Disability	2023	2021
No	26%	46.6%
Yes	1%	1.1%
Decline to Answer	5%	8.6%
No Data	68%	43.7%

Based upon the above, without considering the no data percentages and decline to answer percentages, the majority of the members of EASL are male, White/Caucasian, heterosexual, and without a disability, which is consistent with the information reported in 2021.

The age range for most of the Section’s members in 2023 differs from the age range of most of the members in 2021. Most of the members in 2023 are within the age range of 25 to 35 years old. However, most of the members in 2021 were in the age range of 46 to 55 years old. Thus, EASL is attracting a younger demographic of members.

According to the EASL’s 2021 Diversity, Equity and Inclusion Plan, EASL’s diversity, equity and inclusion goals extend to both EASL’s internal Executive Committee and the nature of programs that EASL sponsors. The EASL’s Diversity Plan further states that EASL will partner with other professional organizations in order to promote diversity-oriented programming. The Diversity Plan states the following with regards to such efforts: “We recently reached out to the Copyright Society of the USA (“CSUSA”) with the idea of EASL and CSUSA

# ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

jointly co-sponsoring one or more diversity programs in 2021, and CSUSA has happily agreed to work with us. In June 2020, an e-sports program was sponsored by EASL's Diversity Committee and the Metropolitan Black Bar Association ("MBBA"), with over 45 attendees. (Our Diversity Committee has held many joint programs with diverse bar associations, including MBBA and Black Entertainment and Sports Lawyers Association over the years.)"

With regards to diversifying EASL's Executive Committee, the Diversity Plan states the following: "As of January 26, 2021, of the 47 members of EASL's Executive Committee, 21 are women or 44.7% of the total, three are Black, and two are Asian American. Of our four current officers, one is Black/female and another is Asian American/female. We can and should do better, especially in attracting more BIPOC members to the EC as Committee chairs and officers, as well within EASL's overall membership. Unfortunately, the statistics for EASL, other Sections and NYSBA itself as to their overall membership compositions are incomplete, given the lack of responses."

In addition, the Diversity Plan states the following: "We are also striving to be conscious of having sufficient diversity of speakers and the perspectives they bring in our program panels. In addition, we are focusing on having our programs appeal to broader and more diverse audiences. We want to attract diverse young lawyers and law students to join EASL to help build our base and future leadership for the longer term. One way we can implement that goal is to liaise with law school student diversity organizations and publications to encourage student membership in EASL and active participation on our committees."

As noted earlier, there has been an increase in the number of young individuals joining EASL. As a result, EASL has achieved its Diversity Plan goal of attracting a younger demographic of members. However, with respect to the overall demographic makeup of the membership, there is still room for improvement. As noted in the EASL Diversity Plan, the statistics, with respect to the overall membership composition of EASL, are incomplete due to the lack of responses. Thus, EASL still needs to work towards encouraging members to provide their demographic information in order to be able to fully assess the overall level of diversity, equity, and inclusion throughout the Section.

While working towards reaching their diversity, equity, and inclusion goals, EASL should consider sharing the outcomes/results of the Section's efforts to reach their Diversity Plan goals with the Committee so that the Committee can be a source of support to the Section.

# INTERNATIONAL SECTION

The International Section consists of 1,453 members. The number of members has increased since 2021, when the International Section consisted of only 1,162 members.

As for the gender, race/ethnicity, sexual orientation, age, and disability status of members, it is difficult to determine the exact numbers for those demographic categories because many members did not report such information. For instance, 675 members did not report their gender (235 members did not report in 2021), 939 members did not report their race/ethnicity (557 did not report in 2021), 571 members did not report their age (218 did not report in 2021), 1,018 members did not report their sexual orientation (699 did not report in 2021), and 920 members did not report whether they are disabled (554 members did not report in 2021).

The foregoing demonstrates that, in comparison to 2021, a greater number of members now are reluctant to provide demographic information, which is used to assess the overall diversity of the International Section. As a result, without such crucial data, it is difficult to fully determine whether the International Section is making strides in the area of diversity.

Nonetheless, according to the data that was gathered regarding gender and race/ethnicity, the following was reported:

Gender	2023	2021
Male	37%	54.7%
Male, Cisgender	0%	Unknown (Data not collected)
Female	17%	25%
No Data	46%	20.2%

Race/Ethnicity	2023	2021
White/Caucasian	23%	36%
Black/African American	2%	2.2%
Hispanic/Latinx	2%	3.4%
Asian/Pacific Islander	4%	6.5%
Native American	Unknown (Data not collected)	0.1%
Decline to Answer	2%	2.2%
Multiple Race/Ethnicity	0%	Unknown (Data not collected)
Other	2%	1.8%
No Data	65%	47.9%

# INTERNATIONAL SECTION

The following was reported with respect to age, sexual orientation, and disability:

Age Segment	2023	2021
24 and under	1%	0.3%
25 to 35 years old	12%	7.9%
36 to 45 years old	9%	14.6%
46 to 55 years old	13%	21.3%
56 to 65 years old	12%	18.1%
66 and over	14%	19%
No Data	39%	18.8%
Sexual Orientation	2023	2021
Heterosexual	25%	34.3%
LGBTQ/Asexual	2%	1.4%
Decline to Answer	3%	4.1%
No Data	70%	60.2%
Disability	2023	2021
No	32%	46%
Yes	1%	1.1%
Decline to Answer	4%	5.2%
No Data	63%	47.7%

Based upon the above, without considering the no-data percentages and decline-to-answer percentages, the majority of the members of the International Section are male, White/Caucasian, heterosexual, and without a disability, which is consistent with the information reported in 2021.

According to the International Section's 2021 Diversity Plan: "The Section's Diversity Plan presents a strategy for developing a global 'way of thinking' that purposefully and strategically imbeds the notions of diversity, equity, and inclusion in all the Section's activities, including how it conducts its business. Through the various Action Steps described in its Diversity Plan, the International Section hopes to infuse intentionality and accountability into all its activities."

# INTERNATIONAL SECTION

Such Action Steps include, but are not limited, to the following:

## **Executive Committee Initiatives**

### A. Assess Diversity, Equity, and Inclusion Gaps:

At each regular meeting of the International Section's Executive Committee, allot a pre-scheduled period for open discussion on what DE&I means to the leadership and how DE&I issues have impacted the International Section's activities.

1. Strive to assure that at every International Section sponsored event, at least 50% of all moderators and panel members are diverse lawyers.
2. Encourage Officers, Executive Committee, and Chapter Chairs to complete their individual demographic profiles on the NYSBA's Member Dashboard and participate in the Individual Leader DE&I Action Plan.

### B. Identify Diverse Candidates for Leadership Positions:

1. Consciously consider diverse members of the International Section when electing or appointing individuals to leadership positions on the Executive Committee.
2. Use a variety of forms of communication, including the International Section's webpage and mass email, to advertise leadership positions and encourage involvement by diverse members.
3. Co-sponsor at least two events, webinars, and/or programs with the NYSBA's affinity sections.

## **II. Diversity, Equity, and Inclusion Committee Initiatives**

### A. Monitoring and Reporting:

1. Monitor and track the number of diverse individuals who participate in the International Section's programs and events as speakers, moderators, and panelists, and who hold leadership positions within the International Section.
2. Monitor and track the number of events and programs that address diversity and inclusion issues.

### B. Association and Community Outreach:

1. Establish connections with NYSBA's Diversity, Equity, and Inclusion Committee to develop best practices in advancing and supporting diversity, equity, and inclusion in the International Section.

# INTERNATIONAL SECTION

2. Engage with other affinity bar associations to create effective means for communicating and partnering with their membership in developing programs and events to further the practice in the International Section area.

## C. Individual Engagement of Section Leadership:

1. Devise an Individual Leader DE&I Action Plan for annual completion by the International Section's Officers, Executive Committee, and Chapter Chairs, which includes, but is not limited to: (i) developing a mentoring relationship with a diverse attorney; (ii) encouraging a diverse attorney to run for an elected position within the International Section; and (iii) attending an affinity section program or event.

## D. Dissemination of Information About the Section's Diversity Activities:

1. Disseminate the International Section's Diversity Plan to all its current and new members.
2. Publish the Diversity Plan on the International Section's webpage.

The above Actions Steps within the International Section's Diversity Plan are commendable. In accordance with one of its above-mentioned Action Steps, the International Section has published its Diversity Plan on the International Section webpage. This public step demonstrates the International Section's desire to commit to diversity, equity, and inclusion within the Section, as well as to hold the International Section accountable with regards to its diversity, equity, and inclusion strategic initiatives and goals.

Although the International Section has an Action Step to encourage its Officers, Executive Committee, and Chapter Chairs to complete their individual demographic profiles on the NYSBA's Member Dashboard, as noted above, many International Section members have not completed their individual demographic profiles. The incompleteness of demographic profiles prevents the International Section from being able to determine whether the Section is making strides in enhancing diversity, equity, and inclusion throughout the International Section. Therefore, more work is still needed in the area of the completion of demographic profiles.

As for the other Action Steps within the International Section Diversity Plan, the Section should consider sharing the outcomes/results of the International Section's Action Steps with the Committee so that the Committee can be a source of support to the Section as it works towards accomplishing the Action Steps outlined in the IS International Section Diversity Plan.

# LABOR & EMPLOYMENT LAW SECTION

The Labor and Employment Law Section (LELS) consists of 1,353 members. The membership is 58% male and 32% female. As with other Sections, in terms of the gender, race/ethnicity, sexual orientation, age and disability status of LELS members, it is impossible to determine the exact numbers for those demographic categories because many members do not report this information. Creative strategies must continue to be deployed to encourage members to provide the necessary data to accurately reflect the demographics of NYSBA members. Perhaps a small dues discount could be given to those who fully report their demographics. After all, we would not be gathering this information if we thought it had no value.

Current data indicates that LELS membership is predominantly male (58%), and White/Caucasian (53%). The Race/Ethnicity data includes 148 members (11%) who provided no information. Thirty-two members (2%) identified as Black/African American, 22 members (2%) identified as Hispanic/Latinx, 23 members (2%) identified as Asian/Pacific Islander. One member identified as American Indian, and one member identified as Multiple Race/Ethnicity.

With respect to Sexual Orientation, 575 members identified as Heterosexual (42%), 19 members (1%) identified as LGBTQ/Asexual, 73 members declined to answer (6%) and 686 members (51%) provided no data. Interestingly, there seems to be a misunderstanding of the term "cisgender." The term cisgender means a person whose gender identity corresponds with the sex registered for them at birth. We recommend that this definition be included in the data collection form because this understanding does not seem to be commonly understood given the data. See, for example, data related to the category "Male: Cisgender" in which only 2 members responded. This despite the fact that there are 432 female members (32%) and 785 (58%) male members. We also recommend that this portion of the data collection tool be reviewed with the LGBTQ+ Section and the DEI Committee once this Report Card is approved.

With respect to disability, 679 members (50%) reported no disability, 32 members (3%) reported having a disability, 98 members (6%) declined to answer, and 544 members (40%) provided no data. With respect to the age of LELS members, 939 members (69%) are over 46.

# LGBTQ LAW SECTION

## Demographics of the Section

Based on available demographic information, the LGBTQ+ Law Section overwhelmingly comprises members who identify as either male or female, although the Section does have a small number of members who indicated a gender identity outside of the male-female gender binary (83% versus 1%). The Section's membership does demonstrate a small level of disparity in the number of members who identify within the male-female binary, with the available information showing that there is a larger percentage of members who identify as male versus those who identify as female (45% versus 38%). The Section's membership also includes a small number of members who have gender identities outside of the male-female gender binary, including male/non-binary, transgender, and female/gender non-conforming (1%).

The Section's membership is overwhelmingly White/Caucasian (50%), with only 9% of membership (22 members) identifying as Black/African American, Hispanic/Latinx, Asian/Pacific Islander, other, or as a multiple race/ethnic group. The majority of the Section's members also identify as LGBTQ/Asexual (43%) and as having no disabilities (51%). The Section's membership is most diverse in terms of age, although members who are aged 56 to 65 years old are slightly more represented in the Section (23%). The next largest age group for the Section is 46 to 55 years old (18%), followed by 36 to 45 years old (16%).

Notably, the LGBTQ Law Section's demographic information may be skewed by the amount of non-reported demographic data, including instances where data was not available and where members declined to report demographic information. For example, in terms of gender demographic information, no data was available for 17% of the Section's members, and for age, no data was available for 19% of members. Moreover, in terms of race/ethnicity demographic information, no data was available for 39% of members, and 2% of members declined to answer. As for disability, no data was available for 42% of members, and 4% of members declined to answer. Interestingly, even in the LGBTQ Law Section, there was no data available related to sexual orientation for 41% of members, and 4% of members declined to answer and provide this demographic information.

## Section's Efforts to Improve Diversity

The LGBTQ Law Section's Diversity Plan provides that the Section is fully committed to diversity at every level of the Association and sets out various objectives, including partnering with the Committee to educate, foster involvement, and develop leadership among attorneys in communities that historically have been excluded from the practice of law and to pursue enhanced diversity and inclusion within the Association, including among the Association's leadership.

The LGBTQ Law Section has identified 14 goals, which are set out in the Section's Diversity Plan. These goals include promoting diversity among Association and Section leadership, promoting Section diversity in marketing and membership solicitation materials, ensuring diversity in programming, developing and participating in events designed to introduce college students to diversity within the profession, promoting diversity accomplishments, developing a mentoring program targeting young lawyers and law students in ways that are designed to advance the Section's diversity, and forming additional committees and



# LGBTQ LAW SECTION

subcommittees within the Section for affinity groups, as necessary. It is not clear whether the Section's Diversity Plan has been updated since 2021–2022.

## **Noticeable Positive Diversity Trends for the Section**

It is important to note that despite a loss of members, the LGBTQ Law Section was able to maintain and increase some areas of diversity in its membership. During this Report Card period, the Section is reported as having 247 members, which is 68 fewer members than was reported for the Section in the 2021 Diversity Report Card (315 members). Despite this loss of membership, the Section has been able to maintain its diversity in some of the relevant demographic areas including, for example, racial/ethnic diversity, with the Section maintaining its percentages of members who identify as Black/African American (2%), Hispanic/Latinx (3%), and other (3%), and disability, with the Section maintaining its percentage of members who report having a disability (3%). Over these two years, the Section was also able to demonstrate an increase in the number of members who identify as LGBTQ/Asexual (from 35% in 2021 to 43% in 2023). The Section has also been able to establish a diverse membership in terms of age, with 1% of members being under 24 years old, 10% between 25 and 35 years old, 16% between 36 and 45 years old, 18% between 46 and 55 years old, 23% between 56 and 65 years old, and 13% being 66 years old and over.

The Section has also made progress towards some of the goals identified in its Diversity Plan. For example, the LGBTQ Law Section has established a LGBTQ+ Vanguard Award, which is given annually to an LGBTQ+ or allied lawyer who has demonstrated dedication to the future prosperity and success of the LGBTQ+ community. The Section has also sponsored and co-sponsored a variety of diversity-related educational programs (eight programs in total in 2023), including a program addressing the experiences of LGBTQ+ people and people living with HIV in the criminal legal system; anti-LGBTQ+ bias in the criminal legal system; using alternative dispute resolution to address racial, ethnic, and socio-economic disparities in heirs' property ownership; and defensive estate planning for LGBTQ+ couples.

## **Recommendations**

Notably, the LGBTQ Law Section is a very new Section and was only established in 2020. With the Section's infancy in mind, we would recommend that the Section's leaders focus on promotion of the Section and recruitment of new members to enhance diversity within the Section's membership. In addition, we would recommend that the Section update and continue to work towards the goals identified in its Diversity Plan. The Section may find additional collaboration with the Committee on Diversity, Equity, and Inclusion and affinity bars helpful in both increasing its diversity, as well as recruiting new Section members.

# TORTS, INSURANCE, & COMPENSATION LAW SECTION

The Torts, Insurance, and Compensation Law Section (TICL) has three Diversity Committee Co-Chairs: Mirna Santiago, Heather Wiltshire Clement, and Stephanie Hibbert. The Section's 2021 Diversity Plan remains in force. The Plan has quarterly commitments to implement NYSBA's Diversity Plan, including working more closely with affinity bars, ensuring DEI and bias issues are addressed in Section CLEs (e.g., bias in insurance underwriting and the disproportionate impact of environmental disasters on communities of color), and recruiting women and BIPOC to fill Section leadership positions.

TICL has lost about 100 members (6.5%) since the last DEI Committee's Diversity Report Card. This is consistent with NYSBA's 6.1% loss in membership (as of this time of year). There have not been significant changes in the Section's demographics. Male membership at 70% is higher than NYSBA membership (40%). The Section data for 2023 shows a small loss in younger members and a small gain in older members. The younger TICL membership reflects the Association membership as a whole, but the older TICL membership (58%) is a higher percentage than membership as a whole (34%). The 2023 data registers the first LGBT percentage in membership at the same overall percentage as Association membership (1%). Section data reflects a higher percentage of White/Caucasian members (54%) than NYSBA membership overall (32%).

The TICL Section does much better than NYSBA membership overall in providing responses in every category of demographic information, perhaps because of the Section's ongoing diversity work. For example, 62% of NYSBA members failed to provide data or respond to questions about their race, while only 42% of TICL members have no data. The Section will continue to assist the Committee's efforts by highlighting the importance of providing demographics in their year-end membership blasts to help NYSBA meet its members' needs.

TICL continues to support diversity and the recruitment of young lawyers to the Section with their programs and events. Examples include TICL's June 2023 Third Department Judiciary Reception at the New York State Bar Center, where they partnered with the Young Lawyers and Trial Lawyers Sections. TICL also partnered with the Young Lawyers and Trial Lawyers Sections in August 2023 for a Pub Night in New York City. The Section also hosted a Judicial event in New York City in September and has another one upcoming in Albany in November.

Additionally, TICL's CLE program in November includes a segment on "Diversity, Civility, Inclusion and Best Practices in the Legal Profession and the Courts." TICL is also presenting a diversity CLE at the NYSBA Annual Meeting on January 18, 2024. The title is yet to be determined, but the program is being developed with the assistance of TICL Diversity Committee Co-Chair Mirna Santiago and TICL CLE Committee Co-Chairs Joanna Roberta and Elizabeth Fitzpatrick.

TICL's leadership includes diverse co-chairs of its Diversity Committee, utilizing another opportunity to share leadership opportunities and skills.

We applaud the Section's historic and ongoing commitment to diversity and its success in improving data collection. Our only recommendations are that the TICL Section's Diversity/Racial Justice Committee consider updating the training ideas included in its Diversity Plan and increase possible collaborations with affinity bars to aid its efforts to diversify its membership.

# TRIAL LAWYERS SECTION

The membership of the Trial Lawyers Section (TLS) is predominantly male at 59%. At first glance, this appears to be a significant change from past data reported to NYSBA where 77% of the section was male. However, in the recent data set, 25% of TLS members did not respond to the gender question. That is up significantly from the 4.7% who did not report gender data in prior reports. Therefore, it is difficult to ascertain if there has been an actual increase in female members in TLS.

Approximately 47% of the Section's membership did not report their race/ethnicity.

While this does not allow for an accurate analysis of this demographical data, it appears that the Section primarily comprises White/Caucasian members, with 46% of the members reporting this as their race.

TLS's diversity plan states that the section focuses its efforts on events, publications, and programming.

- The section intends to promote diversity in CLE and other programming, both live and virtual, by creating strategic actions to improve diversity among program chairs, speakers, moderators, and attendees.
- Strategic actions to increase diversity in section members responsible for editorial policy and content of publications.
- In addition, TLS will work to increase diversity in "marquee" events (e.g., annual awards dinners, luncheons, receptions) by focusing on diversity of speakers and award recipients as well as intentional staffing of planning and award nominations committees.

TLS is working on these initiatives through its Diversity Committee, which is currently co-chaired by two women, one of whom will be the next section chair. The creation of the TLS Diversity Committee aids the executive leadership of the section in implementing and following up on the priorities of the section's diversity plan while also creating a group of TLS members who can focus on partnering with other sections and groups on programming pertaining to DEI.



# ■ GENERAL RECOMMENDATIONS

- A. NYSBA should continue to review the questions used in the data collection tool. It should consider the use of Hispanic/Latinx instead of Hispanic. NYSBA should define “cisgender” in the data collection tool: cisgender means a person whose gender identity corresponds with the sex assigned to them at birth. NYSBA should also consider these choices for gender: cis male; cis female; non-binary; gender non-conforming; transgender; intersex. The DEI Committee can appoint a member to assist in an annual review of the data collection tool.
- B. Each Section and Committee should ensure it provides a formal leadership opportunity for a diverse lawyer. The Young Lawyers Section is to be commended for recruiting a variety of diverse attorneys and encouraging them to serve as liaisons to this Committee and to various other Sections.
- C. The DEI Committee urges NYSBA to **encourage** all persons nominated to serve on the Nominating Committee or as a NYSBA Officer or Section Leader to answer each question in their demographic profile. In addition, NYSBA’s leadership should continue to regularly call upon all members to also provide all the data requested in the data collection tool.
- D. The DEI Committee again recommends that NYSBA set aside special funding to recruit diverse members for leadership positions. Funds should be used to recruit diverse new leaders. We again call upon the Executive Committee to budget \$5,000 for a pilot expense reimbursement program.
- E. The DEI Committee again calls upon NYSBA to implement a statistical sampling of a portion of the membership to determine if the results would be more accurate, easier to obtain, and more useful to direct NYSBA’s efforts to meet membership profiles and their needs and desires. The use of a third-party polling provider (i.e. – The Marist Poll) is recommended for this project as same is likely to garner a higher and more detailed rate of responsiveness.
- G. The Committee offers its expert assistance to collaborate with Sections to coordinate and facilitate continuing legal education (CLE) programs for the Association’s and Section members. The Committee looks forward to co-sponsoring and coordinating various programs with each Section.
- H. The Committee encourages the Association’s leadership to participate in its annual 21-day diversity, equity, and inclusion challenge.
- I. The Committee encourages members to participate in its LinkedIn page and requests that Sections and Association leadership actively participate in this group.

## Continue to Implement the NYSBA Diversity Plan

1. The DEI Committee is grateful that NYSBA has appointed a Diversity Coordinator to help oversee implementation of the Association's Diversity Plan. However, the DEI Committee urges NYSBA to further bolster Association implementation of the Association-wide Diversity Plan by making this position full-time by June 30, 2024.
2. The DEI Committee appreciates that in supporting continuation of the diverse delegate positions for the House of Delegates and the Executive Committee, the focus remains on people of color, whether thanks to race or ethnicity. This report card demonstrates the continuing need to **encourage that** we hear the voices of LGBTQIA+ people and people with disabilities.
3. The DEI Committee continues to support creation of an award to recognize the NYSBA entity that has shown outstanding leadership in diversity-related membership initiatives or other diversity efforts. To that end, the Committee pledges to submit a proposal for such an award by June 30, 2024.
4. The DEI Committee continues to recommend that each Executive Committee action item present a Diversity Impact Statement, stating how the action will impact NYSBA's and the profession's diversity.
5. Each Section should be required to review and revise their Diversity Plan and submit the plan along with its proposed budget every two years.
6. The DEI Committee proposes to work with NYSBA's Marketing Department to engage and recruit diverse members via relevant social media targeted to reach desired demographics in dynamic and interactive ways. We recommend bolstering existing marketing efforts to recruit younger and more diverse members. We also recommend social media and marketing to persuade members and leaders who resist answering all the questions in our data collection instrument (especially those relating to sexual orientation and disability).
7. Finally, the DEI Committee recommends that it continue participation in Section Leaders workshops and Section meetings to encourage across-the-board compliance with data collection requests. The Committee will also talk with possible surveyors to learn whether we can get concrete information about why members and leaders decline to provide all data and then better focus education and advocacy to address the significant non-response rate.



NEW YORK STATE BAR ASSOCIATION  
**COMMITTEE ON DIVERSITY, EQUITY,  
AND INCLUSION**

One Elk Street  
Albany, NY 12207



COMMITTEE ON LEGAL AID

December 18, 2023

TO: Committee on Diversity, Equity, and Inclusion  
FROM: Committee on Legal Aid  
RE: Support of the Diversity Report Card Recommendations

The Committee on Legal Aid has voted in support of the Diversity Report Card Recommendations. The Committee hopes this report card will be used as a tool by Section Chairs, along with Diversity Chairs and staff liaisons, to enhance their Sections' diversity efforts. We challenge the Association to continue to gather and analyze data and to implement constructive change. For these reasons we lend our support to the Diversity Report Card Recommendations.



NEW YORK STATE BAR ASSOCIATION  
One Elk Street, Albany, New York 12207 ☎ PH 518.463.3200 ☎ www.nysba.org

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## PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

January 2, 2024

TO: Committee on Diversity, Equity, and Inclusion  
FROM: President's Committee on Access to Justice  
RE: Support of the Diversity Report Card Recommendations

The President's Committee on Access to Justice has reviewed the Committee on Diversity, Equity, and Inclusion and supports its findings and recommendations as it furthers the President's Committee on Access to Justice's mission of promoting and facilitating access to our justice system for all.





**LGBTQ+ Law Section**

SAMUEL W. BUCHBAUER, ESQ.  
Capell Barnett Matalon & Schoenfeld LLP  
1385 Broadway, 12<sup>th</sup> Floor  
New York, NY 10018  
Phone: (212) 840-6711  
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January 2, 2024

The LGBTQ+ Law Section stands in strong support of the 9<sup>th</sup> Diversity Report Card. The LGBTQ+ Law Section calls upon all NYSBA leaders to provide their own demographic information and to encourage members within their Sections to do so as well.

The LGBTQ+ Law Section stands for the Association's commitment to promote equality in the law for LGBTQ+ people and diversity within the judiciary by inclusion of all underrepresented groups. Continuing to enhance the diversity of this Association and our profession is the first step to doing so. Measuring progress, or the lack thereof, is the only way to ensure it continues.

We applaud the efforts of the Committee on Diversity, Equity, and Inclusion in publishing the Diversity Report Card and urge the House of Delegates to adopt it without comment or amendment. If any additional information can be provided, please let us know.

Sincerely,

Samuel W. Buchbauer  
Chair

LGBTQ+ Law Section



NEW YORK STATE BAR ASSOCIATION

# TORTS, INSURANCE AND COMPENSATION LAW SECTION

2023-2024 Officers

Brian Rayhill, Esq., TICL Chair

Kathleen A. Barclay, Esq., TICL Vice Chair

Richard W. Kokel, Esq. TICL Secretary

Brendan Baynes, Esq., TICL Treasurer

Date: January 4, 2024

To: Committee on Diversity, Equity, and Inclusion

From: Torts, Insurance and Compensation Law Section

Re: Support of the Diversity Report Card Recommendations

The Torts, Insurance and Compensation Law Section, (TICL), of the New York State Bar Association has worked collaboratively with the Committee on Diversity, Equity, and Inclusion throughout 2023 and strongly endorses its findings and recommendations.

TICL supports the 9<sup>th</sup> Diversity Report Card and the commitment and efforts by the Committee on Diversity, Equity, and Inclusion to promote diversity in the NYSBA and the legal profession. Identifying and measuring progress is an important and necessary initiative and facilitates meaningful access to all in our New York judicial system.

TICL acknowledges and recognizes the 2023 efforts by the Committee on Diversity, Equity, and Inclusion and recommends approval by the House of Delegates at their January 2024 Executive Committee meeting.

Sincerely,

*Brian Rayhill*

Brian Rayhill

Chair – TICL Section



**New York State Bar Association (NYSBA) Women in Law Section**

Memorandum Supporting the Report of the Committee on Diversity, Equity, and Inclusion – Ninth Edition of the NYSBA Diversity Report Card, January 4, 2024.

**WHEREAS**, the Committee on Diversity, Equity, and Inclusion (CDEI) has requested the support of the Women in Law Section for its report titled “Ninth Edition of the NYSBA Diversity Report Card”:

**NOW THEREFORE** it is resolved that the Women in Law Section of the New York State Bar Association supports the CDEI initiative to promote and track the membership, leadership, and participation of diverse attorneys from varied identities and backgrounds in NYSBA sections to create equity within our profession and joins the Committee on Diversity, Equity and Inclusion in requesting that the New York State Bar Association adopt the proposed report.

Chair of the Section: Kimberly Wolf Price, Esq.  
January 4, 2024



# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

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**Jeffrey K. Anderson**

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Anderson, Moschetti & Taffany, PLLC

**Deborah A. Reperowitz**

Treasurer  
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**Jill Pilgrim**

Chair-Elect  
Pilgrim & Associates Arbitration, Law &  
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Secretary  
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Vice Chair  
The Interpublic Group Of Companies, Inc.

January 11, 2024

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Dena M. DeFazio, Esq.

Co-Chairs

NYSBA Committee on Diversity, Equity and Inclusion

New York State Bar Association

One Elk Street

Albany, New York 12207

Dear Ms. Sikkander and Ms. DeFazio:

The Dispute Resolution Section stands in strong support of the 9<sup>th</sup> Diversity Report Card. We call upon NYSBA leaders to provide their own demographic information and to encourage other members and leaders to do so as well.

The Dispute Resolution Section stands for the Association's commitment to address the long-lingering effects of structural racism in our legal system. Continuing to enhance the diversity of this Association and our profession is the first step to doing so. Measuring progress, or the lack thereof, is the only way to ensure it continues.

We applaud the efforts of the Committee on Diversity, Equity, and Inclusion and urge the House of Delegates to adopt it without comment or amendment. If any additional

January 11, 2024

Page 2

information can be provided, please let us know.

Sincerely,



Jeffrey K. Anderson

Chair

NYSBA Dispute Resolution Section

JKA/tdh

Copy to:

Richard Lewis

Ernesto Guerrero

Lillian Moy

Marilyn Genoa

Jocelyn Lupetin

Jill Pilgrim



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #7**

REQUESTED ACTION: None, as the report is informational.

Committee on Membership Co-Chairs Clotelle Drakeford, Esq. and Michelle Wildgrube, Esq., will provide an update on the Association's membership engagement and retention efforts, including membership renewal for the 2024 dues year.



NEW YORK STATE  
BAR ASSOCIATION

# Report and Recommendations of the New York State Bar Association **Committee on Membership**

January 2024

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

# Introduction

An updated membership model presents a new approach for NYSBA, allowing members to pay a recurring fee, monthly or annually, to access our products and services. It is a departure from the traditional model we have been using and aims to establish an ongoing relationship with members as well as a strong value proposition enticing prospective members.

- In June 2023, the Executive Committee and House of Delegates approved the concept of this model.
- In November 2023, updates made, based on extensive stakeholder feedback, were presented to the Executive Committee and House of Delegates.

For the model we are recommending, paying members will receive exclusive content, complimentary live CLE programming, 24/7 access to our on-demand CLE library of 1,700+ programs, 2 free Section memberships, complimentary access to hundreds of digital publications and forms, and additional partner benefits.

## Objectives

**Recurring Revenue:** The model provides a steady stream of revenue for the association, as members are billed periodically. This predictable income can help with financial planning and sustainability.

**Member Retention:** By offering ongoing value and maintaining a relationship with members, this new model encourages member loyalty. Members are more likely to continue their memberships, reducing member churn.

**Value Proposition:** The model focuses on delivering ongoing value to members. Whether it is access to exclusive content, regular updates and improvements, or personalized experiences, the value proposition is designed to justify the recurring payments.

**Improved Member Experience:** From a technological perspective, the model will allow for a more efficient join/renew process as well as improve the existing transactional processes required for program registrations and online purchases.



## Proposed Membership Dues

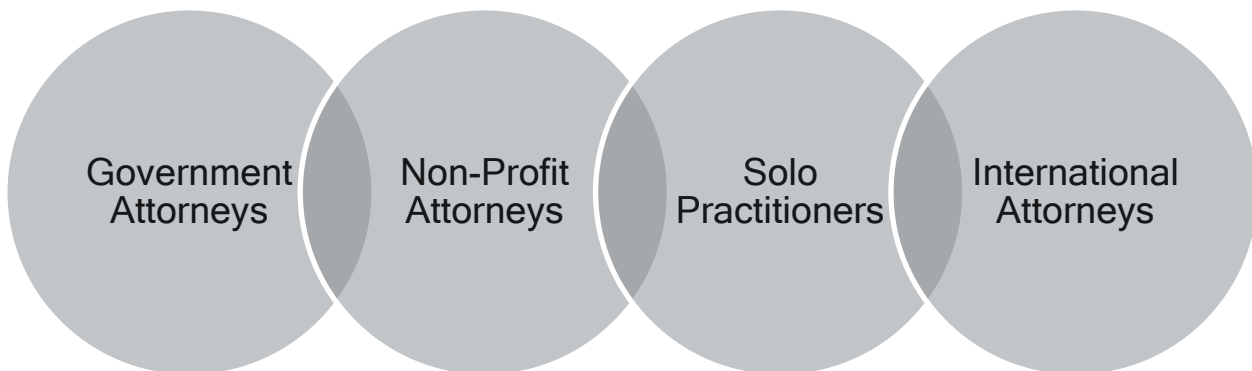
Membership Category	Newly Admitted <i>PLUS</i>	1-2 Year	3-6 Year	7+ Year	Retired
Monthly Fee	\$9.95	\$14.95	\$24.95	\$32.95	\$11.95
Annual Fee (10% Disc)	\$107.46	\$161.46	\$269.46	\$355.86	\$129.06



\*\$600 Value based on twelve credits annually

## Dues Considerations

- It is important to recognize that the association has not increased dues in over a decade, however, we opted not to deviate greatly from our existing pricing structure for this new model.
- We will continue to support complimentary membership for law students and newly admitted attorneys, but we are excited to introduce a premium option for newly admitted attorneys that will be 100% optional.
- We will continue the implementation of our existing dues waiver program, extending an automatic 25% discount based on a gross income of \$75,000 or less. Members participating in the Dues Waiver program remain completely anonymous and receive the exact same benefits as that of a full-paying member.
- This benefit will extend to all members that are in need, based on a financial hardship standpoint, and should be particularly helpful with some of the following cohorts:



## Impact on Sections

Existing benefits and deliverables that Sections receive will not be altered. We intend on providing first access to Section Publications content to Section members before releasing it to the general membership. The existing autonomy that Sections possess, as far as their day-to-day activities, should not change based on this proposed model. Larger Section Meetings, such as multi-day, off-site meetings, will not be included in the free CLE component of this model.

## Section Dues Revenue

For this new model, we are providing a royalty to Sections, using a rate determined by total paid Section membership, then multiplied by total NYSBA paying members. This model would see Sections generating revenue based on the total NYSBA paid membership number, regardless of whether the paid NYSBA member is also a member of that Section. When NYSBA membership increases, then Section revenue increases along with it.

*For example, a Section with 1,000 paid members would qualify for the \$0.95 revenue share rate. Multiply that by 38,000 NYSBA paying members and it comes to \$36,100.*

Each NYSBA member would receive two complimentary Section memberships, and then would pay a flat rate of \$30 for any additional Section memberships above that number.

Section Members	Royalty Rate	2022 Paid NYSBA Members	*Section Revenue	Section Members	Royalty Rate	2022 Paid NYSBA Members	*Section Revenue
0-200	\$0.15	38,000	\$5,700	1501-1600	\$1.55	38,000	\$58,900
201-400	\$0.30	38,000	\$11,400	1601-1700	\$1.60	38,000	\$60,800
401-500	\$0.35	38,000	\$13,300	1701-1800	\$1.65	38,000	\$62,700
501-600	\$0.45	38,000	\$17,100	1801-1900	\$1.70	38,000	\$64,600
601-700	\$0.55	38,000	\$20,900	1901-2000	\$1.75	38,000	\$66,500
701-800	\$0.70	38,000	\$26,600	2001-2250	\$1.80	38,000	\$68,400
801-900	\$0.80	38,000	\$30,400	2251-2500	\$1.95	38,000	\$74,100
901-1000	\$0.90	38,000	\$34,200	2501-2750	\$2.10	38,000	\$79,800
1001-1100	\$0.95	38,000	\$36,100	2751-3000	\$2.25	38,000	\$85,500
1101-1200	\$1.30	38,000	\$49,400	3001-3250	\$3.25	38,000	\$123,500
1201-1300	\$1.35	38,000	\$51,300	3251-3500	\$3.45	38,000	\$131,100
1301-1400	\$1.45	38,000	\$55,100	3501-3750	\$3.65	38,000	\$138,700
1401-1500	\$1.50	38,000	\$57,000	3751-4000	\$3.95	38,000	\$150,100

\*Based on 2022 final numbers

If this model was in place today, based on 38,000 paid members, with each of our twenty-eight Sections receiving their appropriate revenue share percentage, then 26 Sections would generate equal or greater income. The association intends to compensate for the small loss the remaining two Sections would encounter.

In anticipation of proceeding with this membership model for the 2025 membership year, the membership numbers, and subsequent royalty used, will reflect closing Section numbers from the 2024 calendar year. Payment(s) will then be distributed to Sections in Q1 of 2025. Payment(s) to Sections in 2026 will be based on final 2025 numbers, and so on and so forth.

The Association intends to review the royalty scale at the end of 2025 and 2026, upon having a better idea of where significant growth in Section membership may take place, and adjusting the scale accordingly, still ensuring a lack of negative impact on any of our twenty-eight Sections.

## Technology Considerations

In preparation for the implementation of this new model in Fall of 2025, a group of internal and external stakeholders, including our primary technology vendors, have been working diligently on gathering feedback from members, staff, and others, to ensure suitable improvements are made to NYSBA's overarching web-based infrastructure. This led to the construction of a heavily detailed business requirements document (BRD).

Using this BRD as a foundation, it has been strongly understood that a heavy emphasis on UX and UI is necessary for the evolution of NYSBA.ORG, particularly for the join/renew process, and general registrations and transactions, so the internal Business Operations Team is acutely aware of needs going forward.

## Marketing the New Model

During the Fall of 2023, NYSBA's marketing team released an RFP to dozens of marketing firms across New York State. Proposals were reviewed by key internal stakeholders of the NYSBA staff, including the Executive Director, Associate Executive Director, and the Director of Marketing.

A select team of leaders, including members of the Finance Committee, and the Committee on Membership, met with the finalists chosen to present proposals in person during December of 2023. A final decision on firm selection will be made in January 2024, with necessary discovery work kicking off in February of 2024.

The marketing for the new model will be rolled out across three separate phases during a 14-month period, beginning in February 2024, and concluding in March 2025.



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #8**

REQUESTED ACTION: None, as the report is informational.

Association President Richard C. Lewis will advise the Executive Committee with respect to his presidential initiatives, the governance of the Association, and other developments of interest to the members.

A copy of the report is attached here.

And today, our expertise will once again be on display when we vote on the reports of our Task Force on Combating Antisemitism and Anti-Asian Hate and our Task Force on Medical Aid in Dying.

The report of our Task Force on Advancing Diversity continues to provide significant guidance to universities and colleges, the courts, and the business sector. The response has been overwhelmingly positive. We have heard from several state bar associations including California and Pennsylvania who have turned to us for inspiration and direction. We have been commended for being thorough and balanced, for developing our response without criticizing the U.S. Supreme Court and for producing the report in record time. We intend to present the report at the American Bar Association Mid-Year Meeting in early February because we believe the ABA should adopt it as policy, making our report available nationwide. In connection with that presentation, I have been invited to serve on a panel to discuss the impact of the Affirmative Action decisions.

Our Task Force on Combating Antisemitism and Anti-Asian Hate has worked diligently to formulate recommendations on how we can redefine hate crimes and remove the burden on prosecutors so that they can effectively prosecute hate crimes when appropriate. The standards for charging a hate crime right now are unrealistically high. The report recommends that more offenses be added to the state hate crime statute through the Hate Crimes Modernization Act. It would expand hate crime eligible offenses to include charges such as graffiti, criminal obstruction of breathing and rape in the third-degree. Additional recommendations for improving the reporting and prosecution of hate crimes and preventing the spread of online hate speech are also included in the report. We support the Stop Hiding Hate Act, which would require social media companies to disclose the measures they take to address hate speech. The issues of antisemitism and anti-Asian hate were worsening exponentially when this task force was formed last June and today the level of intolerance is beyond comprehension.

I commend co-chairs Brian Cohen and Vince Chang for their diligent work to present solutions to deescalate some of the most entrenched forms of hate.

Also, our Task Force on Medical Aid in Dying under the leadership of Mary Beth Morrissey will present its report, which contains strong recommendations to support the New York Medical Aid in Dying bill. The task force has spoken with diverse parties including attorneys, physicians and social workers, and others with relevant experience. An open forum was held in November to afford people outside the legal community a chance to express their ideas and insights. The Task Force's suggestions include safeguards for special populations, funding and insurance to ensure citizens have equal access to comprehensive end-of-life care, and the development and provision of Medical Aid in Dying training.

In addition to the work of the Task Force on Combating Antisemitism and Anti-Asian Hate, we are partnering with the Israel Bar Association and the legal tech company Paladin to create an innovative pro bono website that connects Israel residents with legal professionals to resolve legal issues related to the Oct. 7 attacks. Even before the website launched, the Israel Bar Association received hundreds of requests for help with relocation, Social Security, medical benefits and other issues. The efforts of Greenberg Traurig and Paul, Wess have been a significant help to the bar association in this initiative.

Our task forces do work that we can all be proud of, but I would be remiss if I didn't mention the achievements within the bar association as well.

One example is our Lawyer Assistance Program. I recently attended its annual dinner, and I was touched by the bravery shown by our colleagues who are willing to confront issues of substance misuse and mental illness. Their courage is an inspiration to all of us. The Lawyer Assistance Program continues to provide well-being programming including a six-week ADHD workshop series this past fall and ongoing outreach to local bar associations with educational programming regarding the L.A.P. and its services. It also continues to work with lawyers who are in

crisis and struggling with professional or personal issues such as substance use disorder or mental health challenges.

We need to espouse the same fearlessness as those individuals. One way we can do that is by joining other good people throughout the world who refuse to remain silent and are raising their voices to fight hate. We need to continue to speak up because a failure to do so is synonymous with complicity.

Our commitment to combating hate is illustrated through our crucial decision to confront it in our public statements and other publications while intentionally looking at it from many perspectives.

We also need to be mindful of the future.

Artificial Intelligence will have a bigger impact on our profession than any other technology we have ever witnessed, which is why it was the theme of this week's Presidential Summit. It will inevitably become a major part of our professional toolbox. It therefore behooves us to put aside any hesitation we may have to use it and instead embrace its potential. However, we cannot do so blindly. Instead, we need to be focused on proactively developing regulations to help ensure that the technology is not misused.

In May, we will hold a compelling forum to address civics education in our schools. This is central to our way of life as a democratic society. Our children are the next generation of voters and so it is imperative that they are educated about the power and importance of democracy. They must understand that the best way to maintain the rule of law is to better understand it. This is a central issue to the long-term success of our nation, our state, and our organization. Among the speakers will be the co-chairs of our Task Force on 2024 Civics Convocation, Jay Worona of the New York State School Boards Association and Gail Ehrlich, chair of the Committee on Law, Youth and Citizenship.

On a personal note, I'd like to thank President-Elect Domenick Napoletano who has been a partner and sounding board for me throughout the past eight months and Immediate Past President Sherry Levin Wallach for her dedication to our association. I also want to acknowledge Secretary Taa Grays and Treasurer Susan Harper for their support. In addition, I would like to commend the Nominating Committee for selecting Kathleen Sweet to assume the office of president-elect in June. We are proud and fortunate to have someone as talented and dedicated as Kathleen ascending to the presidency.

In closing, I would like to say again how wonderful it was to have everyone gather in person at this week's Annual Meeting and how our collaboration and willingness to listen to each other only makes our association stronger. We should be proud of the work we are doing.

Thank you.

Now, I am pleased to ask Chief Judge Rowan Wilson to come forward and offer his remarks.

A handwritten signature in cursive script that reads "Richard C. Lewis". The signature is written in dark ink and is positioned above the typed name and title.

Richard C. Lewis, Esq.  
President



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item #9**

REQUESTED ACTION: Not applicable.

Chief Judge Rowan D. Wilson will address the attendees of the House of Delegates meeting.





# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: None, as this report is informational.

Taa R. Grays and Christopher R. Riano, co-chairs of the Strategic Planning Committee, and Dr. Romona Hill, will report to the Executive Committee on the focus, activities, and scope of work of the Committee, which was formed in March 2022 by past president T. Andrew Brown.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #11

**REQUESTED ACTION:** Approval of the Report and Recommendations of the Task Force on Medical Aid in Dying.

The New York State Bar Association Task Force on Medical Aid in Dying (MAID) was formed in June 2023 by President Richard Lewis. The Task Force mission and charge includes:

Review of the legal, ethical, health and public health, and broader policy considerations concerning medical aid in dying, including legislative proposals in New York and issues that may be related to the design as well as implementation of any such proposals if enacted by the NYS Legislature.

Section II of the report explains that MAID cannot be created judicially under current controlling authority and reviews the history of certain New York laws relevant to the Task Force's focus of inquiry.

In Section III, the New York MAID bill is framed in the end-of-life spectrum of care options, alongside hospice and palliative care. The need for more information and counseling at the end of life is also addressed.

The MAID laws and the history of their implementation in 10 other U.S. jurisdictions are mapped out in Section IV to provide further context for consideration of the bill currently before the New York State Legislature, which would amend the Public Health Law to provide that certain terminally ill patients could request and use medication for aid in dying. The text of the bill can be found here: [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A00995&term=&Summary=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00995&term=&Summary=Y&Text=Y)

Sections V and VI of this Report set forth specific recommendations as follows:

- The Task Force on Medical Aid in Dying recommends that the New York State Bar Association adopts a position in support of the pending MAID Bill (A995A/S2445); and additional comments and recommendations, and to support similar bills that accomplish this purpose. The Task Force considers: i) Safeguards for special populations; ii) Funding and insurance; and iii) Training.
  - o Inequities in Access
    - Policymakers must address structural inequities and disparities in health and end-of-life care at the intersectionality of race, ethnicity, gender, disability, age, immigration status, and social determinants of health.
    - The report focused specifically on race and LGBTQ+ persons.

- In addressing structural inequities regarding race, the task force recommends patient educational program, cross-cultural training, subsidies that compensate hospitals and medical providers in minority communities for low Medicaid reimbursement rates, and direct government investment in adequate health care institutions in minority communities.
    - In addressing structural inequities for LGBTQ+ persons, the task force recommends policy changes, cultural competency training, stronger antidiscrimination laws, and societal initiatives to reduce stigma and promote inclusivity.
  - Protecting Special Populations
    - The task force calls for more specificity in the NY Maid Bill via regulations and oversight in the form of additional protections for certain special populations including:
      - Persons with intellectual and mental health disabilities.
      - Persons in nursing homes and other long-term residential facilities.
      - Persons in carceral settings.
      - Persons in jails and prisons under ICE detainer agreements.
    - The task force recommends that Mental Hygiene Legal Services, Office for People with Developmental Disabilities, Office of Mental Health, Office of the Long-Term Care Ombudsman, and Prisoners' Legal Services of New York provide oversight of end-of-life services for the above protected populations, respectively.
  - Funding and Insurance
    - New York should follow the successful examples set by Oregon, Hawaii, and California, each an example of a state that continues to devote public funds to make MAID accessible and high-quality aspect of end-of-life care, and NYS could easily develop its own model. The Legislature has passed bills that could be used as a template for a MAID coverage law.
    - Urge the Legislature to require health insurers to include coverage for MAID and require payors to include providers that offer MAID in their networks.
  - Training
    - Develop and provide MAID training to a variety of professionals including physicians, social workers, chaplains, nurse practitioners, physician assistants, pharmacists, mental health providers, and other medical professionals. This training should be tailored to the needs of the specific profession.
    - MAID should be part of health care professionals' continuing education and include elements set forth above.
    - Physicians who will provide MAID prescriptions should receive additional required training, which should cover patient selection; medical record requirements; medications used; legal administration of medications; and ongoing communication with patients and/or families.
    - Health care facilities with training departments should be mandated to provide MAID training to their employees.
    - Physician professional groups and MAID advocacy groups should organize training opportunities and create educational resources.

- Palliative care providers should offer training opportunities to clinicians. This can include knowledgeable practitioner-volunteers from other MAID states.
- MAID should be covered at conferences of health care specialty groups.
- Training opportunities should be expanded at medical schools and medical residency.
- New York should provide a hotline to answer providers' medical and legal questions.

This report will be presented by Task Force Chair, Mary Beth Morrissey, Esq.



NEW YORK STATE  
BAR ASSOCIATION

# Report and Recommendations of the New York State Bar Association **Task Force on Medical Aid in Dying**

January 2024

The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

**Report and Recommendations of the New York State Bar  
Association Task Force on Medical Aid in Dying**

**January 2024**

**NEW YORK STATE BAR ASSOCIATION  
TASK FORCE MEMBERS**

Mary Beth Quaranta Morrissey, Esq., PhD, MPH, Chair  
Judith Grimaldi, Esq., Working Group Chair  
Hon. Rachel Kretser, Working Group Chair

Heather Butts, Esq.  
John Dow, Esq.  
Cynthia Feathers, Esq.  
Amanda Giannone, Esq.  
Michael Gilberg, Esq.  
Thomas Maroney, Esq., NYSBA Executive Committee  
Edward McArdle, Esq.  
Kerianne Morrissey, Esq.  
Lauren Roseney, Esq.  
Violet Samuels, Esq., RN  
Matthew J. Skinner, Esq.  
Susan B. Somers, J.D.  
Kathleen Sweet, Esq., NYSBA, Executive Committee  
Mark Ustin, Esq.

**Interns**

Dani Dubon, Esq.  
Nikita Nayar, Esq.

**Law Student**

Cauolyn Britney Baptiste

**NYSBA Staff**

Melissa O'Clair  
Bridget O'Donlon

## **ACKNOWLEDGMENTS**

### **TASK FORCE PRESENTERS**

Sheila Shea, Esq. (Aug. 14)  
David Leven, Esq. (Aug. 28)  
Amy Paulin, New York State Assembly Member (Sept. 7)  
Brad-Sigal Hoylman, New York State Senator (Sept. 7)  
Corinne Carey, Esq. (Oct. 17)  
Jeanne Chirico (Oct. 30)  
Cheryl A. Kraus, Esq. (Oct. 30)  
Robert Swidler, Esq. (Nov. 14)  
Susan Hedlund, M.S.W., LCSW, OSW-C (Nov. 27)  
Gary Stein, Esq. (Nov. 27)  
Richard Gottfried, Esq. (Dec. 12)  
Thaddeus Pope, Esq. (Dec. 12)

### **Physicians**

Thomas Caprio, MD (Sept. 11)  
Christopher Comfort, MD (Sept. 11)  
Judy Setla, MD (Sept. 11)  
Guerman Ermolenko, MD (Oct. 14)  
Heather Paladine, MD (Oct. 14)  
Paul E. Heasley, MD (Dec. 12)  
Robin S. Plumer, MD (Dec. 12)  
Jaime Bickford, MD (Dec. 12)

### **WRITTEN TESTIMONY SUBMITTED**

Khaleel Anderson, New York State Assembly Member  
Rabbi Dr. Shlomo Brody  
Diane Coleman  
David Hoffman, Esq.  
Gary Stein, Esq.



## **TESTIMONY BEFORE LEGISLATIVE WORKING GROUP**

Art Caplan, PhD  
Maggie Carpenter, MD  
David N. Hoffman, Esq.  
Seth Morgan, MD  
Deborah Pasik, MD  
Benny Pollack  
Sue Porter  
David S. Pratt, MD  
Sonja Richmond, MD  
Mitsuo Tomita, MD

## I. EXECUTIVE SUMMARY

The New York State Bar Association Task Force on Medical Aid in Dying (MAID) was formed in June 2023 by President Richard Lewis. President Lewis framed the Task Force mission and charge to the Task Force as follows:

The Task Force on Medical Aid in Dying shall review the legal, ethical, health and public health, and broader policy considerations concerning medical aid in dying, including legislative proposals in New York and issues that may be related to the design as well as implementation of any such proposals if enacted by the NYS Legislature. The focus of the Task Force review shall include available research evidence and public health data; risks and benefits; financing; potential inequities and disparities; and the impacts of any such proposal or law if enacted upon families and caregivers; providers and residential and correctional care facilities; professional and informal workforces; and structural vulnerability and social determinants of health across diverse communities. The Task Force may evaluate laws of other states, jurisdictions, and countries, including Canada, as may be relevant to the Task Force inquiry. Through a consultative process with its members and other sections, the Task Force will develop recommendations for submission to the NYSBA Executive Committee and House of Delegates.

The members of the Task Force are leaders in many NYSBA sections and committees with relevant expert knowledge in multiple areas, including disabilities rights; elder law; health and public health law; insurance law; palliative care, hospice, and end-of-life care. President Lewis appointed Mary Beth Morrissey Esq., PhD, MPH, who is chair elect of NYSBA's Health Law Section and an active member of the Committee on Rights of Persons with Disabilities and the Elder Law Section, as Task Force Chair. Dr. Morrissey had chaired NYSBA's Health Law Section Task Force on COVID-19 in 2020,<sup>1</sup> and NYSBA's Emergency Task Force on Mandatory Vaccination and Safeguarding the Public's Health in 2021.<sup>2</sup> She served on NYSBA's Nursing Homes and Long-Term Care Task Force in 2021,<sup>3</sup> chaired by Hermes Fernandez. Dr. Morrissey is a well-known public policy researcher in gerontological health, public health, and social work, and palliative and end-of-life care, and has a strong record of scholarship and policy advocacy in New York, as well as nationally and in the United Nations global health and aging communities. Judith Grimaldi chaired the Task Force's Working Group on Hospice, Palliative, and End-of-Life Care (End-of-Life Working Group), and Hon. Rachel Kretser chaired the Task Force's Legislative Working Group.

The Task Force heard from diverse parties, including individuals, organizations, attorneys, physicians, social workers, and other professionals with relevant expertise. Those who presented testimony included individuals and organizations who support the MAID bill, as well as those who

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<sup>1</sup> <https://nysba.org/app/uploads/2021/01/health-Law-Resolutions-and-report-with-cover-approved-November-2020.pdf>.

<sup>2</sup> <https://nysba.org/app/uploads/2021/08/EC-Approved-Final-Report-on-Emergency-Task-Force-on-Mandatory-Vaccination-and-Safeguarding-the-Publics-Health..-with-appendix-a.pdf>.

<sup>3</sup> <https://nysba.org/app/uploads/2021/03/Task-Force-on-Nursing-Home-and-Long-Term-Care-Report-FINAL-approved-6.12.2021.pdf>.

voice serious concerns about it or oppose it. In addition, the Task Force held a five-hour Open Forum on November 17 to afford people outside the legal community an opportunity to offer their ideas and insights.

This report summarizes the comprehensive and methodical review carried out by the Task Force since June 2023.

Section II explains that MAID cannot be created judicially under current controlling authority and reviews the history of certain New York laws relevant to the Task Force's focus of inquiry.

In Section III, the New York MAID bill is framed in the end-of-life spectrum of care options, alongside hospice and palliative care. The need for more information and counseling at the end of life is also addressed.

The MAID laws and the history of their implementation in 10 other U.S. jurisdictions are mapped out in Section IV to provide further context for consideration of the bill currently before the New York State Legislature, which would amend the Public Health Law to provide that certain terminally ill patients could request and use medication for aid in dying.<sup>4</sup>

Sections V and VI of this Report set forth additional comments and recommendations for consideration once MAID is authorized in New York State. The State ought then to draw on its past legislation and regulatory and payment models, and on approaches created in other states, to ensure citizens have equal access to comprehensive end-of-life care including MAID. Comments and recommendations address structural inequities and disparities in health and end-of-life care at the intersectionality of race, ethnicity, gender, disability, age, immigration status, and social determinants of health; additional safeguards for certain special populations; funding for MAID; and development and provision of MAID training.

The Appendices provide summaries of testimony by individuals and organizations who appeared during the Public Forum and before the Legislative Working Group, affiliations of the Task Force Members, and charts comparing MAID laws and reports nationwide.

In order to ensure that all eligible New Yorkers have equitable access to high-quality medical aid in dying as part of a continuum of compassionate end-of-life care options in New York, and further, based on the methodical review conducted by the Task Force pursuant to the charge from New York State Bar Association President Lewis and after serious deliberations:

**The Task Force on Medical Aid in Dying recommends the New York State Bar Association adopt a position in support of the pending MAID bill (A995a/S2445); and additional comments and recommendations, and to support similar bills that accomplish this purpose.<sup>5</sup>**

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<sup>4</sup> The NY Medical Aid in Dying Act, A995A/S2445A, available at [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A00995&term=&Summary=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00995&term=&Summary=Y&Text=Y).

<sup>5</sup> This report reflects the consensus opinion of the New York State Bar Association Task Force members and does not reflect, unless otherwise stated, the views held by any individual member or the member's clients or employers. Participation in the Task Force by any one member should not be interpreted as an expression of support for the Task Force, this report, or Medical Aid in Dying by the member or the member's client or employer.

## INTRODUCTION

To address the experience of some terminally ill people who suffer at the end of life, even with the support of hospice and palliative care, lawmakers have sought for more than 9 years to change the law in New York to allow these people to access an end-of-life option known as “medical aid in dying.”

Medical aid in dying is a medical practice that has now been adopted in 11 U.S. jurisdictions that allow a terminally ill, mentally capable adult with a prognosis of six months or less to live to request from their doctor a prescription for medication they can decide to self-ingest to die peacefully in their sleep.

New York’s Medical Aid in Dying Act was introduced by Senator Diane Savino and Assemblymember Amy Paulin in 2016 and has been amended several times and re-introduced each two-year legislative cycle since then. The bill currently before the legislature (A995a/S2445), carried by Senator Brad Hoylman-Sigal and Assemblymember Amy Paulin, will be considered by the New York State legislature in the 2024 legislative session. At the time this report went to press, the bill was co-sponsored by 84 lawmakers.

The New York bill is modeled after legislation in Oregon and the other 9 states and Washington, D.C., where medical aid in dying has been authorized. The bill would allow a terminally ill adult with mental capacity to request and receive from their physician a prescription for medication that they can take at a time of their own choosing to bring about a peaceful death. The safeguards in the legislation include the following: i) a qualified patient must have a medically confirmed terminal illness that is incurable and irreversible and will likely cause death within 6 months; and the bill states that individuals are not eligible for medical aid in dying because of age or disability; ii) two physicians must confirm that the person is terminally ill with a prognosis of 6 months or less to live, is making an informed health care decision and is not being coerced; iii) the attending physician must inform the requesting individual about all of their end-of-life care options, including palliative care and hospice; iv) there is a mandatory mental health evaluation if either physician has concerns about the person’s mental capacity to make their own healthcare decisions and the mental health provider must confirm in writing the dying person’s capacity before a prescription can be written; v) the individual must make an oral and a written request for aid-in-dying medication, witnessed by two people — neither of whom can be a relative or someone who stands to benefit from the person’s estate; vi) the terminally ill person can withdraw their request for aid-in-dying medication, not take the medication once they have it, or otherwise change their mind at any point in time; vii) the individual must be able to self-ingest the medication; viii) no physician, health provider or pharmacist is required to participate in medical aid in dying and those who do and comply with all aspects of the law receive civil and criminal immunity; ix) anyone attempting to coerce a patient will face criminal prosecution; and x) unused medication must be disposed of as required by state and federal laws.

## II. MAID DECISIONS AND SURROGATE DECISION-MAKING LAWS

Because the U.S. Supreme Court and the New York Court of Appeals have not recognized MAID as a fundamental liberty interest, legislation is the pathway available to legalize MAID. In *Washington v. Glucksberg*, 521 US 702 (1997), physicians argued that a Washington state ban on physician-assisted suicide violated the fundamental liberty interest of personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. The Supreme Court rejected such argument, grounded in the Due Process Clause of the 14<sup>th</sup> Amendment, and held that the Washington statute was rationally related to a legitimate state interest. *Id.* at 720–721, 728. *Vacco v. Quill*, 521 US 793 (1997), concerned a challenge by New York physicians to statutes criminalizing physician-assisted suicide as a violation of the Equal Protection Clause. The Supreme Court upheld the prohibition. *Id.* at 806; *see also Myers v. Schneiderman*, 30 NY3d 1 (2017) (upholding ban on MAID in New York’s Penal Law under Due Process and Equal Protection analyses). If a statute legalizing—rather than prohibiting—MAID were enacted, under the applicable rational basis standard, such statute could be expected to withstand a constitutional challenge since such additional end-of-life option could be shown to be rationally related to a legitimate state interest.

### History of New York’s Surrogate Decision-Making Laws

In providing the full spectrum of medical, residential, and habilitative care to patients, providers must consider New York’s wide-ranging surrogate decision-making laws and regulations. To be clear, New York’s Medical Aid in Dying Bill does not allow for surrogate decision making. The only person who can request medical aid in dying is a terminally ill patient themselves. This request cannot be made by a physician, guardian, family member, or health care proxy; nor can it be requested by a person in a living will or advance care planning document to be deployed after the person loses the capacity to make their own medical decisions. The bill is explicit: only a terminally ill, decisionally-capable adult can make a request for medical aid in dying.

Despite the complexity of New York State’s surrogate decision-making system, for decisions like executing consents to certain routine medical treatments or screenings, or agreements for admission to rehabilitation or nursing facilities and related matters, the lack of any (in some cases) or even intermediate options leads to situations that are difficult to address. The Legislature should consider directing its attention to remedying the current process of legislating or promulgating regulations that stand alone as patches to the system and should utilize the strengths within current law to bolster MAID if it becomes law. The full spectrum of social, financial, and medical surrogate decision-making law and regulations could fill a report on their own. Still, a brief overview of a few key options that could interact with MAID follows. Readers would be well served by becoming familiar with the various reports issued by New York’s Task Force on Life and the Law. Many of the surrogate decision-making laws and principles we currently follow in New York started with that group’s writings.<sup>6</sup>

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<sup>6</sup> [https://www.health.ny.gov/regulations/task\\_force/](https://www.health.ny.gov/regulations/task_force/).

Prior to the March 16, 2010, signing of the Family Health Care Decisions Act (FHCDA) into law during a ceremony at Albany Memorial Hospital, the law in New York on end-of-life decision making had been relatively stable, but unable to address many real-world situations.<sup>7</sup> Healthcare providers were caught between a desire to behave in a humanely, respectfully, and medically appropriate way that could be rectified versus harsh caselaw and a patchwork of policies. The law before 2010 was united in its acceptance of the principle that a patient with decision-making capacity had a broad right to consent to or decline treatment: even life-sustaining treatment.<sup>8</sup> Life-sustaining treatment could be withdrawn or withheld if there was clear and convincing evidence that the patient would want the treatment withdrawn or withheld.<sup>9</sup> If there was not clear and convincing evidence that the patient would want treatment withdrawn or withheld, life-sustaining treatment was legally required to be provided. Since the 1980s, the Legislature has implemented several changes in law that create other instances where life-sustaining treatment can be withdrawn or withheld. The first is a decision to put in place an order not to resuscitate (DNR).<sup>10</sup> A second option is healthcare proxies (“HCP”), an option for individuals with capacity who want to make sure their wishes are honored when it comes time to make a healthcare decision, but they are no longer able to fully advocate on their own. New York’s HCP system was developed based on recommendations by the Task Force on Life and the Law. In a healthcare proxy, a then-competent adult may appoint a healthcare agent.<sup>11</sup> The healthcare agent becomes empowered upon a determination by an attending physician that the principal now lacks capacity to make healthcare decisions.<sup>12</sup> A second type of advance directive that is commonly (and advisably) used in conjunction with a healthcare proxy is a Living Will. A Living Will can provide the agent appointed by the proxy with the clarity they need to fulfill their charge and to be protected while they do so.<sup>13</sup> Persons with intellectual disabilities who lack decisional capacity can have healthcare decisions made on their behalf, including decisions to withhold or withdraw life-sustaining treatment, by an Article 17-A guardian or by an actively involved family member with specific

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<sup>7</sup> 2010 N.Y. Laws ch. 8, A.7729-D (Gottfried et al.) and S.3164-B. (Duane et al.). Section 2 of Chapter 8 amends N.Y. Public Health Law (PHL) to create “Article 29-CC Family Health Care Decisions Act.”

<sup>8</sup> 52 N.Y.2d 363, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981). *See also* 521 U.S. 793 (1997), specifically Justice Stevens’ concurrence, which implies even broader rights.

<sup>9</sup> 72 N.Y.2d 517, 531, 534 N.Y.S.2d 886 (1988).

<sup>10</sup> PHL art. 29-B.

<sup>11</sup> PHL § 2980–81. NYS Task Force on Life and the Law, *When Others Must Choose: Deciding for Patients Without Capacity* (March 1992) available at <http://www.health.state.ny.us/nysdoh/taskfrce/inforpts.htm>.

<sup>12</sup> A candidate for agent is disqualified if the conditions in PHL § 2981(3) are met. PHL § 2983, PHL § 2982, SCPA § 1750-b(2), PHL § 2985, 2008 N.Y. Laws ch. 210, section 4. Steps were taken to develop a healthcare proxy form for use by individuals with I/DD, including the creation of a workgroup, but their work product was never advanced for approval because the Legislature did not appropriate funds for the required preapproval study of the forms. As a result, OPWDD has not been able to approve the draft form. Individuals with I/DD may be able to use other healthcare proxy forms, but they would not be able to have their proxy commence decision making by proxy immediately and with nearly the same limitations and powers of a proxy acting under the Public Health Law. In these cases, some “extra” requirements include that one witness must be someone who is not “affiliated with” the facility, and the other must be a physician or clinical psychologist with specialized experience.

<sup>13</sup> Where an advance directive would have been helpful but does not exist you have to examine the past statements of the patient. It is advisable to consult the following case in such an instance: *Matter of O’Connor*, 72 N.Y.2d 517 (NY Court of Appeals, 1988). New York has no statute governing their form, interpretation, or enforcement of Living Wills.

limitations and safeguards under a special law enacted in 2002 applicable to people who are intellectually disabled.<sup>14</sup>

In 1985, Governor Mario Cuomo formed the Task Force on Life and the Law, which, in its 1992 report “When Others Must Choose: Deciding for Patients Without Capacity,” called for a number of specific reforms to state law and advanced legislation to enact its suggested reforms.<sup>15</sup> In 1993 the proposal was introduced in the Assembly by Richard Gottfried, Chair of the Assembly Health Committee and formerly the lead sponsor of the Health Care Proxy Act.<sup>16</sup> Bills that the Task Force had previously supported, such as the aforementioned DNR and HCP laws, had been successful, which supported the case for passing the FHCDA. Unfortunately, the bill remained in legislative doldrums until 2003, when various amendments gave some hope the FHCDA would pass. It did not pass until 2010 after Senator Duane’s unity bill weathered the June 2009 Senate “coup”.<sup>17</sup> A Senate bill and Assembly consort were re-introduced in both houses in January 2010 with only one change: a provision stating that a surrogate’s decision was not required if the patient had made a prior decision personally, was amended to attach witnessing requirements to prior oral decisions to forgo life-sustaining treatment. The Assembly passed the FHCDA on January 20 with a nearly unanimous bipartisan vote, and the Senate passed it on February 24, unanimously. On March 16, 2010, 17 years after the FHCDA was first introduced, Governor Paterson signed the FHCDA into law.<sup>18</sup> It is worth mentioning that the FHCDA’s passage also paved the way for the MOLST (Medical Orders for Life-Sustaining Treatment) form’s use in New York.<sup>19</sup>

The FHCDA is a sweeping piece of legislation that strains any attempt to summarize it, reaching into the areas of guardianship, civil litigation, patient notification, HCPs, DNRs, and other areas. The FHCDA applies to decisions for incapable patients in general hospitals and residential health care facilities (both are referred to as “hospitals”).<sup>20</sup> It sets forth a hospital-based process to determine that a patient lacks decisional capacity, but only for purposes of the FHCDA, and for objections to such determinations.<sup>21</sup> The statute sets forth, in order of priority, the persons who may act as a surrogate decision maker for the incapable patient. The surrogate has the authority to make all health care decisions for the patient that the adult patient could make for themselves, subject

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<sup>14</sup> Surrogate’s Court Procedure Act 1750-b (SCPA). A variety of other guardianship types exist in modern New York law.

<sup>15</sup> NYS Task Force on Life and the Law, *When Others Must Choose: Deciding for Patients Without Capacity* (March 1992) available at <http://www.health.state.ny.us/nysdoh/taskfrce/inforpts.htm>.

<sup>16</sup> The bill was not named the “Family Health Care Decisions Act” until 1995. The bill was introduced in the Senate by Sen. DeFrancisco, and later sponsored by Sen. Hannon, with broad support as S4685 (1995). Assem. Gottfried was also a sponsor of New York’s MAID bill.

<sup>17</sup> S.3164-B (Duane). The “coup” refers to two Democrats voting with Republicans to give the Republican party control of the State Senate. Ken Rudin, *Winners & Losers In New York Coup; Dems Not Giving Up* (Jun 2009) available at [https://www.npr.org/sections/politicaljunkie/2009/06/winners\\_losers\\_in\\_new\\_york\\_cou.html](https://www.npr.org/sections/politicaljunkie/2009/06/winners_losers_in_new_york_cou.html). This abridged retelling skips over, but is not intended to diminish, the difficult concessions as to the rights of same-sex partners and fetuses made from 2003–2009, and the impasse that resulted.

<sup>18</sup> Enacted at PHL § 2994-d(3)(ii).

<sup>19</sup> NY State Department of Health, MOLST Form, <https://www.health.ny.gov/forms/doh-5003.pdf> (last visited December 29, 2023).

<sup>20</sup> PHL § 2994-b and c. The FHCDA does not apply to decisions for incapable patients who have a health care agent; who have a court-appointed guardian under SCPA 1750-b; for whom decisions about life-sustaining treatment may be made by a family member or close friend under SCPA 1750-b; or for whom treatment decisions may be made pursuant to OMH or OMRDD surrogate decision-making regulations.

<sup>21</sup> PHL § 2994-c(4)(a)-(6).

to certain standards and limitations.<sup>22</sup> The surrogate must make decisions based on the wishes of the patient, if known, or based on the patient’s best interests if their wishes are not known.<sup>23</sup>

The FHCDA also creates a process for healthcare providers to secure legally valid decisions concerning treatment for “isolated” patients, meaning patients without family, close friends, or any other surrogate recognized by state law.<sup>24</sup> Most important to this report, the FHCDA allows a surrogate to make decisions concerning the withholding or withdrawal of life-sustaining treatment if the treatment would be an extraordinary burden to the patient and the patient is terminally or permanently unconscious; or, if the patient has an irreversible or incurable condition and the treatment would involve such pain, suffering, or other burden that it would reasonably be deemed inhumane or excessively burdensome under the circumstances.<sup>25</sup> The two standards also apply to decisions regarding artificial nutrition and hydration (e.g., the provision of nutrition or hydration by a tube inserted through the nose, stomach, or vein). Decisions regarding the oral provision of food and drink are not considered health care decisions and are outside the scope of the statute.<sup>26</sup>

One aspect of the FHCDA that the Workgroup spent a considerable amount of time discussing is the adequacy of the safeguards it put in place and whether those safeguards could provide additional layers of protection for vulnerable patients if MAID is made law. The most significant change made by the FHCDA was that it empowered family members to direct the withdrawal of life-sustaining treatment in the absence of clear and convincing evidence of a patient’s wish to forgo treatment. Surrogates receive this power without going to court (as is the case with certain guardianships), without signing a document (as with a HCP), or appearing before a decision-making body.<sup>27</sup> Over ten years on from the FHCDA there is reason to believe its safeguards work, though we must also acknowledge they have room to improve. We have limited empirical confirmation but ample testimony from healthcare professionals, patient advocates, medical ethicists, academics, and others that the safeguards and other provisions are working as intended. Special mention of the FHCDA’s requirement that hospitals and nursing homes implement ethical review committees (ERCs) is warranted because the ERCs seem to be an obvious check on a patient with an intermediate level of capacity, enough perhaps to indicate they would like to avail themselves of MAID without a mental health consultation, but not enough to reassure their attending physician.<sup>28</sup> ERCs could be especially helpful in the case of an isolated patient. The Department of Health, as is suggested by other sections of this report, could also support the development of ERC best practices.

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<sup>22</sup> PHL § 2994-d.

<sup>23</sup> PHL § 2994-d.

<sup>24</sup> PHL § 2994-g.

<sup>25</sup> PHL § 2994-d.

<sup>26</sup> PHL § 2994-a (12).

<sup>27</sup> Once again, for the purposes of summary we are simplifying the complexities of the interaction between the FHCDA and the HCDA, Article 17-A, and other laws. Still, the FHCDA undoubtedly filled in gaps and allowed family, friends, and medical professionals into the decision-making process when guardians or the Surrogate Decision Making Committee (SDMC) were not an option. Now housed in the Justice Center for the Protection of People with Special Needs, SDMC provides an alternative to court for individuals who do not have capacity to give informed consent, but who also have no authorized surrogate available. Again, SDMC will only tackle “major” decisions and specifically excludes routine diagnosis and treatment decisions. *See generally* <https://www.justicecenter.ny.gov/services-supports/sdmc>.

<sup>28</sup> PHL § 2994-m.



### III. HOSPICE, PALLIATIVE CARE, AND MAID

MAID is inextricably tied to hospice and palliative care. As with MAID, a core value of hospice is patient autonomy. Patients are supported in their desire to die in the manner and setting they choose. Some hospice providers have reservations about legalizing MAID. However, many concerns have been addressed in the current bill, which the Hospice and Palliative Care Association of New York State (HPCANYS) does not oppose. HPCANYS is a not-for-profit organization representing hospice and palliative care programs, allied organizations, and individuals in New York that are interested in quality, comprehensive end-of-life services. The Task Force received testimony from HPCANYS President and Chief Executive Officer Jeanne Chirico and Director of Government Relations and Policy Director Cheryl Kraus.

HPCANYS urges that patients must have full autonomy to make informed choices about their end-of-life care. Unfortunately, often patients do not receive relevant information, as further discussed in Section VI, *infra*. Indeed, New York ranks last in the country for hospice utilization.<sup>29</sup> The responsibility for this failure rests with providers, as well as regulators, who have not properly incorporated hospice and palliative care services into planning efforts or budget allocation processes. This problem led to the Palliative Care Information Act (PCIA), which requires physicians and nurse practitioners to offer to terminally ill patients information and counseling concerning palliative care and end-of-life options.<sup>30</sup> In 2011, this requirement was expanded by the Palliative Care Access Act (PCAA), which provides that (a) such information and counseling must be provided by general hospitals, nursing homes, home care agencies, enhanced assisted living residences, and special needs assisted living residences to individuals with life-limiting conditions or illnesses who might benefit from palliative care, and (b) such entities must facilitate access to such care.<sup>31</sup> Unfortunately, the requirements of PCIA and PCAA have been routinely ignored by providers. HPCANYS was thus concerned that terminal patients would choose MAID without an adequate understanding of other options.

HPCANYS therefore asked that New York’s MAID legislation be amended to include a mandate that providers inform patients of their hospice and palliative care options prior to prescribing MAID. In response, several provisions were added to the legislation. The bill requires that a patient make an “informed decision.” The definition of “informed decision” includes a requirement that patients be informed about “the feasible alternatives and appropriate treatment options, including but not limited to palliative care and hospice care.”<sup>32</sup> The bill includes a separate requirement that the prescribing physician discuss “the feasible alternatives and appropriate treatment options,” offer to refer the patient for such options, and provide:

“[H]ealth literate and culturally appropriate educational material regarding hospice and palliative care that has been prepared by the department [of health] in consultation with representatives of hospice and palliative care providers from all regions of New York State, and that is available on the department’s website for

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<sup>29</sup> National Hospice and Palliative Care Association, *NHPCO Facts and Figures*, Dec 2022, p 6 (available at [NHPCO-Facts-Figures-2022.pdf](#)).

<sup>30</sup> Chapter 332 of the 2010 Laws of NY; *see also* Pub Health Law § 2997-c.

<sup>31</sup> Chapter 59 of the 2011 Laws of NY; *see also* Pub Health Law § 2997-d.

<sup>32</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-d(7).

access and download, provided, however, an otherwise eligible patient cannot be denied care under this article if these materials are not developed by the effective date of this article.”<sup>33</sup>

Moreover, patients requesting MAID must attest to having received such information.<sup>34</sup> HPCANYS requested other changes that were made to the bill, including conforming terminology to language in existing statutes regarding healthcare decision making and ensuring that providers can opt out of providing MAID as a matter of conscience. Not all requested changes were made, and concerns remain. The bill includes a provision that “an otherwise eligible patient cannot be denied care under this article if these materials are not developed by the effective date” of the law.<sup>35</sup> Despite such provision, HPCANYS does not oppose the legislation, given its implications for patient autonomy.

Another concern involves opt-out provisions. The bill provides broad protection for practitioners who do not wish to participate in MAID<sup>36</sup> and allows health care facilities to prohibit the prescribing, dispensing, ordering, or self-administering of MAID if doing so is contrary to a “formally adopted policy of the facility that is expressly based on sincerely held religious beliefs or moral convictions central to the facility's operating principles.”<sup>37</sup> However, “health care facility” is defined to include only inpatient hospice care and hospice residences.<sup>38</sup> This means that home hospice has no opt-out available, and some hospices might be forced to have multiple, conflicting policies about MAID that depend on the treatment venue. Finally, HPCANYS is concerned that the bill will be effective immediately upon approval by the Governor.<sup>39</sup> Thus, providers would have no opportunity to develop and implement policies necessary to support the administration of MAID. Accordingly, HPCANYS seeks a sufficient time between final approval and effectiveness to ensure that providers can administer MAID as expected. Notwithstanding these remaining issues, HPCANYS does not oppose the bill.

HPCANYS has identified other recent State actions that should support the hospice infrastructure and advance patient awareness about hospice and palliative care. Recently, the Governor’s Master Plan on Aging (MPA) Council acknowledged the importance of hospice and palliative care. The MPA Council was created in 2022 to “coordinate existing and new state policy and programs creating a blueprint of strategies to ensure older New Yorkers can live fulfilling lives, in good health, with freedom, dignity and independence to age in place for as long as possible.”<sup>40</sup> Foundational pillars have been identified to focus ongoing conversations.<sup>41</sup> HPCANYS and other stakeholders in the MPA Council advocated for, and were granted, the inclusion of an additional new central element focused on delivering quality health care services and ensuring that the MPA addresses all aspects of an aging population’s health and well-being.

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<sup>33</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-f(1)(e)-(g).

<sup>34</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-k(1).

<sup>35</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-f(1)(g).

<sup>36</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-m(1).

<sup>37</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-m(2).

<sup>38</sup> NY State Bill No A995A/S2445A of 2023, § 2, new § 2899-d(5).

<sup>39</sup> NY State Bill No A995A/S2445A of 2023, § 3.

<sup>40</sup> 9 NYCRR § 9.23(1).

<sup>41</sup> See Preliminary Report of the New York State Master Plan for Aging, August 28, 2023 (available at [MPA Preliminary Report FINAL.pdf \(ny.gov\)](#)).

Similarly, in response to a law promoted by HPCANYS and passed by the Legislature,<sup>42</sup> in November 2023 the Department of Health (DOH) created a Center for Hospice and Palliative Care Access and Quality in DOH's Office of Aging and Long Term Care. Hospice advocates hope that this legislation and Center will ensure that hospices and palliative care providers and the patients and families they serve are thought of at the front end of all DOH strategic planning, program development, and investment efforts. The Center can also provide a platform for research and innovation in end-of-life care. Among the programs that the Center could administer is a statewide advance care planning campaign established by statute in 2022,<sup>43</sup> which could be invaluable in promoting public awareness of hospice and palliative care services. The new Center could also advance efforts to educate the public and train providers on MAID administration.

## IV. MAID LEGISLATION NATIONWIDE

### MAID in Eleven Jurisdictions

The Task Force's Legislative Working Group researched laws in the 11 U.S. jurisdictions that have legalized MAID; compared those approaches to the New York bill; reviewed reports in those states to determine how well the laws are working; and interviewed relevant experts and individuals, including those with first-hand experience with MAID.

The first MAID law in the United States—the Oregon Death with Dignity Act (DWDA)—was passed through a voter ballot initiative in 1994 and was implemented in 1997.<sup>44</sup> Since then, nine more states and Washington, D.C. have legalized MAID:

- Washington's Death with Dignity Act, 2008 (ballot initiative),<sup>45</sup> amended 2023<sup>46</sup>
- Montana Supreme Court ruling, 2009<sup>47</sup>
- Vermont's Patient Choice and Control at the End of Life Act, 2013,<sup>48</sup> amended 2023<sup>49</sup>
- California's End of Life Option Act, 2015,<sup>50</sup> amended 2021<sup>51</sup>

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<sup>42</sup> A5587/S4858 of 2023.

<sup>43</sup> Chapter 406 of the 2022 Laws of NY.

<sup>44</sup> Oregon Death with Dignity Act, available at

<https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/index.aspx>.

<sup>45</sup> Washington Death with Dignity Act, Revised Code of Washington, Chapter 70.245, available at <https://app.leg.wa.gov/rcw/default.aspx?cite=70.245>.

<sup>46</sup> Washington State Legislature, Substitute Senate Bill 5179 (April 6, 2023), available at [https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Session Laws/Senate/5179-S.SL.pdf?q=20230510092955](https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5179-S.SL.pdf?q=20230510092955).

<sup>47</sup> *Baxter v. Montana*, 224 P.3d 1211, 354 Mont. 234 (2009).

<sup>48</sup> Vermont Patient Choice at End of Life, Chapter 113, available at

<https://legislature.vermont.gov/statutes/chapter/18/113>.

<sup>49</sup> Act No. 10, An Act Relating to Removing the Residency Requirement from Vermont's Patient Choice at End of Life Laws, Vermont General Assembly (passed May 2, 2023), available at

<https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT010/ACT010%20As%20Enacted.pdf>.

<sup>50</sup> California End of Life Option Act, California Health and Safety Code, Division 1, Part 1.85, Section 443–443.22, available at [https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=HSC&division=1.&title=&part=1.85.&chapter=&article=](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=1.&title=&part=1.85.&chapter=&article=)

<sup>51</sup> California Senate Bill 380, Chapter 542, End of life (enacted October 5, 2021), available at [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB380](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB380).

- Colorado’s End-of-Life Options Act, 2016 (ballot initiative)<sup>52</sup>
- District of Columbia’s Death with Dignity Act, 2017<sup>53</sup>
- Hawaii’s Our Care, Our Choice Act, 2018,<sup>54</sup> amended 2023<sup>55</sup>
- Maine’s Death with Dignity Act, 2019<sup>56</sup>
- New Jersey’s Aid in Dying for the Terminally Ill Act, 2019<sup>57</sup>
- New Mexico’s Elizabeth Whitefield End-of-Life Options Act, 2021<sup>58</sup>, amended 2023.<sup>59</sup>

The above statutes (described in Appendix IV, Exhibit A), are modeled after the Oregon DWDA and require a patient to:

- be an adult (aged 18 or older);
- be confirmed by two doctors to be terminally ill;
- have a prognosis of six months or less to live;
- have decision-making capacity;
- be able to self-administer the medication.

## Public Support for MAID

In its most recent report, Gallup reveals that 74% of U.S. adults believe that doctors should be allowed to end the life of a patient with an incurable disease “by some painless means” if the patient and the patient’s family request such relief.<sup>60</sup> While the Gallup poll specifically addressed “doctor-assisted suicide”<sup>61</sup> rather than MAID, it is evident that most Americans have favored some form of MAID since Gallup first asked about it in 1996.<sup>62</sup> This includes majority support

<sup>52</sup> Colorado End of Life Options Act, Article 48, available at <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2015-2016/145Final.pdf>.

<sup>53</sup> Death with Dignity Act of 2016, D.C. Law 21-182 (December 19, 2016), available at [https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page\\_content/attachments/Death%20With%20Dignity%20Act\\_FINAL\\_.pdf](https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page_content/attachments/Death%20With%20Dignity%20Act_FINAL_.pdf).

<sup>54</sup> Hawaii Our Care, Our Choice Act, HB 2739 (April 5, 2018), available at <https://health.hawaii.gov/opppd/files/2018/11/OCOC-Act2.pdf>.

<sup>55</sup> Hawaii House Bill 650 (signed June 1, 2023), available at [https://www.capitol.hawaii.gov/session/measure\\_indiv.aspx?billtype=HB&billnumber=650&year=2023](https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=650&year=2023).

<sup>56</sup> Maine Death with Dignity Act, Public Law Chapter 271, available at [https://legislature.maine.gov/legis/bills/bills\\_129th/chapters/PUBLIC271.asp](https://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC271.asp).

<sup>57</sup> New Jersey Medical Aid in Dying for the Terminally Ill Act, Chapter 59 (April 12, 2019), available at [https://pub.njleg.gov/bills/2018/PL19/59\\_.HTM](https://pub.njleg.gov/bills/2018/PL19/59_.HTM)

<sup>58</sup> The Elizabeth Whitefield End-of-Life Options Act (2021), available at <https://www.nmhealth.org/publication/view/general/8382/>.

<sup>59</sup> New Mexico Senate Bill 471 (2023), available at <https://www.nmlegis.gov/Sessions/23%20Regular/final/SB0471.pdf>.

<sup>60</sup> Gallup News Service, Gallup Poll Social Series: Values and Beliefs (May 1–13, 2020), available at <https://news.gallup.com/poll/312209/prevalence-living-wills-slightly.aspx>.

<sup>61</sup> The term “doctor-assisted suicide” was in use at the time Gallup initiated its polling. The term “medical aid in dying” is now more commonly used.

<sup>62</sup> *Id.*

across most demographic groups.<sup>63</sup> In addition, 79% of people living with disabilities in the United States opine that MAID should be legal for terminally ill, mentally capable adults.<sup>64</sup>

Fifty-eight percent of New Yorkers support MAID, according to recent Siena College Research Institute poll results.<sup>65</sup> New York’s MAID Act has been endorsed by nearly 40 organizations including ACT UP- NY, Coalition of Progressive Hindus, Gay Men’s Health Crisis, Inc., Harlem United, Latino Commission on AIDS, Hispanic Health Network, Latino Commission on AIDS, League of Women Voters of New York State, New York Civil Liberties Union, New York State Academy of Family Physicians, New York State Public Health Association, Planned Parenthood Empire State Acts, SADHANA, SAGE, New York Statewide Senior Action Council.<sup>66</sup> Two New York disability rights organizations have taken supportive or neutral positions on MAID.<sup>67</sup> The New York Alliance Against Assisted Suicide provides information on certain organizations that may oppose MAID.<sup>68</sup>

In the most recent report of Medscape, 55% of physicians surveyed agreed that “Physician assisted death should be allowed for terminally ill patients.”<sup>69</sup> In addition, 86% of nurses said that they would care for a patient contemplating MAID.<sup>70</sup> In 2018, New York doctors showed strong support for MAID:

- By a margin of 56% to 26%, New York physicians support MAID or physician-assisted suicide.<sup>71</sup>

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<sup>63</sup> *Id.*; see also LifeWay Research, American Views on Assisted Suicide (2016), available at

<http://lifewayresearch.com/wp-content/uploads/2016/12/Sept-2016-American-Views-Assisted-Suicide.pdf>.

<sup>64</sup> US for Autonomy, Nationwide Poll Shows 79% of People with Disabilities Believe Medical Aid in Dying Should Be Legal for Terminally Ill, Mentally Capable Adults, available at <https://www.usforautonomy.org/polling>.

<sup>65</sup> See Siena College Poll Trends, November 2023, available at

<https://scri.siena.edu/wp-content/uploads/2023/11/SNY-November-2023-Release.pdf> (question 28); see also Marist Poll of 822 New York State Adults, Marist Poll (2021), at [https://maristpoll.marist.edu/wp-content/uploads/2021/10/Marist-Poll\\_NYS-NOS-and-Tables\\_202110110852.pdf](https://maristpoll.marist.edu/wp-content/uploads/2021/10/Marist-Poll_NYS-NOS-and-Tables_202110110852.pdf) (59% of voters support the bill compared to only 36% who oppose it).

<sup>66</sup> See Compassion & Choices, New York Organizations that Support Medical Aid in Dying, available at

[https://www.compassionandchoices.org/docs/default-source/new-york/ny-orgs-that-support-medical-aid-in-dying-021522.pdf?sfvrsn=7c838bfc\\_2](https://www.compassionandchoices.org/docs/default-source/new-york/ny-orgs-that-support-medical-aid-in-dying-021522.pdf?sfvrsn=7c838bfc_2).

<sup>67</sup> See The Arc New York Position Statements 2023–2024, position on Medical Aid in Dying, p 40, available at

[https://www.thearcny.org/application/files/1917/0008/1445/TheArcNewYorkPositionStatements\\_2022-24\\_FINAL11-15-23.pdf](https://www.thearcny.org/application/files/1917/0008/1445/TheArcNewYorkPositionStatements_2022-24_FINAL11-15-23.pdf); Cision PR Newswire, the Arc New York—One of the Leaders in Supporting New Yorkers with Disabilities—Supports Medical Aid in Dying, Resource Center for Independent Living Neutral on Issue (March 2, 2020), available at <https://www.prnewswire.com/news-releases/the-arc-new-york--one-of-the-leaders-in-supporting-new-yorkers-with-disabilities--supports-medical-aid-in-dying-301014781.html>.

<sup>68</sup> See New York Alliance Against Assisted Suicide, New York State Organizations Which Oppose Assisted Suicide, available at <https://nosuicideny.org/about>.

<sup>69</sup> Medscape, Life, Death, and Pain: Ethics Report 2020: available at

<https://www.medscape.com/viewarticle/941104?form=fpf>.

<sup>70</sup> Nurses’ Values and Perspectives on Medical Aid in Dying: A Survey of Nurses in the United States, Journal of Hospice Palliative Nursing (February 1, 2022), available at

<https://pubmed.ncbi.nlm.nih.gov/34840280>.

<sup>71</sup> New York Physicians Support Medical Aid in Dying (2018), available at

[https://www.compassionandchoices.org/docs/default-source/polling-documents/3-2018-medscape\\_webmd-survey-of-new-york-physicians.pdf?sfvrsn=14dc4566\\_1](https://www.compassionandchoices.org/docs/default-source/polling-documents/3-2018-medscape_webmd-survey-of-new-york-physicians.pdf?sfvrsn=14dc4566_1).

- When asked whether they support or oppose the bill pending in New York and told about key provisions, doctors supported the legislation 67% to 19%. Ninety percent of the doctors endorsed requiring that patients who request MAID or patient-assisted suicide be offered a referral to hospice if they are not enrolled in hospice when the request is made.<sup>72</sup>

In 1996, the American College of Legal Medicine (ACLM)—an organization of professionals engaged in issues where the disciplines of medicine and law converge—was “the first such organization to publicly advocate for the elimination of the word “suicide” from the lexicon created by a mentally competent, though terminally ill, person who wishes to be aided in dying.” They filed an amicus brief before the U.S. Supreme Court.<sup>73</sup> In 2008, the group issued a position which remains in effect today:

The ACLM recognizes patient autonomy and the right of a mentally competent, though terminally ill, person to hasten what might otherwise be objectively considered a protracted, undignified, or painful death, provided, however, that such person strictly complies with law specifically enacted to regulate and control such a right; and BE IT FURTHER RESOLVED: That the process initiated by a mentally competent, though terminally ill, person who wishes to end his or her suffering and hasten death according to law specifically enacted to regulate and control such a process shall not be described using the word “suicide”, but, rather, as a process intended to hasten the end of life.<sup>74</sup>

In addition, the State Bar Associations in California<sup>75</sup> and Connecticut<sup>76</sup> had previously adopted favorable positions on earlier versions of the respective state MAID bills.

The New York City Bar Association submitted testimony in 2018 to the New York State Assembly Committee on Health Hearing on Medical Aid in Dying, making specific recommendations to amend the 2018 bill.<sup>77</sup> Appended to the 2018 testimony is a full report on Medical Aid in Dying published in 2017.

Six national health care organizations have adopted neutral positions toward MAID: the American Academy of Family Physicians,<sup>78</sup> American Academy of Neurology,<sup>79</sup> American

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<sup>72</sup> *Id.*

<sup>73</sup> American College of Legal Medicine, ACLM Policy on Aid in Dying, Eff. October 6, 2008, available at <https://www.compassionandchoices.org/docs/default-source/policy/american-college-of-legal-medicine-position-statement.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> The Conference of California Bar Associations, Testimony in Support of ABX2-15 (2015), available at <https://compassionandchoices.org/docs/default-source/california/l-doyle-support-for-abx2-15.pdf>.

<sup>76</sup> The Connecticut Bar Association, Testimony in Support of HB7015,” (2015), available at <https://www.cga.ct.gov/2015/juddata/tmy/2015HB-07015-R000318-Collins.%20Barbara-TMY.PDF>.

<sup>77</sup> See New York City Bar Association 2018 testimony to the New York State Assembly Health Committee, available at <https://s3.amazonaws.com/documents.nycbar.org/files/2017371-AidInDyingNYTestimonyMay2018.pdf>.

<sup>78</sup> American Academy of Family Physicians COD Addresses Medical Aid in Dying, Institutional Racism. (2018), available at <https://www.aafp.org/news/2018-congress-fmx/20181010cod-hops.html>.

<sup>79</sup> American Academy of Neurology position statement on Lawful Physician-Hastened Death. (2018), available at <http://n.neurology.org/content/90/9/420>.

Academy of Hospice and Palliative Medicine,<sup>80</sup> American Nurses Association,<sup>81</sup> American Pharmacists Association,<sup>82</sup> American Society for Health System Pharmacists,<sup>83</sup> and National Association of Social Workers.<sup>84</sup> The American Medical Association (AMA) and the National Hospice and Palliative Care Organization (NHPCO) both have taken positions opposing MAID.<sup>85</sup> However, they have updated their policies to clarify that it is ethical for a doctor to participate in MAID in an authorized state. The New York State Academy of Family Physicians—which represents more than 6,000 board-certified physicians, residents, and students in family medicine throughout New York—favored MAID in 2017<sup>86</sup> and currently lists as one of its 2023 priorities the enactment of MAID legislation.<sup>87</sup> Many state medical associations support MAID, including in Oregon,<sup>88</sup> California,<sup>89</sup> Colorado,<sup>90</sup> Vermont,<sup>91</sup> Hawaii,<sup>92</sup> Maine,<sup>93</sup> New Mexico,<sup>94</sup> and the District of Columbia.<sup>95</sup> Neutral stances were taken

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<sup>80</sup> American Academy of Hospice & Palliative Medicine, excerpted from Statement on Physician-Assisted Death (2007), available at <http://aahpm.org/positions/pad>.

<sup>81</sup> American Nurses Association, The Nurse’s Role When a Patient Requests Medical Aid in Dying (2019), revised position statement, available at <https://ojin.nursingworld.org/table-of-contents/volume-24-2019/number-3-september-2019/nurses-role-medical-aid-in-dying/>.

<sup>82</sup> American Pharmacists Association, 2015 APhA House of Delegates, available at [https://docksci.com/report-of-the-2015-apha-house-of-delegates\\_5a35bf67d64ab2ddfc6de3a7.html](https://docksci.com/report-of-the-2015-apha-house-of-delegates_5a35bf67d64ab2ddfc6de3a7.html).

<sup>83</sup> American Society of Health-System Pharmacists, Board Report on the Joint Council Task Force on Pharmacist Participation in Medical Aid in Dying, (2016), available at <https://www.ashp.org/-/media/assets/house-delegates/docs/hod-board-report-on-task-force.ashx>.

<sup>84</sup> National Association of Social Workers, NASW Standards for Palliative and End of Life Care, available at <https://www.socialworkers.org/LinkClick.aspx?fileticket=xBMd58VwEhk%3D&portalid=0>.

<sup>85</sup> American Medical Association, Report 2 of the Council on Ethical and Judicial Affairs (2-A-19), Physician Assisted Suicide (Resolution 15-A-16 and Resolution 14-A-17) (2019), available at <https://www.ama-assn.org/system/files/2019-05/a19-ceja2.pdf>.

<sup>86</sup> New York State Assembly of Family Physicians Position on Medical Aid in Dying, available at <https://www.nysafp.org/2023/02/06/advocates-for-medically-assisted-death-renew-push-for-legalization/>.

<sup>87</sup> New York State Academy of Family Physicians, 2023 Priorities, available at <https://www.nysafp.org/wp-content/uploads/2023/09/NYSAFP-2023-Broad-Priorities-List.pdf>.

<sup>88</sup> Oregon Medical Association, excerpted from October 27 Board of Trustees Report, available at <http://bit.ly/2CYT6Dx>.

<sup>89</sup> California Medical Association Position on Medical Aid in Dying, available at <https://www.cmadoocs.org/newsroom/news/view/ArticleId/27210/California-Medical-Association-removes-opposition-to-physician-aid-in-dying-bill>.

<sup>90</sup> Colorado Medical Society, Position on Medical Aid in Dying, available at <https://www.compassionandchoices.org/resource/medical-associations-medical-aid-dying>.

<sup>91</sup> Vermont Medical Society, Position on Medical Aid in Dying, (2017), available at <http://www.vtmd.org/sites/default/files/2017End-of-Life-Care.pdf>.

<sup>92</sup> Hawaii Society of Clinical Oncology, Hawaii Our Care, Our Choice Act Resources (2018), available at <https://www.accc-cancer.org/state-societies/Hawaii/resources/medical-aid-in-dying>.

<sup>93</sup> Maine Medical Association (MMA) Position on Medical Aid in Dying, (2017), available at <http://newsmanager.commpartners.com/mainemed/issues/2017-05-01/index.html>.

<sup>94</sup> New Mexico Medical Society Position on Medical Aid in Dying (2019), available at [https://d2zhgehghqjuwb.cloudfront.net/accounts/14766/original/2019\\_1\\_5\\_Council\\_Minutes\\_-\\_PENDING\\_APPROVAL.pdf?1547577653](https://d2zhgehghqjuwb.cloudfront.net/accounts/14766/original/2019_1_5_Council_Minutes_-_PENDING_APPROVAL.pdf?1547577653).

<sup>95</sup> Robert Lowes, Another State Medical Society Stops Fighting Assisted Death, Medscape (2017), available at [https://www.medscape.com/viewarticle/889450?reg=1&icd=login\\_success\\_gg\\_match\\_norm](https://www.medscape.com/viewarticle/889450?reg=1&icd=login_success_gg_match_norm).

by medical societies in Connecticut,<sup>96</sup> Maryland,<sup>97</sup> Massachusetts,<sup>98</sup> Minnesota,<sup>99</sup> Delaware,<sup>100</sup> and Virginia.<sup>101</sup> While the Medical Society of the State of New York (MSSNY) has taken a position against MAID in the past,<sup>102</sup> the organization has not filed a memorandum in opposition,<sup>103</sup> nor does it currently maintain a position statement on the New York bill.<sup>104</sup> In addition to the American College of Legal Medicine, five other national health organizations support MAID: American Medical Student Association,<sup>105</sup> American Medical Women's Association,<sup>106</sup> American Public Health Association,<sup>107</sup> GLMA: Health Professionals Advancing LGBT Equality,<sup>108</sup> and the National Student Nurses' Association.<sup>109</sup> In addition, the Coalition for Liberty and Justice, and SAGE<sup>110</sup> (a national organization that provides services and advocacy for LGBT elders), have all endorsed MAID on a national level. In addition, these national Latino/a/x organizations support MAID: the Dolores Huerta Foundation,<sup>111</sup> Hispanic

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<sup>96</sup> Connecticut State Medical Society Position on Medical Aid in Dying (2019), available at <https://www.cga.ct.gov/2019/PHdata/Tmy/2019HB-05898-R000318-Connecticut%20State%20Medical%20Society-TMY.PDF>.

<sup>97</sup> MEDCHI, The Maryland State Medical Society House of Delegates Position on Medical Aid in Dying (2016), available at <http://www.medchi.org/Portals/18/files/Events/Resolution%2016-16.pdf?ver=2016-08-26-140448-047>.

<sup>98</sup> Massachusetts Medical Society Position on Medical Aid in Dying (2017), available at <https://www.massmed.org/About/2017-Annual-Report/>.

<sup>99</sup> Minnesota Medical Association Position on Medical Aid in Dying (2017), available at <https://www.compassionandchoices.org/resource/medical-associations-medical-aid-dying>.

<sup>100</sup> MSD Support of Engaged Neutrality for Medical Aid in Dying (2022), available at <https://files.constantcontact.com/01c210be101/c65122d3-bb72-4b9c-a2f6-8563b3304710.pdf?rdr=true>.

<sup>101</sup> The Medical Society of Virginia, 2022-2023 Policy Compendium, available at <https://www.msv.org/wp-content/uploads/2022/11/2022-2023-Policy-Compendium.pdf>.

<sup>102</sup> Medical Society of the State of New York, MSSNY Statement Re: Medical Aid in Dying (May 14, 2019), available at <https://www.mssnynews.org/enews/mssny-statement-re-medical-aid-in-dying>.

<sup>103</sup> See MSSNY Memos in Support and Opposition, 2019 - present, available at <https://www.mssny.org/take-action/memos-in-support-and-opposition>.

<sup>104</sup> See MSSNY Division of Governmental Affairs, 2023 MSSNY Legislative Program, available at <https://www.mssny.org/wp-content/uploads/2023/01/MSSNY-2023-Legislative-Program.pdf>.

<sup>105</sup> American Medical Student Association, excerpted from Preambles, Purposes, Principles: Principles Regarding Physician Aid in Dying (2008), available at <http://www.amsa.org/wp-content/uploads/2015/03/PPP-2015.pdf>.

<sup>106</sup> American Medical Women's Association, from Position Paper on Aid in Dying, available at <https://www.amwa-doc.org/wp-content/uploads/2018/09/Medical-Aid-in-Dying-Position-Paper.pdf>.

<sup>107</sup> American Public Health Association, excerpted from Patient's Rights to Self-Determination at the End. Policy # 20086 (2008), available at <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/29/13/28/patients-rights-to-self-determination-at-the-end-of-life>.

<sup>108</sup> GLMA Letter of Support on AB X2-15, (2015), available at <https://compassionandchoices.org/docs/default-source/california/20151002-glma-letter-in-support-of-ca-eoloa.pdf>.

<sup>109</sup> National Student Nurses' Association, NSNA Resolutions (2018), available at <https://www.dropbox.com/s/8xwq5f827leqriq/NSNA%20Resolutions%202018.pdf?dl=0>.

<sup>110</sup> Nation's Largest LGBT Elders Group Endorses Medical Aid-in-Dying Laws (2019), available at <https://www.sageusa.org/news-posts/nations-largest-lgbt-elders-group-endorses-medical-aid-in-dying-laws/>.

<sup>111</sup> Dolores Huerta Foundation, 2021 Fall WMNL: People Powered Legislative wins, available at <https://www.doloreshuerta.org/2021-fall-wmnl-people-powered-legislative-wins/>.



Health Network,<sup>112</sup> Latino Commission on AIDS,<sup>113</sup> Latinos for Healthcare Equity,<sup>114</sup> National Hispanic Council on Aging,<sup>115</sup> and Nuestra Salud.<sup>116</sup>

National groups that have taken a position against MAID include the American Association of People with Disabilities, American College of Medical Quality, American Disabled for Attendant Programs Today (ADAPT), American Medical Association, American Medical Directors Association, American Nurses Association, Arc of the United States, Association for Persons with Sever Handicaps (TASH), Disability Rights Education and Defense Funds (DREDF), National Council on Disability, National Council on Independent Living, National Hospice & Palliative Care Organization, National Spinal Cord Injury Association, Not Dead Yet, Patient’s Rights Action Fund, Patient’s Rights Council (PRC), Physicians for Compassionate Care Education Foundation, and the United Spinal Association.<sup>117</sup>

This report focuses on New York’s proposed law and the laws in MAID jurisdictions in this country and does not examine MAID laws in other countries because of the vast differences in eligibility that have largely been rejected in the United States.<sup>118</sup> Unlike in some other countries, U.S. laws require that the patients make their own health care decisions; request the medication themselves, multiple times; and ingest the medication themselves. In addition, U.S. laws do not allow euthanasia, where the medical provider injects the medication through intravenous administration; do not allow a person to make the request in an advance directive; and are restricted to patients with a terminal disease, meaning that they have a prognosis of six months or less to live, and therefore are eligible for hospice care. Other countries permit people who are merely “suffering” to use MAID.<sup>119</sup>

## **New York’s Bill and Other MAID Laws**

The proposed New York MAID law is similar in many ways to the MAID statutes in the other jurisdictions.<sup>120</sup> Appendix IV, Exhibit A reveals that 10 jurisdictions have a statutory framework, whereas Montana’s MAID was authorized through a state Supreme Court decision, which found that a competent terminally ill patient had a fundamental right to die with dignity by self-ingesting

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<sup>112</sup> Latino Health Groups Endorse NY Medical Aid-in-Dying Bill, PR Newswire (February 14, 2018), available at <https://www.prnewswire.com/news-releases/latino-health-groups-endorse-ny-medical-aid-in-dying-bill-300598881.html>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Yanira Cruz, All Americans should have access to all end-of-life care options, The Hill (October 28, 2017), available at <https://thehill.com/opinion/healthcare/357575-all-americans-should-have-access-to-all-end-of-life-care-options/>.

<sup>116</sup> Jorge L. Otero, President Nuestra Salud, Letter to Governor Lujan Grisham and Members of the New Mexico Legislature (January 1, 2019), available at <https://endoflifeoptionsnm.org/wp-content/uploads/2019/01/Nuestra-Salud-letter-to-EOLO-03JAN19.pdf>.

<sup>117</sup> See New York Alliance Against Assisted Suicide, National Organizations in Opposition, available at [nosuicideny.org/about](https://nosuicideny.org/about).

<sup>118</sup> Megan Wright & Cindy L. Cain, Different MAID Laws, Different MAID Outcomes: Expected Rather Than “Disturbing.” The American Journal of Bioethics, 23(11), 92–94 (October 2023), available at <https://doi.org/10.1080/15265161.2023.2256288>.

<sup>119</sup> *Id.*

<sup>120</sup> See Appendix IV to this report, Exhibit A, State-by-State Comparison Chart (November 2023).

medication prescribed by a physician.<sup>121</sup> Consistent with other MAID jurisdictions, the New York legislation requires that an eligible person be an adult aged 18 or older; confirmed by two physicians to be terminally ill; have a prognosis of six months or less to live; be able to self-administer the medication; and be capable of making health care decisions.

One difference in language in New York’s bill as compared to other MAID laws is that here, a person must have “decision making capacity,” whereas most other laws provide that the person must be “mentally capable of making a decision.” This difference in language does not materially change the law; it simply aligns the New York MAID language with the terminology used in other New York public health laws. Like the laws in other states, the New York law also outlines a thorough process for a patient to be able to access the law. This includes requirements that a physician:

- makes the initial determination that a patient has a terminal disease, is capable, and has made the request voluntarily;
- ensures that the patient is making an informed decision;
- refers the patient to a consulting provider who confirms the diagnosis and for a determination that the patient is capable and acting voluntarily;
- counsels the patient about the importance of having another person present when taking the prescription;
- counsels the patient about not taking the prescription in a public place;
- explains that the patient may rescind the request at any time and in any manner;
- verifies, before writing a prescription for medication, that the patient is making an informed decision;
- recommends that the patient notifies their next of kin.

In addition, the New York legislation, like most other MAID statutes:

- requires that an additional request be made in writing, signed, and dated by the patient and witnessed by at least two individuals and neither of whom can benefit from the patient’s estate;
- requires the safe disposal of medication;
- provides immunity for actions in good faith. (“A person is not subject to civil or criminal liability or professional disciplinary action for acting in good faith under this article, which includes being present when a qualified individual self-administers the prescribed MAID medication.”)

In 2023, three states brought constitutional challenges to the residency requirements that prevented out-of-state patients from accessing MAID. Vermont’s legislature approved an amendment eliminating the requirement and became the first state to provide MAID to qualifying out-of-state residents.<sup>122</sup> Oregon’s legislature removed the residency requirement following a lawsuit.<sup>123</sup> An

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<sup>121</sup> See *Baxter v. Montana*, 224 P.3d 1211, 354 Mont. 234 (2009).

<sup>122</sup> Vermont Death With Dignity (2023), available at <https://deathwithdignity.org/states/vermont/>.

<sup>123</sup> A Big Step Forward: Oregon Legislature Moves to Remove Residency Requirements (2023), available at <https://deathwithdignity.org/news/2023/06/or-residency-requirement/>.

action in federal court in New Jersey is pending.<sup>124</sup> Like the Vermont and Oregon laws, the New York bill does not require that a patient prove residency.

## MAID Jurisdiction Reports

A summary below sets forth data from nine MAID jurisdictions: Oregon,<sup>125</sup> Washington,<sup>126</sup> Vermont,<sup>127</sup> California,<sup>128</sup> Colorado,<sup>129</sup> Hawaii,<sup>130</sup> the District of Columbia,<sup>131</sup> New Jersey,<sup>132</sup> and Maine.<sup>133</sup> Because Montana's law was authorized by judicial decision, that state's department of health is not required to issue a report to the state legislature; and New Mexico data was not available. Our review of the data is attached as Appendix IV, Exhibit B: Comparing the Reports. Here are noteworthy national trends:

- Less than 1% of the people who die in each jurisdiction use the law each year.<sup>134</sup> In total, 10,025 MAID prescriptions were written across all jurisdictions. Two-thirds of people (6,378) used the prescription. Seventy-five percent of people who use MAID are 65 or older, split nearly evenly between men (52%) and women (48%).
- The rate at which Asian, Black, Hawaiian/Pacific Islander, Hispanic, Indigenous American/Alaskan Native, Latino/a/x, and multi-race people access and use prescriptions under MAID laws is consistently lower than for white populations.
- Terminal cancer accounts for most qualifying diagnoses, with neurodegenerative diseases following as the second leading diagnosis.

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<sup>124</sup> NJ Doctors, DE, PA Patients File Lawsuit Challenging Residency Mandate in NJ MAID Law (2023), available at <https://www.compassionandchoices.org/news/nj-residency>.

<sup>125</sup> Oregon Death with Dignity Act Annual Reports (2022), Year 25 Data, available at <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/ar-index.aspx>.

<sup>126</sup> Washington Death with Dignity Data (2022), available at <https://doh.wa.gov/sites/default/files/2023-10/422-109-DeathWithDignityAct2022.pdf>.

<sup>127</sup> Vermont Report Concerning Patient Choice at the End of Life. (2022), available at <https://legislature.vermont.gov/assets/Legislative-Reports/2022-Patient-Choice-Legislative-Report.Final.pdf>.

<sup>128</sup> California End of Life Option Act Annual Report (2022), available at [https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH\\_End\\_of\\_Life%20Option\\_Act\\_Report\\_2022\\_FINAL.pdf](https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH_End_of_Life%20Option_Act_Report_2022_FINAL.pdf).

<sup>129</sup> Colorado End of Life Options Act Annual Report (2022), available at <https://drive.google.com/file/d/1DLML5hCvII0Udvt0vCalCziN9g9Lhgf9/>; <https://www.colorado.gov/pacific/cdphe/medical-aid-dying>.

<sup>130</sup> Hawaii Our Care, Our Choice Act Annual Report (2022), available at <https://health.hawaii.gov/opppd/files/2022/07/corrected-MAID-2021-Annual-Report.pdf>.

<sup>131</sup> District of Columbia Death with Dignity Act Annual Report (2021), available at <https://dchealth.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/2021%20Death%20with%20Dignity%20Annual%20Report.pdf>.

<sup>132</sup> New Jersey Medical Aid in Dying for the Terminally Ill Act Data Summary (2022), available at <https://www.nj.gov/health/advancedirective/documents/MAID/MAIDAnnualReport2022.pdf>.

<sup>133</sup> Maine Patient Directed Care at End of Life Annual Report (2022), available at <https://legislature.maine.gov/doc/10118>.

<sup>134</sup> According to the Center for Disease Control, in 2019 in jurisdictions that authorized MAID, 427,296 people died in total. In 2019, authorized jurisdictions report 1,027 people died after being provided with a prescription for MAID—less than 0.002% of total deaths in 2019. Center for Disease Control, Deaths: Final Data for 2019, July 26, 2021, available from: [https://stacks.cdc.gov/view/cdc/106058/cdc\\_106058\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/106058/cdc_106058_DS1.pdf).

- More than 87% of terminally ill people who use MAID received hospice services at the time of their deaths in the five states (Oregon, Washington, California, Colorado, and Hawaii) that collect hospice data.<sup>135</sup>
- Just over 90% of people who use MAID can die at home—which is the preference of most Americans, according to various studies.<sup>136</sup>

Since 1997, the Oregon Health Authority (OHA) has published an annual statistical report about its MAID law, the DWDA.<sup>137</sup> The data is based on mandatory reporting forms and death certificates. Given that Oregon has 25 years of reported data, collects more data than any other state, and has a statutory framework like New York’s bill, the OHA report may provide a meaningful indication of what we can expect if MAID is implemented here. Since the DWDA was passed in 1997, 3,712 people have received prescriptions, and 66% of them (2,454 people) have died from ingesting the medication.<sup>138</sup> An estimated 0.6% of total deaths were DWDA deaths.<sup>139</sup> During 2022, 431 people received prescriptions, and 278 people ingested the medication.<sup>140</sup> OHA referred no physicians for failure to comply with the reporting requirements to the Oregon Medical Board.<sup>141</sup>

As was the case in previous years, most patients were 65 years or older (85%) and white (96%) with a diagnosis of cancer (64%), followed by heart disease (12%) and neurological disease (10%).<sup>142</sup> Nine out of 10 patients died at home (92%) and had enrolled in hospice care (91%).<sup>143</sup> Excluding unknown cases, all patients had health insurance.<sup>144</sup> The three most common reasons for using MAID were decreasing ability to participate in activities that made life enjoyable (89%), loss of autonomy (86%), and loss of dignity (62%).<sup>145</sup> In 2022, 146 physicians wrote 431 prescriptions.<sup>146</sup> In 2022, 70% of ingestions involved the drug combination DDMAPH, which consists of diazepam, digoxin, morphine sulfate, amitriptyline, and phenobarbital.<sup>147</sup> DDMAPH had a median time until death of 42 minutes.<sup>148</sup> Twenty-eight percent of ingestions used the drug combination DDMA, consisting of diazepam, digoxin, morphine sulfate, and amitriptyline.<sup>149</sup>

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<sup>135</sup> See Appendix IV to this report, Exhibit B, Comparing the Reports Chart (November 2023).

<sup>136</sup> See Kaiser Family Foundation, Views, and Experiences with End-of-Life Medical Care in the U.S. (April 27, 2017) available at <https://www.kff.org/report-section/views-and-experiences-with-end-of-life-medical-care-in-the-us-findings/>.

<sup>137</sup> See Oregon Health Authority, Death with Dignity Annual Reports, available at <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/ar-index.aspx>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

DDMA has a median time until death of 49 minutes.<sup>150</sup> Both drugs show longer median times until death than the barbiturates secobarbital and pentobarbital, which are no longer readily available.<sup>151</sup>

## MAID Studies

At the footnotes to this section are citations to selected literature and health and public health data concerning MAID laws. Studies have examined (1) whether these laws ensure that a person who chooses the option of MAID is free from coercion by an agent or agents; and (2) the impact these laws have on families, healthcare providers, nursing homes, and correctional facilities. The evidence confirms what the Task Force heard from experts: even with availability of hospice and palliative care, many patients experience pain at the end of their life.<sup>152</sup> One study found that the prevalence of pain jumps from 26% in the last 24 months of life to 46% in the last four months of life.<sup>153</sup> Additionally, breakthrough pain—severe pain that erupts even when a patient is already medicated—remains a reality for many patients. In the National Breakthrough Pain Study, among respondents who had cancer, 83.3% reported breakthrough pain.<sup>154</sup> For cancer patients who experienced breakthrough pain, only 24.1% reported that using pain management worked every time.<sup>155</sup>

One of the biggest ethical questions that arises with MAID is whether legalization will lead to abuse and/or coercion. With more than 25 years of experience across 11 jurisdictions, to our knowledge there have been no reports of abuse or coercion in a relational or interactional context involving a person or agent being coerced by another person or agent who is doing the coercing. Moving beyond such forms of relational or interactional coercion, consideration of forms of structural or systemic coercion will be addressed later in this report.

Most experts who appeared before the Task Force indicated that they were not aware of any reports of abuse and/or coercion in MAID jurisdictions. A 2015 report from the *Journal of the American Academy of Psychiatry and Law* noted: “There appears to be no evidence to support the fear that assisted suicide [MAID] disproportionately affects vulnerable populations.”<sup>156</sup> However, the authors do note that there is no conclusive evidence about the impact of legalized assisted suicide on vulnerable patients and that such would require more complex studies. As Art Caplan, a renowned bioethicist who originally opposed aid in dying laws, has said:

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Kate M. Tredgett, Pain Control in Palliative Care, *Medicine*, Volume 50, Issue 12, December 2022, Pages 755–761, available at [https://medicinejournal.co.uk/issue/S1357-3039\(22\)X0012-1](https://medicinejournal.co.uk/issue/S1357-3039(22)X0012-1).

<sup>153</sup> Alexander K. Smith, et al., The Epidemiology of Pain During the Last 2 Years of Life, *The Annals of Internal Medicine* (2010), available at <http://annals.org/aim/article/746344/epidemiology-pain-during-last-2-years-life>.

<sup>154</sup> Nathaniel P. Katz, et al., Impact of breakthrough pain on community-dwelling cancer patients: results from the National Breakthrough Pain Study. *Postgraduate Medicine*, 129(1), 32–39 (2016), available at <https://pubmed.ncbi.nlm.nih.gov/27846789/>.

<sup>155</sup> *Id.*

<sup>156</sup> Abilash A. Gopal, Physician-Assisted Suicide: Considering the Evidence, Existential Distress, and an Emerging Role for Psychiatry. *Journal of the American Academy of Psychiatry and the Law*. 2015. Vol 43(2): 183–190 (2015), available at <http://jaapl.org/content/43/2/183>.

“Since the time I first opposed physician aid in dying [PAD] more than two decades ago I have closely followed the empirical evidence gathered in Oregon and later in the state of Washington about Death with Dignity legislation. I found no cause for my concerns—none. The police, government officials, families of those who have died, and the citizenry find no cause or basis for changing the laws due to abuse or misapplication. In fact, most critics of PAD do not live in or have first-hand experience of how the legislation has played out. Nor do they present convincing evidence sufficient to undermine official reports and the satisfaction with the way the legislation is working in either state.”<sup>157</sup>

The current Oregon model, which laid the foundation for all the other MAID laws, requires a lengthy multistep process.<sup>158</sup> It often takes the dying person several weeks to several months to complete the steps, and many die before doing so. Unfortunately, according to testimony heard by the Task Force, many patients suffer needlessly while navigating the process. Challenges include:

- Late enrollment in hospice. Many terminally ill patients do not receive their six-month prognosis until they have far less than six months to live. One study of patients with advanced cancer found that predictions were accurate in only 41% of cases.<sup>159</sup>
- Locating supportive providers. MAID laws allow health care systems and doctors to “opt-out” of providing this care. This restriction means that any patient whose doctor works at an institution that opts out will have to reestablish care in a supportive health system and find two supportive doctors before they can begin the process of qualifying for MAID.
- Providers who do not support MAID. Some doctors who object to the practice believe they should not have to transfer a patient’s medical records.

## MAID Law Amendments

After implementing their bills and reviewing their data, five state legislatures (Oregon, Vermont, California, Washington, and Hawaii) amended their laws and streamlined the process, while maintaining strict eligibility criteria. In addition, New Mexico passed a more balanced law from the outset. Some of the improvements made include:

- Waiting Period. The trend is to reduce or eliminate the waiting period. In 2019, the Oregon Legislature amended their law to allow doctors to waive the 15-day waiting period between the two required oral requests and the 48-hour waiting period if they determined and attested that the patient was likely to die while waiting.<sup>160</sup> After the amendment, 21% of

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<sup>157</sup> Art Caplan on New York’s Medical Aid in Dying Law, available at [https://compassionandchoices.sitefinity.cloud/docs/default-sonource/60-reasons-cc\\_60reasons\\_onesheet\\_artcaplan\\_01.pdf?sfvrsn=ed04cfe7\\_1](https://compassionandchoices.sitefinity.cloud/docs/default-sonource/60-reasons-cc_60reasons_onesheet_artcaplan_01.pdf?sfvrsn=ed04cfe7_1).

<sup>158</sup> See Oregon Death with Dignity Act.

<sup>159</sup> Robert Gramling, et al, Palliative Care Clinician Overestimation of Survival in Advanced Cancer: Disparities and Association with End-of-Life Care, *Journal of Pain and Symptom Management*, 58(4), e19-e20 (2019), available at <https://www.sciencedirect.com/science/article/abs/pii/S0885392418310571>.

<sup>160</sup> Senate Bill 579, 80th Oregon Legislative Assembly—2019 Regular Session, available at <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/SB579>.

patients required a physician exemption to make it through the process.<sup>161</sup> In 2021, the California legislature amended the California End of Life Option Act to decrease the waiting period between the two oral requests from 15 days to 48 hours. Additionally, the request for the final attestation has been eliminated. The original law required that the form be filled out and executed by the qualified individual within 48 hours prior to the qualified individual choosing to self-administer the drug.<sup>162</sup>

In 2021, the Vermont legislature amended the Vermont Patient Choice and Control at the End of Life Act to remove a waiting period at the end of the request process.<sup>163</sup> The New Mexico law requires just one written request, so there is no waiting period related to requests. However, the law requires a 48-hour waiting period between receiving and filling a prescription for MAID medication but allows a qualified clinician to waive the waiting period if a person is going to imminently die.<sup>164</sup>

In 2023, the Washington legislature amended the Washington Death with Dignity Act (DWDA) to reduce the waiting period between a patient's first and second oral request for the medication from 15 to 7 days.<sup>165</sup> In 2023, the Hawaii legislature amended the Our Choice, Our Care Act to reduce the mandatory waiting period between the two oral requests required for a qualified patient to obtain a prescription for medication from 20 days to five days. It also allows providers to waive the mandatory minimum waiting period for terminally ill qualified patients who are not expected to survive the five-day waiting period.<sup>166</sup>

- Qualified Prescribing or Consulting Health Care Providers. New Mexico also expanded its definition of qualified provider to include advanced practice registered nurses (APRNs) and physician assistants (PAs), who may act as either the prescribing or consulting health care provider so long as a physician acts as the other provider.<sup>167</sup> New Mexico does not require confirmation of eligibility for MAID by a consulting provider if the person is enrolled in a Medicare-certified hospice program.<sup>168</sup> In 2023, Washington

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<sup>161</sup> Oregon Death with Dignity Act, Annual Report (2020), available at <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year23.pdf>; see also Oregon Death with Dignity Act. Annual Report, (2021), available at <https://www.oregon.gov/oha/ph/providerpartnerresources/evaluationresearch/deathwithdignityact/pages/ar-index.aspx>.

<sup>162</sup> California SB 380 End of Life Option Act. Enacted October 2021, available at [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB380](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB380).

<sup>163</sup> Vermont S 74 Enacted in 2021, available at [https://www.patientchoices.org/uploads/6/1/7/1/61710711/s.74\\_as\\_of\\_2-22-21.pdf](https://www.patientchoices.org/uploads/6/1/7/1/61710711/s.74_as_of_2-22-21.pdf).

<sup>164</sup> The Elizabeth Whitefield End-of-Life Options Act (2021), available at <https://www.nmhealth.org/publication/view/general/8382/>.

<sup>165</sup> Washington State Legislature, Engrossed Substitute Senate Bill 5179 (April 6, 2023), available at <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5179-S.SL.pdf?q=20230510092955>.

<sup>166</sup> Hawaii House Bill 650 (signed June 1, 2023), available at [https://www.capitol.hawaii.gov/session/measure\\_indiv.aspx?billtype=HB&billnumber=650&year=2023](https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=650&year=2023).

<sup>167</sup> The Elizabeth Whitefield End-of-Life Options Act (2021), available at <https://www.nmhealth.org/publication/view/general/8382/>.

<sup>168</sup> *Id.*

authorized APRNs and PAs to act as the attending or consulting medical provider for individuals who want to access the DWDA.<sup>169</sup> A physician would still have to be one of the other providers in either case. In 2023, Hawaii authorized qualified APRNs to be attending health care providers.<sup>170</sup>

- **Mental Health Capacity.** Most MAID jurisdictions require a mandatory mental health evaluation by a psychiatrist or psychologist if either provider expresses concerns about capacity. In Vermont, New Jersey, and Maine, clinical social workers are also able to make the assessment; and in New Mexico, master social workers, psychiatric nurse practitioners, and professional clinical mental health counselors can make the assessment. In 2023, Hawaii authorized licensed APRNs and clinical nurse specialists with psychiatric or mental health training and licensed marriage and family therapists to provide mental health counseling to qualified patients to determine if they can make an informed decision before they get a prescription.<sup>171</sup>

## Impact on End-of-Life Experience

In one study, Colorado physicians who have supported patients through the MAID process largely reported the experience to be “emotionally fulfilling and professionally rewarding,” despite barriers to offering the end-of-life care option.<sup>172</sup> The finding was confirmed by medical professionals who testified before the Task Force. Several studies concluded that MAID contributes to improvements in other end-of-life care options.<sup>173</sup> The findings from the studies were likewise confirmed by statements from people who testified before the Task Force. An Oregon survey showed that 30% of responding physicians had increased the number of referrals they provided for hospice care, and 76% made efforts to improve their knowledge of pain management.<sup>174</sup> A 2015 Journal of Palliative Medicine study found that the Oregon DWDA may have contributed to more open conversations between doctors and patients about end-of-life care options, which led to more appropriate hospice use options.<sup>175</sup> Hospice programs across Oregon reported an increase in referrals following passage of the Oregon DWDA.<sup>176</sup> More than 20 years

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<sup>169</sup> Washington State Legislature, Engrossed Substitute Senate Bill 5179 (April 6, 2023), available at <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5179-S.SL.pdf?q=20230510092955>.

<sup>170</sup> Hawaii House Bill 650 (signed June 1, 2023), available at [https://www.capitol.hawaii.gov/session/measure\\_indiv.aspx?billtype=HB&billnumber=650&year=2023](https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=650&year=2023).

<sup>171</sup> See Appendix IV to this report, Exhibit A, State-by-State Comparison Chart.

<sup>172</sup> Eric G. Campbell, et al., Physicians' Attitudes and Experiences with Medical Aid in Dying in Colorado: a "Hidden Population" Survey, *Journal of General Internal Medicine* 37(13):3310–3317 (October 2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8751472>.

<sup>173</sup> Melinda A. Lee, MD & Susan W. Tolle, MD., Oregon's Assisted Suicide Vote: The Silver Lining. *Annals of Internal Medicine*, M.A. Lee, S.W. Tolle, (1996), available at [https://www.acpjournals.org/doi/10.7326/0003-4819-124-2-199601150-00014?url\\_ver=Z39.88-2003&rft\\_id=ori:rid:crossref.org&rft\\_dat=cr\\_pub%20%20pubmed](https://www.acpjournals.org/doi/10.7326/0003-4819-124-2-199601150-00014?url_ver=Z39.88-2003&rft_id=ori:rid:crossref.org&rft_dat=cr_pub%20%20pubmed).

<sup>174</sup> Linda Ganzini, et al., Oregon Physicians' Attitudes About and Experiences with End-of-Life Care Since Passage of the Oregon Death with Dignity Act, *Journal of the American Medical Association* (2001), available at <https://pubmed.ncbi.nlm.nih.gov/11343484/>.

<sup>175</sup> Shi-Yi Wang, et al., Geographic Variation of Hospice Use Patterns at the End of Life. *Journal of Palliative Medicine*, 18(9), 771–780 (2015), available at <https://doi.org/10.1089/jpm.2014.0425>.

<sup>176</sup> *Id.*



later, about 90% of those who used MAID were receiving hospice services at the time of their death.<sup>177</sup> Data show that the majority of eligible patients involve their family in their decision-making process.<sup>178</sup> Most patients have someone present at some point during their planned death, which sometimes may help to mitigate families' grieving, according to Oregon data.<sup>179</sup>

## V. INEQUITIES IN ACCESS

### Structural Inequities

It is well documented that there are persistent structural inequities in the U.S. health care system based on race, ethnicity, gender, age, disability, and other categories. Importantly, structural racism, ageism, ableism, and a continuum of inequities have a significant influence on the way people live and their health outcomes. These conditions outside the health sector, such as income level; neighborhood or community resources; access to water, housing, food, and transportation; educational attainment and health literacy; language; employment status; and immigration status, are known as social determinants of health. Social determinants of health have an important relationship to health and health outcomes. For example, low income or unemployment; living in an under-resourced community with limited access to nutritious food or clean water; unstable housing or homelessness; low educational attainment and health literacy; incarceration or being detained in jails on account of immigration status; or residing in a highly-regulated and restrictive institutional setting increase risks of marginalization and structural vulnerability and significantly constrain the choices people make in pursuit of a meaningful life. In some cases, such structural and systemic conditions and power inequities may contribute to a coercive environment for persons who are so marginalized and further constrain their freedom in grappling with choices and decisions about end-of-life care.

There are also very serious concerns that structural inequities and disparities will be perpetuated and will significantly affect how broadly and equitably people will be able to access MAID if the law is enacted here. Several groups conveyed to the Task Force their concerns about risks MAID would pose to persons of color; persons with disabilities; older adults; persons residing in institutional settings, including carceral facilities, nursing homes, and other long-term care institutions; and immigrants being detained in New York jails or prisons under contract with U.S. Immigration and Customs Enforcement.

One of the primary concerns considered by the Task Force was the impact of structural racism on health care. The Centers for Disease Control and Prevention has predicted that by 2030, the U.S. population will age considerably and become more racially and ethnically diverse.<sup>180</sup> Further, New York has the second largest Black population in the country.<sup>181</sup> Income, wealth, and education

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<sup>177</sup> *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Centers for Disease Control and Prevention, *Minority Health*, available at <https://www.cdc.gov/minorityhealth/>.

<sup>181</sup> NYSBA Task Force on Racism, Social Equity, and the Law (2023).

affect health care outcomes;<sup>182</sup> and a lack of access to these benefits can harm the minority population's health care.<sup>183</sup> To ensure equal access to MAID, policymakers must address racial disparities and inequities.<sup>184</sup> In MAID jurisdictions such as Oregon and Washington, data indicate that 95.6% of non-Hispanic whites with higher education and higher income levels are more likely to access MAID than Blacks and Hispanics.<sup>185</sup> Low minority utilization of palliative care and MAID has led to the mistaken assumptions that these populations have no desire to take advantage of such medical options. The reality is that minority populations are severely marginalized by socioeconomic and other barriers.

“Medical deserts” constitute structural barriers to quality end-of-life. Black people and Hispanics are more likely to live in under-resourced neighborhoods.<sup>186</sup> Minorities with lower incomes are more likely to be covered by Medicaid or be uninsured and to lack resources needed to cover high out-of-pocket costs. Since Medicaid has a lower reimbursement rate than private health insurance, minority neighborhoods are less appealing to health care institutions, contributing to the shortage of services in minority neighborhoods.<sup>187</sup> Nursing homes and hospitals serving minority communities are at greater risk of closure and reductions in services compared to those serving white communities.<sup>188</sup> Additionally, minority neighborhoods are less likely to have adequate supplies of opioids.<sup>189</sup> False beliefs concerning the biological differences between Blacks and whites may inform medical judgments. Black people are less satisfied with the quality of end-of-life care and pain management.<sup>190</sup>

“People of color are experiencing the dying process differently, in part because of their lack of access and usage of quality of end-of-life care. Informing, educating, and listening to people of color to ensure their decisions fit their priorities and values is critical, particularly during the end-of-life process. Inclusive programs and materials can only help to empower all,”<sup>191</sup> according to an organization devoted to expanding end-of-life options. Aside from provider biases and stereotypes, cultural differences contribute to barriers in communication between patients and

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<sup>182</sup> Braveman P., Gottlieb L. The social determinants of health: it's time to consider the causes of the causes. *Public Health Rep.* 2014;129 Suppl 2 (Suppl 2):19–31. doi:10.1177/00333549141291S206

<sup>183</sup> Healthy People 2030, Social Determinants of Health, available at <https://health.gov/healthypeople/priority-areas/social-determinants-health>.

<sup>184</sup> Gardner, D. S., Doherty, M., Bates, G., Koplow, A., & Johnson, S. (2018). Racial and Ethnic Disparities in Palliative Care: A Systematic Scoping Review. *Families in Society*, 99(4), 301–316, available at <https://doi.org/10.1177/1044389418809083>.

<sup>185</sup> Aggregating 23 years of data on MAID in the United States, <https://agsjournals.onlinelibrary.wiley.com/doi/full/10.1111/jgs.17925#:~:text=An%20estimated%2074%20million%20people,is%20on%20the%20legislative%20agenda>.

<sup>186</sup> American Psychological Association, Ethnic and Racial Minorities & Socioeconomic Status <https://www.apa.org/pi/ses/resources/publications/minorities>.

<sup>187</sup> Gaskin, Darrell J et al. “Residential segregation and the availability of primary care physicians.” *Health services research* vol. 47,6 (2012): 2353–76. doi:10.1111/j.1475-6773.2012.01417.x <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3416972/>.

<sup>188</sup> *Id.*

<sup>189</sup> McCleskey, Sara G, and Cindy L Cain. “Improving End-of-Life Care for Diverse Populations: Communication, Competency, and System Supports.” *The American journal of hospice & palliative care* vol. 36,6 (2019): 453–459. doi:10.1177/1049909119827933

<sup>190</sup> Kelly M. Hoffman et al., Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between blacks and whites, available at <https://www.pnas.org/doi/10.1073/pnas.1516047113>.

<sup>191</sup> <https://www.compassionandchoices.org/news/people-of-color-need-better-access-to-all-end-of-life-care-options>.

providers. Communication differs by race, which influences the extent to which providers listen and share information with patients. Thus, discussions between patient and provider may be less likely to result in care that reflects preferences of minority patients. Recommendations to address such concerns include patient educational programs to increase knowledge on how to access health care and participate in treatment decisions; cross-cultural training for current and future health care professionals; subsidies that compensate hospitals and medical providers in minority communities for low Medicaid reimbursement rates; and direct governmental investment in adequate health care institutions in minority communities. Some of these solutions are addressed in Section VI, *infra*, on Coverage and Training.

## **Inequities in the LGBTQ Community**

The Task Force also heard testimony about disparities in health care experienced by the LGBTQ community.<sup>192</sup> Structural barriers include stigma and discrimination, health care access and insurance, economic inequities, mental health challenges, violence, and victimization, limited cultural competence in health care, barriers to reproductive health services, and substance use and HIV risk. Certain LGBTQ populations face higher rates of HIV due to several factors, including stigma, lack of comprehensive sex education, and barriers to health care access.<sup>193</sup>

Although new diagnoses of HIV in New York have decreased by 46% from 2011 to 2021, of the 103,900 individuals living with diagnosed HIV, 75% were at least 40 years of age and 57% were 50 years or older.<sup>194</sup> This population includes long-term survivors of HIV/AIDS, or individuals who were diagnosed prior to the advent of antiretroviral therapy in 1996. Many of these individuals are likely to experience consequences from untreated HIV or side effects from other comorbidities of the disease, some of which include cardiovascular disease, cancer, and osteoporosis.<sup>195</sup>

There are many reasons for the disparities. First, negative attitudes about LGBTQ individuals may lead to social isolation and discrimination.<sup>196</sup> This discourages individuals from seeking health care or disclosing their sexual orientation or gender identity to providers.<sup>197</sup> Laws and policies that discriminate against LGBTQ individuals can limit access to health care, employment, and housing,

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<sup>192</sup> See generally Gary L. Stein et al., Project Respect: experiences of seriously ill LGBTQ+ patients and partners with their health care providers, 1 HEALTH AFFAIRS SCHOLAR 4 (Oct. 2023).

<sup>193</sup> See *Braidwood Mgmt. v. Becerra*, No. 4:20-cv-00283-O, 2023 WL 2703229 (N.D. Tex. Mar. 30, 2023) (finding that mandating the coverage of medication taken to prevent the spreading of HIV, pre-exposure prophylaxis (PrEP), violates the Religious Freedom Restoration Act).

<sup>194</sup> New York State HIV/AIDS Annual Surveillance Report 2021, 2022.

[https://www.health.ny.gov/diseases/aids/general/statistics/annual/2021/2021\\_annual\\_surveillance\\_report.pdf](https://www.health.ny.gov/diseases/aids/general/statistics/annual/2021/2021_annual_surveillance_report.pdf)

<sup>195</sup> www.gmhc.org. “Older Adults and Long-Term Survivors of HIV/AIDS - GMHC.” GMHC, August 11, 2020.

<sup>196</sup> See e.g. *303 Creative LLC v. Elenis*, 600 U.S. 570, 637 (2023) (Sotomayor, J. dissenting) (“By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service.”).

<sup>197</sup> *Id.* (“Ask any LGBT person, and you will learn just how often they are forced to navigate life in this way. They must ask themselves: If I reveal my identity to this co-worker, or to this shopkeeper, will they treat me the same way? If I hold the hand of my partner in this setting, will someone stare at me, harass me, or even hurt me? It is an awful way to live.”)

thus contributing to health disparities. Second, some health care systems lack policies that address the needs of LGBTQ individuals, leading to inadequate and culturally insensitive care. Transgender individuals face challenges in accessing gender-affirming care due to bans on that care<sup>198</sup> or insurance exclusions.

Third, LGBTQ individuals experience employment discrimination, leading to higher unemployment and lower income.<sup>199</sup> This results in reduced access to quality health care. Likewise, discrimination in housing leads to homelessness or unstable living conditions. Fourth, LGBTQ individuals experience higher rates of depression, anxiety, and suicide.<sup>200</sup> LGBTQ individuals are also more than twice as likely to have a mental health disorder in their lifetime.<sup>201</sup> Fifth, LGBTQ individuals face higher rates of violence.<sup>202</sup> This has profound effects on physical and mental health. Sixth, many providers lack training in LGBTQ cultural competence. LGBTQ individuals frequently avoid seeking health care due to fear of discrimination<sup>203</sup> or lack of understanding from providers. Seventh, LGBTQ individuals may face barriers to reproductive health services, including family planning, fertility treatments, and adoption services.<sup>204</sup>

Finally, LGBTQ individuals are at a higher risk of substance use. Certain LGBTQ populations face higher rates of HIV due to several factors, including stigma, lack of comprehensive sex education, and barriers to health care access. Individuals living with HIV must receive lifelong treatment to suppress the virus. For an LGBTQ person with a chronic condition like HIV, every health care visit presents a risk of discrimination. Addressing these structural barriers will require comprehensive efforts, including policy changes, cultural competency training for health care providers, stronger antidiscrimination laws, and more societal initiatives to reduce stigma and promote inclusivity.

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<sup>198</sup> See *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (upholding bans on gender-affirming care for transgender youth in Tennessee and Kentucky).

<sup>199</sup> But see *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (finding that Title VII’s sex discrimination provision also prohibits an employer from discriminating against an individual based on sexual orientation or transgender status).

<sup>200</sup> See *303 Creative LLC*, 600 US at 637 (Sotomayor, J. dissenting) (“The truth is, these affronts and denials are intensely human and personal. Sometimes they may harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity. . . . [I]t reminds LGBT people of a painful feeling that they know all too well: There are some public places where they can be themselves, and some where they cannot” [citations omitted]).

<sup>201</sup> Am. Psychiatric Assoc., *Mental Health Disparities: LGBTQ* (2017), available at

<https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-LGBTQ.pdf>.

<sup>202</sup> *Id.* at 617 (“Rates of violent victimization are still significantly higher for LGBT people, with transgender persons particularly vulnerable to attack” [citation omitted]).

<sup>203</sup> See *Neese v. Becerra*, 640 F Supp 3d 668, 684 (N.D. Tex 2022) (setting aside an official U.S. Department of Health and Human Services interpretation of section 1557 of the Affordable Care Act that covered discrimination based on sexual orientation or gender identity).

<sup>204</sup> See *Matter of A.B. v. M.S.*, 77 Misc 3d 1138 (Ulster Co. Family Ct., 2022) (“The [Child Parent Security] Act was born, at least in part, from the acknowledgment that it was time for the laws of this State to provide ‘equality for same-sex parents [and to provide] the opportunity for their children to have the love and support of two committed parents’ regardless of the fact that ‘only one can be biologically related to the child,’” quoting *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 NY3d 1 (2016)).

## **VI. COMMENTS AND RECOMMENDATIONS: SAFEGUARDS FOR SPECIAL POPULATIONS, FUNDING, INSURANCE, AND TRAINING**

### **Protecting Special Populations**

While structural and systemic changes are needed to address racial, gender, and other disparities, we call for more specificity in the New York MAID Bill through regulations and implementation oversight when enacted and in the form of additional protections for certain special populations, as follows:

- For persons with intellectual or mental health disabilities who request MAID and who are eligible for representation by the Mental Hygiene Legal Service (MHLS), we recommend that adequate advance notification be given to MHLS which can serve an external oversight role similar to the role it already serves under state law for decisions to withhold or withdraw life-sustaining treatment from people with intellectual disabilities. Also, if the person seeking MAID is eligible for services from the New York State Office for People with Developmental Disabilities or from the New York Office of Mental Health, similar notification to that given to MHLS should also be given to these agencies.
- For persons residing in nursing homes or other residential or long-term care institutions who request MAID, we recommend that adequate advance notification be given to the NYS Office of the Long-Term Care Ombudsman which can serve an external oversight role similar to the role it plays now. We also recommend that nursing home ethics committees be required to review eligible residents' requests for MAID to ensure that the required legal process has been followed.
- For persons in carceral settings who request MAID, due to the structural coercion inherent in such carceral settings, we recommend that adequate advance notification be given to New York State Prisoners' Legal Services which can serve an external oversight role similar to the role it plays now; and further, that such persons in carceral settings who meet MAID eligibility requirements and request MAID be deemed eligible for early parole so that they may have immediate access to counseling, hospice, and palliative care, or MAID.
- For noncitizens held in state jails or prisons under detainer agreements with Immigration and Custom Enforcement (ICE) and who are eligible for MAID, we recommend that adequate advance notification of any request by a noncitizen be given to New York State Prisoners' Legal Services which can serve an external oversight role similar to the role it already serves under state law; and NYC Health and Hospitals/Correctional Health Services.

### **Funding and Insurance**

Though no other state that passed a MAID or Death with Dignity law did so with an appropriation attached, nor is any state currently considering new appropriations measures to support MAID; this report should not be taken to suggest New York must do differently. The Legislature should

recognize that many other states eventually did appropriate monies to support the provision of MAID and other aspects of end-of-life care or altered state law concerning health insurance to achieve a similar goal. Ensuring insurance coverage for MAID's costs and other end-of-life care is within the State's powers. New York should follow the successful examples set by Oregon, Hawai'i, and California, each an example of a state that continues to devote public funds to make MAID an accessible and high-quality aspect of end-of-life care. A failure to act on MAID's affordability, care that could be made affordable if covered by insurance, will limit MAID to only that portion of the population with the means to pay out of pocket, will reduce the number and quality of healthcare providers offering MAID, and will exacerbate the inequities described in this report.<sup>205</sup> The Task Force also heard from many healthcare professionals in states with MAID who testified that the industry needs additional end-of-life care training opportunities. The NYS Legislature has a variety of approaches to consider; any combination thereof would allow it to head off quality, access, or affordability issues experienced by patients in other states.

States have the authority to regulate health insurers, referred to as payors in the healthcare industry, but they have less authority to regulate the products those payors offer, that is, the content of the plans we buy with our premiums; however, New York should utilize the powers it does have to ensure that if MAID is made law, that it is accessible to as much of the population as possible. A state can set the terms for a payor to do business in that state, including the shape of their provider network. New York does this via an interplay of the Insurance and Public Health Laws and various state agencies' regulations. Most payors offer multiple product types. A state can regulate certain types of products, in full or to some extent. Different product types fall under different statutes, state or federal.

Despite a complex landscape of applicable federal and state laws, the Legislature can require products to include coverage for MAID and can require payors include providers that offer MAID in their networks. The Task Force heard testimony stating that the cost of accessing care under a state-authorized MAID law is at least \$2,000 per patient. A recent study conducted by researchers at Rutgers University found that “[o]ne major barrier to many would-be users is” paying for MAID's cost.<sup>206</sup> The New York State Bar Association's prior studies of healthcare in New York have shown how cost and limited availability of care, particularly end-of-life care, impact patients and their family. We observed these phenomena at play time and time again during the COVID-19 pandemic, and how the underutilization of hospice and palliative care led to patients and their loved ones experiencing worse mental health, less well-controlled symptoms, and lower quality of life near death.

The current state of end-of-life care options in New York, including palliative care and hospice, is an underutilized foundational spectrum of care. Read together, the Palliative Care Information Act

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<sup>205</sup> Currently, people with low incomes – who historically are disproportionately people of color – may be especially affected by even this relatively minimal cost required to access medical aid in dying, which may put the option out of reach. (See, e.g., Department of Health and Human Services, Office of Disease Prevention and Health Promotion. Access to health services. Washington (DC): HHS; 2021 [cited 2021 Dec 10]. Available from: <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/access-to-health>; Racial and Ethnic Disparities in Medicaid: An Annotated Bibliography; Medicaid and CHIP Payment and Access Commission. Available from: <https://www.macpac.gov/publication/racial-and-ethnic-disparities-in-medicaid-an-annotated-bibliography/>).

<sup>206</sup> <https://www.rutgers.edu/news/medical-aid-dying-maid-mostly-used-well-educated-white-patients-cancer>.

(“PCIA”) and Palliative Care Access Act (“PCAA”) patients in a variety of settings have a right to receive information and counseling regarding palliative care, including associated pain management, and access to appropriate palliative care consultations and services.<sup>207</sup> Though patients have a right to this information, there has been limited outreach and training by the NYS Department of Health and little to no public funding to allow healthcare providers to gain facility with these difficult conversations. The Task Force heard testimony that the frequency and quality of compliance with the PCIA and PCAA varies. Experienced providers acquired their skills via continuing medical education, time, and sometimes difficult bedside experiences. It is fair to expect professionals to learn new skills during their time in practice. However, the Workgroup also heard that MAID is a “specialty in its infancy” that can take decades to master when deployed within a comprehensive care continuum, and this suggests that the knowledge base to implement MAID needs further development. The Task Force heard testimony from several guests that if the Legislature creates a new end-of-life care option, MAID, they should support grant based training to ensure patients receive care from providers with additional MAID-specific training.<sup>208</sup> Alternatively, physician-testifiers suggested that instead of requiring palliative or hospice counseling, the MAID process could require a formal consult with a palliative care physician. That change could be a procedural burden, but it would connect patients with existing information sources they need when deciding about MAID. Though the Workgroup heard a great deal of reassuring testimony about the ability of physicians to learn how to administer MAID on their own and the availability of grand rounds and other continuing medical education opportunities available, the Workgroup also heard from many other members of the allied health community who felt that the focus on physicians was too narrow.<sup>209</sup> A publicly supported generalist training program would be beneficial. Various academic institutions, private companies, and regional coalitions already host such programs and could be grown via state funds to meet allied health’s needs. Non-provider professionals help patients and their family navigate the religious, spiritual, and emotional complexities of dying. They are often the ones who doggedly connects the dots in the healthcare continuum for their charges. These professional communities should also be considered for inclusion in any future appropriations or payment streams the Legislature might create, including requirements that payors pay for services such titles offer.

Alternatively, NYSDOH has a long history of bringing healthcare providers together to share materials, best practices, and policies. This repository of information and center for dialogue could spawn the kinds of collaboration and development described above with minimal investment by the state. NYSDOH’s Center for Hospice and Palliative Care Access and Quality could lead the way in creating this nexus.<sup>210</sup> COVID demonstrated the efficiencies and quick gains that can be

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<sup>207</sup> The PCIA, Chapter 331 of the Laws of 2010, is codified as PHL § 2997-c. The PCAA is PHL § 2997-d.

<sup>208</sup> Physicians noted that the connection between a patient and an appropriately experienced physician often came too late in their dying process, so MAID might be the only viable option left to a patient who, after learning more, wished palliative care of hospice was something they knew about sooner.

<sup>209</sup> Maria Buchbinder et al., Health Care Providers Experiences with Implementing Medical Aid-in-Dying in Vermont: A Qualitative Study, *J of General Internal Medicine*, Vol. 34, No. 4, 636–644 (2019), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6445925/> (at 641 discuss the “critical, yet under-recognized role” of nurses and social workers in supporting physicians and patients); *see also* Jonathan Singer, et al., Assessment of Oncology Advanced Practice Professional Willingness to Participate in Medical Aid in Dying, *JAMA Network Open*, Vol. 5, No. 10, 1–11 (2022) available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2797711>. (at 7 reports study finding that fewer than a third of advance practice professionals (physician assistants and nurse practitioners) “feel knowledgeable or very knowledgeable” about MAID).

<sup>210</sup> [NY State Senate Bill 2023-S4858 \(nysenate.gov\)](https://www.nysenate.gov/legislation/bills/2023/S4858). Vetoed, but established by NYSDOH on its own accord.

made when regional providers are brought together to share and problem-solve alongside NYSDOH. The Department was at its best during the pandemic when it was a facilitator first, a regulator when needed, and a partner filling roles only it could.

Even in an educated, high-quality care ecosystem, inadequate health insurance coverage is one of the most significant barriers to health care access, and insufficient coverage fuels disparities in health.<sup>211</sup> Currently, coverage for end-of-life care is a minefield of policies and exemptions that the Legislature should rectify. Some of the payment code descriptions used by existing New York payors that cover palliative care or hospice are broad enough to accommodate MAID, or parts of the process included in the MAID bill. For federally underwritten programs, no state Medicaid program offers a comprehensive or “stand-alone” palliative care benefit.<sup>212</sup>

Gaps in Medicare and Medicaid coverage of end-of-life care, or more specifically MAID, will impact the majority of patients in New York because those funding streams provide the majority of all healthcare dollars spent in the country. The 1997 Assisted Suicide Funding Restriction Act (ASFRA), a federal law, bars the use of federal funds for medical aid in dying. This restriction means that people solely reliant on government healthcare programs do not receive the same options for medical care as those who can afford private supplemental medical insurance or pay for services directly, including MAID and MAID-related services. Suppose a patient wishes to access Since almost all healthcare providers in the country participate in a federally supported payment stream, a patient receiving care in a facility that receives federal funds must find a supportive provider outside the federal healthcare network or an alternative payment method for all MAID-related services and medication. CMS has recognized but not yet fully embraced wider choice in end-of-life care for enrollees with its MCCM model.<sup>213</sup>

Data from other states indicate that the legalization of MAID, if palliative care and hospice are also covered by insurance along with MAID, does not decrease the use of palliative care and hospice. Instead, most states observed an increase in demand for all forms of end-of-life care.<sup>214</sup> Models exist for New York to follow if it wishes to have as many products as possible cover hospice, palliative care, and MAID to the maximum extent possible. In **California**, care costs related to medical aid in dying are directly accounted for in the state budget and paid through the state’s Medicaid program, called Medi-cal. This structure avoids the prohibition on the use of federal funds for MAID. In **Hawai’i**, costs are identified through Medicaid billing codes; the state’s fiscal agent also reviews and identifies claims. None of the claims are processed through state health plans. Instead, costs are carved out from the state health plan coverage and covered and reimbursed by the state’s fee-for-service program. Because all costs related to MAID are covered by state funds only, they are not required to be included in reporting to CMS, and no federal match dollars are claimed. In **Oregon**, the State Health Authority issues a “prioritized list” of diagnosis and treatment pairings used to determine if a diagnosis or service is considered to be part of the

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<sup>211</sup> [Access to Health Services - Healthy People 2030 | health.gov Limited Access: Poverty and Barriers to Accessible Health Care - National Health Council.](#)

<sup>212</sup> Medicare Part A will cover some inpatient palliative care but limited home care (that is covered by Part C, aka Medicare Advantage). Part B covers outpatient services (small premium), and D would cover some medications.

<sup>213</sup> [Medicare Care Choices Model | CMS Medicare Care Choices Model Improved End-Of-Life Care, Lowered Medicare Expenditures, And Increased Hospice Use | Health Affairs.](#)

<sup>214</sup> [AID-brief-may2016.pdf \(ucla.edu\).](#)



state Medicaid benefit package. Palliative care is always on the prioritized list. To ensure coverage, the State Health Authority includes MAID under palliative care. Given these successful examples from other states, New York state could easily develop its own model. The Legislature has already passed bills that could be used as a template for a MAID coverage law.<sup>215</sup>

If the Legislature does not mandate MAID to be covered, then it could set up grants to study it and define a standard of care based on New York’s MAID process, thereafter leaving it up to the private and professional organizations, and the civil liability system, to self-regulate. These grants would have a triple aim of improving the overall administration quality of end-of-life care, reducing the risk of a meritless lawsuit against a MAID provider and increasing the chances MAID would ultimately be covered regardless of New York law. Where not mandated or defined as “effective and proven” and not “unnecessary or experimental” (i.e., where MAID is not a standard of care), payors have valid grounds to resist paying for it. Where MAID is established in professional guidelines, plus research, as meeting those standards, it is typically covered as at least a permissible off-label use of the component drugs. The drugs used in MAID, when used in the MAID combination, arguably are an impermissible off-label use of those drugs; however, the grants described above could prevent this outcome. Though liability protection for prescribers and process participants could help address this concern, funding research supporting MAID could also help cut off the risk of an off-label use objection or liability.

To ensure equitable access to end-of-life care states that authorize MAID, a group of states that New York might enter, ought to draw on its past legislation, regulatory and payment models, and approaches created in other states to ensure citizens have equal access to comprehensive end-of-life care. For some, their needs will include MAID. The Workgroup recognizes that the current bill does not and is unlikely to be amended to address funding or the other issues outlined in this section. Adding funding or a fiscal impact to New York’s Medical Aid in Dying Act would make the bill very likely not pass. The Workgroup heard from several guests who wholeheartedly believe that every year that New York’s MAID bill does not pass, more New Yorkers experience unnecessary suffering at the end of life. No New Yorker should suffer through their final days, and perhaps MAID is a way to bring peace and control to that time. While palliative care and hospice certainly provide that peace and control, if New York state does not address issues of quality, access, and affordability at some point it will leave MAID a privileged form of care available to few.

## **Training**

If MAID is enacted in New York, health care professionals providing MAID will need new training opportunities. As explored in Section III, *supra*, the end-of-life spectrum of care is underutilized in New York. Since 2011, the Palliative Care Information Act (PCIA) has required physicians and nurse practitioners to offer terminally ill patients with information and counseling concerning palliative care and end-of-life care options. (Palliative care can be accessed by patients with any serious illness, regardless of prognosis.) The PCIA was expanded later in 2011 by the Palliative

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<sup>215</sup> [NY State Senate Bill 2023-S1196A \(nysenate.gov\)](#). On December 12, 2023, the Legislature delivered A1637A/S1196A to Governor Hochul, who will hopefully sign it into law. That bill requires health insurance policies and Medicaid to cover biomarker testing under certain circumstances; it could be repurposed to meet New Yorkers’ needs for expanded end-of-life care coverage.

Care Access Act (PCAA). Read together, these laws apply to a variety of facilities. Patients in many facilities or in home care are not receiving information and counseling regarding palliative care due to the limited outreach and training by the State Department of Health and the lack of funding.

The End-of-Life Working Group heard testimony that compliance with the PCIA and PCAA varies in frequency and quality and that providers acquired their skills via continuing medical education, time, and bedside experiences. Further, witnesses observed that MAID is a “specialty in its infancy” that can take years to master. Several guests observed that, if MAID is legalized in New York, providers should have additional MAID training. Small independent hospices may not be able to accommodate these training costs. Funding for training programs could require multiple providers to cooperate in MAID training and research and providing of quality, timely information.<sup>216</sup> Alternatively, physician-testifiers suggested that, instead of requiring palliative or hospice counseling, the MAID process could require a consult with a palliative care physician.

Training is needed not only for physicians, but also for social workers, chaplains, and other health professionals who may regularly interact with patients facing end-of-life decisions. Various academic institutions, private companies, and regional coalitions already host such programs and could be expanded via state funds. Non-provider professionals also help patients and their family navigate the religious, spiritual, and emotional complexities of dying. These communities should be considered for inclusion in any future appropriations. The State Department of Health’s (DOH’s) Center for Hospice and Palliative Care Access and Quality could lead the way as a facilitator with only a small appropriation, as noted in Section III, *supra*.<sup>217</sup>

Clinicians in MAID states have noted the inadequacy of training opportunities.<sup>218</sup> There have been few studies on MAID training.<sup>219</sup> Articles have focused on the educational needs of physicians,<sup>220</sup> not nurse practitioners, physician assistants, social workers, pharmacists, mental health providers, and other medical professionals.<sup>221</sup> When polled, health care practitioners in MAID states have

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<sup>216</sup> Physicians noted that the connection between a patient and an experienced physician often came too late in their dying process, when MAID was the only viable option left. If the patients had known sooner about palliative services available in a hospice, they might have opted for such care.

<sup>217</sup> [NY State Senate Bill 2023-S4858 \(nysenate.gov\)](https://nysenate.gov/legislation/bills/2023/S4858). Vetoed, but established by NYSDOH.

<sup>218</sup> Buchbinder, *supra*, note 208.

<sup>219</sup> Gina Bravo, et al., *Social Workers’ Experiences With Medical Assistance in Dying: Survey Findings from Quebec, Canada*, *Social Work in Health Care*, Vol. 62, No. 5, 193–205 (2023), abstract at <https://pubmed.ncbi.nlm.nih.gov/37183409/>; see also Jamie K. Fujioka et al., *Implementation of Medical Assistance in Dying: A Scoping Review of Health Care Providers’ Perspectives*, *Journal of Pain and Symptom Management*, Vol. 55, No. 6, 1564–1576(2018)m, available at [https://www.jpmsjournal.com/article/S0885-3924\(18\)30077-0/pdf](https://www.jpmsjournal.com/article/S0885-3924(18)30077-0/pdf).

<sup>220</sup> Bravo, *supra*, at 200 (“the small body of literature addressing the educational needs of healthcare professionals in this area [MAID] of practice has focused on physicians.”), Fujioka, *supra*, at 1572: “This scoping article is one of the first attempts to consolidate evidence exploring the roles and challenges of diverse health care professionals in the implementation of MAID.”); see also Sarah LeBlanc, et al., *Development of Learning Objectives for a Medical Assistance in Dying Program for Family Medical Residency*, *BMC Medical Education*, Vol. 22, No. 167, 1–5 (2022), available at <https://bmcmededuc.biomedcentral.com/articles/10.1186/s12909-022-03204-1> (concludes at 5 that “little is known about the most effective strategies for providing MAID education . . .”).

<sup>221</sup> Fujioka, *supra*, note 218 at 1572 (discusses lack of knowledge about work of “nurses, mental health providers, pharmacists, social workers, and medical examiners [who are] integral to the in the execution of MAID in tandem with physicians . . .”).

consistently requested additional training.<sup>222</sup> They are unsure of what they are legally allowed to do and need clinical assistance in the practical bedside provision of MAID.<sup>223</sup> When adequate learning opportunities are not provided, clinicians are less willing to offer MAID to their patients.<sup>224</sup> If fewer practitioners participate, access to MAID could be limited, especially for patients from marginalized populations<sup>225</sup> who have historically had unequal access to health care.<sup>226</sup> Providing opportunities to meet clinician’s training needs will improve access to MAID and promote broad and equitable access. New York can learn from the academic literature about effective MAID training—including conferences, practice guidelines, mentorship, and role-playing exercises.<sup>227</sup> Other articles note that the participation of other health care professionals has been under-recognized, leading to a lack of training opportunities for them tailored to their professional needs.<sup>228</sup> A multidisciplinary approach should be taken since MAID involves collaborative practice by various health professionals.<sup>229</sup>

As in other MAID states, New York could provide MAID training as part of continuing education required by licensing authorities. Training could include a review of the history of MAID, an overview of New York’s law including eligibility standards and safeguards, as well as include

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<sup>222</sup> Maria Buchbinder et al., Health Care Providers Experiences with Implementing Medical Aid-in-Dying in Vermont: A Qualitative Study, *J of General Internal Medicine*, Vol. 34, No. 4, 636–644 (2019), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6445925/> (at 641 discuss the “critical, yet under-recognized role” of nurses and social workers in supporting physicians and patients); *see also* Jonathan Singer, et al., Assessment of Oncology Advanced Practice Professional Willingness to Participate in Medical Aid in Dying, *JAMA Network Open*, Vol. 5, No. 10, 1–11 (2022), available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2797711>. (at 7 reports study finding that fewer than a third of advance practice professionals (physician assistants and nurse practitioners) “feel knowledgeable or very knowledgeable” about MAID).

<sup>223</sup> Buchbinder, *supra*, note 208; *see also* Fujioka, *supra*, note 1 (at 1571—articles surveying clinicians in states with MAID found that “legislative criteria of eligibility, in addition to capacity to consent to MAID, were often vague or ambiguous and thus subject to interpretation by varying practitioners, with examples being clinician confusion about the clinical meaning of terms such as “irremediable” and “intolerable suffering”).

<sup>224</sup> Singer, *supra*, note 208 (reports result of study in which advanced practice professionals who reported higher knowledge and comfort scores with MAID were more willing to participate in providing it); *see also* Bravo, *supra*, note 218, at 200 (surveys articles that recommend course-based, conference, practice guidelines, role playing and mentorship training); *see also* Buchbinder, *supra*, note 208 (discusses clinician concerns about the law and its clinical application and lack of education and training opportunities, leading clinicians to reach out to knowledgeable clinicians and self-educate about MAID).

<sup>225</sup> Tina Sikka, Barriers to Access: A Feminist Analysis of Medically Assisted Dying and the Experience of Marginalized Groups, *Omega Journal of Death and Dying* Vol. 84, Issue 1, abstract at <https://journals.sagepub.com/doi/10.1177/0030222819873770>.

<sup>226</sup> Depesh P. Gopal, et al., Implicit Bias in Healthcare: Clinical Practice, Research and Decision Making, *Future Healthcare Journal*, Vol. 8, No. 1, 40–48, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8004354/> (implicit bias in health care and that it leads to restricted access to health care and poorer outcomes for people from historically excluded or marginalized groups).

<sup>227</sup> Buchbinder, *supra*, note 208; *see also* Bravo, *supra*, note 218, at 200 (surveys articles that recommend course-based, conference, practice guidelines, role playing and mentorship training).

<sup>228</sup> Buchbinder, *supra*, note 208) (at 641, in article surveying Vermont clinicians after Vermont enacted MAID legislation, note notes that nurses and social workers “play a critical, yet under-recognized role in supporting patients to navigate access and in alleviating some of the practical burden on physicians.”); *see also* Singer, *supra*, note 208 (based on survey of physician assistants and nurse practitioners involved in MAID, article recommends “additional education and training about MAID); *see also* Fujioka, *supra*, (notes need for training of nurses, mental health providers, social workers, pharmacists and medical examiners).

<sup>229</sup> Fujioka, *supra* (recommends additional training, with a “multidisciplinary approach . . . in tandem with physicians . . . of nurses, mental health providers, social workers, pharmacists, and medical examiners.”)

simulations and role-playing exercises to increase clinician familiarity with the clinical aspects of MAID.<sup>230</sup> Existing training staffs and various medical facilities could provide MAID training. Finally, some medical schools and medical residency programs have prepared materials for teaching students and residents about MAID, and such materials could be used for various health care professionals.<sup>231</sup> Also, there will likely be many physicians and MAID advocacy groups available to provide free training about MAID.<sup>232</sup> Finally, perhaps DOH could offer MAID training using funding allocated in 2023 for end-of-life care training, though additional state funding may be needed. Upon enactment of MAID, these steps should be considered:

- MAID should be part of health care professionals' continuing education and include elements set forth above.
- Physicians who will provide MAID prescriptions should receive additional required training, which should cover patient selection; medical record requirements; medications used; legal administration of medications; and ongoing communication with patients and/or families.
- Health care facilities with training departments should be mandated to provide MAID training to their employees.
- Physician professional groups and MAID advocacy groups should organize training opportunities and create educational resources.
- Palliative care providers should offer training opportunities to clinicians. This can include knowledgeable practitioner-volunteers from other MAID states.<sup>233</sup>
- MAID should be covered at conferences of health care specialty groups.
- Training opportunities should be expanded at medical schools and medical residency.
- New York should provide a hotline to answer providers' medical and legal questions.

## CONCLUSION

The New York State Bar Association Task Force on Medical Aid in Dying, appointed in June 2023, has completed a rigorous process of inquiry pursuant to the charge given to it by President Lewis to examine a range of legal, ethical, health and public health, and workforce issues regarding the provisions of the New York MAID Bill. The Task Force recommends the New York State Bar Association adopt a position in support of the New York MAID Bill; and additional comments and

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<sup>230</sup> Based on recommendations made by palliative care physician Judy Setla, MD, MPH in November, 2023 communications.

<sup>231</sup> Sarah LeBlanc, et al., Development of Learning Objectives for a Medical Assistance in Dying Curriculum for Family Medicine Residency, BMC Medical Education, 22:167 (2022), at <https://bmcomeduc.biomedcentral.com/articles/10.1186/s12909-022-03204-1>.

<sup>232</sup> Buchbinder, *supra*, note 208 (recounts stories about physicians knowledgeable about MAID providing informal training to other physicians who needed assistance in specific clinical situations).

<sup>233</sup> Based on conversation with Heather Paladine, MD, on November 10, 2023. She advised that there is a wealth of materials “of curricula, protocols, and other educational resources which have been developed and refined as a result of the experience of clinicians in complying with [their states’] laws.” She recommended that this training be made broadly available as online CME and observed that physicians in other states have been willing to volunteer their time to educate clinicians.

recommendations addressing: i) Safeguards for special populations; ii) Funding and insurance; and iii) Training.

The Task Force is available to respond to any questions about the Report and the comments and recommendations made.

**APPENDIX I:  
OPEN FORUM TESTIMONY  
NOV. 17, 2023**

	<b>Attendees</b>	<b>Attendee Organization</b>	<b>Written testimony received</b>
8:10	Nadia Arginteanu	NYSARC, Inc. Trust Services	
8:20	David N. Hoffman, Esq.	Claxton Hepburn Medical Center	X
8:30	Stacey Gibson		
8:40	Daren Eilert		
8:50	Dr. Sonja Richmond		
9:00	Geri Barish	One in Nine Breast Cancer Association	
9:10	Diane Coleman		X
9:20	Prof. Christopher Riddle	Utica University	
9:30	Anita Cameron		
9:40	Scott Barraco		
9:50	Laura Kelly		
10:00	Melissa Milch		
10:10	Nina Miller		
10:20	Nancy Murphy		
10:30	Gail Myers		
10:40	Dr. Jules Netherland		
10:50	Barry Perlman, MD		
11:00	Rachel Rimmel		
11:10	Yale Rosen		
11:20	Cassandra Johnston	Compassion and Choices	
11:30	Myra Shulman		
11:40	Rachel Strauber		
11:50	Barbara K. Koeppicus Thomas	League of Women Voters of NYS	
12:00	Alex Thompson		
12:10	Dr. Lindsay Wright		
12:30	Tim Hoppe		

## **APPENDIX II: OPEN FORUM TESTIMONY SUMMARIES**

*The summaries below strive to capsulize key points made by persons appearing in the open forum.*

### **Nadia Argentino**

#### **Assistant General Counsel, The ARC New York**

Nadia Argentino spoke about the mission of The ARC, which supports persons with intellectual, developmental, and other disabilities. The ARC endorses the concept of MAID but emphasizes the need for additional protections to ensure safe access for individuals with developmental disabilities. The wishes of mentally competent adults with developmental disabilities regarding end-of-life choices should be respected.

### **Geri Barish**

#### **President, One in Nine Breast Cancer Coalition**

#### **Executive director of Long Island's Hewlett House**

Geri Barish testified in favor of the MAID Act. In part based on her own son's harrowing battle with Hodgkin's disease, Barish strongly supports an individual's right to choose the manner of one's own death. She underscored the need for compassion and the importance of personal autonomy and the right to make choices about one's own life and urged the Bar Association to support MAID legislation.

**Scott Barroco** from Rochester spoke in favor of MAID and shared the experience of his late girlfriend, Kathy Quinn, who died nine years ago from tongue cancer. She faced her cancer with intelligence and determination, making choices to extend her life. As Kathy's condition worsened, she realized that there were no more options for the long life she desired. Kathy wanted to die peacefully at home but did not have access to MAID in New York. Her attempt to end her life was unsuccessful, and Barroco endured the trauma of finding her alive but suffering and of calling an ambulance in defiance of her wish to die. He urged the Task Force to support the MAID law to allow for a compassionate and dignified choice for those facing terminal illnesses.

### **Anita Cameron**

#### **Director of Minority Outreach, Not Dead Yet**

Anita Cameron expressed concerns about so-called "assisted suicide" laws and raised concerns about misdiagnoses. She contended that assisted suicide laws affect vulnerable groups disproportionately, particularly seniors and disabled individuals and noted that Black patients have less access to palliative care than other patients. Cameron warned that assisted-suicide laws may become cost-cutting measures when access to health care is lost and commented further that disability-related issues can be addressed through home care, support services, and effective pain control. She conveyed that there are no safety measures that will make assisted suicide laws safe. The only safety measure is that these laws not exist. She urged the Task Force to oppose assisted suicide laws.

**Diane Coleman**

**President and CEO of Not Dead Yet**

Diane Coleman, the president and CEO of Not Dead Yet, a disability group that has a position against assisted suicide, told the Task Force that she is a two-time cancer survivor with a neuromuscular disability. She spoke about the organization Not Dead Yet's opposition to assisted suicide, that they are a part of the New York Alliance Against Assisted Suicide, and join with other national disability groups in opposing these laws.

Coleman said that assisted suicide disproportionately affects people with disabilities, leading to a major lawsuit against California's law. She disputed the claim of no documented abuse, citing several articles and argued that these laws lack mechanisms to detect or report problems. Her concerns include the short duration of physician-patient relationships, elder abuse risks, the absence of independent witnesses during drug ingestion, and the bill's provision of legal immunity based on a claim of good faith. Coleman cited the data from Oregon, which show that psychosocial issues related to disability, not pain, drive assisted suicide requests.

She warned about the possible normalization of assisted suicide and its impact on marginalized communities.

Referencing developments in Canada, Coleman underscored the risk of a slippery slope, stating that although disability alone is purportedly not enough for eligibility in the United States, it could be if the United States follows the Canadian model. She emphasized her advocacy for social justice, and the need for equality in suicide prevention rather than assisted suicide, and urged the Task Force to reject the discrimination against older and disabled persons inherent in the medical aid in dying legislation.

**Daren Eilert** recounted the story of his daughter, Ayla Rain Eilert, who faced unbearable suffering and pain due to cancer. She wanted MAID, which was not available in New York. She was discharged to home hospice care, but within two weeks, Eilert had to take her back to the hospital because providers could not control her pain. He asked the Bar Association to support the MAID bill to prevent needless suffering experienced by terminally ill individuals.

**Stacey Gibson** has supported MAID since 2014. Her husband Sid died a horrific death from a progressive neurological disease. He asked Gibson to help him end his life, and she said no, a decision that haunts her. He chose to voluntarily stop eating and drinking to end his suffering. It took 12 days for him to die—a cruel end because of the absence of MAID as an option. A cancer patient herself, she said that it is important that people like her be allowed to access as many options as possible when they face their final days. She asked the Task Force to support this bill so that everyone can have control and autonomy over their own body at the end of life.

**David N. Hoffman, Esq.**

*See summary of testimony to the Legislative Working Group.*

**Tim Hoppe** testified in honor of his sister, Bernadette Hoppe, who was an advocate for this bill. When she was diagnosed with anal cancer, Hoppe thought that she would survive it. But the disease won, she lost. He asked the Task Force: “Death is never easy, why don’t we try to make it



a little less bad?” He noted that we can plan for weddings and funerals and asked: “Once we know we are dying, why can’t we decide when we have had enough?” Hoppe spoke about the celebration of his sister held at Buffalo church, and said that he wished that his sister could have enjoyed that outpouring of love. He urged the Task Force to support the bill.

**Cassandra Johnston** told the Task Force that she is a resident of New York with firsthand knowledge of what it feels like to be told you are dying. Last year, she learned that she had stage 3 breast cancer. Her entire family lives in NY, and she bought a house in this state just before her diagnosis. She was once proud to be a New Yorker who would spend the rest of her life here but was now “terrified to live here.” Her pain during treatment was unbearable. If she had the financial means to do so, she would have left New York to live in a MAID state. New York’s failure to enact a MAID law caused her anxiety, dread, and heartbreak. Opposing MAID because of the availability of palliative care was misguided. Many terminally ill patients receiving such care starved themselves to death to end their pain. Such forced suffering was barbaric, in her view.

**Laura Kelly**, a self-employed editor, and writer from Mount Kisco, shared the story of her father, Larry Kelly, a lawyer. Diagnosed with stage 4 colon cancer, he soon faced the end of his life and considered moving to Vermont for MAID options, but timing constraints prevented it. Terminal agitation set in, causing suffering and loss of control. The last days at home were harrowing, traumatic, and absurd. She emphasized the importance of MAID laws to expand end-of-life options. Kelly urged NYSBA to support the proposed law on MAID, asserting that individuals with terminal illnesses deserve the right to choose a peaceful and dignified end.

**Ari Klein**, junior at the University of Albany, spoke to the Task Force in honor of his grandfather, Dr. Robert Milch, a fierce advocate for MAID, who passed away in 2021 of terminal cancer. Klein read from a letter that his grandfather wrote on his deathbed to New York lawmakers: “The inaction by the Legislature to make MAID available to New Yorkers has become punitive. We have all the data we need from decades of experience in other states. Legislators, you need not endorse this end-of-life care option, but for goodness’ sake, don’t prohibit it. And by not acting on it, that’s exactly what you’re doing.”

**Nina Miller**, a former executive director of the hospice in Tompkins County, said her perspective on MAID has evolved. She once believed that hospice care could address all the needs of dying patients, but then realized that some patients experience uncontrolled pain that can only be alleviated by keeping them in a state of unconsciousness. She has watched patients who wept with frustration, begging to be released from a position of intolerable existence. Some chose to stop taking nutrition and hydration, which can be a lengthy and uncomfortable way to depart. She urged support for MAID as a compassionate choice for those facing unbearable suffering at the end of life.

**Nancy Murphy**

*See summary of testimony to the Legislative Working Group.*

**Gail Myers****Deputy Director, New York Statewide Senior Action**

Gail Myers said that the mission of her organization is to achieve dignity, well-being, and security for older New Yorkers. Myers stated that the group supports the MAID bill. Drawing upon her decades of legislative experience as a former staffer and a lobbyist, she expressed awe at the level of detail in the bill, including safeguards to assure that those concerned with process that their voices have been heard, to provide patient autonomy, ensure informed decision-making, and protect against coercion. Myers's husband recently received a terminal diagnosis. They would like to be able to make an end-of-life decision that would allow him to be surrounded by loved ones at the time of his death.

**Jules Netherland****Director of Research and Academic Engagement, Drug Policy Alliance**

Jules Netherland told the Task Force that she received a diagnosis of stage 3 breast cancer in November 2019. Brutal treatment and a mastectomy ensued. In December 2022, she learned that her cancer had spread, and she had surgery to remove tumors from her abdomen. In January 2023, her doctor told her that her treatment would be palliative, not curative. She told the Task Force that the possibility of a terrible dying process scares her. After so much traumatic treatment, autonomy at the end of life is critical. NYSBA should stand up for the option of a good death, she said.

**Dr. Barry Perlman** graduated from Yale Medical School in 1971 and was the director of psychiatry at St. Joseph's Medical Center in Yonkers for 34 years. During his career he served as president of the New York State Psychiatric Association (NYSPA), which has taken no position on New York's pending MAID bill but was involved in assisting the sponsors of the bill in strengthening its mental health provisions. In Dr. Perlman's opinion, the bill contains adequate safeguards to protect patients. He has been treated for cancer and would welcome the possibility of MAID relief himself.

**Rachel Rimmel**, a professor from Rochester, told the Task Force that her brother faced a terminal diagnosis and endured unmanageable pain. He found solace that MAID was available to him in Washington. Her brother peacefully passed away at home, surrounded by loved ones, maintaining control and dignity. She stressed that MAID is not suicide. The trauma caused by the lack of legalized MAID in New York causes anguish not only to patients but also to first responders, medical professionals, and families. The MAID bill would honor the choices of persons with terminal illnesses and end persistent suffering.

**Dr. Sonja Richmond****Medical Director, Washington, D.C., Vitas Health Care Corporation**

*See summary of testimony to the Legislative Working Group.*

**Professor Christopher Riddle****Chair of Philosophy, Utica University**

Professor Christopher Riddle support MAID. He has found no evidence of a decrease in the quality of care for people with disabilities due to MAID legalization in other states. He emphasized that

MAID legislation does not devalue lives, but instead grants autonomy for individuals to make choices, including people with disabilities. He urged NYSBA to endorse MAID.

**Dr. Yale Rosen**

**Medical doctor, Long Island**

Dr. Yale Rosen supports the MAID bill. He testified that numerous terminally ill people are enduring unbearable pain and suffering despite palliative and hospice care, which are not always effective. Even patients who do not use the MAID medication provided, benefit from peace of mind knowing that the option is available. Dr. Rosen has witnessed the agony of many terminally ill patients. He encouraged Task Force members to watch the documentary *How to Die in Oregon*. He urged that MAID is not physician-assisted suicide. MAID is not a choice between life and death, but rather a choice between the manner of death when death is imminent.

**Myra Shulman** of Ithaca shared the story of her mother, Beverly Shulman, who died at age 89 from incurable metastatic colon cancer in 2017. A California resident, she had access to MAID and took advantage of such relief. Two weeks after receiving the prescription, she decided it was time, and her family gathered to celebrate their love for her. Shulman described the peaceful and beautiful process as Beverly swallowed the life-ending prescription at home. Beverly slipped into unconsciousness, and her family spent the next five hours at her side, creating a gentle and serene end to her life. Shulman urged NYSBA to support the bill.

**Rachel Stauber** supports the MAID bill. She recounted her mother's last day. A nurse offered morphine without explicit communication about its consequences, and her mother died alone. Stauber regretted leaving her mother's room during that time. If her mother had had access to MAID, she could have planned the time of her death. It was distressing that the burden of restricted access to MAID fell on the poor, marginalized, and those unable to travel.

**Barbara Thomas**

**MAID Issue Specialist, League of Women Voters of New York State**

Thomas supports MAID in New York. In 2018, the NY League of Women Voters decided to support MAID after extensive study. The current bill contains safeguards and protections for both patients and medical personnel, while giving terminally ill patients access to comprehensive end-of-life options. Thomas's husband suffered immensely from his terminal condition and expressed a desire to end his life and urged her to end his life. She is haunted by the fact that she could not do so. Thomas urged NYSBA to support the MAID bill.

**Alex Thompson**

**Director of Advocacy at New York Association on Independent Living**

Alex Thompson urged the Task Force to consider that laws in other countries have been expanded to include people living with disabilities and facing mental illness. As a person who has a spinal cord injury and is a quadriplegic, he was concerned about what could happen to him if he ended up on a ventilator. He echoed the concerns of Diane Coleman and Anita Cameron, questioned whether NYSBA should take a stance on the bill, and objected to the idea of the Task Force itself.

**Lindsay Wright** from Manhattan emphasized that MAID offers comfort to those facing pain and suffering; that people are willing to relocate for autonomy; and that the lack of MAID in New York

creates health care inequities. Her husband, Youssef Cohen, was diagnosed with mesothelioma, wanted a peaceful death at home, and traveled to Oregon for MAID relief—which required overcoming various logistical challenges. Wright stated that most New Yorkers desire better end-of-life options, fewer interventions, and more choices when facing a terminal diagnosis. She urged the Bar Association to support the MAID bill.

## **APPENDIX III: LEGISLATIVE WORKING GROUP TESTIMONY SUMMARIES**

*The summaries below highlight key points made by persons appearing before the Task Force's Legislative Working Group.*

### **Art Caplan, PhD**

**Professor of Bioethics, NYU's Langone Medical Center**

**Founding Director of NYULMC's Division of Medical Ethics**

Dr. Caplan is the Drs. William F. and Virginia Connolly Mitty Professor and founding head of the Division of Medical Ethics at NYU's School of Medicine with extensive expertise in the medical and psychosocial care of the terminally ill and Physician Aid in Dying. Dr. Caplan favors legalization of MAID in New York and other states that are considering legalization and is not persuaded by objections raised. Dr. Caplan does not believe MAID should be called suicide. MAID occurs in a medical situation with external supervision. While it is a form of accelerating one's death, he would not place it in the same category as a suicide by a mentally despondent person. Dr. Caplan argues that MAID is a form of suicide prevention, because in other states where it has not been legalized, people with a terminal diagnosis may end their lives violently because they do not have a MAID option. He believes people would rather live as long as they can, but that the option to use MAID is like having a parachute and provides peace of mind.

### **Maggie Carpenter, MD**

**Medical Director at Hudson Valley Hospice**

Dr. Carpenter is a family doctor and medical director at Hudson Valley Hospice, as well as faculty at the Mid-Hudson Family Practice Residency. She has specialized in palliative and hospice care for the last ten years. For years she had been a silent supporter of MAID, but that changed this past year with the death of her father from pancreatic cancer. She hears requests for MAID frequently with her hospice patients. For many patients, the anxiety associated with their impending death can be all consuming. Dr. Carpenter reports overwhelming support of MAID by her colleagues, while acknowledging some opposition, primarily for religious reasons. She reported that hospice referrals increase with the availability of MAID. The law should not require medical visits in person. Telemedicine would allow for greater access for homebound patients and those in rural communities. Dr. Carpenter believes that MAID can allow people to end their lives in a more dignified and humane fashion than the current legal options of voluntary stopping eating and drinking or palliative sedation.

### **Ann Jackson**

**Former CEO of Oregon Hospice Association**

Ann Jackson served as the CEO of the Oregon Hospice Association and the executive director and chief executive officer of the Oregon Hospice Association (OHA). She originally opposed the Oregon Death with Dignity Act (DWDA) because she believed that hospice care could deliver everything that people needed. She now realizes that hospice and the DWDA complement each other and noted that 98% of people who have used the DWDA were in hospice. Jackson also described how a fiancé died peacefully thanks to the DWDA after having suffered unimaginable

pain and terrifying psychotic episodes. Primarily college-educated white people use the DWDA. About one-third of those who requested a prescription pursuant to the DWDA did not ingest the medication, but they had a sense of control over the end of their life. According to Oregon's data, there has been no abuse or coercion in the implementation of the DWDA.

**David N. Hoffman, Esq.**

**Assistant Professor of Professional Practice in Bioethics at Columbia University**

**Clinical Assistant Professor at Albert Einstein College of Medicine**

**Chief Compliance Officer at Carthage Area Hospital**

David N. Hoffman, a health care lawyer and clinical ethicist in New York, has 40 years of experience in the health care delivery system. He is an Assistant Professor of Bioethics at Columbia University and a Clinical Assistant Professor at the Albert Einstein College of Medicine. Hoffman opined that real-life experience belies rationales to oppose MAID in New York. A patient would never be deemed eligible for MAID based solely on a clinician's determination that the patient would likely expire in six months. Under the law, clinicians can make their own professional judgments about whether MAID is appropriate. Doctors have the duty to ensure that patients are free of coercion. Medical training regarding the capacity to make end-of-life care decisions is available. Palliative sedation does not negate the importance of MAID. He did not see a need for funding or training to implement MAID. The patient advocacy community can provide education, and the Office of Professional Medical Conduct (OPMC) can enforce compliance with laws. Hospital medical staffs and medical schools are ready to develop policies and training programs.

**Seth Morgan, MD**

**Board-Certified Fellow of the American Academy of Neurology**

Seth Morgan is a Board-Certified Fellow of the American Academy of Neurology, an advocate for people with disabilities, and a person living with a disability. He supports New York's MAID Act, which provides rigorous safeguards and is modeled after existing MAID laws. Compelling proof belies fears of coercion of people with disabilities. In the 26 years since the enactment of the Oregon Death with Dignity Act, there have been no complaints of coercion of people with disabilities. Under New York's bill, people with a cognitive disability are not eligible for MAID. The bill also contains protections that prevent improper influence by potential heirs. In contrast, there are no such safeguards for palliative sedation. The disability rights and end-of-life care movements share core values of self-determination and personal autonomy. Seventy-nine percent of U.S. residents who self-identify as having a disability agree that MAID should be legal, according to a 2023 survey. The American Medical Association has concluded that physicians can provide MAID according to the dictates of their conscience, and most doctors surveyed in 2020 favored MAID. He did not discern a need for funding or training to implement MAID. All physicians look to their own professional association and institutions to alert them to changes in relevant laws, which routinely occur without funding or training.

**Nancy Murphy, sister used Vermont's MAID law**

Nancy's sister, Joan Kline, took advantage of the Vermont MAID law after being diagnosed with terminal ovarian cancer, with months or possibly weeks to live. Joan described her sister's death with dignity. On the day of Joan's choosing, surrounded by many family members, a close friend, and a hospice nurse, Joan drank the medicine, and her loved ones held her hands as she slowly

drifted into a deep sleep. She died two hours later. Nancy indicated that the loving, beautiful, peaceful, and chosen transition allowed them to bond with her and she with them in a way that was “beyond description.” She testified that their grieving was mixed with admiration for Joan’s courage, and with pride that they as a family came together to support her decision.

**Deborah Pasik, MD**

**FACR, Founder of Atlantic Rheumatology and Osteoporosis**

**Founder New Jersey Death With Dignity**

Dr. Deborah Pasik, a rheumatologist from 1985 until her retirement in 2020, was part of the advocacy group that helped enact MAID in New Jersey. While generally New Jersey doctors do not oppose MAID, many are not willing to provide prescriptions for their patients—a situation which is improving. Dr. Pasik’s organization, New Jersey Death with Dignity, also provides physician mentoring. She has evaluated 182 new patients who requested the prescription and had provided it for all but the few who lacked the capacity to make the decision—sometimes losing competency during the statutory 15-day waiting period. The two required visits are virtual, which expands access. In the first visit, patients often seek to justify their desire to use the MAID, whereas in the second one, they are relaxed and grateful. Dr. Pasik is not aware of any coercion problems in New Jersey; it is the loved ones who need to be gently persuaded. People who seek MAID relief are very involved in their own health care. About 30% of New Jersey MAID patients opt not to use the prescription, but having it eliminates fears and improves the quality of their final days. About 85% of New Jersey patients seeking a MAID prescription are already in hospice care. Hospice care and MAID complement each other. Dr. Pasik participates in a national group that has refined the medication combination used nationwide. The group has also devised creative, legal ways to allow patients who cannot swallow to self-administer the medication. Dr. Pasik is a plaintiff in a lawsuit challenging New Jersey’s residency requirement, which will likely be resolved via settlement. Many New Yorkers establish residency in New Jersey to get a MAID prescription.

**Benny Pollack, Disability Rights Advocate**

Benny Pollack is a staunch supporter of MAID legislation, independent of his personal condition, and believes in personal freedom, and the right to choose. Pollack became a quadriplegic after a car accident when he was 21 and has been dependent on a wheelchair for the last 43 years. Despite these formidable challenges, he has adapted and gone on to live a happy life with a career as a professional software engineer. Pollack spoke of his experience with the biases that exist in the disability community. He believes people without disabilities tend to view those with disabilities from their subjective perspective. Since they would never wish to live with a disability, this creates a bias towards both the expectations they have of those who become disabled, as well as their view of how people with disabilities should be protected. This bias affects the way that access to MAID is considered for the disability community. Pollack addressed the issue that medication must be self-administered, and how this is unjust for those with disabilities who cannot physically do so. The American with Disabilities Act stance toward the legislation would appear to be protecting people with disabilities. Pollack argues that the whole purpose of the ADA is to empower, not to cradle.

**Sue Porter****Board Chair and Founding Director, End Of Life Choices Oregon**

Sue Porter is the Board Chair and Founding Director of End of Life Choices Oregon, the only organization in the state that implements the law. She has a Master of Science degree in Bioethics and a master's in business administration. Since 2001, Ms. Porter has worked with hundreds of terminally ill people availing themselves of Oregon's Death with Dignity Act. She is also a Volunteer Client Advisor for Washington. Ms. Porter has attended many deaths as a volunteer. She was a participant in *How to Die in Oregon*, a documentary. Porter works closely with hospices and has seen an increased use of hospice because of MAID. Porter is not aware of any residential hospice prohibiting MAID. A lack of funding had not been a problem in implementing the DWDA. Doctors in Oregon receive extensive training. While it was initially challenging to find a doctor, today they are much more accessible. Since those who use MAID are already dying, its use is not suicide. Having been at hundreds of bedsides of those who have used MAID, she describes the event as peaceful; patients find relief knowing they have the option to control how they are going to leave this world.

**David S. Pratt, MD****Pulmonologist, Board Certified in Internal Medicine, and Pulmonary Disease**

David S. Pratt, a licensed New York physician, has provided primary, specialty, and palliative care in New York for more than 40 years. He is board-certified in internal, pulmonary, and preventive medicine. Dr. Pratt testified that, while palliative and hospice care offers seriously ill patients an extra layer of support, such care has its limits. When patients experience pain, loss of autonomy, and humiliation, practitioners may resort to higher doses of opioids and sedatives, and the patient may become a shadow of their prior self. Family members suffer greatly as well. The states that have MAID have proven that society can show compassion to such patients by allowing these competent suffering adults near the end of life to die at the time and place they choose. He stated that there has been no proof of discrimination against people with disabilities in the many years that Oregon has allowed MAID. Physicians who object to MAID need not participate.

**Sonja Richmond, MD****Washington D.C. Medical Director for Vitas Health Care Corporation**

Dr. Sonja Richmond is the Medical Director of the Washington, D.C. area for Vitas Health care Corporation, a hospice provider. She noted no funding was associated with the D.C. statute and contended that physicians already have the necessary information and education. Lack of utilization of MAID, and of hospice services in general, by underserved and disadvantaged populations is less a function of MAID than it is representative of trends in overall health care. Dr. Richmond also spoke to the history of physician reactions to MAID and noted that in D.C., like in New York, the medical society initially tended to be opposed, but over time has become more accepting, and is now formally neutral. She highlighted the formal protections in the D.C. bill intended to protect patients from coercion and noted that they have worked. In D.C., MAID is mostly utilized by hospice patients and seems to have resulted in an increase in hospice enrollment. Access to MAID is impacted by varying rules tied to the setting in which a patient resides, and sometimes a patient's setting must change for that patient to have access to MAID.



**Mitsuo Tomita, MD**

**Co-Chair of San Diego County Medical Society's Bioethics Commission**

**Co-Chair of Compassion and Choices AANHPI Leadership Council**

Dr. Mitsuo Tomita attended medical school at UCSF and did his internship and residency in family medicine at UCSF Fresno before working worked at Kaiser Permanente San Diego in a full-time family practice. Upon retirement, he continued to work part-time in community health centers. Dr. Tomita has been a consulting physician on MAID cases and said supported MAID when it was proposed in California. After the implementation of CA's End of Life Option Act, the 15-day waiting period was reduced to two days, which has made a difference to many patients who would not have survived the original period. California also eliminated requirements for a final attestation requirement for a physician's documentation that the patient requested MAID, even if the physician was not going to be involved. A telemedicine option has allowed access to many MAID for many patients. There are enough organizations in California to help interested patients navigate the MAID process.

## Exhibit A: State-by-State Comparison Chart

	OR	WA	MT*	VT	CA	CO	DC	HI	NJ	ME	NM	NY (proposed)
Effective Date	27-Oct-97	5-March-19	31-Dec-09	20-May-13	9-Jun-16	6-Jun-17	18-Feb-17	5-Apr-18	12-Apr-19	19-Sep-19	18-Jun-21	N/A
Name of the Act	Death with Dignity Act	Washington Death with Dignity Act	Montana Supreme Court Decision	Patient Choice and Control at End of Life	California End of Life Option Act	Colorado End of-Life Options Act	Death with Dignity Act of 2016	Our Care Our Choice Act	MAID for the Terminally Ill Act	Death with Dignity Act	End of Life Options Act	
Provides a "Form Request" template for the prescription	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Residency Requirement?	No	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
"Physician" means a doctor of medicine or osteopathy licensed to practice medicine by the Board of Medical Examiners for that state	Yes	Yes		Yes	Yes	Yes	Yes	Yes	"physician" is licensed pursuant to Title 45 of the Revised Statutes	Yes	physician licensed pursuant to the Medical Practice Act	Yes
<b>Patient Requirements:</b>												
An adult (aged 18 or older);	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Terminally ill, confirmed by 2 doctors	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prognosis of 6 months or less to live	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Mentally capable of making their own healthcare decisions;	Yes			Yes	Yes	Yes	Yes	Yes	Yes	Yes (uses 'competent' instead of 'capable')	Yes	Yes (uses 'decision making capacity' instead of 'capable')
Able to self-ingest/Self-administer the medication.	Didn't specify the words "self-ingest/administer"	Yes		Yes	Yes	Yes	Didn't specify the words "self-ingest/administer"	Yes	Yes	Yes	Yes	Yes
<b>Physician Requirements:</b>												
Make the initial determination of whether a patient has a terminal disease	yes	yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Make the initial determination of whether a patient is capable	yes	yes		Yes	yes	yes	yes	yes	yes	yes	Yes	Yes
Make the initial determination of whether a patient has made the request for the prescription voluntarily	yes	yes		Yes	yes	yes	yes	yes	yes	yes	Yes	Yes
Require that the patient demonstrate residency	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Ensure that the patient is making an informed decision	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Refer the patient to a consulting provider for medical confirmation of the diagnosis , and for a determination that the patient is capable and acting voluntarily	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Refer the patient for counseling	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes****
Must suggest the patient notify their next of kin	Yes	Yes		No	Yes		Yes	Yes	Yes	Yes	No	Yes

	OR	WA	MT*	VT	CA	CO	DC	HI	NJ	ME	NM	NY (proposed)
Counsel the patient about the importance of having another person present when the patient takes the prescription prescribed	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Counsel the patient about the importance of not taking the prescription in a public place	Yes	Yes		No	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Counsel the patient about the importance of safe- keeping and disposal of unused medical aid-in dying medication	No	No		No	No	Yes	No	No	No	No	No	No
Inform the patient that a qualified patient may rescind the request at any time and in any manner	yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Verify, immediately before writing the prescription for medication under this Act, that the patient is making an informed decision	Yes	yes		Yes	Yes	Yes	Yes	Yes	Yes, but not "immediately"	Yes	Yes, but not "immediately"	Yes but not "immediately"
<b>Form of the Written Request:</b>												
Request needs to be in writing	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
signed and dated by the patient	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
witnessed by at least two individuals	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Other:</b>												
Law addresses safe disposal of unused medication	No	Yes		Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes

	OR	WA	MT*	VT	CA	CO	DC	HI	NJ	ME	NM	NY (proposed)
<b>Immunities for Actions in Good Faith:</b> A person is not subject to civil or criminal liability or professional disciplinary action for acting in good faith under this article, which includes being present when a qualified individual self-administers the prescribed medical aid-in-dying medication.	Yes	Yes		Yes	Yes	Yes	Specified differently***	Yes	Yes	Specific information, see below.**	Yes	Yes
Patient is Required to make two oral requests at least 15 days apart	Yes	Yes		Yes	Yes, only 48 hours apart*****	Yes	Yes	Yes, but 20 days	Yes	Yes	oral requests are not required, just in writing	No, just one written and one oral request
	OR	WA	MT*	VT	CA	CO	DC	HI	NJ	ME	NM	NY (proposed)

\* The case does not explicitly lay out the requirements. It just comes to the conclusion that a patient has the fundamental right of a competent terminally ill patient to die with dignity, by self-ingesting medication prescribed by a physician. These seem to be similar requirements as other states, just not laid out as explicitly. See snippet of conclusion at bottom of table.

\*\* Willful alteration or forgery; coercion or undue influence; penalties; civil damages; other penalties not precluded. The following provisions govern criminal and other penalties for certain violations of this Act. A. A person who, without authorization of the patient, willfully alters or forges a request for medication or conceals or destroys a rescission of that request with the intent or effect of causing a patient's death commits a Class A crime. B. A person who coerces or exerts undue influence on a patient to request medication to end the patient's life or to destroy a rescission of a request commits a Class A crime. C. This Act does not limit liability for civil damages resulting from negligent conduct or intentional misconduct by a person.

D. The penalties in this Act do not preclude criminal penalties applicable under other law for conduct that is inconsistent with this Act.

\*\*\*Yes, no person shall be subject to civil or criminal liability or professional disciplinary action for (1) Participating in good faith compliance with this act; (2) Refusing to participate in providing a covered medication under this act; or (3) Being present when a qualified patient takes a covered medication.

\*\*\*\* The attending physician only needs "refer the patient to a mental health professional pursuant to section twenty-eight hundred ninety-nine-i of this article if the attending physician believes that the patient may lack decision-making capacity to make an informed decision."

\*\*\*\*\* "This bill would allow . . . an individual to qualify for aid-in-dying medication by making 2 oral requests a minimum of 48 hours apart." California Senate Bill No. 380 CHAPTER 542, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=20210220SB380](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20210220SB380), passed on October 5, 2021.

## Exhibit B: Comparing the Reports

	OR	WA	MT*	VT (2021)	CA	CO	DC (2021)	HI (2021)	NJ	ME	NM (2021)
Effective Date	27-Oct-97	5-March-19	31-Dec-09	20-May-13	9-Jun-16	6-Jun-17	18-Feb-17	5-Apr-18	12-Apr-19	19-Sep-19	18-Jun-21
Data Period	1/1/22 to 12/31/22	1/1/22 to 12/31/22	N/A	7/1/19 to 6/30/21	1/1/22 to 12/31/22	1/1/22 to 12/31/22	1/1/21 to 12/31/21	1/1/21 to 12/31/21	1/1/22 to 12/31/22	1/1/22 to 12/31/22	-
Number of patients who received the prescription	431	452		29	1,270	316	7	70	91	58	
Number of patients who took the prescription (including those who requested the medication in the year prior)	278 (32 people received it in prior year)	363		17	853 (50 people received it in prior year)	-	6	29	-	40	
Number of patients who requested medication but died without ingesting the medication.	84 (19%)	44		10	173	-	1	20	9	13	
Number deaths caused by prescription out of total deaths in the state	0.06%	-		-	-	-	-	-	-	-	-
Number of patients who outlived their prognosis (lived more than six months after their prescription date)	16 (6%)	-	-	-	-	-	-	-	-	-	-
<b>Demographics</b>	<i>N= 278</i>	<i>N=444</i>		<i>N= 29</i>	<i>N=853</i>	<i>N=316</i>	<i>N= 7</i>	<i>N= 29</i>	<i>N= 91</i>	<i>N= 58</i>	
Aged 65 or older at death	235 (84.5%)	365 (82.3%)		-	91.9% (>60 yrs)	190 (78.2%)	2	20	75 (83%)	43	
Median age at death	75	74		-	78	74		75	79	-	
Male Patients	138 (49.6%)	234 (53%)		-	440 (51.6%)	109 (44.9%)	3	16	47 (52%)	29	
Female Patients	140 (50.4%)	210 (47%)		-	413 (48.4%)	134 (55.1%)	4	12	44 (48%)	29	
White	267 (96%)	93%		-	759 (89%)	226 (93%)	7	18	82 (90%)	-	
African American	1 (0.4%)	-		-	4 (0.5%)	1 (0.4%)	-	-	2 (2%)	-	
American Indian	2 (0.7%)	-		-	4 (0.5%)	1 (0.4%)	-	-	-	-	
Asian / Pacific Islander	5 (1.8%)	4%		-	54 (6.3%)	5 (2.1%)	-	8	6 (7%)	-	
Hispanic (any race)	2 (0.7%)	-		-	24 (2.8%)	7 (2.9%)	-	1	1 (1%)	-	
Native Hawaiian	-	-		-	0	-	-	3	-	-	
<b>Underlying Illness:</b>											
Cancer	64%	73%		21 (72%)	563 (66%)	184 (58.1%)	4		44 (48%)	38 (70%)	
Heart Disease/ Cardiovascular	12%	6%		-	101 (11.8%)	24 (7.6%)	1		13 (14%)	3 (6%)	
Neurodegenerative Disorders	27 (9.7%)	8%		3 (10%)	73 (8.6%)	45 (14.2%)	1		22 (24%)	-	
Amyotrophic lateral sclerosis (ALS)	-	-		2 (7%)	45 (61.6%)	23 (7.3%)	-		-	4 (7%)	

Respiratory disease	27 (9.7%)	7%		-	58 (6.8%)	34 (10.7%)	-		6 (7%)	6 (11%)	
<b>Location of Patient's Death</b>											
Home (patient, family or friend)	255 (91.7%)	76%		-	88.30%	198 (81.5%)	-	-	83 (92%)	-	
Assisted living or foster care facility	18 (6.5%)	-		-	8%	-	-	-	-	-	
Nursing home	0	-		-	1.20%	20 (8.2%)	-	-	2 (2%)	-	
Hospital	1 (0.4%)	-		-	0.40%	4 (1.6%)	-	-	-	-	
Hospice facility	1 (0.4%)	-		-	1.40%	13 (5.3%)	-	-	3 (3%)	-	
<b>End of Life Care</b>											
Enrolled in Hospice Care	91.40%	82%		-	95.4% (hospice and/or palliative care)	195 (80.2%)	-		-	-	

	OR	WA	MT*	VT (2021)	CA	CO	DC (2021)	HI (2021)	NJ	ME	NM (2021)
<b>Insurance</b>											
Number of patients with health insurance		394 (91%)		-	0.981	-	6		-	-	
Private Insurance	43 (20.5%)	-		-	0.107	-	4	6	-	-	
Medicare, Medicaid or Other Govt. Insurance	167 (79.5%)	-		-	2.70%	-	2	1	-	-	
Medicare/private								8			
No Insurance	0	-		-	0.60%	-	-		-	-	
Unknown								14			
<b>Education</b>											
Some high school/high school degree		85 (22%)					-	4			
8th grade or less	5 (1.8%)					1 (0.4%)	-		-		
9th-12th grade, no diploma	8 (2.9%)					5 (2.1%)	-		-	2%	
High school graduate/GED	59 (21.3%)					50 (16.5%)	-		11 (22%)	22%	
Some college/college degree		300 (77.5%)			76.40%		-				
Some college	51 (18.4%)					24 (9.9%)	-	1	4 (8%)	14%	
Associate degree	18 (6.5%)					23 (9.5%)	-		2 (4%)	3%	
Bachelor's degree	61 (22%)					77 (31.7%)	-	4	17 (34%)	27%	
Master's degree	58 (20.9%)					50 (20.6%)	4	6	10 (20%)	24%	
Doctorate or professional degree	17 (6.1%)					22 (9.1%)	1	2	6 (12%)	8%	
Unknown	1	2 (0.5%)				1 (0.4%)	1	12	-		
<b>Other:</b>											
Number of patients referred for psychological or psychiatric evaluation.	3			-	-	-	-	-	-	-	
Non-Residents- Number of out of State Patients who used prescription	3 (1.1%)	N/A		-	-	-	-	-	-	-	
Number of physicians who prescribed medications	146	207		-	341	74	4	21	-	-	

**APPENDIX IV:  
TASK FORCE MEMBER AFFILIATIONS**

Mary Beth Quaranta Morrissey, Esq., PhD, MPH, Task Force Chair  
Chair Elect, Health Law Section  
Assoc. Professor and Director, PhD Program in Social Welfare  
Yeshiva University Wurzweiler School of Social Work

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Hon. Rachel Kretser, Chair, Task Force Legislative Working Group  
Adjunct Professor, Albany Law School and  
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Kathleen Sweet, Esq., NYSBA Executive Committee  
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# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of the Report of Trusts & Estates Section - Proposed Legislation - Equity for Surviving Spouses Act (ESSA).

Attached is the legislative proposal from the Trusts and Estates Law Section supporting the Equity for Surviving Spouses Act (ESSA).

The Equity for Surviving Spouses Act (ESSA) will promote fairness for surviving spouses of members of New York public employer retirement plans by providing those individuals with the same protections that are available to surviving spouses' members of employer retirement plans sponsored by private employers, the federal government, or by public employers from almost every other state. ESSA is a remedial statute which would address the current unjust gap in the protections for New York surviving spouses of members of New York public employer retirement plans.

- The Committee on Legal Aid (COLA) supports and is a co-sponsor of the ESSA proposal.
- The Committee on Diversity, Equity, and Inclusion supports the ESSA proposal and recommends revisions to reflect gender neutral language.
- The General Practice Section supports the ESSA proposal.
- The Elder Law and Special Needs Section supports the ESSA proposal.
- The President's Committee on Access to Justice supports the ESSA proposal.
- The Local and State Government Law Section and Family Law Section Legislation Committee chose not to take a formal position.

This report will be presented by Albert Feuer, Esq., Anna Masilela, Esq., and Cheryl Lynn Katz, Esq.

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# **EQUITY FOR SURVIVING SPOUSES ACT (ESSA)**

## **EXECUTIVE SUMMARY**

January 2024

The Equity for Surviving Spouses Act (ESSA) is proposed legislation that would provide surviving spouses of New York public sector employees with retirement benefit protections similar to those provided to surviving spouses of private sector employees, federal government employees, and public sector employees in almost all other states.

ESSA was developed in response to concerns raised by New York legal services attorneys, who advised surviving spouses of state and city employees. These surviving spouses were distressed to learn after the death of their spouse that they were entitled to no retirement plan benefits. As a result, they were left with significantly reduced standards of living, or in complete destitution.

This is a gap in protections for surviving spouses of New York public sector employees. While New York provides surviving spouses with the right to elect to obtain one-third of the value of their deceased loved one's property, this protection is of no utility if there are no survivor benefits for them to elect against. Similarly, the right of election is of no help if they are not notified of their deceased loved one's designated beneficiary for death benefits.

ESSA would remedy this gap by providing surviving spouses with default benefits from public employer retirement plans at least equal to the retirement survivor benefit under a joint and 50% survivor annuity and at least half of the death benefit. These default benefits may be waived by the surviving spouse with a written plan form. This waiver provision underscores the autonomy of surviving spouses in decisions that significantly impact their financial well-being.

ESSA mirrors the Federal Retirement Equity Act of 1984 provisions governing 100 million active members of private employer retirement plans and the similar provisions governing three million active members of federal employer retirement plans.

ESSA thus remedies a gap in New York surviving spouse protections by applying a tried-and-true approach used for forty years by private and federal employer retirement plans.

If enacted, ESSA would also bring New York in line with almost all other states, as only Tennessee, Alabama, and New York deny such protections to surviving spouses of their public sector employees. ESSA would enhance protections for surviving spouses of New York public sector employees, thereby safeguarding families across New York State.

## MEMORANDUM

From: Trusts & Estates Law Section of the New York State Bar Association  
 To: House of Delegates of the New York State Bar Association  
 Re: Proposed Legislation – Equity for Surviving Spouses Act (ESSA)  
 Date of Approval: June 21, 2023

**TITLE OF BILL: AN ACT** to amend the retirement and social security law, and the education law in relation to enacting the “Equity for Surviving Spouses Act,” which would amend the terms of the eight defined benefit employer retirement plans for employees of the State of New York and/or New York localities, including the City of New York, to provide that: (1) a retired employee’s surviving spouse, if any, is entitled by default to the survivor portion of the joint and 50% survivor annuity form of the retiree’s retirement benefits; and (2) an employee’s surviving spouse, if any, is entitled by default to 50% of the employee’s lump sum death benefits. The surviving spouse could waive the right to receive benefits at least equal to those the surviving spouse would receive under either of the defaults by executing and filing with the plan a written consent on a plan form. The amendment would enhance the protections for surviving spouses of New York public employees, recognize that marriage is an economic partnership, and encourage public employees and their spouses to prepare together for the eventualities of old age and death.

**LAW & SECTION REFERRED TO:** The legislation would add the following subdivisions to the following Sections of the Retirement & Social Security Law:

- Subdivisions f, g, and h to Section 51;
- Subdivisions g, h, and i to Section 60;
- Subdivisions d, e, and f to Section 60-c;
- Subdivisions f, g, and h to Section 90;
- Subdivisions f, g, and h to Section 351;
- Subdivisions h, i, and j to Section 360;
- Subdivisions d, e, and f to Section 360-c;
- Subdivisions f, g, and h to Section 390,
- Subdivisions h, i, and j to Section 448;
- Subdivisions d, e, and f to Section 448-a;
- Subdivisions g, h, and i to Section 508;
- Subdivisions d, e, and f to Section 508-a;
- Subdivisions e, f, and g. to Section 514;
- Subdivisions f, g, and h to Section 606;
- Subdivisions d, e, and f to Section 606-a;
- Subdivisions g, h, and i to Section 610; and
- Subdivisions twelve, thirteen, and fourteen to Section 657.

The legislation would also add the following subdivisions to the following Sections of the Education Law:

- Subdivisions i, j, and k to Section 512; and
- Subdivisions five, six, and seven to Section 513.

The legislation would also add the following subdivisions to the following Sections of the New York City Administrative Code:

- Subdivisions d, e, and f to Section 13-148;
- Subdivisions one, two, and three to Section 13-177;
- Subdivisions e, f, and g to Section 13-243;
- Subdivisions c, d, and e to Section 13-261;
- Subdivisions g, h, and i to Section 13-346;
- Subdivisions e, f, and g to Section 13-369,
- Subdivisions f, g, and h to Section 13-370,
- Subdivisions d, e, and f to Section 13-542;
- Subdivisions g, h, and i to Section 13-543; and
- Subdivisions f, g, and h to Section 13-558.

The legislation would also update statutory references in subdivisions b.1 and b.2 of Section 512 of the Education Law, and replace the term “blank” on which specified written designations are made with the term “form” in subdivisions aa and c of Sections 90 and 390 of the Retirement & Social Security Law.

**STATUTORY PURPOSE:** The Equity for Surviving Spouses Act (ESSA) was developed in response to concerns raised about deficiencies in protections for surviving spouses of public employees and of former employees who are members of New York public defined benefit employer retirement plans. While mourning, a member’s surviving spouse may be devastated to learn that they will not receive any survivor or death benefits; some, as a result, may spend the remainder of their lives in destitution. The spousal right of election, which applies to the member’s benefits from New York public employer retirement plans, is often of little utility because there may be no survivor benefits to elect against, and the surviving spouse may not learn of the death benefits in time to recover any benefits.

There are three reasons that surviving spouses of members of public employer retirement plans are not adequately protected. First, a member’s current default retirement benefit is a single life annuity benefit with no survivor benefits. Second, a member’s surviving spouse may currently receive none of the member’s death benefits. Third, a member’s spouse may currently receive no notice of the member’s form of retirement annuity benefit election, or of the beneficiary election for annuity or death benefits.

ESSA would remedy these deficiencies with three plan term changes. First, the default retirement annuity benefit for a member with a surviving spouse would become the joint and 50% survivor annuity, with the member’s surviving spouse as beneficiary. Second, the default beneficiary of 50% of the death benefit for a member with a surviving spouse would become the member’s surviving spouse. Third, the member would be unable to elect a retirement benefit or a death benefit that would provide the surviving spouse, if any, with smaller payments than those the surviving spouse would receive under either default benefit without the spouse’s written consent.

ESSA would align New York State public employer retirement practice with that of the federal government, most states, and most private-employers, all of which similarly protect the surviving spouses of their employees. The legislation is modeled on the Retirement Equity Act of 1984’s enhancement of the surviving spouse protections of the Employee Retirement Income Security

Act of 1974 (ERISA). Forty years after surviving spouses of employees of private employers were afforded stronger equitable protections, ESSA would do the same for surviving spouses of New York public employees.

The surviving spouse's consent, like those used in the Retirement Equity Act of 1984, must be on a form that sets forth the surviving spouse's entitlement to the default benefit, and the consequences of consenting to an alternate form of benefit, or a different beneficiary. This consent must be executed on or after the date of the member's marriage. The consent would, moreover, be effective only if the surviving spouse acknowledges understanding the consent and signs the form before a notary public or plan representative. The consent for the annuity benefit must be filed with the plan on or before the date the retirement benefit election is finalized and for the death benefit on or before the date of death.

ESSA would affect the terms of the eight New York public employer retirement plans:

- New York State and Local Retirement System;
- New York State and Local Police and Fire Retirement System; and
- New York State Teachers' Retirement System,
- New York City Employees' Retirement System;
- New York City Fire Pension Fund;
- New York City Board of Education Retirement System;
- New York City Police Pension Fund; and
- Teachers' Retirement System of the City of New York.

ESSA is intended to amend all the provisions relating to the retirement survivor annuity provisions and death benefit provisions of these eight plans as described above. Each of these provisions has a different aim and may govern different plans subsets. Thus, these provisions, which appear to be twenty-nine in number, are not identical. In order to illustrate how ESSA amends these different provisions, the attached ESSA Modules show how ESSA amends a retirement survivor annuity provision and a death benefit provision that relate only to the New York State Teachers' Retirement System. The ESSA Modules also present the provision pertaining to the ESSA scope of coverage and its effective date.

ESSA would not change the law pertaining to a domestic relations order or a support order. ESSA would govern all benefit payments beginning after December 31 of the year immediately after the year ESSA is enacted. ESSA would not affect payments made pursuant to an annuity or death benefit designation executed on or before such December 31. On the other hand, death benefit or retirement benefit applications executed after this date would be subject to the ESSA provisions.

As is now the case for the spousal right of election, ESSA's surviving spouse protections would not require any minimum marriage period, and the surviving spouse survivor benefits would not be limited to those accrued during the member's marriage or to those accrued after the ESSA effective date. Furthermore, any individual who is not a surviving spouse for purposes of exercising the spousal right of election would not be a surviving spouse for purposes of ESSA.

ESSA would not affect the current plan benefit rules for New York public employees or former New York public employees who are plan members who are not married on the later of the date the member files an application for retirement, or elects a form of retirement payment. Marriages occurring after these dates would not confer any surviving spouse rights under ESSA.

This memorandum is derived from the memorandum in support of legislation that is part of the attached Proposed ESSA Bill.

ESSA would remedy an unjust flaw in surviving spouse protections by adopting a tried and-true approach used for approximately forty years by private and federal retirement plans with more than 100 million active plan participants. ESSA recognizes that marriage is an economic partnership, and that both spouses have a stake in retirement benefits payable after the death of their partner. ESSA would enhance protections for surviving spouses of New York public employees, and thus protect families across New York State.

# ESSA Modules

## Illustrative Death Benefit Module ESSA Section 2: Section 512 of the Education Law

i. Notwithstanding any other provision of this section to the contrary, at least one-half of any death benefits payable under this section, including any accumulated contributions remaining at the time of the member's death, shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that accords with this subdivision i) that the surviving spouse receive less than one-half of the death benefits, and:

1. (A) the member's surviving spouse consented, on or after the date of the member's marriage, in writing to the member's election;
- (B) the surviving spouse's consent is on a plan form that sets forth:
  - (i) the amount of the member's death benefits and of the spouse, if the spouse were entitled to half those benefits;
  - (ii) a statement to the effect that (absent valid consent to the contrary) the surviving spouse is entitled to at least half of the death benefits;
  - (iii) a statement to the effect that the surviving spouse has the right to prevent any future member elections regarding the member's death benefits without the surviving spouse's consent unless the consent of the surviving spouse expressly permits member elections without any further consent by the surviving spouse; and
  - (iv) the fact that consenting to the member's election would result in the surviving spouse receiving either no death benefits or smaller death benefits than the surviving spouse would otherwise receive under this subdivision;
- (C) the consent includes an acknowledgement that the surviving spouse understands that, absent the surviving spouse's consent to the member's election, the surviving spouse would be entitled to at least one-half of the death benefits, and that the surviving spouse's consent would result in the elimination or reduction of such death benefits;
- (D) the consent includes a signature by the surviving spouse that was witnessed by a notary public or a representative of the retirement system; and
- (E) the system receives the completed consent and the member's election before the member's death;



2. the member and the surviving spouse were legally separated when the member's election was filed with the retirement system;
3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the member's death;
4. it is established to the satisfaction of the retirement board of the system that the surviving spouse could not have been located if the member had been willing and able to exercise due diligence to locate the surviving spouse on the date of the member's death; or
5. there is no surviving spouse.

j. Notwithstanding any other provision of this section to the contrary, a member's election must comply with the terms of subdivision i of this section to be effective.

k. If the retirement board of the system acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in—

1. relying on a consent referred to in paragraph one of subdivision i of this section, or
2. making a determination that at least one of paragraphs two, three, four, or five of subdivision i of this section is true,

then (without implication as to what liability the retirement system and the board might have in the absence of this subdivision k) such consent or determination shall be treated as valid for purpose of discharging the retirement system and the board from liability to the extent of payments made pursuant to such action; provided that the foregoing discharges shall not act to deprive the surviving spouse of any rights to recover amounts from any party other than the retirement system or the board.

## **Illustrative Annuity Benefit Module**

### **ESSA Section 3: Section 513 of the Education Law**

5. Notwithstanding any other provision of this section to the contrary, a member's retirement allowance payable under this section shall be paid as Option 3, with the spouse as the member's beneficiary, so that upon his or her death, if the member has a surviving spouse who was married to the member on the date the member filed his or her retirement application, or on the date the member filed his or her last effective option selection, if any, whichever is later, unless the member (a) elects that the surviving spouse receive survivor benefit payments in amounts that are greater than the benefit payments that would be paid to the surviving spouse under Option 3, if the spouse were the member's beneficiary; or (b) elects (in a manner that accords with this subdivision five) that the surviving spouse receive either no survivor benefit payments or survivor benefit payments, in amounts that are smaller than the benefit payments that would be paid to the surviving spouse under Option 3, if the spouse were the member's beneficiary, and:

- a. (i) the member's surviving spouse consented, on or after the date of the member's marriage, in writing to the member's election;
- (ii) the surviving spouse's consent is on a plan form that sets forth:
  - (A) the amount of the Option 3 monthly benefit entitlements of the member and of the spouse, if the spouse were the member's beneficiary, and when the member and the surviving spouse would each be entitled to those benefits;
  - (B) a statement to the effect that (absent valid consent to the contrary) the surviving spouse is entitled to survivor benefit payments in amounts that are greater or equal to the amounts of the retirement allowance payments that would be paid to the surviving spouse under Option 3, if the spouse were the member's beneficiary;
  - (C) a statement to the effect that the surviving spouse has the right to prevent any future member elections regarding the member's survivor benefits without the surviving spouse's consent unless the consent of the surviving spouse expressly permits member elections without any further consent by the surviving spouse; and
  - (D) the fact that consenting to the member's survivor benefit election would result in the surviving spouse receiving no survivor benefits or smaller survivor benefits than the surviving spouse would otherwise receive under this subdivision;
- (iii) the consent includes an acknowledgement that the surviving spouse understands that, absent the surviving spouse's consent to the member's election, the surviving spouse would be entitled to be paid lifetime survivor

benefit payment amounts that are at least the amounts that would be paid to the surviving spouse under Option 3, if the spouse were the member's beneficiary, and that the surviving spouse's consent would result in the elimination or reduction of such survivor benefits;

(iv) the consent includes a signature by the surviving spouse that was witnessed by a notary public or a representative of the retirement system; and

(v) the system receives the completed consent and the member's election before the date the member filed his or her retirement application, or the date the member filed his or her last effective option selection, if any, whichever is later;

- b. the member and the surviving spouse were legally separated when the member's election was filed with the retirement system;
- c. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date the member's election is filed with the retirement system;
- d. it is established to the satisfaction of the retirement board of the system that the surviving spouse could not have been located if the member had been willing and able to exercise due diligence to locate the surviving spouse on the later of the date the member's retirement application was filed with the retirement system, or the date the member's last effective option selection was filed with the retirement system; or
- e. there is no surviving spouse.

6. Notwithstanding any other provision of this section to the contrary, a member's election must comply with the terms of subdivision five of this section to be effective.

7. If the retirement board of the system acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in—

- a. relying on a consent referred to in paragraph a of subdivision five of this section, or
- b. determining that at least one of paragraphs b, c, d, or e of subdivision five of this section is true,

then (without implication as to what liability the retirement system and the board might have in the absence of this subdivision seven) such consent or determination shall be treated as valid for purpose of discharging the retirement system and the board from liability to the extent of payments made pursuant to such action; provided that the foregoing discharges shall not act to deprive the surviving spouse of any rights to recover from any party other than the retirement system or the

board. The retirement system may recover the actuarial equivalent of such discharged payments, computed using the plan's actuarial factors, from the surviving spouse with offsets against the system's monthly annuity benefit payments to the surviving spouse payable under this section, but may not thereby reduce any of those benefit payments by more than 10%.

## **Scope of Coverage and Effective Date Provisions**

### **ESSA Section 32**

Section 32. This act shall not change the law pertaining to a prenuptial agreement or a postnuptial agreement executed on or before December 31 of the year immediately after the year the bill is enacted. This act shall not change the law pertaining to any domestic relations order or a support order.

This act shall take effect for all benefit payments beginning after December 31 of the year immediately after the year the bill is enacted other than those payments made pursuant to a benefit designation executed on or before December 31 of the year immediately after the year the bill is enacted.

## **Illustrative Explanatory paragraphs in Memorandum in Support of Legislation for Education Law §§ 512 and 513**

### Education Law § 512. Withdrawal and death benefits

This Section applies to members of the New York State Teachers' Retirement System who die prior to retirement. Under current law, the death benefit, including the accumulated member contributions, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (i), which provides that the member's surviving spouse, if any, is entitled to at least half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated. The current statute references Section 103-a of the decedent estate law, which was repealed effective September 1, 1967. Thus, the reference is replaced by one to the current counterpart, Section 1310 of the Surrogate's Court Procedure Act.

### Education Law § 513. Optional allowances

This Section sets forth the forms in which a member of the New York State Teachers' Retirement System may elect to receive his or her retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision five, which provides that the default benefits are paid pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits

payable under Option 3 and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

## STATE OF NEW YORK

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 BILL NUMBER \_\_\_\_\_

IN \_\_\_\_\_

\_\_\_\_\_, 2024

**Passed on Home Rule Request pursuant to Article IX, Section 2(b)(2) of the Constitution****Introduced by:** \_\_\_\_\_

**AN ACT** to amend the retirement and social security law, and the education law in relation to enacting the “Equity for Surviving Spouses Act,” which would which would amend the terms of the eight defined benefit employer retirement plans for employees of the State of New York and/or New York localities, including the City of New York, to provide that: (1) a retired employee’s surviving spouse, if any, is entitled by default to the survivor portion of the joint and 50% survivor annuity form of the retiree’s retirement benefits; and (2) an employee’s surviving spouse, if any, is entitled by default to 50% of the employee’s lump sum death benefits. The surviving spouse could waive the right to receive benefits at least equal to those the surviving spouse would receive under either of the defaults by executing and filing with the plan a written consent on a plan form. The amendment would enhance the protections for surviving spouses of New York public employees, recognize that marriage is an economic partnership, and encourage public employees and their spouses to prepare together for the eventualities of old age and death.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as the “Equity for Surviving  
2 Spouses Act.”

3

4

5 Section 2. Section 512 of the education law, as amended by L. 2021, ch. 78, § 5, is amended to  
6 read as follows:

7

8 § 512. Withdrawal and death benefits

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
ESSA May 22, 2023



1 Benefits upon withdrawal and death shall be payable as follows:

2  
3 a. A member who withdraws from service or ceases to be a teacher for any cause other than death  
4 or retirement shall be paid on demand the accumulated contributions standing to the credit of his  
5 individual account in the annuity savings fund. A member who has no accumulated contributions  
6 credited to his individual account in the annuity savings fund and who ceases to be a teacher for  
7 any cause other than death or retirement may withdraw from membership in the system by filing  
8 a notice of withdrawal with the system pursuant to rules and regulations adopted by the retirement  
9 board.

10 b. 1. Should a contributor die before retirement, his accumulated contributions shall be paid to  
11 his estate or to such person as he shall have nominated to receive such benefit. In the  
12 event such designated beneficiary does not survive him, or if he shall not have so  
13 designated a beneficiary, such benefit shall be payable to the deceased member's estate  
14 or as provided in section [one thousand three hundred ten of the surrogate's court](#)  
15 [procedure act](#) [~~one hundred three a of the decedent estate law~~]. Such nomination must  
16 be by written designation duly executed and filed with the retirement board.

17 2. In addition to the return of accumulated contributions, a death benefit also shall be  
18 payable upon the death of a member who dies before the effective date of his  
19 retirement, and was in service upon which his membership was based when he  
20 died or was on the payroll in such service and paid within a period of twelve  
21 months prior to his death and had not been otherwise gainfully employed since  
22 he ceased to be on such payroll or if, during the period that membership is valid,  
23 the retirement board shall determine to its satisfaction that said member was  
24 physically or mentally incapacitated for the performance of duty at the time he  
25 ceased to be on the payroll in such service and that he had been so incapacitated  
26 and had not been otherwise gainfully employed since he ceased to be on such  
27 payroll; provided he had credit for one or more years of service while actually a  
28 member. The amount of death benefit shall be computed by multiplying one  
29 twelfth of the compensation earnable by such member during his last twelve  
30 months of service while a member by the number of years, not to exceed twelve,  
31 of his total credit for service as a teacher in this state. Where the member has  
32 more than twelve years of credited service as a teacher in this state and when his  
33 death occurs on or after July first, nineteen hundred sixty-one, and before July  
34 first, nineteen hundred seventy-four, there shall be added to such benefit one  
35 twenty-fourth of such compensation multiplied by the number of years in excess  
36 of twelve, but not to exceed twenty-four such years, of his total credit for service  
37 as a teacher in the state. The death benefit shall be paid to such person as he shall  
38 have nominated to receive such benefit. In the event such designated beneficiary  
39 does not survive him, or if he shall not have so designated a beneficiary, such  
40 benefit shall be payable to the deceased member's estate or as provided in  
41 section one thousand three hundred ten [of the surrogate's court procedure act](#)  
42 [~~one hundred three a of the decedent estate law~~]. Such nomination must be by  
43 written designation duly executed and filed with the retirement board. The

1 provisions of this paragraph two of subdivision b of this section shall apply only  
2 to deaths occurring on and after July first, nineteen hundred fifty-nine.

3 3. Notwithstanding any other provisions of this article or any rules or regulations  
4 adopted thereunder by the retirement board, the death benefit payable pursuant  
5 to paragraph two of this subdivision, in the case of a member who dies after  
6 having become eligible to apply and be retired for special service or  
7 superannuation pursuant to the provisions of this article, shall be increased by  
8 the amount, if any, that the actuarial equivalent of the pension portion of his  
9 retirement allowance, computed as if he had been retired on the day immediately  
10 preceding his death, and computed in accordance with the provisions of  
11 subdivision two of section five hundred ten and subdivision four of section five  
12 hundred eleven-a of this article, exceeds the amount of the death benefit  
13 otherwise payable pursuant to paragraph two of this subdivision. The provisions  
14 of this paragraph three of subdivision b of this section shall apply only to deaths  
15 occurring after the date on which said paragraph three becomes operative and  
16 prior to July first, nineteen hundred seventy-four.

17 4. Notwithstanding any other provision of this article, the requirement of one or more  
18 years of credited service, as set forth in paragraph two of this subdivision, shall  
19 be deemed to have been satisfied by any member who has credit for three or  
20 more months of service rendered since last becoming a member. The provisions  
21 of this paragraph shall apply only to deaths occurring after June thirtieth,  
22 nineteen hundred seventy and before July first, nineteen hundred seventy-five.

23 5. Notwithstanding any other provision of this article, the death benefit payable  
24 pursuant to paragraph two of this subdivision shall be increased by the excess,  
25 if any, of the greater of a or b over the sum of c and d, where a, b, c and d are as  
26 set forth hereunder:

27 a. One-twelfth of the member's compensation multiplied by the number of years,  
28 not to exceed thirty-six, of his total credited state service.

29 b. The lesser of three times the member's compensation or twenty thousand  
30 dollars.

31 c. The death benefit which, in accordance with the provisions of paragraph two  
32 of this subdivision, is payable in addition to the return of accumulated  
33 contributions.

34 d. The reserve for increased-take-home-pay.

35 The term "compensation", as used in this subparagraph, shall mean (1) in the case of  
36 a member who has credit for one or more years of service rendered since last  
37 becoming a member, the compensation earned by such member during his last  
38 twelve months of service, and (2) in the case of a member who has credit for less  
39 than one year of service rendered since last becoming a member, it shall mean  
40 his annual rate of compensation at the time of his death. The provisions of this  
41 paragraph shall apply only to deaths occurring after June thirtieth, nineteen

1           hundred seventy and before July first, nineteen hundred seventy-five. The  
 2           additional death benefits payable hereunder shall be construed as being payable  
 3           under paragraph two of this subdivision for the purpose of computing benefits  
 4           payable under paragraph three of this subdivision.

5           c. The member or, within ninety days after his death, the person nominated by him to receive any  
 6           benefit payable on his account, may file with the retirement board a written designation, duly  
 7           executed, providing that such benefit shall be paid in the form of an annuity to the person so  
 8           nominated. Such annuity shall be determined as the actuarial equivalent of the benefit otherwise  
 9           payable, on the basis of the interest rate and the mortality tables adopted by the retirement board  
 10          for use in the calculations of such annuities. Such annuity shall be payable throughout the life of  
 11          the person so nominated, with no payments at his death unless the member or, within ninety days  
 12          after his death, the person nominated by him to receive his benefit, shall elect to have the actuarial  
 13          equivalent of such annuity paid in the form of a reduced annuity payable for life with the provision  
 14          that if the person so nominated should die before the annuity payments received by him are equal  
 15          to such actuarial equivalent, the balance thereof shall be paid in a lump sum to such beneficiary's  
 16          estate or to such person as such member or his nominee shall have designated. Such designation  
 17          of a beneficiary to receive such benefit may be made or changed at any time by the person who  
 18          made it. Such election or change shall be made by written designation duly executed and filed with  
 19          the retirement board. Notwithstanding the foregoing provisions, the retirement board reserves the  
 20          right to pay any benefit in the form of a lump sum payment if the annuity determined as the  
 21          actuarial equivalent of the benefit otherwise payable is less than one hundred dollars per month.

22          d.     1. The retirement board may adopt rules and regulations providing that a trustee of an inter  
 23                 vivos or testamentary trust shall be eligible to be nominated to receive a lump sum  
 24                 benefit pursuant to subdivision b of this section.

25                 2. Any proceeds received by a trustee under this section shall not be subject to the  
 26                 debts of the member or to transfer or estate taxes to any greater extent than if  
 27                 such proceeds were payable to the beneficiaries named in the trust and not to the  
 28                 estate of the member.

29                 3. A payment made in good faith under this section to either a designated trustee of an  
 30                 inter vivos trust, a successor trustee of an inter vivos trust who provides a copy  
 31                 of his appointment or a trustee of [or] successor trustee of a testamentary trust  
 32                 who provides a copy of the letters of trusteeship shall be a complete discharge  
 33                 to the system to the extent of the payment.

34                 4. If no qualified trustee claims the proceeds within eighteen months after the death of  
 35                 the member, or if satisfactory evidence is furnished within such period showing  
 36                 that there is or will be no trustee to receive the proceeds, payment shall be made  
 37                 to the deceased member's estate.

38          e. Notwithstanding any other provision of law, a member with ten or more years of credited service  
 39          in such system who dies before a retirement benefit becomes payable and who is otherwise not  
 40          entitled to a death benefit from the retirement system shall be deemed to have died on the last day  
 41          that he or she was in service upon which his or her membership was based for purposes of

1 eligibility for the payment of a death benefit pursuant to the provisions of this section. The death  
 2 benefit payable in such case shall be one-half of that which would have been payable had such  
 3 member died on the last day that service was rendered.

4 f. Notwithstanding the provisions of any other law to the contrary and solely for the purpose of  
 5 determining eligibility for the death benefit payable pursuant to this section, a person subject to  
 6 this section shall be considered to have died while in teaching service provided such person was  
 7 in such service at the time he or she was ordered to active duty pursuant to Title 10 of the United  
 8 States Code, with the armed forces of the United States or to service in the uniformed services  
 9 pursuant to Chapter 43 of Title 38 of the United States Code and died while on such active duty or  
 10 service in the uniformed services on or after June fourteenth, two thousand five. Provided, further,  
 11 that any such person ordered to active duty pursuant to Title 10 of the United States Code, with  
 12 the armed forces of the United States or to service in the uniformed services pursuant to Chapter  
 13 43 of Title 38 of the United States Code who died prior to rendering the minimum amount of  
 14 service necessary to be eligible for this benefit shall be considered to have satisfied the minimum  
 15 service requirement.

16 g. Notwithstanding any other provision of law to the contrary, any member of the retirement  
 17 system subject to article fourteen or fifteen of the retirement and social security law who has  
 18 permanently ceased teaching shall have the right to elect the return of his or her accumulated  
 19 contributions and thereby terminate his or her membership in the retirement system without regard  
 20 to the amount of service to his or her credit, provided a public employee retirement system in  
 21 another state has certified in a manner satisfactory to the system that such member is a member of  
 22 such other retirement system, has at least five years of retirement credit in such other system, and  
 23 is eligible, upon the termination of his or her membership in the system, to obtain retirement credit  
 24 in such other retirement system for the service which has been credited to his or her membership  
 25 in the system. Upon refund of such accumulated contributions, any and all obligations of the  
 26 retirement system to such member shall be totally discharged. The retirement board is authorized  
 27 to adopt such rules and regulations as may be necessary to implement this subdivision.

28 h. [Expires and deemed repealed Dec. 31, 2022, pursuant to L. 2021, c. 78, § 14. See, also, subd.  
 29 H above.]

30 1. Notwithstanding any other provision of this article or of any general, special or local  
 31 law to the contrary, and solely for the purpose of determining eligibility for  
 32 benefits under this section, where:

33 (A) a member reported in person to such member's usual place of public  
 34 employment at the direction of such member's public employer or to any  
 35 alternate worksite as directed by such public employer, on or after March first,  
 36 two thousand twenty, provided that such alternate worksite was not such  
 37 member's home or residence;

38 (B) such member contracted COVID-19 within forty-five days after reporting to  
 39 work as described in subparagraph (A) of this paragraph as confirmed by a  
 40 positive laboratory test or as diagnosed before or after such member's death by

1 a licensed, certified, registered or authorized physician, nurse practitioner, or  
 2 physician's assistant currently in good standing in any state or the District of  
 3 Columbia, or a physician, nurse practitioner, or physician's assistant authorized  
 4 to practice in New York by executive order during the declared COVID-19 state  
 5 of emergency; and

6 (C) such member died on or before December thirty-first, two thousand twenty-  
 7 two, and COVID-19 caused or contributed to such member's death, as  
 8 documented on such member's death certificate, or as certified by a physician,  
 9 nurse practitioner, or physician's assistant described in subparagraph (B) of this  
 10 paragraph who determines with a reasonable degree of medical certainty that  
 11 COVID-19 caused or contributed to the member's death, such member's  
 12 statutory beneficiary shall receive an accidental death benefit, unless such  
 13 statutory beneficiary elects to receive an ordinary death benefit.

14 2. Any amount payable as a result of this section shall be reduced by any amount paid  
 15 by such member's retirement system to any recipient of ordinary death benefits  
 16 under this article.

17  
 18 3. (A) Notwithstanding any provision of this article or of any general, special or  
 19 local law to the contrary, and solely for the purpose of determining eligibility  
 20 for benefits under this section, where a member:

21 (i) retired from his or her retirement system on or after March first, two  
 22 thousand twenty, and before July first, two thousand twenty;

23 (ii) on or after March first, two thousand twenty, reported in person to such  
 24 member's usual place of public employment at the direction of such  
 25 member's public employer or to any alternate worksite as directed by such  
 26 public employer, provided that such alternate worksite was not such  
 27 member's home or residence;

28 (iii) contracted COVID-19 within forty-five days after any such date of  
 29 reporting to work in person, as confirmed by a positive laboratory test or as  
 30 diagnosed before or after such member's death by a licensed, certified,  
 31 registered or authorized physician, nurse practitioner, or physician's assistant  
 32 currently in good standing in any state or the District of Columbia, or a  
 33 physician, nurse practitioner, or physician's assistant authorized to practice  
 34 in New York by executive order during the declared COVID-19 state of  
 35 emergency; and

36 (iv) such member died on or before December thirty-first, two thousand  
 37 twenty, and COVID-19 caused or contributed to such member's death, as  
 38 documented on such member's death certificate, or as certified by a  
 39 physician, nurse practitioner, or physician's assistant described in clause (iii)  
 40 of this subparagraph who determines with a reasonable degree of medical  
 41 certainty that COVID-19 caused or contributed to the member's death, such  
 42 member's statutory beneficiary shall receive an accidental death benefit if

1 such statutory beneficiary elects conversion of the member's service or  
2 disability retirement benefit into an accidental death benefit.

3  
4 (B) Such member's statutory beneficiary, as defined under this article, for  
5 purposes of accidental death benefits payable from such member's retirement  
6 system under this article, may, within ninety days of such member's retirement  
7 or September first, two thousand twenty, whichever is later, apply to such  
8 member's retirement system to request the conversion of such member's service  
9 or disability retirement benefit into an accidental death benefit. For purposes of  
10 the salary base upon which the accidental death benefit is calculated, such  
11 member shall be deemed to have died<sup>5</sup> on the date of such member's retirement.  
12 At the time of such conversion, such statutory beneficiary shall relinquish all  
13 rights to the prospective benefits payable under the service or disability  
14 retirement statute, including any post-retirement death benefits, since such  
15 member's death. If the statutory beneficiary is not the only beneficiary receiving  
16 or entitled to receive a benefit under the service or disability retirement statute,  
17 including, but not limited to, a post-retirement death benefit or benefit paid or  
18 payable pursuant to the member's option selection, the accidental death benefit  
19 payments to the statutory beneficiary will be reduced by any amounts paid or  
20 payable to any other statutory beneficiary.

- 21 4. In order to be eligible for the benefit described in this subdivision, the applicable  
22 retirement system or systems are authorized to promulgate rules and regulations  
23 to administer this benefit including, but not limited to, requiring a statement to  
24 be filed confirming the member contracted COVID-19 and the dates and  
25 locations of the member's employment.

26 i. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
27 benefits payable under this section, including any accumulated contributions remaining at the time  
28 of the member's death, payable under this section shall be paid to the member's surviving spouse,  
29 if any, unless the member elects (in a manner that accords with this subdivision i) that the surviving  
30 spouse receive less than one-half of the death benefits, and:

- 31 1. (A) the member's surviving spouse consented, on or after the date of the  
32 member's marriage, in writing to the member's election;

33 (B) the surviving spouse's consent is on a plan form that sets forth:

34 (i) the amount of the member's death benefits, and of the spouse, if the  
35 spouse were entitled to half those benefits;

36 (ii) a statement to the effect that (absent valid consent to the contrary)  
37 the surviving spouse is entitled to at least half of the death benefits;

38 (iii) a statement to the effect that the surviving spouse has the right to  
39 prevent any future member elections regarding the member's death  
40 benefits without the surviving spouse's consent unless the consent of the

1 surviving spouse expressly permits member elections without any  
 2 further consent by the surviving spouse; and

3 (iv) the fact that consenting to the member's election would result in the  
 4 surviving spouse receiving either no death benefits or smaller death  
 5 benefits than the surviving spouse would otherwise receive under this  
 6 subdivision;

7 (C) the consent includes an acknowledgement that the surviving spouse  
 8 understands that, absent the surviving spouse's consent to the member's  
 9 election, the surviving spouse would be entitled to be paid at least one-half of  
 10 the death benefits, and that the surviving spouse's consent would result in the  
 11 elimination or reduction of such death benefits;

12 (D) the consent includes a signature by the surviving spouse that was witnessed  
 13 by a notary public or a representative of the retirement system; and

14 (E) the system receives the completed consent and the member's election before  
 15 the member's death;

16 2. the member and the surviving spouse were legally separated when the member's  
 17 election was filed with the retirement system; or

18 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 19 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 20 of the member's death;

21 4. it is established to the satisfaction of the retirement board of the system that the  
 22 surviving spouse could not have been located if the member had been willing  
 23 and able to exercise due diligence to locate the surviving spouse on the date of  
 24 the member's death; or

25 5. there is no surviving spouse.

26 j. Notwithstanding any other provision of this section to the contrary, a member's election must  
 27 comply with the terms of subdivision i of this section to be effective.

28 k. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 29 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 30 matters would use in the conduct of an enterprise of a like character and with like aims, in—

31 1. relying on a consent referred to in paragraph one of subdivision i of this section,  
 32 or

33 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 34 i of this section is true,

35 then (without implication as to what liability the retirement system and the board might have in  
 36 the absence of this subdivision k) such consent or determination shall be treated as valid for  
 37 purpose of discharging the retirement system and the board from liability to the extent of payments  
 38 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 [surviving spouse of any rights to recover amounts from any party other than the retirement system](#)  
 2 [or the board.](#)

3  
 4  
 5 Section 3. Section 513 of the education law, as amended by L. 1973, ch. 1046, § 82, is amended  
 6 to read as follows:

7  
 8 § 513. Optional allowances

9 1. With the exception that no election of an optional benefit shall become effective in case a  
 10 member dies within thirty days after the filing of an application for a retirement allowance,  
 11 until the first payment on account of any benefit becomes normally due, any member, at the  
 12 time of his retirement, may elect to receive his benefits in a retirement allowance payable  
 13 throughout life or he may on retirement elect to receive the actuarial equivalent at that time of  
 14 his retirement allowance in a lesser retirement allowance, payable throughout life with the  
 15 provision that:

16 Option 1. If he dies before he has received in payments the present value of his  
 17 retirement allowance as it was at the time of his retirement, the balance shall be  
 18 paid to his legal representatives or to such person as he shall nominate by written  
 19 designation duly acknowledged and filed with the retirement board.

20 Option 2. Upon his death, his retirement allowance shall be continued through  
 21 the life of and paid to such person as he shall nominate by written designation  
 22 duly acknowledged and filed with the retirement board at the time of his  
 23 retirement.

24 Option 3. Upon his death, one-half of his retirement allowance shall be  
 25 continued throughout the life of and paid to such person as he shall nominate by  
 26 written designation duly acknowledged and filed with the retirement board at  
 27 the time of his retirement.

28 Option 4. Some other benefit or benefits shall be paid either to the member or to  
 29 such person or persons as he shall nominate, provided such other benefit or  
 30 benefits, together with the lesser retirement allowance, shall be certified by the  
 31 actuary to be of equivalent actuarial value to his retirement allowance and shall  
 32 be approved by the retirement board.

33 2. If any retired member who has not elected an optional benefit, or who has elected a benefit under  
 34 Option 4 providing for the payment at death of the amount, if any, by which his accumulated  
 35 contributions at the time of his retirement exceed the aggregate amount of his annuity payments,  
 36 dies within thirty days after the date his retirement becomes effective, notwithstanding any other  
 37 provisions of this law to the contrary, benefits shall be paid in accordance with subdivision (b) or  
 38 (c) of section five hundred twelve, except that the amount of his accumulated contributions payable  
 39 under paragraph (1) of said subdivision (b) shall be reduced by any annuity payments received by  
 40 him prior to his death and the benefit payable under paragraph (2) of said subdivision (b) shall be  
 41 reduced by any pension payments received by him prior to his death. The amounts payable shall  
 42 be paid to the beneficiary or beneficiaries entitled thereto as provided under section five hundred

EXPLANATION—Matter ([underscored](#)) is new; matter in brackets [-] is old law to be omitted  
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1 twelve, except that if the member has elected Option 4, as provided above, the beneficiary  
 2 nominated under such Option 4 shall be substituted for any beneficiary previously nominated and  
 3 all amounts payable shall be paid to the beneficiary nominated under such Option 4.

4 3. In the case of persons who last became members on or after July first, nineteen hundred seventy-  
 5 three, the provisions of subdivision two of this section shall apply only to deaths occurring after  
 6 the date on which said subdivision two becomes operative and prior to July first, nineteen hundred  
 7 seventy-four.

8 4. a. The retirement board may adopt rules and regulations providing that a trustee of an inter  
 9 vivos or testamentary trust shall be (1) eligible to be nominated to receive a lump sum  
 10 benefit under option one and (2) eligible to be nominated to receive any benefit under  
 11 option four which the retirement board shall deem appropriate.

12 b. Any proceeds received by a trustee under this section shall not be subject to the  
 13 debts of the member or to transfer or estate taxes to any greater extent than if  
 14 such proceeds were payable to the beneficiaries named in the trust and not to the  
 15 estate of the member.

16 c. A payment made in good faith under this section to either a designated trustee of an  
 17 inter vivos trust, a successor trustee of an inter vivos trust who provides a copy  
 18 of his appointment or a trustee or successor trustee of a testamentary trust who  
 19 provides a copy of the letters of trusteeship shall be a complete discharge to the  
 20 system to the extent of the payment.

21 D. If no qualified trustee claims the proceeds within eighteen months after the death  
 22 of the retired member, or if satisfactory evidence is furnished within such period  
 23 showing that there is or will be no trustee to receive the proceeds, payment shall  
 24 be made to the deceased retired member's estate.

25 5. Notwithstanding any other provision of this section to the contrary, a member's retirement  
 26 allowance payable under this section shall be paid as Option 3, with the spouse as the member's  
 27 beneficiary, so that upon his or her death, if the member has a surviving spouse who was married  
 28 to the member on the date the member filed his or her retirement application, or on the date the  
 29 member filed his or her last effective option selection, if any, whichever is later, unless the member  
 30 (a) elects that the surviving spouse receive survivor benefit payments in amounts that are greater  
 31 than the benefit payments that would be paid to the surviving spouse under Option 3, if the spouse  
 32 were the member's beneficiary; or (b) elects (in a manner that accords with this subdivision five)  
 33 that the surviving spouse receive either no survivor benefit payments or survivor benefit payments,  
 34 in amounts that are smaller than the benefit payments that would be paid to the surviving spouse  
 35 under Option 3, if the spouse were the member's beneficiary, and:

36 a. (i) the member's surviving spouse consented on or after the date of the member's  
 37 marriage, in writing to the member's election;

38 (ii) the surviving spouse's consent is on a plan form that sets forth:

39 (A) the amount of the Option 3 monthly benefit entitlements of the  
 40 member and of the spouse, if the spouse were the member's beneficiary,

1 and when the member and the surviving spouse would each be entitled  
 2 to those benefits;

3 (B) a statement to the effect that (absent valid consent to the contrary) the  
 4 surviving spouse is entitled to survivor benefit payments in amounts that  
 5 are greater or equal to the amounts of the retirement allowance payments  
 6 that would be paid to the surviving spouse under Option 3, if the spouse  
 7 were the member's beneficiary;

8 (C) a statement to the effect that the surviving spouse has the right to  
 9 prevent any future member elections regarding the member's survivor  
 10 benefits without the surviving spouse's consent unless the consent of the  
 11 surviving spouse expressly permits member elections without any  
 12 further consent by the surviving spouse; and

13 (D) the fact that consenting to the member's survivor benefit election  
 14 would result in the surviving spouse receiving no survivor benefits or  
 15 smaller survivor benefits than the surviving spouse would otherwise  
 16 receive under this subdivision;

17 (iii) the consent includes an acknowledgement that the surviving spouse  
 18 understands that, absent the surviving spouse's consent to the member's  
 19 election, the surviving spouse would be entitled to be paid lifetime survivor  
 20 benefit payment amounts that are at least the amounts that would be paid to the  
 21 surviving spouse under Option 3, if the spouse were the member's beneficiary,  
 22 and that the spouse's consent would result in the elimination or reduction of such  
 23 survivor benefits;

24 (iv) the consent includes a signature by the surviving spouse that was witnessed  
 25 by a notary public or a representative of the retirement system; and

26 (v) the system receives the completed consent and the member's election before  
 27 the date the member filed his or her retirement application, or the date the  
 28 member filed his or her last effective option selection, if any, whichever is later;

29 b. the member and the surviving spouse were legally separated when the member's  
 30 election was filed with the retirement system;

31 c. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 32 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 33 of the filing of the member's application for a retirement allowance;

34 d. it is established to the satisfaction of the retirement board of the system that the  
 35 surviving spouse could not have been located if the member had been willing  
 36 and able to exercise due diligence to locate the surviving spouse on the later of  
 37 the date the member's retirement application was filed with the retirement  
 38 system, or the date the member's last effective option selection was filed with  
 39 the retirement system; or

40 e. there is no surviving spouse.

1 6. Notwithstanding any other provision of this section to the contrary, a member's election must  
 2 comply with the terms of subdivision five of this section to be effective.

3 7. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 4 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 5 matters would use in the conduct of an enterprise of a like character and with like aims, in—

6 a. relying on a consent referred to in paragraph a of subdivision five of this section, or

7 b. determining that at least one of paragraphs b, c, d, or e of subdivision five of this  
 8 section is true,

9 then (without implication as to what liability the retirement system and the board might have in  
 10 the absence of this subdivision seven) such consent or determination shall be treated as valid for  
 11 purpose of discharging the retirement system and the board from liability to the extent of payments  
 12 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 13 surviving spouse of any rights to recover from any party other than the retirement system or the  
 14 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 15 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 16 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 17 may not thereby reduce any of those benefit payments by more than 10%.

18  
 19  
 20 Section 4. Section 51 of the retirement & social security law, as amended by L. 1972, ch. 283, §  
 21 32, is amended to read as follows:  
 22

23 § 51. Refunds and Withdrawals.  
 24

25 a. A member under age sixty may withdraw his accumulated contributions if he has been separated  
 26 from service for a period of at least fifteen days.

27 b. A member sixty years of age, or over, may elect, not later than fifteen days after filing his  
 28 application for retirement, or not later than thirty days after his mandatory retirement has become  
 29 effective by operation of law, to withdraw his accumulated contributions in lieu of a retirement  
 30 allowance, provided that he

31 1. Has had less than five years of total service credit, or

32 2. Last became a member before April sixth, nineteen hundred forty-three, or

33 3. Is eligible for an annual retirement allowance which, without optional modification,  
 34 amounts to less than three hundred dollars.

35 c. The following contributions or additional contributions shall be treated as excess contributions  
 36 which, together with regular interest and special interest thereon, may be withdrawn by a member  
 37 at any time prior to retirement, or if not so withdrawn, shall be used to purchase additional annuity:

38 1. Contributions paid by a member in order to receive credit for service in war after

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1 world war I, as defined in section two of this article, not including, however,  
2 contributions required by subdivision k of section forty-one of this article.

3 2. Additional contributions paid by a member pursuant to section eighty, eighty-nine-  
4 a or eighty-nine-b and where, as a result of a change in his employment, such  
5 additional contributions would not provide an additional pension allowance for service  
6 for which such additional contributions were made.

7 3. Such other contributions to the annuity savings fund as may be determined by  
8 regulation of the comptroller to be excess and subject to such withdrawal.

9 d. If a member dies before the effective date of his retirement, his accumulated contributions shall  
10 be paid to his estate or to the person nominated by him in a written designation duly executed and  
11 filed with the comptroller.

12 In the event such a designated beneficiary does not survive him, or if he shall not have so  
13 designated a beneficiary, such contributions shall be payable to the deceased member's estate or  
14 as provided in section one thousand three hundred ten of the surrogate's court procedure act. Such  
15 member, or after his death, the person so nominated by him may file with the comptroller a written  
16 designation, duly executed providing that such contributions shall be paid in the form of an annuity  
17 to such person so nominated. Such designation shall be filed prior to or within ninety days after  
18 the death of the member. The amount of such annuity shall be determined as the actuarial  
19 equivalent of such accumulated contributions on the basis of regular interest and the age of the  
20 person so nominated as of the date of such member's death.

21 d. Notwithstanding the provisions of section ninety of this article, accumulated contributions shall  
22 be payable in the manner provided by subdivision d or e of this section in the case of a retired  
23 member who shall die before attaining age seventy where:

24 1. His application for retirement became effective prior to his death, and

25 2. No optional election by him was in effect at the time of his death, or he had made  
26 and filed a valid election to receive his retirement allowance without optional  
27 modification, and

28 3. He died within the period of thirty days immediately after his retirement became  
29 effective.

30 The amount of the accumulated contributions so payable under this subdivision shall be reduced  
31 by the amount of any annuity payment that may have been paid on account of such retirement.

32 The provisions of this subdivision shall apply in any case where death occurred on or after January  
33 first, nineteen hundred fifty-four.

34 e. A member, or after his death, the person nominated by him to receive his accumulated  
35 contributions, may elect to receive the actuarial equivalent of the annuity specified in subdivision  
36 d of this section in the form of a reduced annuity, payable for life, with the further proviso that if  
37 the person so nominated should die before the annuity payments received by him are equal to such  
38 actuarial equivalent, the balance thereof shall be paid in a lump sum to such beneficiary's estate

1 or to such person as such member or his nominee shall have designated prior to his death. Such  
 2 election shall be made prior to or within ninety days after the death of the member. Such  
 3 designation of a beneficiary to receive such lump sum may be made or changed at any time by the  
 4 person who made it. Such election, designation or change shall be made by a writing duly executed  
 5 and filed with the comptroller. If the person nominated to receive such lump sum does not survive  
 6 the member's beneficiary, such lump sum, if any, shall be payable to the estate of the member's  
 7 beneficiary or as provided in section one thousand three hundred ten of the surrogate's court  
 8 procedure act.

9 f. Notwithstanding any other provision of this section to the contrary, at least one-half of the  
 10 accumulated contributions remaining at the time of the member's death, payable under this section  
 11 shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that  
 12 accords with this subdivision f) that the surviving spouse receive less than one-half of the death  
 13 benefits, and:

14 1. (A) the member's surviving spouse consented, on or after the date of the  
 15 member's marriage, in writing to the member's election;

16 (B) the surviving spouse's consent is on a plan form that sets forth:

17 (i) the amount of the member's accumulated contributions, and of the  
 18 spouse, if the spouse were entitled to half those contributions;

19 (ii) a statement to the effect that (absent valid consent to the contrary)  
 20 the surviving spouse is entitled to at least half of the accumulated  
 21 contributions;

22 (iii) a statement to the effect that the surviving spouse has the right to  
 23 prevent any future member elections regarding the accumulated  
 24 contributions without the surviving spouse's consent unless the consent  
 25 of the surviving spouse expressly permits member elections without any  
 26 further consent by the surviving spouse; and

27 (iv) the fact that consenting to the member's election would result in the  
 28 surviving spouse receiving either no accumulated contributions or  
 29 smaller contributions than the surviving spouse would otherwise receive  
 30 under this subdivision;

31 (C) the consent includes an acknowledgement that the surviving spouse  
 32 understands that, absent the surviving spouse's consent to the member's  
 33 election, the surviving spouse would be entitled to be paid at least one-half of  
 34 the accumulated contributions, and that the surviving spouse's consent would  
 35 result in the elimination or reduction of such payments;

36 (D) the consent includes a signature by the surviving spouse that was witnessed  
 37 by a notary public or a representative of the retirement system; and

38 (E) the system receives the completed consent and the member's election before  
 39 the member's death;

- 1        2. the member and the surviving spouse were legally separated when the member's  
2        election was filed with the retirement system;
- 3        3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
4        of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
5        of the member's death;
- 6        4. it is established to the satisfaction of the retirement board of the system that the  
7        surviving spouse could not have been located if the member had been willing  
8        and able to exercise due diligence to locate the surviving spouse on the date of  
9        the member's death; or
- 10       5. there is no surviving spouse.

11 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
12 comply with the terms of subdivision f of this section to be effective.

13 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
14 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
15 matters would use in the conduct of an enterprise of a like character and with like aims, in—

- 16       1. relying on a consent referred to in paragraph one of subdivision f of this section,  
17       or
- 18       2. determining that at least one of paragraphs two, three, four, or five of subdivision  
19       i of this section is true,

20 then (without implication as to what liability the retirement system and the board might have in  
21 the absence of this subdivision h) such consent or determination shall be treated as valid for  
22 purpose of discharging the retirement system and the board from liability to the extent of payments  
23 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
24 surviving spouse of any rights to recover amounts from any party other than the retirement system  
25 or the board.

26  
27  
28 Section 5. Section 60 of the retirement & social security law, as amended by L. 2011, ch. 582, §§  
29 1, 2, is amended to read as follows:  
30

31 § 60. Ordinary death benefit

32 a. An ordinary death benefit plus the reserve-for-increased-take-home-pay shall be payable upon  
33 the death of a member who:

- 34       1. Died before the effective date of his retirement, and
- 35       2. Was in service upon which his membership was based when he died or was on the  
36       payroll in such service and paid within a period of twelve months prior to his  
37       death or within a period of twenty-four months prior to his death if on leave of

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1 absence as set forth below and had, unless his service was based on seasonal  
 2 employment, not been otherwise gainfully employed since he ceased to be on  
 3 such payroll except while on leave of absence which was granted in accordance  
 4 with the provisions of subdivision i of section forty-one of this chapter and  
 5 which commenced during the period from April first, nineteen hundred sixty-six  
 6 through June thirtieth, nineteen hundred seventy-four, to perform services as a  
 7 civilian officer or employee of the federal government or one of its agencies or  
 8 a contractor of the United States Agency for International Development engaged  
 9 to perform the work of such agency, the United Nations, any other international  
 10 organization of which the United States of America is a member, or a foreign  
 11 government, and

- 12 3. Has credit for one or more years of service while actually a member. This  
 13 requirement of one or more years of service while actually a member shall not  
 14 be applicable to the reserve-for-increased-take-home-pay and shall be subject to  
 15 waiver as provided in subdivision e of section forty-one of this article.

16 An ordinary death benefit shall not be payable in any case in which an accidental death benefit is  
 17 payable provided, however, that where payments made pursuant to section sixty-one of this chapter  
 18 on account of an accidental death benefit, computed without reduction pursuant to section sixty-  
 19 four of this article, and the reserve-for-increased-take-home-pay total less than the ordinary death  
 20 benefit and the reserve-for-increased-take-home-pay that would have been computed and made  
 21 payable pursuant to this section sixty in the case of ordinary death, the difference shall be paid to  
 22 the beneficiary or member's estate to which the ordinary death benefit and reserve-for-increased-  
 23 take-home-pay would have been paid.

24 Provided further, that where the beneficiary or beneficiaries designated to receive the accidental  
 25 death benefit pursuant to section sixty-one of this article is the same beneficiary or beneficiaries  
 26 designated by the member to receive the ordinary death benefit, then, and in that case, the  
 27 beneficiary or beneficiaries may elect to receive, in a lump sum, the value of the ordinary death  
 28 benefit and the reserve-for-increased-take-home-pay, if any, that would have been computed and  
 29 made payable pursuant to the provisions hereof in case of ordinary death, in lieu of any other  
 30 benefit.

31 Notwithstanding the provisions of any other law to the contrary and solely for the purpose of  
 32 determining eligibility for an ordinary death benefit and/or guaranteed ordinary death benefit, a  
 33 member shall be considered to have died while in service upon which his or her membership was  
 34 based provided such member was on the payroll in the service upon which membership is based  
 35 at the time he or she was ordered to active duty pursuant to Title 10 of the United States Code,  
 36 with the armed forces of the United States or to service in the uniformed services pursuant to  
 37 Chapter 43 of Title 38 of the United States Code and died while on such active duty or service in  
 38 the uniformed services on or after June fourteenth, two thousand five. Provided, further, that any  
 39 such member ordered to such active duty with the armed forces of the United States or in service  
 40 in the uniformed services who died prior to rendering the minimum amount of service necessary  
 41 to be eligible for this benefit shall be considered to have satisfied the minimum service  
 42 requirement.

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1 aa. Notwithstanding the provisions of section ninety of this article, an ordinary death benefit plus  
 2 the reserve-for-increased-take-home-pay shall be payable to the beneficiary designated in a valid  
 3 election of “Option One-half”, if any, or in the manner provided by subdivision c, d, or e of this  
 4 section, in any other case, if a retired member shall die where:

- 5 1. His application for retirement became effective prior to his death, and
- 6 2. No optional election by him was in effect at the time of his death, or he had made  
 7 and filed a valid election to receive his retirement allowance without optional  
 8 modification or under “Option One-half”, and
- 9 3. He died within the period of thirty days immediately after his retirement became  
 10 effective.

11 The amount of the ordinary death benefit so payable under this subdivision shall be reduced by the  
 12 amount of any pension payment that may have been paid on account of such retirement.

13 The provisions of this subdivision shall apply in any case where death occurred on or after January  
 14 first, nineteen hundred fifty-four.

15 32. The ordinary death benefit plus the reserve-for-increased-take-home-pay shall be payable  
 16 from the pension accumulation fund. The ordinary death benefit shall not exceed the  
 17 compensation earnable by such member during his last twelve months of service while a  
 18 member. The amount thereof shall be computed by multiplying one-twelfth of such  
 19 compensation by the number of years, not to exceed twelve, of his total service credit.  
 20 Provided, however, that where the member has more than twelve years of total service  
 21 credit and where his death occurs on or after July first, nineteen hundred sixty, and on or  
 22 before June thirtieth, nineteen hundred seventy-four, there shall be added to such ordinary  
 23 death benefit one-twenty-fourth of such compensation multiplied by the number of years,  
 24 not to exceed twenty-four, but exclusive of the first twelve, of his total service credit.  
 25 Provided, further, that where a member, qualified under subdivisions a or aa of this section,  
 26 would have been entitled to a service retirement benefit at the time of his death and where  
 27 his death occurs on or after July first, nineteen hundred sixty-three and on or before June  
 28 thirtieth, nineteen hundred seventy-four, the amount payable under this section shall be  
 29 equal to the pension reserve that would have been established had the member retired on  
 30 the date of his death, unless the ordinary death benefit and the reserve-for-increased-take-  
 31 home-pay, hereinabove provided for, shall be in excess thereof.

32 In the case of a retired member who has returned to service, total service credit, for purposes of  
 33 this section only, shall include service rendered prior to his retirement, provided that he shall have  
 34 rendered at least one year of service since he last became a member, or provided he shall have  
 35 rendered since he returned to public service one year of service during which he elected pursuant  
 36 to subdivision a of section one hundred one of this article not to be restored to membership in the  
 37 retirement system. The member’s accumulated contributions shall be refunded in accordance with  
 38 subdivision d of section fifty-one of this article.

39 bb. (a) An ordinary death benefit shall be payable upon the death of a member who was in the  
 40 employ of the state during its participation under section seventy-five-a of this chapter or of a



1 participating employer while such employer is participating under the provisions of section  
2 seventy-five-b of this chapter.

3 The provisions of this subdivision bb shall apply in any case where death occurred on or after  
4 August nineteenth, nineteen hundred sixty-six and prior to July first, nineteen hundred seventy-  
5 four.

6 (b) The ordinary death benefit shall be payable from the pension accumulation  
7 fund. Such ordinary death benefit shall be based on compensation earnable by  
8 such member during his last twelve months of service while a member. The  
9 amount thereof shall be computed by multiplying one-twelfth of such  
10 compensation by the number of years, not to exceed thirty-six, of his total  
11 service credit. Provided that where a member, qualified under subdivisions a and  
12 aa of this section would have been eligible for service retirement at the time of  
13 his death and where his death occurs on or after August nineteenth, nineteen  
14 hundred sixty-six and prior to July first, nineteen hundred seventy-four, the  
15 amount payable under this section shall be equal to the pension reserve that  
16 would have been established pursuant to section seventy-five-c had the member  
17 retired on the date of his death, unless the ordinary death benefit hereinabove  
18 provided for shall be in excess thereof. The benefit provided herein shall be in  
19 lieu of the ordinary death benefit presently payable under other provisions of  
20 this chapter, unless the benefit under such other provisions shall be in excess of  
21 those provided for herein, in which event the greater benefit shall be payable.

22 (c) In the case of a retired member who has returned to service, total service  
23 credit, for purposes of this subdivision only, shall include service rendered prior  
24 to his retirement, provided that he shall have rendered at least one year of service  
25 since he last became a member, or provided he shall have rendered since he  
26 returned to public service one year of service during which he elected pursuant  
27 to subdivision a of section one hundred one of this article not to be restored to  
28 membership in the retirement system. The member's accumulated contributions  
29 shall be refunded in accordance with subdivision d of section fifty-one of this  
30 article.

31 c. The ordinary death benefit and the reserve-for-increased-take-home-pay shall be paid to the  
32 member's estate or to such person as he shall have nominated to receive such ordinary death  
33 benefit. To be effective, such a nomination must be in the form of a written designation, duly  
34 acknowledged and filed with the comptroller for this specific purpose. In the event such a  
35 designated beneficiary does not survive him, or if he shall not have so designated a beneficiary,  
36 such benefit shall be payable to the deceased member's estate or as provided in section one  
37 thousand three hundred ten of the surrogate's court procedure act.

38 d. The member, or on the death of the member, the person nominated by him to receive his death  
39 benefit, may provide, by written designation, duly executed and filed with the comptroller, that  
40 such death benefit and the reserve-for-increased-take-home-pay shall be paid in the form of an  
41 annuity. Such designation shall be filed prior to or within ninety days after the death of the member.

1 The amount of such annuity shall be determined as the actuarial equivalent of such death benefit  
 2 and reserve on the basis of the age of such beneficiary at the time of the member's death and  
 3 regular interest.

4 e. A member, or after his death, the person nominated by him to receive his ordinary death benefit,  
 5 may elect to receive the actuarial equivalent of the annuity specified in subdivision d of this section  
 6 in the form of a reduced annuity, payable for life, with the further proviso that if the person so  
 7 nominated should die before the annuity payments received by him are equal to such actuarial  
 8 equivalent, the balance thereof shall be paid in a lump sum to such beneficiary's estate or to such  
 9 person as such member or his nominee shall have designated prior to his death. Such election shall  
 10 be made prior to or within ninety days after the death of the member. Such designation of a  
 11 beneficiary to receive such lump sum may be made or changed at any time by the person who  
 12 made it. Such election, designation or change shall be made by a writing duly executed and filed  
 13 with the comptroller. If the person nominated to receive such lump sum does not survive the  
 14 member's beneficiary, such lump sum, if any, shall be payable to the estate of the member's  
 15 beneficiary, or as provided in section one thousand three hundred ten of the surrogate's court  
 16 procedure act.

17 f. 1. Notwithstanding any provision of paragraph three of subdivision a of this section to  
 18 the contrary and in lieu of the ordinary death benefit payable pursuant to subdivisions b or  
 19 bb of this section or the guaranteed ordinary death benefit payable pursuant to section sixty-  
 20 a of this article, a special death benefit shall be payable upon the death in service of a security  
 21 service s unit member or parkway police unit member or security supervisors unit member  
 22 who is subject to the provisions of this article, and who has credit for ninety or more days of  
 23 service while actually a member of the retirement system.

24 2. The special death benefit provided under this section to the beneficiary of  
 25 such security services unit member or parkway police unit member or security  
 26 supervisors unit member shall be:

27 (a) in the case of a security services unit member or parkway police unit member  
 28 or security supervisors unit member who was employed by the state on or before  
 29 the date this act takes effect, equal to three times the member's compensation  
 30 earnable during his last twelve months of service as a member or, if he had not  
 31 completed twelve months of service prior to the date of his death, three times  
 32 the compensation he would have earned had he worked for twelve months prior  
 33 to such date, in either case raised to the next higher multiple of one thousand  
 34 dollars. If, however, the ordinary death benefit payable pursuant to subdivision  
 35 b or bb of this section upon the death of such a security services member or  
 36 parkway police unit member or security supervisors unit member would have  
 37 exceeded the special death benefit payable pursuant to this subdivision, the  
 38 special death benefit payable in the event of death of such a member prior to  
 39 July first, nineteen hundred seventy-one shall be equal to that benefit which  
 40 would have otherwise been payable pursuant to subdivision b or bb of this  
 41 section notwithstanding any provision of paragraph one of this subdivision to

1 the contrary; or

2 (b) in the case of a security services unit member or parkway police unit member  
3 or security supervisors unit member who enters service after the date this act  
4 takes effect,<sup>1</sup> equal to three times the member’s compensation earnable during  
5 his last twelve months of service as a member or, if he has not completed twelve  
6 months of service prior to the date of his death, three times the compensation he  
7 would have earned had he worked for twelve months prior to such date in either  
8 case raised to the next higher multiple of one thousand dollars.

- 9 3. For the purpose of this subdivision: (a) the terms “security services unit member”,  
10 “parkway police unit member”, and “security supervisors unit member” shall  
11 mean a member in the employ of the state in the collective negotiating unit  
12 designated as the security services unit or parkway police unit or security  
13 supervisors unit established pursuant to article fourteen of the civil service law;  
14 and (b) the term “death in service” shall include the death of such a member who  
15 dies while off the payroll provided he or she (i) was on the payroll in such service  
16 and paid within a period of twelve months prior to his or her death, or was on  
17 the payroll in the service upon which membership is based at the time he or she  
18 was ordered to active duty pursuant to Title 10 of the United States Code, with  
19 the armed forces of the United States or to service in the uniformed services  
20 pursuant to Chapter 43 of Title 38 of the United States Code and died while on  
21 such active duty or service in the uniformed services on or after June fourteenth,  
22 two thousand five, (ii) had not been otherwise gainfully employed since he or  
23 she ceased to be on such payroll and (iii) had credit for one or more years of  
24 continuous service since he last entered or reentered the service of his or her  
25 employer. Provided, further, that any such member ordered to active duty  
26 pursuant to Title 10 of the United States Code, with the armed forces of the  
27 United States or to service in the uniformed services pursuant to Chapter 43 of  
28 Title 38 of the United States Code who died prior to rendering the minimum  
29 amount of service necessary to be eligible for this benefit shall be considered to  
30 have satisfied the minimum service requirement.

- 31 4. The provisions of this subdivision shall apply in any case where death occurs on or  
32 after the date this subdivision takes effect and prior to July first, nineteen  
33 hundred seventy-four.

34 g. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
35 benefits payable under this section, including the reserve-for-increased-take-home-pay at the time  
36 of the member’s death, payable under this section shall be paid to the member’s surviving spouse,  
37 if any, unless the member elects (in a manner that accords with this subdivision g) that the  
38 surviving spouse receive less than one-half of the death benefits, and:

- 39 1. (a) the member’s surviving spouse consented, on or after the date of the  
40 member’s marriage, in writing to the member’s election;

41 (b) the surviving spouse’s consent is on a plan form that sets forth:

- 1           (i) the amount of the member’s death benefits, and of the spouse, if the  
2           spouse were entitled to half those benefits;
- 3           (ii) a statement to the effect that (absent valid consent to the contrary)  
4           the surviving spouse is entitled to at least half of the death benefits;
- 5           (iii) a statement to the effect that the surviving spouse has the right to  
6           prevent any future member elections regarding the member’s death  
7           benefits without the surviving spouse’s consent unless the consent of the  
8           surviving spouse expressly permits member elections without any  
9           further consent by the surviving spouse; and
- 10           (iv) the fact that consenting to the member’s election would result in the  
11           surviving spouse receiving no death benefits or less death benefits than  
12           the surviving spouse would otherwise be entitled under this subdivision;
- 13           (c) the consent includes, an acknowledgement that the surviving spouse  
14           understands that, absent the surviving spouse’s consent to the member’s  
15           election, the surviving spouse is entitled to be paid at least one-half the death  
16           benefits, and that the surviving spouse’s consent would result in the elimination  
17           or reduction of such death benefits;
- 18           (d) the consent includes a signature by the surviving spouse that was witnessed  
19           by a notary public or a representative of the retirement system, and
- 20           (e) the system receives the completed consent and the member’s election before  
21           the member’s death;
- 22           2.   the member and the surviving spouse were legally separated when the member’s  
23           election was filed with the retirement system;
- 24           3.   any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
25           of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
26           of the member’s death;
- 27           4.   it is established to the satisfaction of the retirement board of the system that the  
28           surviving spouse could not have been located if the member had been willing  
29           and able to exercise due diligence to locate the surviving spouse on the date of  
30           the member’s death; or
- 31           5.   there is no surviving spouse.
- 32           h. Notwithstanding any other provision of this section to the contrary, a member’s election must  
33           comply with the terms of subdivision g of this section to be effective.
- 34           i. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
35           circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
36           matters would use in the conduct of an enterprise of a like character and with like aims, in—
- 37           1.   relying on a consent referred to in paragraph one of subdivision g of this section,  
38           or

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1           2. determining that at least one of paragraphs two, three, four, or five of subdivision  
2           i of this section is true,

3 then (without implication as to what liability the retirement system and the board might have in  
4 the absence of this subdivision i) such consent or determination shall be treated as valid for purpose  
5 of discharging the retirement system and the board from liability to the extent of payments made  
6 pursuant to such action; provided that the foregoing shall not act to deprive the surviving spouse  
7 of any rights to recover amounts from any party other than the retirement system or the board.  
8  
9

10 Section 6. Section 60-c of the retirement and social security law, added L. 1998, ch. 388, § 1, is  
11 amended to read as follows:

12 § 60-c. Death benefit for vested members who die prior to retirement

13 a. A death benefit plus the reserve-for-increased-take-home-pay shall be payable upon the death  
14 of a member who:  
15

- 16           1. Died before the effective date of retirement while a member of the retirement  
17           system;  
18           2. Had at least ten years of credited service at the time of death; and  
19           3. Died at a time and in a manner which did not result in the eligibility of the member's  
20           estate or any beneficiary to receive any other retirement system death benefits  
21           on account of such death.

22 b. Benefits provided under this section shall be payable to the member's estate or the beneficiary  
23 or beneficiaries nominated by the member on a designation of beneficiary form filed with the  
24 comptroller pursuant to section sixty of this title, who would have been eligible to receive benefits  
25 if benefits had become payable pursuant to such section.

26 c. The amount of the benefit payable pursuant to this section shall be equal to one-half of the  
27 amount of the ordinary death benefit which would have been payable pursuant to section sixty of  
28 this title had the member's death occurred on the last day of service upon which membership was  
29 based.

30 d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
31 benefits payable under this section, including the reserve-for-increased-take-home-pay at the time  
32 of the member's death, payable under this section shall be paid to the member's surviving spouse,  
33 if any, unless the member elects (without implication as to what liability the retirement system and  
34 the board might have in the absence of this subdivision d) that the surviving spouse receive less  
35 than one-half of the death benefits, and:

- 36           1. (A) the member's surviving spouse consented, on or after the date of the  
37           member's marriage, in writing to the member's election;  
38           (B) the surviving spouse's consent is on a plan form that sets forth:

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1 (i) the amount of the member's death benefits, and of the spouse, if the  
 2 spouse were entitled to half those benefits;

3 (ii) a statement to the effect that (absent valid consent to the contrary)  
 4 the surviving spouse is entitled to at least half of the death benefits;

5 (iii) a statement to the effect that the surviving spouse has the right to  
 6 prevent any future member elections regarding the member's death  
 7 benefits without the surviving spouse's consent unless the consent of the  
 8 surviving spouse expressly permits member elections without any  
 9 further consent by the surviving spouse; and

10 (iv) the fact that consenting to the member's election would result in the  
 11 surviving spouse receiving either no death benefits or smaller death  
 12 benefits than the surviving spouse would otherwise receive under this  
 13 subdivision;

14 (C) the consent includes an acknowledgement that the surviving spouse  
 15 understands that, absent the surviving spouse's consent to the member's  
 16 election, the surviving spouse would be entitled to be paid at least one-half of  
 17 the death benefits, and that the surviving spouse's consent to the member's  
 18 election would result in the elimination or reduction of such death benefits; and

19 (D) the consent includes a signature by the surviving spouse that was witnessed  
 20 by a notary public or a representative of the retirement system; and,

21 (E) the completed consent and the member's election are received by the system  
 22 before the member's death;

23 2. the member and the surviving spouse were legally separated when the member's  
 24 election was filed with the retirement system;

25 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 26 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 27 of the member's death;

28 4. it is established to the satisfaction of the retirement board of the system that the  
 29 surviving spouse could not have been located if the member had been willing  
 30 and able to exercise due diligence to locate the surviving spouse on the date of  
 31 the member's death; or

32 5. there is no surviving spouse.

33 e. Notwithstanding any other provision of this section to the contrary, a member's election must  
 34 comply with the terms of subdivision d of this section to be effective.

35 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 36 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 37 matters would use in the conduct of an enterprise of a like character and with like aims, in—

38 1. relying on a consent referred to in paragraph one of subdivision d of this section, or

1           2. determining that at least one of paragraphs two, three, four, or five of subdivision i  
 2           of this section is true,

3           then (without implication as to what liability the retirement system and the board might have in  
 4           the absence of this subdivision f) such consent or determination shall be treated as valid for purpose  
 5           of discharging the retirement system and the board from liability to the extent of payments made  
 6           pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 7           surviving spouse of any rights to recover amounts from any party other than the retirement system  
 8           or the board.

10  
 11 Section 7. Section 90 of the retirement and social security law, as amended by L. 2004, ch. 446, §  
 12 1, is amended to read as follows:

13  
 14 § 90. Options

15 A member; or if he is an incompetent, his spouse or the committee of his property; or if he is a  
 16 conservatee, his spouse or the conservator of his property, may elect to receive a Single Life  
 17 Allowance (a retirement allowance without optional modification) or to receive the actuarial  
 18 equivalent of his retirement allowance at the time of his retirement, in the form of a smaller  
 19 retirement allowance payable to him for life and one of the following optional settlements:

20           Cash Refund-Contributions (Option One-half). If he dies before he has received  
 21           annuity payments equal to the present value of his annuity, as it was at the time  
 22           of his retirement, the balance thereof shall be paid to his estate or to a beneficiary  
 23           designated as provided in this section. In the event a designated beneficiary does  
 24           not survive him, any balance shall be payable to the estate of the deceased retired  
 25           member or as provided in section one thousand three hundred ten of the  
 26           surrogate's court procedure act. The beneficiary so designated may elect by  
 27           written designation, duly executed and filed with the comptroller, to receive the  
 28           balance payable in the form of an annuity, the amount of which shall be  
 29           determined as the actuarial equivalent of such balance on the basis of regular  
 30           interest and the age of such beneficiary at the time of the retiree's death, or in  
 31           the alternative to receive the actuarial equivalent of such balance in the form of  
 32           a reduced annuity payable for life, with the further proviso that if he should die  
 33           before the annuity payments received by him are equal to such actuarial  
 34           equivalent, the balance thereof shall be paid in a lump sum to his estate or to  
 35           such person as he shall have designated to receive same. In either case the  
 36           election shall be made within ninety days after the death of the retiree. The  
 37           designation of the individual who is to receive such lump sum on the death of  
 38           the beneficiary, may be changed by the beneficiary at any time. Such election,  
 39           designation or change shall be made by a writing, duly executed and filed with  
 40           the comptroller. In the event a designated beneficiary has elected to receive a  
 41           balance payable in the form of a reduced annuity, and the person designated by  
 42           him to receive a lump sum payment does not survive him, such lump sum, if

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1 any, shall be payable to the estate of the designated beneficiary or as provided  
2 in section one thousand three hundred ten of the surrogate's court procedure act.

3 Cash Refund-Initial Value (Option One). If he dies before he has received retirement  
4 allowance payments equal to the present value of his retirement allowance, as it  
5 was at the time of his retirement, the balance thereof shall be paid to his estate  
6 or to the beneficiary so designated. In the event a designated beneficiary does  
7 not survive him, any balance shall be payable to the estate of the deceased retired  
8 member or as provided in section one thousand three hundred ten of the  
9 surrogate's court procedure act. The beneficiary so designated may elect by  
10 written designation, duly executed and filed with the comptroller, to receive the  
11 balance payable in the form of an annuity, the amount of which shall be  
12 determined as the actuarial equivalent of such balance on the basis of regular  
13 interest and the age of such beneficiary at the time of the retiree's death, or in  
14 the alternative, to receive the actuarial equivalent of such balance in the form of  
15 a reduced annuity payable for life, with the further proviso that if he should die  
16 before the annuity payments received by him are equal to such actuarial  
17 equivalent, the balance thereof shall be paid in a lump sum to his estate or to  
18 such person as he shall have designated to receive same. In either case the  
19 election shall be made within ninety days after the death of the retiree. The  
20 designation of the individual who is to receive such lump sum on the death of  
21 the beneficiary, may be changed by the beneficiary at any time. Such election,  
22 designation or change shall be made by a writing, duly executed and filed with  
23 the comptroller. In the event a designated beneficiary has elected to receive a  
24 balance payable in the form of a reduced annuity, and the person designated by  
25 him to receive a lump sum payment does not survive him, such lump sum, if  
26 any, shall be payable to the estate of the designated beneficiary or as provided  
27 in section one thousand three hundred ten of the surrogate's court procedure act.

28 Joint Allowance-Full (Option Two). Upon his death, a retirement allowance in an  
29 amount equal to that paid to him, shall be paid for life to the beneficiary so  
30 designated.

31 Joint Allowance-Half (Option Three). Upon his death, a retirement allowance of one-  
32 half the amount paid to him shall be paid for life to the beneficiary so designated.

33 Actuarial Equivalent Allowance (Option Four). Such other optional benefit or benefits  
34 as the comptroller shall approve and which shall be the actuarial equivalent of  
35 his retirement allowance at the time of his retirement.

36 aa. In the event that the monthly retirement allowance payable to a member or a beneficiary shall  
37 amount to less than twenty-five dollars, then and in such event, the member or beneficiary may  
38 elect, in lieu of such monthly retirement allowance, to receive the actuarial equivalent thereof in a  
39 lump sum.

40 All elections under this section shall be made on [forms](#) prepared by the comptroller for that  
41 purpose. Any such election may be made at any time before the first payment on account of any

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- 1 benefit becomes normally due, except that in the case of retirement on account of disability, such  
 2 an election may be made within thirty days after mailing by the comptroller of notification of  
 3 approval of retirement on account of disability.
- 4 An optional election shall not become effective if the member dies before the effective date of his  
 5 retirement. Provided, however, if a member who is otherwise eligible for disability retirement  
 6 pursuant to this chapter dies after the filing in the office of the comptroller of the application for  
 7 disability retirement and a valid option election form pursuant to this chapter and it is established  
 8 that the physical or mental impairment or incapacitation of the applicant specified in such  
 9 application was directly related to the cause of the applicant's death, such application shall be  
 10 approved by the comptroller effective one day before the date of the applicant's death. An election  
 11 of an option may be withdrawn or a new option may be chosen within the period provided in this  
 12 subdivision b for the making of such an election. Except as provided in subdivision b of section  
 13 seventy of this article, where an optional election does not become effective, retirement shall be  
 14 without option.
- 15 bb. 1. Notwithstanding any other provision of this section or of section seventy of this  
 16 article, the comptroller, for reasonable cause, shall have power to extend the time  
 17 for the election of an option, for a period or periods which shall expire not later  
 18 than sixty days immediately after the effective date of a member's retirement.
- 19 2. Notwithstanding any other provision of this section, but except where payment of  
 20 accumulated contributions, an ordinary death benefit, or both, is or are required  
 21 pursuant to subdivision dd of section fifty-one of this article or subdivision aa  
 22 of section sixty of this article, retirement shall be on the basis of "Option One-  
 23 half" unless the member files an effective election pursuant to this section to  
 24 retire on a different basis. The provisions of this paragraph two shall apply to  
 25 cases where retirement shall become effective on or after May first, nineteen  
 26 hundred fifty-four.
- 27 c. A member, or person authorized by this section to make an election in his behalf, may designate  
 28 his beneficiary under any of the options herein provided. Each such designation shall be:
- 29 1. Made in writing on a [form](#) provided by the comptroller for such purpose, and  
 30 2. Ineffective until it is filed in the comptroller's office, and  
 31 3. Revocable to the extent that:
- 32 (a) A new beneficiary under a "Cash Refund-Contributions" option (Option  
 33 One-half), or "a Cash Refund-Initial Value" option (Option One) may be  
 34 designated at any time during the member's life.
- 35 (b) A new beneficiary under any other option may be designated at any time  
 36 within the period provided for the making of an election pursuant to this section.
- 37 d. In the event of the death of a retired member, the installment of his retirement allowance, which  
 38 would have become due and payable next following his death, shall be pro-rated as of the date of  
 39 his death. The amount of such installment, as so pro-rated, shall be paid as follows:

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- 1           1. If the member shall have:
- 2               (a) Elected to receive an optional benefit pursuant to this section, and
- 3               (b) Designated a beneficiary pursuant to this section, such amount shall be paid
- 4               to such beneficiary, if such beneficiary survives him. In any other case such
- 5               amount shall be paid to the retired member's estate or pursuant to section one
- 6               thousand three hundred ten of the surrogate's court procedure act.
- 7           2. If the member shall not have elected to receive an optional benefit, such amount
- 8               shall be paid to the beneficiary designated by him pursuant to subdivision d of
- 9               section fifty-one of this article. In the event the appropriately designated
- 10              beneficiary does not survive such member, or if he shall not have so designated
- 11              a beneficiary, such amount shall be payable to the retired member's estate or
- 12              pursuant to section one thousand three hundred ten of the surrogate's court
- 13              procedure act.
- 14           e. Notwithstanding any other provision of this article, an option selection previously filed by a
- 15              member or retired member subject to the provisions of this section may be changed no later than
- 16              thirty days following the date of payability of his or her retirement allowance. A retired member
- 17              who has been retired for disability may change an option selection previously filed no later than
- 18              (1) thirty days following the date on which such member's application for disability retirement
- 19              was approved by the retirement board or (2) thirty days following the date on which such retiree
- 20              was retired for disability, whichever is later.
- 21           f. Notwithstanding any other provision of this section to the contrary, a member's retirement
- 22           allowance payable under this section shall be paid as Option Three, with the spouse as the
- 23           member's beneficiary, so that upon his or her death, if the member has a surviving spouse who
- 24           was married to the member on the date the member filed his or her retirement application, or on
- 25           the date the member filed his or her last effective option selection, if any, whichever is later, unless
- 26           the member (a) elects that the surviving spouse receive survivor benefit payments, whose amounts
- 27           are at least equal to the amounts of the retirement allowance payments that would be paid to the
- 28           surviving spouse under Option Three, if the spouse were the member's beneficiary; or (b) elects
- 29           (in a manner that accords with this subdivision f) that the surviving spouse receive either no
- 30           survivor benefit payments or survivor benefit payments, whose amounts are less than the amounts
- 31           of the retirement allowance payments that would be paid to the surviving under Option Three, if
- 32           the spouse were the member's beneficiary, and :
- 33               1. (a) the member's surviving spouse consented on or after the date of the
- 34               member's marriage, in writing to the member's election;
- 35               (b) the surviving spouse's consent is on a plan form that sets forth:
- 36                   (i) the amount of the Option Three monthly benefit entitlements of the
- 37                   member and of the spouse, if the spouse were the member's beneficiary,
- 38                   and when the member and the surviving spouse would each be entitled
- 39                   to those benefits;
- 40                   (ii) a statement to the effect that (absent valid consent to the contrary)

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1 the surviving spouse is entitled to survivor benefit payments in amounts  
 2 that are greater or equal to the amounts of the retirement allowance  
 3 payments that would be paid to the surviving spouse under Option 3, if  
 4 the spouse were the member's beneficiary;

5 (iii) a statement to the effect that the surviving spouse has the right to  
 6 prevent any future member elections regarding the member's survivor  
 7 benefits without the surviving spouse's consent unless the consent of the  
 8 surviving spouse expressly permits member elections without any  
 9 further consent by the surviving spouse, and

10 (iv) the fact that consenting to the member's survivor benefit election  
 11 would result in the surviving spouse receiving no survivor benefits or  
 12 smaller survivor benefits than the surviving spouse would otherwise  
 13 receive under this subdivision;

14 (c) the consent includes an acknowledgement that the surviving spouse  
 15 understands that, absent the surviving spouse's consent to the member's  
 16 election, the surviving spouse would be entitled paid lifetime survivor benefit  
 17 payment amounts that are at least the amounts that would be paid to the surviving  
 18 spouse under Option Three, if the spouse were the member's beneficiary, and  
 19 that the surviving spouse's consent would result in the elimination or reduction  
 20 of such survivor benefits;

21 (d) the consent includes a signature by the surviving spouse that was witnessed  
 22 by a notary public or a representative of the retirement system; and

23 (e) the system receives the completed consent and the member's election before  
 24 the date the member filed his or her retirement application, or the date the  
 25 member filed his or her last effective option selection, if any, whichever is later;

26 2. the member and the surviving spouse were legally separated when the member's  
 27 election was filed with the retirement system;

28 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 29 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 30 of the filing of the member's application for a retirement allowance;

31 4. it is established to the satisfaction of the retirement board of the system that the  
 32 surviving spouse could not have been located if the member had been willing  
 33 and able to exercise due diligence to locate the surviving spouse on the later of  
 34 the date the member's retirement application was filed with the retirement  
 35 system, or the date the member's last effective option selection was filed with  
 36 the retirement system; or

37 5. there is no surviving spouse.

38 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 39 comply with the terms of subdivision one of this section to be effective.

1 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 2 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 3 matters would use in the conduct of an enterprise of a like character and with like aims, in—

4 1. relying on a consent referred to in paragraph 1 of subdivision f of this section, or

5 2. determining that at least one of paragraphs two, three, four, or five of subdivision f  
 6 this section is true,

7 then (without implication as to what liability the retirement system and the board might have in  
 8 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 9 purpose of discharging the retirement system and the board from liability to the extent of payments  
 10 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 11 surviving spouse of any rights to recover from any party other than the retirement system or the  
 12 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 13 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 14 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 15 may not thereby reduce any of those benefit payments by more than 10%.

16  
 17  
 18 Section 8. Section 351 of the retirement & social security law, as amended by L. 2018, ch. 476, §  
 19 185, is amended to read as follows:

20  
 21 § 351 Refunds and withdrawals

22  
 23 a. A member under age sixty may withdraw his accumulated contributions if he has been separated  
 24 from service for a period of at least fifteen days.

25 b. A member sixty years of age or over, may elect, not later than fifteen days after filing his  
 26 application for retirement, or not later than thirty days after his mandatory retirement has become  
 27 effective by operation of law, to withdraw his accumulated contributions in lieu of a retirement  
 28 allowance, provided that he

29 1. Has had less than five years of total service credit, or

30 2. Last became a member of the state employees' retirement system before April sixth,  
 31 nineteen hundred forty-three, and subsequently became a member of the police  
 32 and fire retirement system, or

33 3. Is eligible for an annual retirement allowance which, without optional modification,  
 34 amounts to less than three hundred dollars.

35 c. The following contributions or additional contributions shall be treated as excess contributions  
 36 which, together with regular interest and special interest thereon, may be withdrawn by a member  
 37 at any time prior to retirement, or if not so withdrawn, shall be used to purchase additional annuity:

38 1. Contributions paid by a member in order to receive credit for service in war after  
 39 world war I, as defined in section three hundred two of this article, not including,  
 40 however, contributions required by subdivision k of section three hundred forty-

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- 1           one of this article.
- 2           2. Additional contributions paid by a member pursuant to sections three hundred  
3           eighty-one, three hundred eighty-one-a, three hundred eighty-three, three  
4           hundred eighty-three-a, three hundred eighty-four, three hundred eighty-four-a,  
5           three hundred eighty-four-b, three hundred eighty-four-d, three hundred eighty-  
6           five, three hundred eighty-five-a, three hundred eighty-six, three hundred  
7           eighty-seven, three hundred eighty-seven-a and three hundred eighty-eight and  
8           where, as a result of a change in his employment, such additional contributions  
9           would not provide an additional pension allowance for service for which such  
10          additional contributions were made.
- 11          3. Such other contributions to the annuity savings fund as may be determined by  
12          regulation of the comptroller to be excess and subject to such withdrawal.
- 13          d. If a member dies before the effective date of his retirement, his accumulated contributions shall  
14          be paid to his estate or to the person nominated by him in a written designation duly executed and  
15          filed with the comptroller. In the event such a designated beneficiary does not survive him, or if  
16          he shall not have so designated a beneficiary, such contributions shall be payable to the deceased  
17          member's estate or as provided in section one thousand three hundred ten of the surrogate's court  
18          procedure act. Such member, or after his death, the person so nominated by him may file with the  
19          comptroller a written designation, duly executed providing that such contributions shall be paid in  
20          the form of an annuity to such person so nominated. Such designation shall be filed prior to or  
21          within ninety days after the death of the member. The amount of such annuity shall be determined  
22          as the actuarial equivalent of such accumulated contributions on the basis of regular interest and  
23          the age of the person so nominated as of the date of such member's death.
- 24          dd. Notwithstanding the provisions of section three hundred ninety of this article, accumulated  
25          contributions shall be payable in the manner provided by subdivision d or e of this section in the  
26          case of a retired member who shall die before attaining age seventy where:
- 27                1. His application for retirement became effective prior to his death, and
- 28                2. No optional election by him was in effect at the time of his death, or he had made  
29                and filed a valid election to receive his retirement allowance without optional  
30                modification, and
- 31                3. He died within the period of thirty days immediately after his retirement became  
32                effective.
- 33          The amount of the accumulated contributions so payable under this subdivision shall be reduced  
34          by the amount of any annuity payment that may have been paid on account of such retirement.
- 35          The provisions of this subdivision shall apply in any case where death occurred on or after January  
36          first, nineteen hundred fifty-four.
- 37          e. A member, or after his death, the person nominated by him to receive his accumulated  
38          contributions, may elect to receive the actuarial equivalent of the annuity specified in subdivision  
39          d of this section in the form of a reduced annuity, payable for life, with the further proviso that if

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1 the person so nominated should die before the annuity payments received by him are equal to such  
 2 actuarial equivalent, the balance thereof shall be paid in a lump sum to such beneficiary's estate  
 3 or to such person as such member or his nominee shall have designated prior to his death. Such  
 4 election shall be made prior to or within ninety days after the death of the member. Such  
 5 designation of a beneficiary to receive such lump sum may be made or changed at any time by the  
 6 person who made it. Such election, designation or change shall be made by a writing duly executed  
 7 and filed with the comptroller. If the person nominated to receive such lump sum does not survive  
 8 the member's beneficiary, such lump sum, if any, shall be payable to the estate of the member's  
 9 beneficiary or as provided in section one thousand three hundred ten of the surrogate's court  
 10 procedure act.

11 f. Notwithstanding any other provision of this section to the contrary, at least one-half of the  
 12 accumulated contributions remaining at the time of the member's death, payable under this section  
 13 shall be paid to the member's surviving spouse, unless the member elects (in a manner that accords  
 14 with this subdivision f) that the surviving spouse receive less than one-half of the accumulated  
 15 contributions, and:

16 1. (A) the member's surviving spouse consented, on or after the date of the  
 17 member's marriage, in writing to the member's election

18 (B) the surviving spouse's consent is on a plan form that sets forth:

19 (i) the amount of the member's accumulated contributions, and of the  
 20 spouse, if the spouse were entitled to half those contributions;

21 (ii) a statement to the effect that (absent valid consent to the contrary)  
 22 the surviving spouse is entitled to at least half of the accumulated  
 23 contributions;

24 (iii) a statement to the effect that the surviving spouse has the right to  
 25 prevent any future member elections regarding the member's death  
 26 benefits without the surviving spouse's consent unless the consent of the  
 27 surviving spouse expressly permits member elections without any  
 28 further consent by the surviving spouse; and

29 (iv) the fact that consenting to the member's election would result in the  
 30 surviving spouse receiving either no accumulated contributions or  
 31 smaller contributions than the surviving spouse would otherwise receive  
 32 under this subdivision;

33 (C) the consent includes an acknowledgement that the surviving spouse  
 34 understands that, absent the surviving spouse's consent to the member's  
 35 election, the surviving spouse would be entitled to be paid at least one-half of  
 36 the accumulated contributions, and that the surviving spouse's consent would  
 37 result in the elimination or reduction of such payments; and

38 (D) the consent includes a signature by the surviving spouse that was witnessed  
 39 by a notary public or a representative of the retirement system, and

40 (E) the system receives the completed consent and the member's election before

- 1           the member's death;  
 2           2. the member and the surviving spouse were legally separated when the member's  
 3           election was filed with the retirement system;  
 4           3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 5           of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 6           of the member's death;  
 7           4. it is established to the satisfaction of the retirement board of the system that the  
 8           surviving spouse could not have been located if the member had been willing  
 9           and able to exercise due diligence to locate the surviving spouse on the date of  
 10           the member's death; or  
 11           5. there is no surviving spouse.

12 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 13 comply with the terms of subdivision f of this section to be effective.

14 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 15 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 16 matters would use in the conduct of an enterprise of a like character and with like aims, in—

- 17           1. relying on a consent referred to in paragraph one of subdivision f of this section, or  
 18           2. determining that at least one of paragraphs two, three, four, or five of subdivision f  
 19           of this section is true,

20 then (without implication as to what liability the retirement system and the board might have in  
 21 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 22 purpose of discharging the retirement system and the board from liability to the extent of payments  
 23 made pursuant to such action; provided that the foregoing discharges shall not at to deprive the  
 24 surviving spouse of any rights to recover amounts from any party other than the retirement system  
 25 or the board.

26  
 27  
 28 Section 9. Section 360 of the retirement and social security law, as amended by L. 2018, ch. 476,  
 29 § 186, is amended to read as follows:  
 30

31 § 360. Ordinary death benefit

32 a. An ordinary death benefit plus the reserve-for-increased-take-home-pay shall be payable upon  
 33 the death of a member who:

- 34           1. Died before the effective date of his retirement, and  
 35           2. Was in service upon which his membership was based when he died or was on the  
 36           payroll in such service and paid within a period of twelve months prior to his  
 37           death or within a period of twenty-four months prior to his death if on leave of

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1 absence as set forth below and had, unless his service was based on seasonal  
 2 employment, not been otherwise gainfully employed since he ceased to be on  
 3 such payroll except while on leave of absence which was granted in accordance  
 4 with the provisions of subdivision i of section three hundred forty-one of this  
 5 chapter and which commenced during the period from April first, nineteen  
 6 hundred sixty-six through June thirtieth, nineteen hundred seventy-four, to  
 7 perform services as a civilian officer or employee of the Federal government or  
 8 one of its agencies or a contractor of the United States Agency for International  
 9 Development engaged to perform the work of such agency, the United Nations,  
 10 any other international organization of which the United States of America is a  
 11 member, or a foreign government, and

12 3. Has credit for one or more years of service while actually a member. This requirement of one  
 13 or more years of service while actually a member shall not be applicable to the reserve-for-  
 14 increased-take-home-pay and shall be subject to waiver as provided in subdivision e of section  
 15 three hundred forty-one of this article.

16 An ordinary death benefit shall not be payable in any case in which an accidental death benefit is  
 17 payable provided, however, that where payments made pursuant to section three hundred sixty-  
 18 one of this chapter on account of an accidental death benefit, computed without reduction pursuant  
 19 to section three hundred sixty-four of this article, and the reserve-for-increased-take-home-pay  
 20 total less than the ordinary death benefit and the reserve-for-increased-take-home-pay that would  
 21 have been computed and made payable pursuant to this section three hundred sixty in the case of  
 22 ordinary death, the difference shall be paid to the beneficiary or member's estate to which the  
 23 ordinary death benefit and reserve-for-increased-take-home-pay would have been paid. Provided  
 24 further, that where the beneficiary or beneficiaries designated to receive the accidental death  
 25 benefit pursuant to section three hundred sixty-one of this chapter is the same beneficiary or  
 26 beneficiaries designated by the member to receive the ordinary death benefit, then, and in that case  
 27 the beneficiary or beneficiaries may elect to receive, in a lump sum, the value of the ordinary death  
 28 benefit and the reserve-for-increased-take-home-pay, if any, that would have been computed and  
 29 made payable pursuant to the provisions hereof in case of ordinary death, in lieu of any other  
 30 benefit.

31 Notwithstanding the provisions of any other law to the contrary and solely for the purpose of  
 32 determining eligibility for an ordinary death benefit and/or guaranteed ordinary death benefit, a  
 33 member shall be considered to have died while in service upon which his or her membership was  
 34 based provided such member was on the payroll in the service upon which membership is based  
 35 at the time he or she was ordered to active duty pursuant to Title 10 of the United States Code,  
 36 with the armed forces of the United States or to service in the uniformed services pursuant to  
 37 Chapter 43 of Title 38 of the United States Code and died while on such active duty or service in  
 38 the uniformed services on or after June fourteenth, two thousand five. Provided, further, that any  
 39 such member ordered to active duty with the armed forces of the United States or to service in the  
 40 uniformed services who died prior to rendering the minimum amount of service necessary to be  
 41 eligible for this benefit shall be considered to have satisfied the minimum service requirement.

42 aa. Notwithstanding the provisions of section three hundred ninety of this article, an ordinary death



1 benefit plus the reserve-for-increased-take-home-pay shall be payable to the beneficiary  
 2 designated in a valid election of “Option One-half”, if any, or in the manner provided by  
 3 subdivisions c, d, or e of this section, in any other case, if a retired member shall die where:

- 4 1. His application for retirement became effective prior to his death, and
- 5 2. No optional election by him was in effect at the time of his death, or he had made  
 6 and filed a valid election to receive his retirement allowance without optional  
 7 modification or under “Option One-half”, and
- 8 3. He died within the period of thirty days immediately after his retirement became  
 9 effective.

10 The amount of the ordinary death benefit so payable under this subdivision shall be reduced by the  
 11 amount of any pension payment that may have been paid on account of such retirement.

12 The provisions of this subdivision shall apply in any case where death occurred on or after January  
 13 first, nineteen hundred fifty-four.

- 14 32. The ordinary death benefit plus the reserve-for-increased-take-home-pay shall be payable  
 15 from the pension accumulation fund. The ordinary death benefit shall not exceed the  
 16 compensation earnable by such member during his last twelve months of service while a  
 17 member. The amount thereof shall be computed by multiplying one-twelfth of such  
 18 compensation by the number of years, not to exceed twelve, of his total service credit.  
 19 Provided, however, that where the member has more than twelve years of total service  
 20 credit and where his death occurs on or after April first, nineteen hundred sixty-seven and  
 21 on or before June thirtieth, nineteen hundred seventy-four, there shall be added to such  
 22 ordinary death benefit one-twenty-fourth of such compensation multiplied by the number  
 23 of years, not to exceed twenty-four, but exclusive of the first twelve, of his total service  
 24 credit. Provided, further, that where a member, qualified under subdivisions<sup>1</sup> a or aa of this  
 25 section, would have been entitled to a service retirement benefit at the time of his death  
 26 and where his death occurs on or after April first, nineteen hundred sixty-seven, and on or  
 27 before June thirtieth, nineteen hundred seventy-four, the amount payable under this section  
 28 shall be equal to the pension reserve that would have been established had the member  
 29 retired on the date of his death, unless the ordinary death benefit and the reserve-for-  
 30 increased-take-home-pay, hereinabove provided for, shall be in excess thereof.

31 In the case of a retired member who has returned to service, total service credit for purposes of this  
 32 section only, shall include service rendered prior to his retirement, provided that he shall have  
 33 rendered at least one year of service since he last became a member or provided he shall have  
 34 rendered since he returned to public service one year of service during which he elected pursuant  
 35 to subdivision a of section four hundred one of this article not to be restored to membership in the  
 36 police and fire retirement system. The member’s accumulated contributions shall be refunded in  
 37 accordance with subdivision d of section three hundred fifty-one of this article.

- 38 bb. (a) An ordinary death benefit shall be payable upon the death of a member who was  
 39 in the employ of the state during its participation under section three hundred  
 40 seventy-five-a of this chapter or of a participating employer while such employer

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1 is participating under the provisions of section three hundred seventy-five-b of  
2 this chapter.

3 The provisions of this subdivision bb shall apply in any case where death occurred on or<sup>2</sup> April  
4 first, nineteen hundred sixty-seven and prior to July first, nineteen hundred seventy-four.

5 (b) The ordinary death benefit shall be payable from the pension accumulation fund.  
6 Such ordinary death benefit shall be based on compensation earnable by such  
7 member during his last twelve months of service while a member. The amount  
8 thereof shall be computed by multiplying one-twelfth of such compensation by  
9 the number of years, not to exceed thirty-six, of his total service credit.  
10 Provided that where a member qualified under subdivisions a and aa of this  
11 section would have been eligible for service retirement at the time of his death  
12 and where his death occurs on or after April first, nineteen hundred sixty-seven  
13 and prior to July first, nineteen hundred seventy-four, the amount payable  
14 under this section shall be equal to the pension reserve that would have been  
15 established pursuant to section three hundred seventy-five-c had the member  
16 retired on the date of his death, unless the ordinary death benefit hereinabove  
17 provided for, shall be in excess thereof. The benefit provided herein shall be in  
18 lieu of the ordinary death benefit presently payable under other provisions of  
19 this chapter, unless the benefit under such other provisions shall be in excess  
20 of those provided for herein, in which event the greater benefit shall be  
21 payable.

22 (c) In the case of a retired member who has returned to service, total service credit, for  
23 purposes of this subdivision only, shall include service rendered prior to his  
24 retirement, provided that he shall have rendered at least one year of service  
25 since he last became a member, or provided he shall have rendered since he  
26 returned to public service one year of service during which he elected pursuant  
27 to subdivision a of section four hundred one of this article not to be restored to  
28 membership in the retirement system. The member's accumulated  
29 contributions shall be refunded in accordance with subdivision d of section  
30 three hundred fifty-one of this article.

31 c. The ordinary death benefit and the reserve-for-increased-take-home-pay shall be paid to the  
32 member's estate or to such person as he shall have nominated to receive such ordinary death  
33 benefit. To be effective, such a nomination must be in the form of a written designation, duly  
34 acknowledged and filed with the comptroller for this specific purpose. In the event such a  
35 designated beneficiary does not survive him, or if he shall not have so designated a beneficiary,  
36 such benefit shall be payable to the deceased member's estate or as provided in section one  
37 thousand three hundred ten of the surrogate's court procedure act.

38 d. The member, or on the death of the member, the person nominated by him to receive his death  
39 benefit, may provide, by written designation, duly executed and filed with the comptroller, that  
40 such death benefit and the reserve-for-increased-take-home-pay shall be paid in the form of an  
41 annuity. Such designation shall be filed prior to or within ninety days after the death of the member.  
42 The amount of such annuity shall be determined as the actuarial equivalent of such death benefit

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1 and reserve on the basis of the age of such beneficiary at the time of the member's death and  
2 regular interest.

3 e. A member, or after his death, the person nominated by him to receive his ordinary death benefit,  
4 may elect to receive the actuarial equivalent of the annuity specified in subdivision d of this section  
5 in the form of a reduced annuity, payable for life, with the further proviso that if the person so  
6 nominated should die before the annuity payments received by him are equal to such actuarial  
7 equivalent, the balance thereof shall be paid in a lump sum to such beneficiary's estate or to such  
8 person as such member or his nominee shall have designated prior to his death. Such election shall  
9 be made prior to or within ninety days after the death of the member. Such designation of a  
10 beneficiary to receive such lump sum may be made or changed at any time by the person who  
11 made it. Such election, designation or change shall be made by a writing duly executed and filed  
12 with the comptroller. If the person nominated to receive such lump sum does not survive the  
13 member's beneficiary, such lump sum, if any, shall be payable to the estate of the member's  
14 beneficiary or as provided in section one thousand three hundred ten of the surrogate's court  
15 procedure act.

16 f. Special death benefit. Notwithstanding any provision of paragraph three of subdivision a of this  
17 section to the contrary, a special death benefit shall be payable upon the death of an officer or  
18 member of the state police who is subject to the provisions of section three hundred eighty-one-b  
19 of this chapter, and who has credit for ninety or more days of service while actually a member of  
20 the retirement system. In lieu of the ordinary death benefit payable pursuant to subdivisions b or  
21 bb of this section, the special death benefit shall be payable upon the death of an officer or member  
22 of the state police and shall be equal to three times the member's compensation earnable during  
23 his last twelve months of service as a member, raised to the next higher multiple of one thousand  
24 dollars. If, however, the ordinary death benefit payable pursuant to subdivision b or bb of this  
25 section upon the death of an officer or member of the state police who had been in service on or  
26 before April first, nineteen hundred sixty-nine would have exceeded the special death benefit  
27 otherwise payable pursuant to this subdivision had he not elected to come under the provisions of  
28 section three hundred eighty-one-b, the special death benefit payable under this subdivision shall  
29 be equal to that benefit which he would have received had he remained in his former plan. In no  
30 case shall the amount payable as a special death benefit on behalf of an officer or member of the  
31 state police who enters or re-enters service in the division after April first, nineteen hundred sixty-  
32 nine exceed three times the member's compensation earnable during his last twelve months of  
33 service as a member, raised to the next higher multiple of one thousand dollars.

34 g. 1. Notwithstanding any provision of paragraph three of subdivision a of this section to  
35 the contrary and in lieu of the ordinary death benefit payable pursuant to  
36 subdivisions b or bb of this section or the guaranteed ordinary death benefit  
37 payable pursuant to section three hundred sixty-a of this article, a special death  
38 benefit shall be payable upon the death in service of a security services unit  
39 member or parkway police unit member or security supervisors unit member  
40 who is subject to the provisions of this article, and who has credit for ninety or  
41 more days of service while actually a member of the retirement system.

1           2. The special death benefit provided under this section to the beneficiary of such  
2           security services unit member or parkway police unit member or security  
3           supervisors unit member shall be:

4           (a) in the case of a security services unit member or parkway police unit member  
5           or security supervisors unit member who was employed by the state on or before  
6           the date this act takes effect, equal to three times the member's compensation  
7           earnable during his last twelve months of service as a member or, if he had not  
8           completed twelve months of service prior to the date of his death, three times  
9           the compensation he would have earned had he worked for twelve months prior  
10          to such date, in either case raised to the next higher multiple of one thousand  
11          dollars. If, however, the ordinary death benefit payable pursuant to subdivision  
12          b or bb of this section upon the death of such a security services member or  
13          parkway police unit member or security supervisors unit member would have  
14          exceeded the special death benefit payable pursuant to this subdivision, the  
15          special death benefit payable in the event of the death of such a member prior to  
16          July first, nineteen hundred seventy-one shall be equal to that benefit which  
17          would have otherwise been payable pursuant to subdivision b or bb of this  
18          section notwithstanding any provision of paragraph one of this subdivision to  
19          the contrary; or

20          (b) in the case of a security services unit member or parkway police unit member  
21          or security supervisors unit member who enters service after the date this act  
22          takes effect, equal to three times the member's compensation earnable during  
23          his last twelve months of service as a member or, if he has not completed twelve  
24          months of service prior to the date of his death, three times the compensation he  
25          would have earned had he worked for twelve months prior to such date, in either  
26          case raised to the next higher multiple of one thousand dollars.

27          3. For the purpose of this subdivision:

28          (a) the terms "security services unit member", "parkway police unit member",  
29          and "security supervisors unit member" shall mean a member in the employ of  
30          the state in the collective negotiating unit designated as the security services unit  
31          or parkway police unit or security supervisors unit established pursuant to article  
32          fourteen of the civil service law; and

33          (b) the term "death in service" shall include the death of such a member who  
34          dies while off the payroll provided he or she (i) was on the payroll in such service  
35          and paid within a period of twelve months prior to his or her death, or was on  
36          the payroll in the service upon which membership is based at the time he or she  
37          was ordered to active duty pursuant to Title 10 of the United States Code, with  
38          the armed forces of the United States or to service in the uniformed services  
39          pursuant to Chapter 43 of Title 38 of the United States Code and died while on  
40          such active duty or service in the uniformed services on or after June fourteenth,  
41          two thousand five, (ii) had not been otherwise gainfully employed since he or  
42          she ceased to be on such payroll and (iii) had credit for one or more years of

1 continuous service since he or she last entered or reentered the service of his or  
 2 her employer. Provided, further, that any such member ordered to active duty  
 3 pursuant to Title 10 of the United States Code, with the armed forces of the  
 4 United States or to service in the uniformed services pursuant to Chapter 43 of  
 5 Title 38 of the United States Code who died prior to rendering the minimum  
 6 amount of service necessary to be eligible for this benefit shall be considered to  
 7 have satisfied the minimum service requirement.

- 8 4. The provisions of this subdivision shall apply in any case where death occurs on or  
 9 after the date this subdivision takes effect and prior to July first, nineteen  
 10 hundred seventy-four.

11 h. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 12 benefits payable under this section, including the reserve-for-increased-take-home-pay at the time  
 13 of the member's death, payable under this section shall be paid to the member's surviving spouse,  
 14 if any, unless the member elects (in a manner that accords with this subdivision h) that the  
 15 surviving spouse receive less than one-half of the death benefits, and:

- 16 1. (a) the member's surviving spouse consented, on or after the date of the  
 17 member's marriage, in writing to the member's election;

18 (b) the surviving spouse's consent is on a plan form that sets forth:

19 (i) the amount of the member's death benefits, and of the spouse, if the  
 20 spouse were entitled to half those benefits;

21 (ii) a statement to the effect that (absent valid consent to the contrary)  
 22 the surviving spouse is entitled to at least half of the death benefits;

23 (iii) a statement to the effect that the surviving spouse has the right to  
 24 prevent any future member elections regarding the member's death  
 25 benefits without the surviving spouse's consent unless the consent of the  
 26 surviving spouse expressly permits member elections without any  
 27 further consent by the surviving spouse; and

28 (D) the fact that consenting to the member's election would result in the  
 29 surviving spouse receiving either no death benefits or smaller death  
 30 benefits than the surviving spouse would otherwise receive under this  
 31 subdivision;

32 (c) the consent includes an acknowledgement that the surviving spouse  
 33 understands that, absent the surviving spouse's consent to the member's  
 34 election, the surviving spouse would be entitled to be paid at least one-half of  
 35 the death benefits, and that the surviving spouse's consent would result in the  
 36 elimination or reduction of such death benefits; and

37 (d) the consent includes a signature by the surviving spouse that was witnessed  
 38 by a notary public or a representative of the retirement system, and

39 (e) the system receives the completed consent and the member's election before

- 1           the member's death;  
 2           2. the member and the surviving spouse were legally separated when the member's  
 3           election was filed with the retirement system;  
 4           3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 5           of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 6           of the member's death;  
 7           4. it is established to the satisfaction of the retirement board of the system that the  
 8           surviving spouse could not have been located if the member had been willing  
 9           and able to exercise due diligence to locate the surviving spouse on the date of  
 10           the member's death; or  
 11           5. there is no surviving spouse.

12 i. Notwithstanding any other provision of this section to the contrary, a member's election must  
 13 comply with the terms of subdivision h of this section to be effective.

14 j. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 15 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 16 matters would use in the conduct of an enterprise of a like character and with like aims, in—

- 17           1. relying on a consent referred to in paragraph one of subdivision h of this section, or  
 18           2. determining that at least one of paragraphs two, three, four, or five of subdivision i  
 19           of this section is true,

20 then (without implication as to what liability the retirement system and the board might have in  
 21 the absence of this subdivision j) such consent or determination shall be treated as valid for purpose  
 22 of discharging the retirement system and the board from liability to the extent of payments made  
 23 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 24 surviving spouse of any rights to recover amounts from any party other than the retirement system  
 25 or the board.

26

27

28 Section 10. Section 360-c of the retirement and social security law, as amended by L. 1998, ch.  
 29 388, § 2, is amended to read as follows:

30

31 § 360-c. Death benefit for vested members who die prior to retirement

32 a. A death benefit plus the reserve-for-increased-take-home-pay shall be payable upon the death  
 33 of a member who:

- 34           1. Died before the effective date of retirement while a member of the retirement  
 35           system;  
 36           2. Had at least ten years of credited service at the time of death; and

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1           3. Died at a time and in a manner which did not result in the eligibility of the member's  
2           estate or any beneficiary to receive any other retirement system death benefits  
3           on account of such death.

4           b. Benefits provided under this section shall be payable to the member's estate or the beneficiary  
5           or beneficiaries nominated by the member on a designation of beneficiary form filed with the  
6           comptroller pursuant to section sixty of this chapter, who would have been eligible to receive  
7           benefits if benefits had become payable pursuant to such section.

8           c. The amount of the benefit payable pursuant to this section shall be equal to one-half of the  
9           amount of the ordinary death benefit which would have been payable pursuant to section sixty of  
10          this chapter had the member's death occurred on the last day of service upon which membership  
11          was based.

12          d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
13          benefits payable under this section, including the reserve-for-increased-take-home-pay at the time  
14          of the member's death, payable under this section shall be paid to the member's surviving spouse,  
15          if any, unless the member elects (in a manner that accords with this subdivision d) that the  
16          surviving spouse receive less than one-half of the death benefits, and:

17           1.    (A) the member's surviving spouse consented, on or after the date of the  
18           member's marriage, in writing to the member's election;

19           (B) the surviving spouse's consent is on a plan form that sets forth:

20           (i) the amount of the member's death benefits, and of the spouse, if the  
21           spouse were entitled to half those benefits;

22           (ii) a statement to the effect that (absent valid consent to the contrary)  
23           the surviving spouse is entitled to at least half of the death benefits;

24           (iii) a statement to the effect that the surviving spouse has the right to  
25           prevent any future member elections regarding the member's death  
26           benefits without the surviving spouse's consent unless the consent of the  
27           surviving spouse expressly permits member elections without any  
28           further consent by the surviving spouse; and

29           (iv) the fact that consenting to the member's election would result in the  
30           surviving spouse receiving either no death benefits or smaller death  
31           benefits than the surviving spouse would otherwise receive under this  
32           subdivision;

33           (C) the consent includes an acknowledgement that the surviving spouse  
34           understands that, absent the surviving spouse's consent to the member's  
35           election, the surviving spouse would be entitled to be paid at least one-half of  
36           the death benefits, and that the surviving spouse's consent would result in the  
37           elimination or reduction of such death benefits;

38           (D) the consent includes a signature by the surviving spouse that was witnessed

1 by a notary public or a representative of the retirement system; and

2 (E) the system receives the completed consent and the member's election before  
 3 the member's death;

4 2. the member and the surviving spouse were legally separated when the member's  
 5 election was filed with the retirement system; or

6 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 7 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 8 of the member's death;

9 4. it is established to the satisfaction of the retirement board of the system that the  
 10 surviving spouse could not have been located if the member had been willing  
 11 and able to exercise due diligence to locate the surviving spouse on the date of  
 12 the member's death; or

13 5. there is no surviving spouse.

14 e. Notwithstanding any other provision of this section to the contrary, a member's election must  
 15 comply with the terms of subdivision d of this section to be effective.

16 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 17 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 18 matters would use in the conduct of an enterprise of a like character and with like aims, in—

19 1. relying on a consent referred to in paragraph one of subdivision d of this section, or

20 2. determining that at least one of paragraphs two, three, four, or five of subdivision i  
 21 of this section is true,

22 then (without implication as to what liability the retirement system and the board might have in  
 23 the absence of this subdivision f) such consent or determination shall be treated as valid for purpose  
 24 of discharging the retirement system and the board from liability to the extent of payments made  
 25 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 26 surviving spouse of any right s to recover amounts from any party other than the retirement system  
 27 or the board.

28  
 29  
 30 Section 11. Section 390 of the retirement and social security law, as amended by L. 2004, ch. 446,  
 31 § 2, is amended to read as follows:

32  
 33 § 390. Options

34 A member; or if he is an incompetent, his spouse or the committee of his property; or if he is a  
 35 conservatee, his spouse or the conservator of his property, may elect to receive a Single Life  
 36 Allowance (a retirement allowance without optional modification) or to receive the actuarial  
 37 equivalent of his retirement allowance at the time of his retirement, in the form of a smaller  
 38 retirement allowance payable to him for life and one of the following optional settlements.

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 Cash Refund-Contributions (Option One-half). If he dies before he has received  
 2 annuity payments equal to the present value of his annuity, as it was at the time  
 3 of his retirement, the balance thereof shall be paid to his estate or to a beneficiary  
 4 designated as provided in this section. In the event a designated beneficiary does  
 5 not survive him, any balance shall be payable to the estate of the deceased retired  
 6 member or as provided in section one thousand three hundred ten of the  
 7 surrogate's court procedure act.

8 The beneficiary so designated may elect by written designation, duly executed  
 9 and filed with the comptroller, to receive the balance payable in the form of an  
 10 annuity, the amount of which shall be determined as the actuarial equivalent of  
 11 such balance on the basis of regular interest and the age of such beneficiary at  
 12 the time of the retiree's death, or in the alternative, to receive the actuarial  
 13 equivalent of such balance in the form of a reduced annuity payable for life, with  
 14 the further proviso that if he should die before the annuity payments received by  
 15 him are equal to such actuarial equivalent, the balance thereof shall be paid in a  
 16 lump sum to his estate or to such person as he shall have designated to receive  
 17 same. In either case the election shall be within ninety days after the death of the  
 18 retiree. The designation of the individual who is to receive such lump sum on  
 19 the death of the beneficiary, may be changed by the beneficiary at any time.  
 20 Such election, designation or change shall be made by a writing, duly executed  
 21 and filed with the comptroller. In the event a designated beneficiary has elected  
 22 to receive a balance payable in the form of a reduced annuity, and the person  
 23 designated by him to receive a lump sum payment does not survive him, such  
 24 lump sum, if any, shall be payable to the estate of the designated beneficiary or  
 25 as provided in section one thousand three hundred ten of the surrogate's court  
 26 procedure act.

27 Cash Refund-Initial Value (Option One). If he dies before he has received retirement  
 28 allowance payments equal to the present value of his retirement allowance, as it  
 29 was at the time of his retirement, the balance thereof shall be paid to his estate  
 30 or to the beneficiary so designated. In the event a designated beneficiary does  
 31 not survive him, any balance shall be payable to the estate of the deceased retired  
 32 member or as provided in section one thousand three hundred ten of the  
 33 surrogate's court procedure act. The beneficiary so designated may elect by  
 34 written designation, duly executed and filed with the comptroller, to receive the  
 35 balance payable in the form of an annuity, the amount of which shall be  
 36 determined as the actuarial equivalent of such balance on the basis of regular  
 37 interest and the age of such beneficiary at the time of the retiree's death, or in  
 38 the alternative, to receive the actuarial equivalent of such balance in the form of  
 39 a reduced annuity payable for life, with the further proviso that if he should die  
 40 before the annuity payments received by him are equal to such actuarial  
 41 equivalent, the balance thereof shall be paid in a lump sum to his estate or to  
 42 such person as he shall have designated to receive same. In either case the  
 43 election shall be within ninety days after the death of the retiree. The designation  
 44 of the individual who is to receive such lump sum on the death of the beneficiary,

1           may be changed by the beneficiary at any time. Such election, designation or  
 2           change shall be made by a writing, duly executed and filed with the comptroller.  
 3           In the event a designated beneficiary has elected to receive a balance payable in  
 4           the form of a reduced annuity, and the person designated by him to receive a  
 5           lump sum payment does not survive him, such lump sum, if any, shall be payable  
 6           to the estate of the designated beneficiary or as provided in section one thousand  
 7           three hundred ten of the surrogate's court procedure act.

8           Joint Allowance-Full (Option Two). Upon his death, a retirement allowance in an  
 9           amount equal to that paid to him, shall be paid for life to the beneficiary so  
 10          designated.

11          Joint Allowance-Half (Option Three). Upon his death, a retirement allowance of one-  
 12          half the amount paid to him shall be paid for life to the beneficiary so designated.

13          Actuarial Equivalent Allowance (Option Four). Such other optional benefit or benefits  
 14          as the comptroller shall approve and which shall be the actuarial equivalent of  
 15          his retirement allowance at the time of his retirement.

16          aa. In the event that the monthly retirement allowance payable to a member or a beneficiary shall  
 17          amount to less than twenty-five dollars, then and in such event, the member or beneficiary may  
 18          elect, in lieu of such monthly retirement allowance, to receive the actuarial equivalent thereof in a  
 19          lump sum.

20          All elections under this section shall be made on [forms](#) prepared by the comptroller for that  
 21          purpose. Any such election may be made at any time before the first payment on account of any  
 22          benefit becomes normally due, except that in the case of retirement on account of disability, such  
 23          an election may be made within thirty days after mailing by the comptroller of notification of  
 24          approval of retirement on account of disability.

25          An optional election shall not become effective if the member dies before the effective date of his  
 26          retirement. Provided, however, if a member who is otherwise eligible for disability retirement  
 27          pursuant to this chapter dies after the filing in the office of the comptroller of the application for  
 28          disability retirement and a valid option election form pursuant to this chapter and it is established  
 29          that the physical or mental impairment or incapacitation of the applicant specified in such  
 30          application was directly related to the cause of the applicant's death, such application shall be  
 31          approved by the comptroller effective one day before the date of the applicant's death. An election  
 32          of an option may be withdrawn or a new option may be chosen within the period provided in this  
 33          subdivision b for the making of such an election. Except as provided in subdivision b of section  
 34          three hundred seventy of this article, where an optional election does not become effective,  
 35          retirement shall be without option.

36          bb. 1. Notwithstanding any other provision of this section or of section three hundred seventy of  
 37                this article, the comptroller, for reasonable cause, shall have power, to extend the time  
 38                for the election of an option, for a period or periods which shall expire not later than  
 39                sixty days immediately after the effective date of a member's retirement.

40          2. Notwithstanding any other provision of this section, but except where payment of

EXPLANATION—Matter ([underscored](#)) is new; matter in brackets [-] is old law to be omitted  
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1 accumulated contributions, an ordinary death benefit, or both, is or are required  
 2 pursuant to subdivision dd of section three hundred fifty-one of this article or  
 3 subdivision aa of section three hundred sixty of this article, retirement shall be  
 4 on the basis of “Option One-half” unless the member files an effective election  
 5 pursuant to this section to retire on a different basis. The provisions of this  
 6 paragraph two shall apply to cases where retirement shall become effective on  
 7 or after April first, nineteen hundred sixty-seven.

8 c. A member, or person authorized by this section to make an election in his behalf, may designate  
 9 his beneficiary under any of the options herein provided. Each such designation shall be:

- 10 1. Made in writing on a [form](#) provided by the comptroller for such purposes, and
- 11 2. Ineffective until it is filed in the comptroller’s office, and
- 12 3. Revocable to the extent that:

13 (a) A new beneficiary under a “Cash Refund-Contributions” option (Option  
 14 One-half), or a “Cash Refund-Initial Value” option (Option One) may be  
 15 designated at any time during the member’s life.

16 (b) A new beneficiary under any other option may be designated at any time  
 17 within the period provided for the making of an election pursuant to this section.

18 d. In the event of the death of a retired member, the installment of his retirement allowance, which  
 19 would have become due and payable next following his death, shall be pro-rated as of the date of  
 20 his death. The amount of such installment, as so pro-rated, shall be paid as follows:

- 21 1. If the member shall have

22 (a) Elected to receive an optional benefit pursuant to this section, and

23 (b) Designated a beneficiary pursuant to this section, such amount shall be paid  
 24 to such beneficiary, if such beneficiary survives him. In any other case such  
 25 amount shall be paid to the retired member’s estate or pursuant to section one  
 26 thousand three hundred ten of the surrogate’s court procedure act.

- 27 2. If the member shall not have elected to receive an optional benefit, such amount  
 28 shall be paid to the beneficiary designated by him pursuant to subdivision d of  
 29 section three hundred fifty-one of this article. In the event the appropriately  
 30 designated beneficiary does not survive such member, or if he shall not have so  
 31 designated a beneficiary, such amount shall be payable to the retired member’s  
 32 estate or pursuant to section one thousand three hundred ten of the surrogate’s  
 33 court procedure act.

34 e. Notwithstanding any other provision of this article, an option selection previously filed by a  
 35 member or retired member subject to the provisions of this section may be changed no later than  
 36 thirty days following the date of payability of his or her retirement allowance. A retired member  
 37 who has been retired for disability may change an option selection previously filed no later than  
 38 (1) thirty days following the date on which such member’s application for disability retirement

1 was approved by the retirement board or (2) thirty days following the date on which such retiree  
2 was retired for disability, whichever is later.

3 f. Notwithstanding any other provision of this section to the contrary, a member's retirement  
4 allowance payable under this section shall be paid as Option Three, with the spouse as the  
5 member's beneficiary, so that upon his or her death, if the member has a surviving spouse who  
6 was married to the member on the date the member filed his or her retirement application, or on  
7 the date the member filed his or her last effective option selection, if any, whichever is later, unless  
8 the member (a) elects that the surviving spouse receive a) survivor benefit payments, whose  
9 amounts are at least equal to the amounts of the retirement allowance payments that would be paid  
10 to the surviving spouse under Option Three, if the spouse were the member's beneficiary; or (b)  
11 elects (in a manner that accords with this subdivision f) that the surviving spouse receive either  
12 no survivor benefit payments or survivor benefit payments, whose amounts are less than the  
13 amounts of the retirement allowance payments that would be paid to the surviving under Option  
14 Three, if the spouse were the member's beneficiary, and:

15 1. (a) the member's surviving spouse consented on or after the date of the  
16 member's marriage, in writing to the member's election;

17 (b) the surviving spouse's consent is on a plan form that sets forth:

18 (i) the amount of the Option Three monthly benefit entitlements of the  
19 member and of the spouse, if the spouse were the member's beneficiary,  
20 and when the member and the surviving spouse would each be entitled  
21 to those benefits;

22 (ii) a statement to the effect that (absent valid consent to the contrary) t  
23 the surviving spouse is entitled to survivor benefit payments in amounts  
24 that are greater or equal to the amounts of the retirement allowance  
25 payments that would be paid to the surviving spouse under Option 3, if  
26 the spouse were the member's beneficiary;

27 (iii) a statement to the effect that the surviving spouse has the right to  
28 prevent any future member elections regarding the member's survivor  
29 benefits without the surviving spouse's consent unless the consent of the  
30 surviving spouse expressly permits member elections without any  
31 further consent by the surviving spouse; and

32 (iv) the fact that consenting to the member's survivor benefit election  
33 would result in the surviving spouse receiving no survivor benefits or  
34 smaller survivor benefits than the surviving spouse would otherwise  
35 receive under this subdivision;

36 (c) the consent includes an acknowledgement that the surviving spouse  
37 understands that, absent the surviving spouse's consent to the member's  
38 election, the surviving spouse would be entitled paid lifetime survivor benefit  
39 payment amounts that are at least the amounts that would be paid to the surviving  
40 spouse under Option 3, if the spouse were the member's beneficiary, and that

1 the surviving spouse's consent would result in the elimination or reduction of  
 2 such survivor benefits;

3 (d) the consent includes a signature by the surviving spouse that was witnessed  
 4 by a notary public or a representative of the retirement system, and

5 (e) the system receives the completed consent and the member's election before  
 6 the date the member filed his or her retirement application, or the date the  
 7 member filed his or her last effective option selection, if any, whichever is later;

8 2. the member and the surviving spouse were legally separated when the member's  
 9 election was filed with the retirement system;

10 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
 11 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
 12 of the filing of the member's application for a retirement allowance;

13 4. it is established to the satisfaction of the retirement board of the system that the  
 14 surviving spouse could not have been located if the member had been willing  
 15 and able to exercise due diligence to locate the surviving spouse on the later of  
 16 the date the member's retirement application was filed with the retirement  
 17 system, or the date the member's last effective option selection was filed with  
 18 the retirement system; or

19 5. there is no surviving spouse.

20 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 21 comply with the terms of subdivision f of this section to be effective.

22 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 23 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 24 matters would use in the conduct of an enterprise of a like character and with like aims, in—

25 1. relying on a consent referred to in paragraph one of subdivision f of this section, or

26 2. determining that at least one of paragraphs two, three, four, or five of subdivision f  
 27 this section is true,

28 then (without implication as to what liability the retirement system and the board might have in  
 29 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 30 purpose of discharging the retirement system and the board from liability to the extent of payments  
 31 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 32 surviving spouse of any rights to recover from any party other than the retirement system or the  
 33 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 34 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 35 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 36 may not thereby reduce any of those benefit payments by more than 10%.

37  
 38  
 EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 Section 12. Section 448 of the retirement and social security law, as amended by L. 2021, ch. 376,  
2 § 1, is amended to read as follows:

3  
4 § 448. Death benefits

5 a. A member of a retirement system who is subject to the provisions of this article, exclusive of  
6 those members for whom provision is made pursuant to subdivision b of this section, shall, at the  
7 time of first becoming a member thereof, make an election, which shall be irrevocable, for  
8 coverage for financial protection in the event of death in service, between the two following  
9 benefits:

10 1. A benefit upon the death of a member in service equal to one month's salary for  
11 each full year of service up to a maximum of three years' salary upon the  
12 completion of thirty-six full years of service, or in the event that a member is  
13 eligible to retire without benefit reduction pursuant to section four hundred  
14 forty-two of this article, a benefit equal to the pension reserve, if any, which  
15 would have been payable to such member had he entered prior to the effective  
16 date of this article and died in service, subject to the benefit limitations set forth  
17 in section four hundred forty-four of this article, if this alternative provides a  
18 greater benefit, or;

19 2. A benefit upon the death of a member in service equal to the member's salary upon  
20 his or her completion of one year of service, two years' salary upon completion  
21 of two years of service, and three years' salary upon completion of three years  
22 of service. In the case of a member of a retirement system other than the New  
23 York state teachers' retirement system, the New York city employees'  
24 retirement system, the New York city board of education retirement system, the  
25 New York city teachers' retirement system, the New York state and local  
26 employees' retirement system or the New York state and local police and fire  
27 retirement system and the New York state teachers' retirement system, such  
28 benefit shall be subject to the following limitations:

29 (a) If the member last joined the retirement system prior to attainment of age  
30 fifty-two, the maximum benefit shall be three years' salary;

31 (b) If the member was age fifty-two when he or she last joined the retirement  
32 system, the maximum benefit shall be two and one-half times annual salary;

33 (c) If the member was age fifty-three when he or she last joined the retirement  
34 system, the maximum benefit shall be two years' salary;

35 (d) If the member was age fifty-four when he or she last joined the retirement  
36 system, the maximum benefit shall be one and one-half times annual salary;

37 (e) If the member was age fifty-five or older but under age sixty-five when he  
38 or she last joined the retirement system, the maximum benefit shall be one year's  
39 salary; and

40 (f) If the member was age sixty-five or older when he or she last joined the

1 retirement system, the maximum benefit shall be one thousand dollars.

2 In the case of a member of a retirement system other than the New York state teachers'  
3 retirement system, the New York city employees' retirement system, the New  
4 York city board of education retirement system, the New York city teachers'  
5 retirement system, the New York state and local employees' retirement system  
6 or the New York state and local police and fire retirement system, commencing  
7 upon attainment of age sixty-one, the benefit otherwise provided pursuant to this  
8 paragraph shall be reduced while the member is in service to ninety per centum  
9 of the benefit otherwise payable and each year thereafter the benefit payable  
10 shall be reduced by an amount equal to ten per centum per year of the original  
11 benefit otherwise payable, but not below ten per centum of the original benefit  
12 otherwise payable.

13 In the case of a member of the New York state teachers' retirement system,  
14 commencing upon attainment of age sixty-one, the benefit otherwise provided  
15 pursuant to this paragraph shall be reduced while the member is in service to  
16 ninety-six per centum of the benefit otherwise payable and each year thereafter  
17 the benefit payable shall be reduced by an amount equal to four per centum per  
18 year of the original benefit otherwise payable, but not below sixty per centum of  
19 the original benefit otherwise payable. In the case of a member of the New York  
20 city employees' retirement system, the New York city board of education  
21 retirement system or the New York city teachers' retirement system,  
22 commencing upon attainment of age sixty-one, the benefit otherwise provided  
23 pursuant to this paragraph shall be reduced while the member is in service to  
24 ninety-five per centum of the benefit otherwise payable and each year thereafter  
25 the benefit payable shall be reduced by an amount equal to five per centum per  
26 year of the original benefit otherwise payable, but not below fifty per centum of  
27 the original benefit otherwise payable. In the case of any member of the New  
28 York state and local employees' retirement system who is permitted to retire  
29 without regard to age or a member of the New York state and local police and  
30 fire retirement system, commencing upon attainment of age sixty-one, the  
31 benefit otherwise provided pursuant to this paragraph shall be reduced while the  
32 member is in service to ninety-seven per centum of the benefit otherwise  
33 payable, and each year thereafter the benefit payable shall be reduced by an  
34 amount equal to three per centum per year of the original benefit otherwise  
35 payable, but not below seventy per centum of the original benefit otherwise  
36 payable. In the case of any other member of the New York state and local  
37 employees' retirement system, commencing upon attainment of age sixty-one,  
38 the benefit otherwise provided pursuant to this paragraph shall be reduced while  
39 the member is in service to ninety-six per centum of the benefit otherwise  
40 payable, and each year thereafter the benefit payable shall be reduced by an  
41 amount equal to four per centum per year of the original benefit otherwise  
42 payable, but not below sixty per centum of the original benefit otherwise  
43 payable. Upon retirement from any retirement system, the benefit in force shall  
44 be reduced by fifty per centum; upon completion of the first year of retirement,

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1 the benefit in force at the time of retirement shall be reduced by an additional  
 2 twenty-five per centum, and upon commencement of the third year of retirement,  
 3 the benefit shall be ten per centum of the benefit in force at age sixty, if any, or  
 4 at the time of retirement if retirement preceded such age; provided, however, the  
 5 benefit in retirement shall not be reduced below ten per centum of the benefit in  
 6 force at age sixty, if any, or at the time of retirement if retirement preceded such  
 7 age. Notwithstanding any other provision of this paragraph to the contrary, the  
 8 benefit for a retiree from the New York state and local employees' retirement  
 9 system shall not be reduced below ten per centum of the benefit in force at the  
 10 time of retirement.

11 3. If a member dies in service without having made the election specified in this  
 12 subdivision within ninety days after first becoming a member, or within the  
 13 period prescribed by the retirement system of which he is a member if such  
 14 period is less than ninety days, he shall be deemed to have made the election  
 15 specified in paragraph two.

16 4. Notwithstanding any other provision of this article, any member of the New York  
 17 state teachers' retirement system who joined on or after July first, nineteen  
 18 hundred seventy-three and before July first, nineteen hundred seventy-four may  
 19 change the election set forth in this subdivision by filing a new election on or  
 20 before June thirtieth, nineteen hundred eighty-nine. The election filed pursuant  
 21 to this paragraph shall be irrevocable.

22 5. Notwithstanding any provision of this article, a member of a retirement system  
 23 subject to the provisions of this article who last joined such system on or after  
 24 January first, two thousand one who is not covered by the death benefit  
 25 calculation provided in subdivision b of this section shall, upon a qualifying  
 26 death, be covered by the death benefit calculation provided pursuant to  
 27 paragraph two of this subdivision and shall not be entitled to elect between the  
 28 death benefit calculations provided in paragraphs one and two of this  
 29 subdivision. Any individual who last joined such system before January first,  
 30 two thousand one who is not covered by the death benefit calculation provided  
 31 in subdivision b of this section shall be covered, upon a qualifying death, by the  
 32 death benefit calculation provided by paragraph two of this subdivision unless  
 33 such individual had timely elected death benefit coverage under the calculation  
 34 provided by paragraph one of this subdivision and, upon such death, it is  
 35 determined that the benefit, as calculated under such paragraph one would be  
 36 greater than as calculated under such paragraph two, in which case the benefit  
 37 calculated under such paragraph one shall be payable.

38 b. A member of a retirement system subject to the provisions of this article who is a police officer,  
 39 firefighter, correction officer or sanitation worker and is in a plan which permits immediate  
 40 retirement upon completion of a specified period of service without regard to age or who is subject  
 41 to the provisions of subdivision b of section four hundred forty-five of this article, shall upon  
 42 completion of ninety days of service be covered for financial protection in the event of death in



1 service pursuant to this subdivision.

2 1. Such death benefit shall be equal to three times the member's salary raised to the  
 3 next highest multiple of one thousand dollars, but in no event shall it exceed  
 4 three times the maximum salary specified in section one hundred thirty of the  
 5 civil service law or, in the case of a member of a retirement system other than  
 6 the New York city employees' retirement system, the New York city police  
 7 pension fund, subchapter two or the New York city fire department pension  
 8 fund, subchapter two, the specific limitations specified for age of entrance into  
 9 service contained in subparagraphs (b), (c), (d), (e) and (f) of paragraph two of  
 10 subdivision a of this section.

11 2. Provided further, notwithstanding any other provision of this article to the contrary,  
 12 where the member is a police officer or firefighter and would have been entitled  
 13 to a service retirement benefit at the time of his or her death and where his or  
 14 her death occurs on or after July first, two thousand, the beneficiary or  
 15 beneficiaries nominated for the purposes of this subdivision may elect to receive,  
 16 in a lump sum, an amount payable which shall be equal to the pension reserve  
 17 that would have been established had the member retired on the date of his or  
 18 her death, or the value of the death benefit and the reserve-for-increased-take-  
 19 home-pay, if any, whichever is greater, provided further that for the purpose of  
 20 determining entitlement to the benefit provided by this subdivision, and  
 21 notwithstanding subdivision j of section three hundred forty-one of this chapter,  
 22 where the member is an officer or member of the state police the total number  
 23 of days of unused sick leave and accumulated vacation credit accrued by the  
 24 member at the time of his or her death shall be considered in meeting the total  
 25 creditable service required to qualify for a service retirement benefit provided  
 26 without regard to age where his or her death occurs on or after July second, two  
 27 thousand nine. Provided further that where such police officer or firefighter dies  
 28 on or after July first, two thousand, after having retired from service, but before  
 29 a first payment of a retirement allowance, such person shall be deemed to have  
 30 been in service at the time of his or her death for the purposes of this subdivision  
 31 only, and provided further that the pension reserve established pursuant to this  
 32 paragraph for a person who dies after retiring from service, but before first  
 33 payment of a retirement allowance, shall be determined as of the date of  
 34 retirement and any pension payments payable for the period of time prior to the  
 35 retiree's death shall be deducted from any benefits payable pursuant to this  
 36 subdivision.

37 c. For the purpose of this section, salary shall be the regular compensation earned during the  
 38 member's last twelve months of service in full pay status as a member or, if he or she had not  
 39 completed twelve months of service prior to the date of death, but was subject to the provisions of  
 40 subdivision b of this section, the compensation he or she would have earned had he or she worked  
 41 for the twelve months prior to such date; provided, however, for the purpose of this section salary  
 42 shall exclude any form of termination pay (which shall include any compensation in anticipation  
 43 of retirement), or any lump sum payment for deferred compensation sick leave, or accumulated

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1 vacation credit or any other payment for time not worked (other than compensation received while  
 2 on sick leave or authorized leave of absence) and in no event shall it exceed the maximum salary  
 3 specified in section one hundred thirty of the civil service law, as added by part B of chapter ten  
 4 of the laws of two thousand eight, or the maximum salary specified in section one hundred thirty  
 5 of the civil service law, as hereafter amended, whichever is greater.

6 D. The benefits provided pursuant to this section are in lieu of all other benefits provided by this  
 7 or any other state or local law exclusive of a benefit provided under the workmen's compensation  
 8 law, the civil service law or group life insurance; provided, however, a beneficiary of a member  
 9 eligible for a benefit as the result of a service connected accident, may elect to receive such other  
 10 benefit in lieu of the benefit provided pursuant to this section.

11 e. For the purposes of this section:

12 1. A member who dies while off the payroll shall be considered to be in service  
 13 provided he or she (a) was on the payroll in such service and paid within a period  
 14 of twelve months prior to his or her death, or was on the payroll in the service  
 15 upon which membership is based at the time he or she was ordered to active duty  
 16 pursuant to Title 10 of the United States Code, with the armed forces of the  
 17 United States or to service in the uniformed services pursuant to Chapter 43 of  
 18 Title 38 of the United States Code and died while on such active duty or service  
 19 in the uniformed services on or after June fourteenth, two thousand five, (b) had  
 20 not been otherwise gainfully employed since he or she ceased to be on such  
 21 payroll and (c) had credit for one or more years of continuous service since he  
 22 or she last entered or reentered the service of his or her employer;  
 23 notwithstanding any other provision of law to the contrary, a member of the New  
 24 York city employees' retirement system or the board of education retirement  
 25 system of the city of New York shall be deemed to have died on the payroll for  
 26 the purposes of this section in the event that death occurs while such member is  
 27 on an authorized leave of absence without pay for medical reasons which has  
 28 continuously been in effect since the member was last paid on the payroll in such  
 29 service, provided, however, that such member was on the payroll in such service  
 30 and paid within the four-year period prior to his or her death; and

31 2. The benefit payable shall be in addition to any payment made on account of a  
 32 member's accumulated contributions.

33 3. Provided, further, that any such member ordered to active duty pursuant to Title 10  
 34 of the United States Code, with the armed forces of the United States or to  
 35 service in the uniformed services pursuant to Chapter 43 of Title 38 of the United  
 36 States Code who died prior to rendering the minimum amount of service  
 37 necessary to be eligible for this benefit shall be considered to have satisfied the  
 38 minimum service requirement.

39 f. Notwithstanding the provisions of any other law to the contrary and solely for the purpose of  
 40 determining eligibility for the death benefit payable pursuant to this section, a person subject to

1 this section shall be considered to have died while in teaching service provided such person was  
 2 in such service at the time he or she was ordered to active duty pursuant to Title 10 of the United  
 3 States Code, with the armed forces of the United States or to service in the uniformed services  
 4 pursuant to Chapter 43 of Title 38 of the United States Code and died while on such active duty or  
 5 service in the uniformed services on or after June fourteenth, two thousand five. Provided, further,  
 6 that any such person ordered to active duty pursuant to Title 10 of the United States Code, with  
 7 the armed forces of the United States or to service in the uniformed services pursuant to Chapter  
 8 43 of Title 38 of the United States Code who died prior to rendering the minimum amount of  
 9 service necessary to be eligible for this benefit shall be considered to have satisfied the minimum  
 10 service requirements.

11 g. A member, or on the death of such member, the person nominated by him or her to receive his  
 12 or her death benefit, may provide, by written designation, duly executed and filed with the  
 13 comptroller, that such death benefit and the reserve-for-increased-take-home-pay shall be paid in  
 14 the form of an annuity. Such designation shall be filed prior to or within ninety days after the death  
 15 of the member. The amount of such annuity shall be determined as the actuarial equivalent of such  
 16 death benefit and reserve on the basis of the age of such beneficiary at the time of the member's  
 17 death. For the purposes of this subdivision, the mortality and interest rates used in determining this  
 18 annuity shall be the rates in effect on the date of the death of such member.

19 h. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 20 benefits payable under this section, including the reserve-for-increased-take-home-pay, and any  
 21 accumulated contributions remaining at the time of the member's death, payable under this section  
 22 shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that  
 23 accords with this subdivision h) that the surviving spouse receive less than one-half of the death  
 24 benefits, and:

25 1. (a) the member's surviving spouse consented, on or after the date of the  
 26 member's marriage, in writing to the member's election;

27 (b) the surviving spouse's consent is on a plan form that sets forth:

28 (i) the amount of the member's death benefits, and of the spouse, if the  
 29 spouse were entitled to half those benefits;

30 (ii) a statement to the effect that (absent valid consent to the contrary)  
 31 the surviving spouse is entitled to at least half of the death benefits;

32 (iii) a statement to the effect that the surviving spouse has the right to  
 33 prevent any future member elections regarding the member's death  
 34 benefits without the surviving spouse's consent unless the consent of the  
 35 surviving spouse expressly permits member elections without any  
 36 further consent by the surviving spouse; and

37 (iv) the fact that consenting to the member's election would result in the  
 38 surviving spouse receiving either no death benefits or smaller death  
 39 benefits than the surviving spouse would otherwise receive under this  
 40 subdivision;

1 (c) the consent includes an acknowledgement that the surviving spouse  
 2 understands that, absent the surviving spouse's consent to the member's  
 3 election, the surviving spouse would be entitled to be paid at least one-half of  
 4 the death benefits, and that the surviving spouse's consent would result in the  
 5 elimination or reduction of such death benefits;

6 (d) the consent includes a signature by the surviving spouse that was witnessed  
 7 by a notary public or a representative of the retirement system; and

8 (e) the system receives the completed consent and the member's election before  
 9 the member's death;

10 2. the member and the surviving spouse were legally separated when the member's  
 11 election was filed with the retirement system;

12 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 13 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 14 the member's death;

15 4. it is established to the satisfaction of the retirement board of the system that the  
 16 surviving spouse could not have been located if the member had been willing  
 17 and able to exercise due diligence to locate the surviving spouse on the date of  
 18 the member's death; or

19 5. there is no surviving spouse.

20 i. Notwithstanding any other provision of this section to the contrary, a member's election must  
 21 comply with the terms of subdivision h of this section to be effective.

22 j. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 23 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 24 matters would use in the conduct of an enterprise of a like character and with like aims, in—

25 1. relying on a consent referred to in paragraph one of subdivision h of this section,  
 26 or

27 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 28 h of this section is true,

29 then (without implication as to what liability the retirement system and the board might have in  
 30 the absence of this subdivision j) such consent or determination shall be treated as valid for purpose  
 31 of discharging the retirement system and the board from liability to the extent of payments made  
 32 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 33 surviving spouse of any rights to recover from any party other than the retirement system or the  
 34 board.

35  
 36  
 37 Section 13.\_Section 448-a of the retirement and social security law, as amended by L. 1998, ch.  
 38 388, § 3, is amended to read as follows:  
 39

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
 ESSA May 22, 2023

1 § 448-a. Death benefit for vested members who die prior to retirement

2 a. A death benefit plus the reserve-for-increased-take-home-pay, if any, shall be payable upon the  
3 death of a member of a retirement system who:

4 1. Died before the effective date of retirement while a member of such retirement  
5 system;

6 2. Had at least ten years of credited service at the time of death; and

7 3. Died at a time and in a manner which did not result in the eligibility of the member's  
8 estate or any beneficiary to receive any death benefits from such retirement  
9 system on account of such death.

10 b. Benefits provided under this section shall be payable to the member's estate or the beneficiary  
11 or beneficiaries nominated by the member on a designation of beneficiary form filed with the  
12 administrative head of such retirement system.

13 c. The amount of the benefit payable pursuant to this section shall be equal to one-half of the  
14 amount of the ordinary death benefit which would have been payable had the member's death  
15 occurred on the last day of service upon which membership was based.

16 d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
17 benefits payable under this section, including the reserve-for-increased-take-home-pay remaining  
18 at the time of the member's death, payable under this section shall be paid to the member's  
19 surviving spouse, if any, unless the member elects (in a manner that accords with this subdivision  
20 d) that the surviving spouse receive less than one-half of the death benefits, and:

21 1. (A) the member's surviving spouse consented, on or after the date of the  
22 member's marriage, in writing to the member's election;

23 (B) the surviving spouse's consent is on a plan form that sets forth:

24 (i) the amount of the member's death benefits, and of the spouse, if the  
25 spouse were entitled to half those benefits;

26 (ii) a statement to the effect that (absent valid consent to the contrary)  
27 the surviving spouse is entitled to at least half of the death benefits;

28 (iii) a statement to the effect that the surviving spouse has the right to  
29 prevent any future member elections regarding the member's death  
30 benefits without the surviving spouse's consent unless the consent of the  
31 surviving spouse expressly permits member elections without any  
32 further consent by the surviving spouse; and

33 (iv) the fact that consenting to the member's election would result in the  
34 surviving spouse receiving either no death benefits or smaller death  
35 benefits than the surviving spouse would otherwise receive under this  
36 subdivision;

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 (C) the consent includes an acknowledgement that the surviving spouse  
 2 understands that, absent the surviving spouse’s consent to the member’s  
 3 election, the surviving spouse would be entitled to be paid at least one-half of  
 4 the death benefits, and that the surviving spouse’s consent would result in the  
 5 elimination or reduction of such death benefits;

6 (D) the consent includes a signature by the surviving spouse that was witnessed  
 7 by a notary public or a representative of the retirement system; and,

8 (E) the system receives the completed consent and the member’s election before  
 9 the member’s death;

10 2. the member and the surviving spouse were legally separated when the member’s  
 11 election was filed with the retirement system;

12 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 13 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the  
 14 member’s death;

15 4. it is established to the satisfaction of the retirement board of the system that the  
 16 surviving spouse could not have been located if the member had been willing and  
 17 able to exercise due diligence to locate the surviving spouse on the date of the  
 18 member’s death; or

19 5. there is no surviving spouse.

20 e. Notwithstanding any other provision of this section to the contrary, a member’s election must  
 21 comply with the terms of subdivision d of this section to be effective.

22 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 23 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 24 matters would use in the conduct of an enterprise of a like character and with like aims, in—

25 1. relying on a consent referred to in paragraph one of subdivision d of this section,  
 26 or

27 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 28 d of this section is true,

29 then (without implication as to what liability the retirement system and the board might have in  
 30 the absence of this subdivision f) such consent or determination shall be treated as valid for purpose  
 31 of discharging the retirement system and the board from liability to the extent of payments made  
 32 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 33 surviving spouse of any rights to recover from any party other than the retirement system or the  
 34 board.

35  
 36  
 37 Section 14. Section 508 of the retirement and social security law, as amended by L. 2021, ch. 376,  
 38 § 2, is amended to read as follows:  
 39

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
 ESSA May 22, 2023

1 § 508. Death benefits

2 a. A member of a retirement system who is subject to the provisions of this article, exclusive of  
3 those members for whom provision is made pursuant to subdivision b of this section, shall, at  
4 the time of first becoming a member thereof, make an election, which shall be irrevocable, for  
5 coverage for financial protection in the event of death in service, between the two following  
6 benefits:

7 1. A benefit upon the death of a member in service equal to one month's salary for  
8 each full year of service up to a maximum of three years' salary upon the  
9 completion of thirty-six full years of service, or in the event that a member is  
10 eligible to retire without benefit reduction pursuant to section five hundred three  
11 of this article, a benefit equal to the pension reserve, if any, which would have  
12 been payable to such member had he entered prior to the effective date of this  
13 article<sup>1</sup> and died in service; or

14 2. A benefit upon the death of a member in service equal to the member's salary upon  
15 his or her completion of one year of service, two years' salary upon completion  
16 of two years of service, and three years' salary upon completion of three years  
17 of service. In the case of a member of a retirement system other than the New  
18 York state teachers' retirement system, the New York city employees'  
19 retirement system, the New York city board of education retirement system, the  
20 New York city teachers' retirement system, or the New York state and local  
21 employees' retirement system and the New York state teachers' retirement  
22 system, such benefit shall be subject to the following limitations:

23 (a) If the member last joined the retirement system prior to attainment of age  
24 fifty-two, the maximum benefit shall be three years' salary;

25 (b) If the member was age fifty-two when he or she last joined the retirement  
26 system, the maximum benefit shall be two and one-half times annual salary;

27 (c) If the member was age fifty-three when he or she last joined the retirement  
28 system, the maximum benefit shall be two years' salary;

29 d) If the member was age fifty-four when he or she last joined the retirement  
30 system, the maximum benefit shall be one and one-half times annual salary;

31 (e) If the member was age fifty-five or older but under age sixty-five when he  
32 or she last joined the retirement system, the maximum benefit shall be one year's  
33 salary; and

34 (f) If the member was age sixty-five or older when he or she last joined the  
35 retirement system, the maximum benefit shall be one thousand dollars.

36 In the case of a member of a retirement system other than the New York state teachers'  
37 retirement system, the New York city employees' retirement system, the New  
38 York city board of education retirement system, the New York city teachers'  
39 retirement system, or the New York state and local employees' retirement

1 system, commencing upon attainment of age sixty-one, the benefit otherwise  
 2 provided pursuant to this paragraph shall be reduced while the member is in  
 3 service to ninety per centum of the benefit otherwise payable and each year  
 4 thereafter the benefit payable shall be reduced by an amount equal to ten per  
 5 centum per year of the original benefit otherwise payable, but not below ten per  
 6 centum of the original benefit otherwise payable.

7 Notwithstanding any other provision of this paragraph, in the case of a member of the  
 8 New York state teachers' retirement system, commencing upon attainment of  
 9 age sixty-one, the benefit otherwise provided pursuant to this paragraph shall be  
 10 reduced while the member is in service to ninety-six per centum of the benefit  
 11 otherwise payable, and each year thereafter the benefit payable shall be reduced  
 12 by an amount equal to four per centum per year of the original benefit otherwise  
 13 payable, but not below sixty per centum of the original benefit otherwise  
 14 payable. In the case of a member of the New York city employees' retirement  
 15 system, the New York city board of education retirement system or the New  
 16 York city teachers' retirement system, commencing upon attainment of age  
 17 sixty-one, the benefit otherwise provided pursuant to this paragraph shall be  
 18 reduced while the member is in service to ninety-five per centum of the benefit  
 19 otherwise payable and each year thereafter the benefit payable shall be reduced  
 20 by an amount equal to five per centum per year of the original benefit otherwise  
 21 payable, but not below fifty per centum of the original benefit otherwise payable.  
 22 In the case of any member of the New York state and local employees'  
 23 retirement system who is permitted to retire without regard to age, commencing  
 24 upon attainment of age sixty-one, the benefit otherwise provided pursuant to this  
 25 paragraph shall be reduced while the member is in service to ninety-seven per  
 26 centum of the benefit otherwise payable, and each year thereafter the benefit  
 27 payable shall be reduced by an amount equal to three per centum per year of the  
 28 original benefit otherwise payable, but not below seventy per centum of the  
 29 original benefit otherwise payable. In the case of any other member of the New  
 30 York state and local employees' retirement system, commencing upon  
 31 attainment of age sixty-one, the benefit otherwise provided pursuant to this  
 32 paragraph shall be reduced while the member is in service to ninety-six per  
 33 centum of the benefit otherwise payable, and each year thereafter the benefit  
 34 payable shall be reduced by an amount equal to four per centum per year of the  
 35 original benefit otherwise payable, but not below sixty per centum of the original  
 36 benefit otherwise payable. Upon retirement from any retirement system, the  
 37 benefit in force shall be reduced by fifty per centum; upon completion of the  
 38 first year of retirement, the benefit in force at the time of retirement shall be  
 39 reduced by an additional twenty-five per centum, and upon commencement of  
 40 the third year of retirement, the benefit shall be ten per centum of the benefit in  
 41 force at age sixty, if any, or at the time of retirement if retirement preceded such  
 42 age; provided, however, the benefit in retirement shall not be reduced below ten  
 43 per centum of the benefit in force at age sixty, if any, or at the time of retirement  
 44 if retirement preceded such age. Notwithstanding any other provision of this



1 paragraph to the contrary, the benefit for a retiree from the New York state and  
 2 local employees' retirement system shall not be reduced below ten per centum  
 3 of the benefit in force at the time of retirement.

4 3. If a member dies in service without having made the election specified in this  
 5 subdivision within ninety days after first becoming a member, or within the  
 6 period prescribed by the retirement system of which he is a member if such  
 7 period is less than ninety days, he shall be deemed to have made the election  
 8 specified in paragraph two.

9 4. Notwithstanding any provision of this article, a member of a retirement system  
 10 subject to the provisions of this article who last joined such system on or after  
 11 January first, two thousand one who is not covered by the death benefit  
 12 calculation provided in subdivision b of this section shall, upon a qualifying  
 13 death, be covered by the death benefit calculation provided pursuant to  
 14 paragraph two of this subdivision and shall not be entitled to elect between the  
 15 death benefit calculations provided in paragraphs one and two of this  
 16 subdivision. Any individual who last joined such system before January first,  
 17 two thousand one who is not covered by the death benefits calculation provided  
 18 in subdivision b of this section shall be covered, upon a qualifying death, by the  
 19 death benefit calculation provided by paragraph two of this subdivision unless  
 20 such individual had timely elected death benefit coverage under the calculation  
 21 provided by paragraph one of this subdivision and, upon such death, it is  
 22 determined that the benefit, as calculated under such paragraph one would be  
 23 greater than as calculated under such paragraph two, in which case the benefit  
 24 calculated under such paragraph one shall be payable.

25 b. A member of a retirement system subject to the provisions of this article who is a police officer,  
 26 firefighter, correction officer, investigator revised plan member or sanitation worker and is in a  
 27 plan which permits immediate retirement upon completion of a specified period of service without  
 28 regard to age or who is subject to the provisions of section five hundred four or five hundred five  
 29 of this article, shall upon completion of ninety days of service be covered for financial protection  
 30 in the event of death in service pursuant to this subdivision. Such death benefit shall be equal to  
 31 three times the member's salary raised to the next highest multiple of one thousand dollars, but in  
 32 no event shall it exceed three times the maximum salary specified in section one hundred thirty of  
 33 the civil service law or, in the case of a member of a retirement system other than the New York  
 34 city employees' retirement system, or in the case of a member of the New York city employees'  
 35 retirement system who is a New York city uniformed correction/sanitation revised plan member  
 36 or an investigator revised plan member, the specific limitations specified for age of entrance into  
 37 service contained in subparagraphs (b), (c), (d), (e) and (f) of paragraph two of subdivision a of  
 38 this section.

39 c. For the purpose of this section, salary shall be the regular compensation earned during the  
 40 member's last twelve months of service in full pay status as a member or, if he or she had not  
 41 completed twelve months of service prior to the date of death, but was subject to the provisions of  
 42 subdivision b of this section, the compensation he or she would have earned had he or she worked

1 for the twelve months prior to such date; provided, however, for the purpose of this section salary  
 2 shall exclude any form of termination pay (which shall include any compensation in anticipation  
 3 of retirement), or any lump sum payment for deferred compensation sick leave, or accumulated  
 4 vacation credit or any other payment for time not worked (other than compensation received while  
 5 on sick leave or authorized leave of absence) and in no event shall it exceed the maximum salary  
 6 specified in section one hundred thirty of the civil service law, as added by part B of chapter ten  
 7 of the laws of two thousand eight, or the maximum salary specified in section one hundred thirty  
 8 of the civil service law, as hereafter amended, whichever is greater.

9 D. The benefits provided pursuant to this section are in lieu of all other benefits provided by this  
 10 or any other state or local law exclusive of a benefit provided under the workmen's compensation  
 11 law, the civil service law or group life insurance; provided, however, a beneficiary of a member  
 12 eligible for a benefit as the result of a service-connected accident, may elect to receive such other  
 13 benefit in lieu of the benefit provided pursuant to this section.

14 e. For the purposes of this section:

15 1. A member who dies while off the payroll shall be considered to be in service  
 16 provided he or she (a) was on the payroll in such service and paid within a period  
 17 of twelve months prior to his or her death, or was on the payroll in the service  
 18 upon which membership is based at the time he or she was ordered to active duty  
 19 pursuant to Title 10 of the United States Code, with the armed forces of the  
 20 United States or to service in the uniformed services pursuant to Chapter 43 of  
 21 Title 38 of the United States Code and died while on such active duty or service  
 22 in the uniformed services on or after June fourteenth, two thousand five, (b) had  
 23 not been otherwise gainfully employed since he or she ceased to be on such  
 24 payroll and (c) had credit for one or more years of continuous service since he  
 25 or she last entered or reentered the service of his or her employer; and

26 2. The benefit payable shall be in addition to any payment made on account of a  
 27 member's accumulated contributions.

28 3. Provided, further, that any such member ordered to active duty pursuant to Title 10  
 29 of the United States Code, with the armed forces of the United States or to  
 30 service in the uniformed services pursuant to Chapter 43 of Title 38 of the United  
 31 States Code who died prior to rendering the minimum amount of service  
 32 necessary to be eligible for this benefit shall be considered to have satisfied the  
 33 minimum service requirement.

34 f. With respect to a member of the New York state and local employees' retirement system who  
 35 was covered by paragraph two of subdivision a of the former section five hundred eight of this  
 36 chapter, as added by chapter eight hundred ninety of the laws of nineteen hundred seventy-six,  
 37 prior to its repeal pursuant to chapter six hundred seventeen of the laws of nineteen hundred eighty-  
 38 six and who is entitled under the state constitution to have benefits calculated under such provision  
 39 as it read prior to such nineteen hundred eighty-six amendment, the lump sum death benefit shall  
 40 be determined pursuant to subdivision a of this section. With respect to a member of the New York  
 41 state and local employees' retirement system who was covered by subdivision b of the former

1 section five hundred eight of this chapter, as added by chapter eight hundred ninety of the laws of  
 2 nineteen hundred seventy-six, prior to its repeal pursuant to chapter six hundred seventeen of the  
 3 laws of nineteen hundred eighty-six and who is entitled under the state constitution to have benefits  
 4 calculated under such provision as it read prior to such nineteen hundred eighty-six amendment,  
 5 the lump sum death benefit shall be determined pursuant to subdivision a of this section.

6 g. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 7 benefits payable under this section, including any accumulated contributions remaining at the time  
 8 of the member's death, payable under this section shall be paid to the member's surviving spouse,  
 9 if any, unless the member elects (in a manner that accords with this subdivision g) that the  
 10 surviving spouse receive less than one-half of the death benefits, and:

11 1. (a) the member's surviving spouse consented, on or after the date of the  
 12 member's marriage, in writing to the member's election;

13 (b) the surviving spouse's consent is on a plan form that form sets forth:

14 (i) the amount of the member's death benefits, and of the spouse, if the  
 15 spouse were entitled to half those benefits;

16 (ii) a statement to the effect that (absent valid consent to the contrary)  
 17 the surviving spouse is entitled to at least half of the death benefits;

18 (iii) a statement to the effect that the surviving spouse has the right to  
 19 prevent any future member elections regarding the member's death  
 20 benefits without the surviving spouse's consent unless the consent of the  
 21 surviving spouse expressly permits member elections without any  
 22 further consent by the surviving spouse; and

23 (iv) the fact that consenting to the member's election would result in the  
 24 surviving spouse receiving either no death benefits or smaller death  
 25 benefits than the surviving spouse would otherwise receive under this  
 26 subdivision;

27 (c) the consent includes an acknowledgement that the surviving spouse  
 28 understands that, absent the surviving spouse's consent to the member's  
 29 election, the surviving spouse would be entitled to be paid at least one-half of  
 30 the death benefits, and that the surviving spouse's consent would result in the  
 31 elimination or reduction of such death benefits;

32 (d) the consent includes a signature by the surviving spouse that was witnessed  
 33 by a notary public or a representative of the retirement system; and

34 (e) the system receives the completed consent and the member's election before  
 35 the member's death;

36 2. the member and the surviving spouse were legally separated when the member's  
 37 election was filed with the retirement system;

38 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 39 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the

1 member's death;

2 4. it is established to the satisfaction of the retirement board of the system that the  
 3 surviving spouse could not have been located if the member had been willing and  
 4 able to exercise due diligence to locate the surviving spouse on the date of the  
 5 member's death; or

6 5. there is no surviving spouse.

7 h. Notwithstanding any other provision of this section to the contrary, a member's election must  
 8 comply with the terms of subdivision g of this section to be effective.

9 i. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 10 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 11 matters would use in the conduct of an enterprise of a like character and with like aims, in—

12 1. relying on a consent referred to in paragraph one of subdivision g of this section,  
 13 or

14 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 15 g of this section is true,

16 then (without implication as to what liability the retirement system and the board might have in  
 17 the absence of this subdivision i) such consent or determination shall be treated as valid for purpose  
 18 of discharging the retirement system and the board from liability to the extent of payments made  
 19 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 20 surviving spouse of any rights to recover from any party other than the retirement system or the  
 21 board.

22  
 23  
 24 Section 15. Section 508-a of the retirement and social security law, as amended by L. 1998, ch.  
 25 388, § 4, is amended to read as follows:

26  
 27 § 508-a. Death benefit for vested members who die prior to retirement

28 a. A death benefit plus the reserve-for-increased-take-home-pay, if any, shall be payable upon the  
 29 death of a member of a retirement system who:

30 1. Died before the effective date of retirement while a member of such retirement  
 31 system;

32 2. Had at least ten years of credited service at the time of death; and

33 3. Died at a time and in a manner which did not result in the eligibility of the  
 34 member's estate or any beneficiary to receive any death benefits from such retirement  
 35 system on account of such death.

36 b. Benefits provided under this section shall be payable to the member's estate or the beneficiary  
 37 or beneficiaries nominated by the member on a designation of beneficiary form filed with the  
 38 administrative head of such retirement system.

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 c. The amount of the benefit payable pursuant to this section shall be equal to one-half of the  
 2 amount of the ordinary death benefit which would have been payable had the member's death  
 3 occurred on the last day of service upon which membership was based.

4 d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 5 benefits payable under this section, including the reserve-for-increased-take-home-pay remaining  
 6 at the time of the member's death, payable under this section shall be paid to the member's  
 7 surviving spouse, if any, unless the member elects (in a manner that accords with this subdivision  
 8 d) that the surviving spouse receive less than one-half of the death benefits, and:

9 1. (i) the member's surviving spouse consented, on or after the date of the  
 10 member's marriage, in writing to the member's election;

11 (ii) the surviving spouse's consent is on a plan form that sets forth:

12 (A) the amount of the member's death benefits, and of the spouse, if the  
 13 spouse were entitled to half those benefits;

14 (B) a statement to the effect that (absent valid consent to the contrary)  
 15 the surviving spouse is entitled to at least half of the death benefits;

16 (C) a statement to the effect that the surviving spouse has the right to  
 17 prevent any future member elections regarding the member's death  
 18 benefits without the surviving spouse's consent unless the consent of the  
 19 surviving spouse expressly permits member elections without any  
 20 further consent by the surviving spouse; and

21 (D) the fact that consenting to the member's election would result in the  
 22 surviving spouse receiving either no death benefits or smaller death  
 23 benefits than the surviving spouse would otherwise receive under this  
 24 subdivision;

25 (iii) the consent includes an acknowledgement that the surviving spouse  
 26 understands that, absent the surviving spouse's consent to the member's  
 27 election, the surviving spouse would be entitled to be paid at least one-half of  
 28 the death benefits, and that the surviving spouse's consent would result in the  
 29 elimination or reduction of such death benefits;

30 (iv) the consent includes a signature by the surviving spouse that was witnessed  
 31 by a notary public or a representative of the retirement system; and

32 (v) the system receives the completed consent and the member's election before  
 33 the member's death;

34 2. the member and the surviving spouse were legally separated when the member's  
 35 election was filed with the retirement system;

36 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 37 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 38 the member's death;

39 4. it is established to the satisfaction of the retirement board of the system that the

surviving spouse could not have been located if the member had been willing and able to exercise due diligence to locate the surviving spouse on the date of the member's death; or

5. there is no surviving spouse.

e. Notwithstanding any other provision of this section to the contrary, a member's election must comply with the terms of subdivision d of this section to be effective.

f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in—

1. relying on a consent referred to in paragraph one of subdivision d of this section,  
or

2. determining that at least one of paragraphs two, three, four, or five of subdivision d of this section is true,

then (without implication as to what liability the retirement system and the board might have in the absence of this subdivision f) such consent or determination shall be treated as valid for purpose of discharging the retirement system and the board from liability to the extent of payments made pursuant to such action; provided that the foregoing discharges shall not act to deprive the surviving spouse of any rights to recover from any party other than the retirement system or the board.

Section 16. Section 514 of the retirement and social security law, as amended by L. 2010, ch. 498, § 1, is amended to read as follows:

§ 514. Options

A member, or if he or she is an incompetent, the member's spouse or the committee of such member's property, may elect to receive the actuarial equivalent of the retirement allowance at the time of retirement, in the form of a smaller retirement allowance payable to such member for life and one of the following optional settlements:

Option one. Upon the member's death, a retirement allowance in an amount equal to that paid to the member shall be paid for life to the beneficiary so designated.

Option two. Upon the member's death, a retirement allowance of ninety percent or less (measured in increments of not less than ten percent) of the amount paid to such member shall be paid for life to the beneficiary so designated.

Option three. A five-year certain option under which payment is made to the member for life but is guaranteed for a minimum of five years following retirement.

Option four. A ten-year certain option under which payment is made to the member for life but is guaranteed for a minimum of ten years following retirement.

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1 Option five. Upon the member's death, a retirement allowance in an amount equal to  
 2 fifty percent or one hundred percent of that paid to the member shall be paid for  
 3 life to such person as he shall nominate by written designation duly  
 4 acknowledged and filed with the retirement system at the time of retirement.  
 5 Upon the death, prior to the death of the member, of said person so nominated,  
 6 the member shall begin receiving, in lieu of the allowance then payable, an  
 7 allowance equal in amount to that which would have been payable if no optional  
 8 modification of the retirement allowance were in effect.

9 A-1. A member of the New York state and local employees' retirement system or the New York  
 10 state and local police and fire retirement system who retires pursuant to the provisions of this  
 11 article, may elect, in lieu of the options set forth in subdivision a of this section, the following  
 12 optional settlement:

13 Alternative Option. The actuarial equivalent of the member's retirement allowance at  
 14 the time of retirement, in the form of a smaller retirement allowance payable to  
 15 such members for life and some other benefit or benefits paid either to the  
 16 member or to such person or persons as he shall nominate, provided such other  
 17 benefit or benefits, together with such smaller allowance, shall be certified by  
 18 the actuary of such retirement system to be of equivalent actuarial value to his  
 19 retirement allowance and shall be approved by the head of such retirement  
 20 system and provided further that nothing herein shall require such retirement  
 21 system to pay a benefit in violation of paragraph nine of subsection a of section  
 22 four hundred one of the Internal Revenue Code of 1986, as amended, 26 U.S.C.  
 23 § 401(a)(9).

24 b. Upon attainment of early retirement age or age sixty-two, if earlier, a member who has not  
 25 terminated employment or who is not receiving service retirement, disability or vested benefits  
 26 may elect a survivor annuity under option one or option two to be payable on such member's death  
 27 during the period commencing with attainment of early retirement age or age sixty-two, if earlier,  
 28 and ending upon (i) the attainment of normal retirement age or (ii) the date upon which service  
 29 retirement or deferred vested benefits commence, if earlier or later than normal retirement age. In  
 30 the event of an election hereunder, the benefits payable to the member or the member's survivor  
 31 shall be actuarially reduced to reflect the cost of the survivor annuity elected. Such survivor annuity  
 32 shall be paid in lieu of any other death benefit available, unless such death benefit is greater than  
 33 such survivor annuity, in which event the applicable death benefit shall be paid in lieu of the  
 34 survivor benefit hereunder.

35 c. No option hereunder shall be permitted whereby the member would receive less than fifty  
 36 percent of the pension reserve during such member's life expectancy. Provided, however, the  
 37 preceding sentence shall not apply if the surviving beneficiary is the member's spouse.

38 d. [As added by L. 2004, ch. 446. See, also, subd. D below.] Notwithstanding any other provision  
 39 of this article, an option selection previously filed by a member or retired member subject to the  
 40 provisions of this section may be changed no later than thirty days following the date of payability

1 of his or her retirement allowance. A retired member who has been retired for disability may  
 2 change an option selection previously filed no later than (1) thirty days following the date on which  
 3 such member's application for disability retirement was approved by the retirement board or (2)  
 4 thirty days following the date on which such retiree was retired for disability, whichever is later.

5 D. [As added by L. 2004, ch. 651. See, also, subd. D above.] Notwithstanding any other provision  
 6 of this article, an option selection previously filed by a member or retired member of the New  
 7 York city teachers' retirement system or the New York city board of education retirement system  
 8 subject to the provisions of this section may be changed no later than thirty days following the date  
 9 of payability of his or her retirement allowance. A retired member who has been retired for  
 10 disability may change an option selection previously filed no later than (1) thirty days following  
 11 the date on which such member's application for disability retirement was approved by the  
 12 retirement board or (2) thirty days following the date on which such retiree was retired for  
 13 disability, whichever date is later.

14 e. Notwithstanding any other provision of this section to the contrary, a member's retirement  
 15 allowance shall be paid as Option two with fifty as the percent and the spouse as the member's  
 16 beneficiary, so that upon his or her death, if the member has a surviving spouse who was married  
 17 to the member on the date the member filed his or her retirement application, or on the date the  
 18 member filed his or her last effective option selection, if any, whichever is later, unless the member  
 19 (a) elects that the surviving spouse receive survivor benefit payments in amounts that are greater  
 20 than the benefit payments that would be paid to the surviving spouse under Option two with fifty  
 21 as the percent and the spouse as the member's beneficiary; or (b) elects (in a manner that accords  
 22 with this subdivision e) that the surviving spouse receive either no survivor benefit payments or  
 23 survivor benefit payments, in amounts that are smaller than the benefit payments that would be  
 24 paid to the surviving spouse under Option two with fifty as the percent and the spouse as the  
 25 member's beneficiary, and:

26 1. (a) the member's surviving spouse consented on or after the date of the  
 27 member's marriage, in writing to the member's election;

28 (b) the surviving spouse's consent is on a plan form that sets forth:

29 (i) the amount of the monthly benefit entitlements of the member and of  
 30 the spouse under Option two with fifty as the percent and the spouse as  
 31 the member's beneficiary, and when the member and the surviving  
 32 spouse would each be entitled to those benefits;

33 (ii) a statement to the effect that (absent valid consent to the contrary)  
 34 the surviving spouse is entitled to survivor benefit payments in amounts  
 35 that are greater or equal to the amounts of the retirement allowance  
 36 payments that would be paid to the surviving spouse under Option two  
 37 with fifty as the percent, if the spouse were the member's beneficiary;

38 (iii) a statement to the effect that the surviving spouse has the right to  
 39 prevent any future member elections regarding the member's survivor  
 40 benefits without the surviving spouse's consent unless the consent of the



1 surviving spouse expressly permits member elections without any  
 2 further consent by the surviving spouse; and

3 (iv) the fact that consenting to the member's survivor benefit election  
 4 would result in the surviving spouse receiving no survivor benefits or  
 5 smaller survivor benefits than the surviving spouse would otherwise  
 6 receive under this subdivision;

7 (c) the consent includes an acknowledgement that the surviving spouse  
 8 understands the surviving spouse would be entitled to paid lifetime survivor  
 9 benefit payment amounts that are at least the amounts that would be paid to the  
 10 surviving spouse under Option two with fifty as the percent, if the spouse were  
 11 the member's beneficiary, and that the surviving spouse's consent would result  
 12 in the elimination or reduction of such survivor benefits;

13 (d) the consent includes a signature by the surviving spouse that was witnessed  
 14 by a notary public or a representative of the retirement system; and

15 (e) the system receives the completed consent and the member's election before  
 16 the date the member filed his or her retirement application, or the date the  
 17 member filed his or her last effective option selection, if any, whichever is later;

18 2. the member and the surviving spouse were legally separated when the member's  
 19 election was filed with the retirement system;

20 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 21 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 22 the filing of the member's application for a retirement allowance;

23 4. it is established to the satisfaction of the retirement board of the system that the  
 24 surviving spouse could not have been located if the member had been willing  
 25 and able to exercise due diligence to locate the surviving spouse on the later of  
 26 the date the member's retirement application was filed with the retirement  
 27 system, or the date the member's last effective option selection was filed with  
 28 the retirement system; or

29 5. there is no surviving spouse.

30 f. Notwithstanding any other provision of this section to the contrary, a member's election must  
 31 comply with the terms of subdivision e of this section to be effective.

32 g. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 33 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 34 matters would use in the conduct of an enterprise of a like character and with like aims, in—

35 1. relying on a consent referred to in paragraph one of subdivision e of this section,  
 36 or

37 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 38 e of this section is true,

1 then (without implication as to what liability the retirement system and the board might have in  
 2 the absence of this subdivision g) such consent or determination shall be treated as valid for  
 3 purpose of discharging the retirement system and the board from liability to the extent of payments  
 4 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 5 surviving spouse of any rights to recover from any party other than the retirement system or the  
 6 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 7 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 8 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 9 may not thereby reduce any of those benefit payments by more than 10%.

10  
 11  
 12 Section 17. Section 606 of the retirement and social security law, as amended by L. 2021, ch. 376,  
 13 § 3, is amended to read as follows:

14 § 606. Death benefits

15  
 16 a. A member of a retirement system who is subject to the provisions of this article, exclusive of  
 17 those members for whom provision is made pursuant to subdivision b of this section, shall, at  
 18 the time of first becoming a member thereof, make an election, which shall be irrevocable, for  
 19 coverage for financial protection in the event of death in service, between the two following  
 20 benefits:

21 1. A benefit upon the death of a member in service equal to one month's salary for  
 22 each full year of service up to a maximum of three years' salary upon the  
 23 completion of thirty-six full years of service, or in the event that a member is  
 24 eligible to retire without benefit reduction pursuant to section six hundred three  
 25 of this article, a benefit equal to the pension reserve, if any, which would have  
 26 been payable to such member had he entered prior to the effective date of this  
 27 article and died in service; or

28 2. A benefit upon the death of a member in service equal to the member's salary upon  
 29 his or her completion of one year of service, two years' salary upon completion  
 30 of two years of service, and three years' salary upon completion of three years  
 31 of service. In the case of a member of a retirement system other than the New  
 32 York state teachers' retirement system, the New York city employees'  
 33 retirement system, the New York city board of education retirement system, the  
 34 New York city teachers' retirement system or the New York state and local  
 35 employees' retirement system and the New York state teachers' retirement  
 36 system, such benefit shall be subject to the following limitations:

37 (a) If the member last joined the retirement system prior to attainment of age  
 38 fifty-two, the maximum benefit shall be three years' salary;

39 (b) If the member was age fifty-two when he or she last joined the retirement  
 40 system, the maximum benefit shall be two and one-half times annual salary;

41 (c) If the member was age fifty-three when he or she last joined the retirement

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1 system, the maximum benefit shall be two years' salary;

2 (d) If the member was age fifty-four when he or she last joined the retirement  
3 system, the maximum benefit shall be one and one-half times annual salary;

4 (e) If the member was age fifty-five or older but under age sixty-five when he  
5 or she last joined the retirement system, the maximum benefit shall be one year's  
6 salary; and

7 (f) If the member was age sixty-five or older when he or she last joined the  
8 retirement system, the maximum benefit shall be one thousand dollars.

9 In the case of a member of a retirement system other than the New York state teachers'  
10 retirement system, the New York city employees' retirement system, the New  
11 York city board of education retirement system, the New York city teachers'  
12 retirement system or the New York state and local employees' retirement  
13 system, commencing upon attainment of age sixty-one, the benefit otherwise  
14 provided pursuant to this paragraph shall be reduced while the member is in  
15 service to ninety per centum of the benefit otherwise payable and each year  
16 thereafter the benefit payable shall be reduced by an amount equal to ten per  
17 centum per year of the original benefit otherwise payable, but not below ten per  
18 centum of the original benefit otherwise payable.

19 In the case of a member of the New York state teachers' retirement system,  
20 commencing upon attainment of age sixty-one, the benefit otherwise provided  
21 pursuant to this paragraph shall be reduced while the member is in service to  
22 ninety-six per centum of the benefit otherwise payable, and each year thereafter  
23 the benefit payable shall be reduced by an amount equal to four per centum per  
24 year of the original benefit otherwise payable, but not below sixty per centum of  
25 the original benefit otherwise payable. In the case of a member of the New York  
26 city employees' retirement system, the New York city board of education  
27 retirement system or the New York city teachers' retirement system,  
28 commencing upon attainment of age sixty-one, the benefit otherwise provided  
29 pursuant to this paragraph shall be reduced while the member is in service to  
30 ninety-five per centum of the benefit otherwise payable and each year thereafter  
31 the benefit payable shall be reduced by an amount equal to five per centum per  
32 year of the original benefit otherwise payable, but not below fifty per centum of  
33 the original benefit otherwise payable. In the case of any member of the New  
34 York state and local employees' retirement system who is permitted to retire  
35 without regard to age, commencing upon attainment of age sixty-one, the benefit  
36 otherwise provided pursuant to this paragraph shall be reduced while the  
37 member is in service to ninety-seven per centum of the benefit otherwise  
38 payable, and each year thereafter the benefit payable shall be reduced by an  
39 amount equal to three per centum per year of the original benefit otherwise  
40 payable, but not below seventy per centum of the original benefit otherwise  
41 payable. In the case of any other member of the New York state and local  
42 employees' retirement system, commencing upon attainment of age sixty-one,  
43 the benefit otherwise provided pursuant to this paragraph shall be reduced while

1 the member is in service to ninety-six per centum of the benefit otherwise  
 2 payable, and each year thereafter the benefit payable shall be reduced by an  
 3 amount equal to four per centum per year of the original benefit otherwise  
 4 payable, but not below sixty per centum of the original benefit otherwise  
 5 payable. Upon retirement, from any retirement system, the benefit in force shall  
 6 be reduced by fifty per centum; upon completion of the first year of retirement,  
 7 the benefit in force at the time of retirement shall be reduced by an additional  
 8 twenty-five per centum, and upon commencement of the third year of retirement,  
 9 the benefit shall be ten per centum of the benefit in force at age sixty, if any, or  
 10 at the time of retirement if retirement preceded such age; provided, however, the  
 11 benefit in retirement shall not be reduced below ten per centum of the benefit in  
 12 force at age sixty, if any, or at the time of retirement if retirement preceded such  
 13 age. Notwithstanding any other provision of this paragraph to the contrary, the  
 14 benefit for a retiree from the New York state and local employees' retirement  
 15 system shall not be reduced below ten per centum of the benefit in force at the  
 16 time of retirement.

17 3. If a member dies in service without having made the election specified in this  
 18 subdivision within ninety days after first becoming a member, or within the  
 19 period prescribed by the retirement system of which he is a member if such  
 20 period is less than ninety days, he shall be deemed to have made the election  
 21 specified in paragraph two.

22 4. Notwithstanding any provision of this article, a member of a retirement system  
 23 subject to the provisions of this article who last joined such system on or after  
 24 January first, two thousand one who is not covered by the death benefit  
 25 calculation provided in subdivision b of this section shall, upon a qualifying  
 26 death, be covered by the death benefit calculation provided pursuant to  
 27 paragraph two of this subdivision and shall not be entitled to elect between the  
 28 death benefit calculations provided in paragraphs one and two of this  
 29 subdivision. Any individual who last joined such system before January first,  
 30 two thousand one who is not covered by the death benefit calculation provided  
 31 in subdivision b of this section shall be covered, upon a qualifying death, by the  
 32 death benefit calculation provided by paragraph two of this subdivision unless  
 33 such individual had timely elected death benefit coverage under the calculation  
 34 provided by paragraph one of this subdivision and, upon such death, it is  
 35 determined that the benefit, as calculated under such paragraph one would be  
 36 greater than as calculated under such paragraph two, in which case the benefit  
 37 calculated under such paragraph one shall be payable.

38 b. A member of a retirement system subject to the provisions of this article who is a police officer,  
 39 firefighter, correction officer or sanitation worker and is in a plan which permits immediate  
 40 retirement upon completion of a specified period of service without regard to age or who is subject  
 41 to the provisions of section six hundred four of this article, shall upon completion of ninety days  
 42 of service be covered for financial protection in the event of death in service pursuant to this  
 43 subdivision. Such death benefit shall be equal to three times the member's salary raised to the next

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1 highest multiple of one thousand dollars, but in no event shall it exceed three times the maximum  
 2 salary specified in section one hundred thirty of the civil service law or, in the case of a member  
 3 of a retirement system other than the New York city employees' retirement system, the specific  
 4 limitations specified for age of entrance into service contained in subparagraphs (b), (c), (d), (e)  
 5 and (f) of paragraph two of subdivision a of this section.

6 c. For the purpose of this section, salary shall be the regular compensation earned during the  
 7 member's last twelve months of service in full pay status as a member or, if he or she had not  
 8 completed twelve months of service prior to the date of death, but was subject to the provisions of  
 9 subdivision b of this section, the compensation he or she would have earned had he or she worked  
 10 for the twelve months prior to such date; provided, however, for the purpose of this section salary  
 11 shall exclude any form of termination pay (which shall include any compensation in anticipation  
 12 of retirement), or any lump sum payment for deferred compensation sick leave, or accumulated  
 13 vacation credit or any other payment for time not worked (other than compensation received while  
 14 on sick leave or authorized leave of absence) and in no event shall it exceed the maximum salary  
 15 specified in section one hundred thirty of the civil service law, as added by part B of chapter ten  
 16 of the laws of two thousand eight, or the maximum salary specified in section one hundred thirty  
 17 of the civil service law, as hereafter amended, whichever is greater.

18 D. The benefits provided pursuant to this section are in lieu of all other benefits provided by this  
 19 or any other state or local law exclusive of a benefit provided under the workmen's compensation  
 20 law, the civil service law or group life insurance; provided, however, a beneficiary of a member  
 21 eligible for a benefit as the result of a service connected accident, may elect to receive such other  
 22 benefit in lieu of the benefit provided pursuant to this section.

23 e. For the purposes of this section:

24 1. A member who dies while off the payroll shall be considered to be in service  
 25 provided he or she (a) was on the payroll in such service and paid within a period  
 26 of twelve months prior to his or her death, or was on the payroll in the service  
 27 upon which membership is based at the time he or she was ordered to active duty  
 28 pursuant to Title 10 of the United States Code, with the armed forces of the  
 29 United States or to service in the uniformed services pursuant to Chapter 43 of  
 30 Title 38 of the United States Code and died while on such active duty or service  
 31 in the uniformed services on or after June fourteenth, two thousand five, (b) had  
 32 not been otherwise gainfully employed since he or she ceased to be on such  
 33 payroll and (c) had credit for one or more years of continuous service since he  
 34 or she last entered or reentered the service of his or her employer;  
 35 notwithstanding any other provision of law to the contrary, a member of the New  
 36 York city employees' retirement system or the board of education retirement  
 37 system of the city of New York shall be deemed to have died on the payroll for  
 38 the purposes of this section in the event that death occurs while such member is  
 39 on an authorized leave of absence without pay for medical reasons which has  
 40 continuously been in effect since the member was last paid on the payroll in such  
 41 service, provided, however, that such member was on the payroll in such service

1 and paid within the four-year period prior to his or her death; and

2 2. The benefit payable shall be in addition to any payment made on account of a  
3 member's accumulated contributions.

4 3. Provided, further, that any such member ordered to active duty pursuant to Title 10  
5 of the United States Code, with the armed forces of the United States or to  
6 service in the uniformed services pursuant to Chapter 43 of Title 38 of the United  
7 States Code who died prior to rendering the minimum amount of service  
8 necessary to be eligible for this benefit shall be considered to have satisfied the  
9 minimum service requirement.

10 f. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
11 benefits payable under this section shall be paid to the member's surviving spouse, if any, unless  
12 the member elects (in a manner that accords with this subdivision f) that the surviving spouse  
13 receive less than one-half of the death benefits, and:

14 1. (a) the member's surviving spouse consented, on or after the date of the  
15 member's marriage, in writing to the member's election;

16 (b) the surviving spouse's consent is on a plan form that sets forth:

17 (i) the amount of the member's death benefits, and of the spouse, if the  
18 spouse were entitled to half those benefits;

19 (ii) a statement to the effect that (absent valid consent to the contrary)  
20 the surviving spouse is entitled to at least half of the death benefits;

21 (iii) a statement to the effect that the surviving spouse has the right to  
22 prevent any future member elections regarding the member's death  
23 benefits without the surviving spouse's consent unless the consent of the  
24 surviving spouse expressly permits member elections without any  
25 further consent by the surviving spouse; and

26 (iv) the fact that consenting to the member's election would result in the  
27 surviving spouse receiving either no death benefits or smaller death  
28 benefits than the surviving spouse would otherwise receive under this  
29 subdivision;

30 (c) the consent includes an acknowledgement that the surviving spouse  
31 understands the surviving spouse would be entitled to be paid at least one-half  
32 of the death benefits absent the surviving spouse's consent to the member's  
33 election, and that the surviving spouse's consent would result in the elimination  
34 or reduction of such death benefits;

35 (d) the consent includes a signature by the surviving spouse that was witnessed  
36 by a public or a representative of the retirement system; and

37 (e) the system receives the completed consent and the member's election before  
38 the member's death;

1 2. the member and the surviving spouse were legally separated when the member's  
 2 election was filed with the retirement system;

3 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 4 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 5 the member's death;

6 4. it is established to the satisfaction of the retirement board of the system that the  
 7 surviving spouse could not have been located if the member had been willing  
 8 and able to exercise due diligence to locate the surviving spouse on the date of  
 9 the member's death; or

10 5. there is no surviving spouse.

11 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 12 comply with the terms of subdivision f of this section to be effective.

13 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 14 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 15 matters would use in the conduct of an enterprise of a like character and with like aims, in—

16 1. relying on a consent referred to in paragraph one of subdivision f of this section,  
 17 or

18 2. determining that at least one of paragraphs two, three, four, or five of  
 19 subdivision f of this section is true,

20 then (without implication as to what liability the retirement system and the board might have in  
 21 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 22 purpose of discharging the retirement system and the board from liability to the extent of payments  
 23 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 24 surviving spouse of any rights to recover from any party other than the retirement system or the  
 25 board.

26  
 27  
 28 Section 18, Section 606-a of the retirement and social security law, as amended by L. 1998, ch.  
 29 388, § 5, is amended to read as follows:

30 § 606-a. Death benefit for vested members who die prior to retirement

31 a. A death benefit plus the reserve-for-increased-take-home-pay, if any, shall be payable upon the  
 32 death of a member of a retirement system who:  
 33

34 1. Died before the effective date of retirement while a member of such retirement  
 35 system;

36 2. Had at least ten years of credited service at the time of death; and

37 3. Died at a time and in a manner which did not result in the eligibility of the member's  
 38 estate or any beneficiary to receive any death benefits from such retirement  
 39 system on account of such death.

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1 b. Benefits provided under this section shall be payable to the member's estate or the beneficiary  
 2 or beneficiaries nominated by the member on a designation of beneficiary form filed with the  
 3 administrative head of such retirement system.

4 c. The amount of the benefit payable pursuant to this section shall be equal to one-half of the  
 5 amount of the ordinary death benefit which would have been payable had the member's death  
 6 occurred on the last day of service upon which membership was based.

7 d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 8 benefits payable under this section, including any accumulated contributions remaining at the time  
 9 of the member's death, payable under this section shall be paid to the member's surviving spouse,  
 10 if any, unless the member elects (in a manner that accords with this subdivision d) that the  
 11 surviving spouse receive less than one-half of the death benefits, and:

12 1. (A) the member's surviving spouse consented, on or after the date of the  
 13 member's marriage, in writing to the member's election;

14 (B) the surviving spouse's consent is on a plan form that sets forth:

15 (i) the amount of the member's death benefits, and of the spouse, if the  
 16 spouse were entitled to half those benefits;

17 (ii) a statement to the effect that (absent valid consent to the contrary)  
 18 the surviving spouse is entitled to at least half of the death benefits;

19 (iii) a statement to the effect that the surviving spouse has the right to  
 20 prevent any future member elections regarding the member's death  
 21 benefits without the surviving spouse's consent unless the consent of the  
 22 surviving spouse expressly permits member elections without any  
 23 further consent by the surviving spouse; and

24 (iv) the fact that consenting to the member's election would result in the  
 25 surviving spouse receiving either no death benefits or smaller death  
 26 benefits than the surviving spouse would otherwise receive under this  
 27 subdivision;

28 (C) the consent includes an acknowledgement that the surviving spouse  
 29 understands that, absent the surviving spouse's consent to the member's  
 30 election, the surviving spouse would be entitled to be paid at least one-half of  
 31 the death benefits, and that the surviving spouse's consent would result in the  
 32 elimination or reduction of such death benefits;

33 (D) the consent includes a signature by the surviving spouse that was witnessed  
 34 by a notary public or a representative of the retirement system; and

35 (E) the system receives the completed consent and the member's election before  
 36 the member's death;

37 2. the member and the surviving spouse were legally separated when the member's  
 38 election was filed with the retirement system;



1 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 2 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 3 the member's death;

4 4. it is established to the satisfaction of the retirement board of the system that the  
 5 surviving spouse could not have been located if the member had been willing  
 6 and able to exercise due diligence to locate the surviving spouse on the date of  
 7 the member's death; or

8 5. there is no surviving spouse.

9 e. Notwithstanding any other provision of this section to the contrary, a member's election must  
 10 comply with the terms of subdivision d of this section to be effective.

11 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 12 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 13 matters would use in the conduct of an enterprise of a like character and with like aims, in—

14 1. relying on a consent referred to in paragraph one of subdivision d of this section,  
 15 or

16 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 17 d of this section is true,

18 then (without implication as to what liability the retirement system and the board might have in  
 19 the absence of this subdivision f) such consent or determination shall be treated as valid for purpose  
 20 of discharging the retirement system and the board from liability to the extent of payments made  
 21 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 22 surviving spouse of any rights to recover from any party other than the retirement system or the  
 23 board.

24  
 25  
 26 Section 19. Section 610 of the retirement and social security law, as amended by L. 2004, ch. 651,  
 27 § 2, is amended to read as follows:

28  
 29 § 610. Options

30 Until the effective date of retirement a member may elect to receive the actuarial equivalent of the  
 31 retirement allowance at the time of retirement, in the form of a smaller retirement allowance  
 32 payable to such member for life and one of the following optional settlements;

33 Option one. Upon the member's death, a retirement allowance in an amount equal to  
 34 that paid to the member shall be paid for life to such person as he shall nominate  
 35 by written designation duly acknowledged and filed with the retirement system  
 36 at the time of retirement.

37 Option two. Upon the member's death, a retirement allowance of seventy-five percent  
 38 or less (measured in increments of twenty-five percent) of the amount paid to  
 39 such member shall be paid for life to such person as he shall nominate by written

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1 designation duly acknowledged and filed with the retirement system at the time  
2 of retirement.

3 Option three. A five-year certain option under which payment is made to the member  
4 for life but is guaranteed for a minimum of five years following retirement. Such  
5 payments shall continue to a person as he shall nominate by written designation,  
6 duly acknowledged and filed with the retirement system, for the unexpired  
7 balance of the five-year guaranteed period. If said beneficiary should predecease  
8 him, the commuted value of any installments due during the unexpired balance  
9 of the five-year guaranteed period shall be paid in a single sum to a duly  
10 designated contingent beneficiary or if none exists to the legal representative of  
11 the member. Should a beneficiary who has commenced receipt of the payments  
12 die before the said guaranteed minimum period, the commuted value of any  
13 installments due during the unexpired balance of the five-year guaranteed period  
14 shall be paid in a single sum to a duly designated contingent beneficiary or if  
15 none exists, to the legal representative of said deceased primary beneficiary.

16 Option four. A ten-year certain option under which payment is made to the member  
17 for life but is guaranteed for a minimum of ten years following retirement. Such  
18 payments shall continue to a person as he shall nominate by written designation,  
19 duly acknowledged and filed with the retirement system, for the unexpired  
20 balance of the ten-year guaranteed period. If said beneficiary should predecease  
21 him, the commuted value of any installments due during the unexpired balance  
22 of the ten-year guaranteed period shall be paid in a single sum to a duly  
23 designated contingent beneficiary or if none exists to the legal representative of  
24 the member. Should a beneficiary who has commenced receipt of the payments  
25 die before the said guaranteed minimum period, the commuted value of any  
26 installments due during the unexpired balance of the ten-year guaranteed period  
27 shall be paid in a single sum to a duly designated contingent beneficiary or if  
28 none exists to the legal representative of said deceased primary beneficiary.

29 Option five. Upon the member's death, a retirement allowance in an amount equal to  
30 fifty percent or one hundred percent of that paid to the member shall be paid for  
31 life to such person as he shall nominate by written designation duly  
32 acknowledged and filed with the retirement system at the time of retirement.  
33 Upon the death, prior to the death of the member, of said person so nominated,  
34 the member shall begin receiving, in lieu of the allowance then payable, an  
35 allowance equal in amount to that which would have been payable if no optional  
36 modification of the retirement allowance were in effect.

37 A-1. A member of the New York state teachers' retirement system or the New York state and local  
38 employees' retirement system who retires pursuant to the provisions of this article, may elect, in  
39 lieu of the options set forth in subdivision a of this section, the following optional settlement:

40 Alternative Option. The actuarial equivalent of the member's retirement allowance at  
41 the time of retirement, in the form of a smaller retirement allowance payable to  
42 such member for life and some other benefit or benefits paid either to the

1 member or to such person or persons as he shall nominate, provided such other  
 2 benefit or benefits, together with such smaller allowance, shall be certified by  
 3 the actuary of the appropriate retirement system to be of equivalent actuarial  
 4 value to his retirement allowance and shall be approved by the head of such  
 5 retirement system and provided further that nothing herein shall require such  
 6 retirement system to pay a benefit in violation of paragraph nine of subsection a  
 7 of section four hundred one of the Internal Revenue Code of 1986, as amended,  
 8 26 U.S.C. § 401(a)(9).

9 b. No option hereunder shall be permitted whereby the member would receive less than fifty  
 10 percent of the actuarial equivalent of the retirement allowance without optional modification  
 11 during such member's life expectancy. Provided, however, the preceding sentence shall not apply  
 12 if the surviving beneficiary is the member's spouse.

13 c. The mortality and interest rates used in determining options under this article shall be those in  
 14 effect for the public retirement system on the date of retirement.

15 d. Notwithstanding any other provision of this section, with respect to the New York state  
 16 employees' retirement system:

17 1. The comptroller, for reasonable cause, shall have power to extend the time for the  
 18 election of an option, for a period or periods which shall expire not later than  
 19 sixty days immediately after the effective date of a member's retirement; and

20 2. If the member is incompetent, his spouse or the committee of his property, or if he  
 21 is a conservatee, his spouse or the conservator of his property, may elect on the  
 22 member's behalf a retirement option as provided for in subdivision a of this  
 23 section.

24 e. Notwithstanding any other provision of this section, a member of the New York state teachers'  
 25 retirement system at the time of retirement may elect an option until the first payment on account  
 26 of any benefit becomes normally due.

27 f. [As added by L. 2004, ch. 446. See, also, subd. F below.] Notwithstanding any other provision  
 28 of this article, an option selection previously filed by a member or retired member subject to the  
 29 provisions of this section may be changed no later than thirty days following the date of payability  
 30 of his or her retirement allowance. A retired member who has been retired for disability may  
 31 change an option selection previously filed no later than (1) thirty days following the date on which  
 32 such member's application for disability retirement was approved by the retirement board or (2)  
 33 thirty days following the date on which such retiree was retired for disability, whichever is later.

34 f. [As added by L. 2004, ch. 651. See, also, subd. F above.] Notwithstanding any other provision  
 35 of this article, an option selection previously filed by a member or retired member of the New  
 36 York city teachers' retirement system or the New York city board of education retirement system  
 37 subject to the provisions of this section may be changed no later than thirty days following the date  
 38 of payability of his or her retirement allowance. A retired member who has been retired for

1 disability may change an option selection previously filed no later than (1) thirty days following  
 2 the date on which such member's application for disability retirement was approved by the  
 3 retirement board or (2) thirty days following the date on which such retiree was retired for  
 4 disability, whichever date is later.

5 g. Notwithstanding any other provision of this section to the contrary, a member's retirement  
 6 allowance shall be paid as Option two with fifty as the percent and the spouse as the member's  
 7 beneficiary, so that upon his or her death, if the member has a surviving spouse who was married  
 8 to the member on the date the member filed his or her retirement application, or on the date the  
 9 member filed his or her last effective option selection, if any, whichever is later, unless the member  
 10 (a) elects that the surviving spouse receive survivor benefit payments in amounts that are greater  
 11 than the benefit payments that would be paid to the surviving spouse under Option two with fifty  
 12 as the percent and the spouse as the member's beneficiary; or (b) elects (in a manner that accords  
 13 with this subdivision g) that the surviving spouse receive either no survivor benefit payments or  
 14 survivor benefit payments, in amounts that are smaller than the benefit payments that would be  
 15 paid to the surviving spouse under Option two with fifty as the percent and the spouse as the  
 16 member's beneficiary, and:

17 1. (a) the member's surviving spouse consented on or after the date of the  
 18 member's marriage, in writing to the member's election;

19 (b) the surviving spouse's consent is on a plan form that sets forth:

20 (i) the amount of the monthly benefit entitlements of the member and of  
 21 the spouse under Option two with fifty as the percent and the spouse as  
 22 the member's beneficiary, and when the member and the surviving  
 23 spouse would each be entitled to those benefits;

24 (ii) a statement to the effect that (absent valid consent to the contrary)  
 25 the surviving spouse is entitled to survivor benefit payments in amounts  
 26 that are greater or equal to the amounts are greater or equal to the  
 27 amounts of the retirement allowance payments that would be paid to the  
 28 surviving spouse under Option two with fifty as the percent and the  
 29 spouse as the member's beneficiary;

30 (iii) a statement to the effect that the surviving spouse has the right to  
 31 prevent any future member elections regarding the member's survivor  
 32 benefits without the surviving spouse's consent unless the consent of the  
 33 surviving spouse expressly permits member elections without any  
 34 further consent by the surviving spouse; and

35 (iv) the fact that consenting to the member's survivor benefit election  
 36 would result in the surviving spouse receiving no survivor benefits or  
 37 smaller survivor benefits than the surviving spouse would otherwise  
 38 receive under this subdivision;

39 (c) the consent includes an acknowledgement that the surviving spouse  
 40 understands that, absent the surviving spouse's consent to the member's

1 election, the surviving spouse would be entitled paid lifetime survivor benefit  
 2 payment amounts that are at least the amounts that would be paid to the surviving  
 3 spouse under Option two with fifty as the percent and the spouse as the  
 4 member's beneficiary, and that the surviving spouse's consent would result in  
 5 the elimination or reduction of such survivor benefits;

6 (d) the consent includes a signature by the surviving spouse that was witnessed  
 7 by a notary public or a representative of the retirement system; and

8 (e) the system receives the completed consent and the member's election before  
 9 the date the member filed his or her retirement application, or the date the  
 10 member filed his or her last effective option selection, if any, whichever is later;

11 2. the member and the surviving spouse were legally separated when the member's  
 12 election was filed with the retirement system;

13 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 14 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 15 the filing of the member's application for a retirement allowance;

16 4. it is established to the satisfaction of the retirement board of the system that the  
 17 surviving spouse could not be have been located if the member had been willing  
 18 and able to exercise due diligence to locate the surviving spouse on the later of  
 19 the date the member's retirement application was filed with the retirement system,  
 20 or the date the member's last effective option selection was filed with the  
 21 retirement system; or

22 5. there is no surviving spouse.

23 h. Notwithstanding any other provision of this section to the contrary, a member's election must  
 24 comply with the terms of subdivision g of this section to be effective.

25 i. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 26 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 27 matters would use in the conduct of an enterprise of a like character and with like aims, in—

28 1. relying on a consent referred to in paragraph one of subdivision g of this section,  
 29 or

30 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 31 g of this section is true,

32 then (without implication as to what liability the retirement system and the board might have in  
 33 the absence of this subdivision i) such consent or determination shall be treated as valid for purpose  
 34 of discharging the retirement system and the board from liability to the extent of payments made  
 35 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 36 surviving spouse of any rights to recover from any party other than the retirement system or the  
 37 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 38 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 39 system's monthly annuity benefit payments to the surviving spouse payable under this section, but

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1 may not thereby reduce any of those benefit payments by more than 10%.  
 2  
 3

4 Section 20. Section 657 of the retirement and social security law, as amended by L. 1989, ch. 75,  
 5 § 2, is amended to read as follows:  
 6

7 § 657. Survivor's benefit for retired state employees

- 8 1. a. The term "retired state employee" as used in this section shall mean a former employee  
 9 or officer of the state (1) who while in state service retired for any cause from any  
 10 retirement system or pension plan supported by funds of the state other than the state  
 11 university optional retirement program of article eight-B of the education law or the  
 12 education department optional retirement program of article three, part V, of the  
 13 education law, or (2) who while in state service retired for any cause from either or  
 14 both such optional retirement programs provided he or she had thereupon attained age  
 15 fifty-five, or (3) who terminated state service for any cause on or after the attainment  
 16 of age sixty-two; and who, at the time he or she retired pursuant to subparagraph one  
 17 or two of this paragraph or terminated service pursuant to subparagraph three of this  
 18 paragraph, had ten or more years of full time service as a state employee, provided that  
 19 the ten years' full time service were within the last fifteen years prior to such retirement  
 20 or termination. For purposes of this section, no person shall be deemed to be or have  
 21 been an employee or officer of the state or in the state service for any period during  
 22 which his or her salary was not paid directly by the state, except a person employed in  
 23 an institution specified in paragraph b of this subdivision or a person employed in an  
 24 authority or commission specified in paragraph c of this subdivision.
- 25 b. For all purposes of this section alone, the state colleges of agriculture, home  
 26 economics, industrial and labor relations, and veterinary medicine, the state  
 27 agricultural experiment station at Geneva, and any other institution or agency  
 28 under the management and control of Cornell university, as the representative  
 29 of the board of trustees of the state university of New York, and the state college  
 30 of ceramics under the management and control of Alfred university, as the  
 31 representative of the board of trustees of the state university of New York shall  
 32 be deemed to be the state.
- 33 c. For the purpose of determining eligibility for benefits under this section, previous  
 34 service rendered as an employee of an authority or commission established  
 35 under the public authorities law shall be credited to a retired state employee as  
 36 state service, provided such authority or commission has in effect, at the time of  
 37 retirement of such retired employee, a provision for a survivor's benefit which  
 38 is substantially equivalent to that provided in this section and in which previous  
 39 state service is credited to retired authority or retired commission employees  
 40 toward eligibility for such survivor's benefit.
- 41 D. For the purpose of determining eligibility for benefits under this section, no retired  
 42 state employee who retired prior to October first, nineteen hundred sixty-six

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1 shall be eligible for benefits hereunder unless such retiree is a pensioner of the  
2 New York state and local employees' retirement system or the New York state  
3 and local police and fire retirement system.

4 2. The amount of a survivor's benefit under this section shall be a lump sum of two thousand  
5 dollars, except that where a retired state employee dies while reemployed as provided in  
6 subdivision four of this section or dies within thirty days following retirement pursuant to  
7 subdivision one of this section, the amount of the survivor's benefit under this section, if any, shall  
8 be two thousand dollars less any ordinary death benefit, exclusive of any ordinary death benefit  
9 attributable to the reserve-for-increased-take-home-pay, payable on account of the death of such  
10 employee under a retirement system or pension plan supported by funds of the state.

11 3. In addition to the benefit provided pursuant to subdivision two of this section an additional  
12 benefit shall be provided on behalf of retired state employees who retire or terminate their services,  
13 as defined by subdivision one of this section, on or after April first, nineteen hundred seventy,  
14 except, however, such additional benefits shall be provided on behalf of retired state employees  
15 who were members of the state police in a collective negotiating unit consisting of commissioned  
16 officers established pursuant to article fourteen of the civil service law who retire or terminate their  
17 services, as defined by subdivision one of this section, on or after April first, nineteen hundred  
18 seventy-one, and on behalf of retired state employees who were members of the state police in a  
19 collective negotiating unit defined in the certification of the public employment relations board  
20 dated December twenty-ninth, nineteen hundred seventy in case numbers C-0570 and C-0575  
21 established pursuant to article fourteen of the civil service law who retire or terminate their  
22 services, as defined by subdivision one of this section, on or after April first, nineteen hundred  
23 seventy-two, of one thousand dollars, except that where such retired state employee dies while  
24 reemployed as provided in subdivision five of this section or dies within thirty days following  
25 retirement pursuant to subdivision one of this section, the amount of the survivor's benefit under  
26 this section, if any, shall be three thousand dollars less any ordinary death benefit, exclusive of any  
27 ordinary death benefit attributable to the reserve-for-increased-take-home-pay, payable on account  
28 of the death of such employee under a retirement system or pension plan supported by funds of  
29 the state in lieu of the survivor's benefits specified in subdivision two of this section.

30 4. A survivor's benefit under this section shall not be payable in any case in which a survivor's  
31 benefit is payable pursuant to section six hundred fifty-five of this chapter.

32 5. The eligibility for survivor's benefit protection provided by this section of a retired state  
33 employee who subsequently reenters state service, or enters the service of a participating employer  
34 of a retirement system or pension plan supported by funds of the state, shall continue but only until  
35 such employee attains eligibility either for coverage under the survivor's benefit program provided  
36 by section six hundred fifty-five of this article or for payment of an ordinary death benefit of two  
37 thousand dollars or more, exclusive of any ordinary death benefit attributable to the reserve-for-  
38 increased-take-home-pay, payable on account of the death of such employee under such a  
39 retirement system or pension plan. Each time such employee leaves state service, or the service of  
40 such a participating employer, and loses the eligibility attained following such entry or reentry,  
41 such employee shall again become eligible for payment of a survivor's benefit provided by this

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1 section.

2 6. The survivor's benefit payable under this section shall be paid to such person or persons as the  
 3 retired state employee shall have last nominated to receive benefits under a retirement option of  
 4 the retirement system or pension plan supported by funds of the state of which such employee last  
 5 became a member, or if such employee did not nominate such a beneficiary, or if such beneficiary  
 6 has died, or if the employee was not a member of such a retirement system or pension plan, to the  
 7 person last specifically designated by such employee to receive the survivor's benefit under this  
 8 section on a form prescribed by and filed with the state comptroller. In the event such a designated  
 9 beneficiary does not survive such employee, or if a beneficiary was not designated, the survivor's  
 10 benefit shall be payable to the estate of the retired state employee or as provided in section thirteen  
 11 hundred ten of the surrogate's court procedure act.

12 7. The survivor's benefit fund provided for by subdivision seven of section six hundred fifty-five  
 13 of this article shall be the fund from which survivor's benefit payments pursuant to this section  
 14 shall be paid.

15 8. The state comptroller shall prescribe such regulations as may be required for the effective  
 16 administration and implementation of the provisions of this section including the establishment of  
 17 criteria for determining eligibility for payment under this section. The state comptroller may enter  
 18 into agreement with other agencies to perform such duties as may be necessary to implement the  
 19 provisions of this section.

20 9. a. Every state department or agency shall promptly inform the state comptroller of the  
 21 retirement or termination, as defined by subdivision one of this section, of any  
 22 employee on whose behalf a survivor's benefit under this section may be payable.  
 23 Such employer shall set forth the relevant state employment record of the employee  
 24 and such other information as is required by the form to be prescribed by the state  
 25 comptroller.

26 b. Every public retirement system or pension plan within the state shall promptly  
 27 inform the state comptroller of the death of any member on whose behalf a  
 28 survivor's benefit under this section may be payable. Such system or plan shall  
 29 set forth the name or names of the beneficiary or beneficiaries, if any, last  
 30 designated by the member under any retirement option selected and such other  
 31 information as is required by the form to be prescribed by the state comptroller.

32 10. A designated beneficiary of every retired state employee who filed a designation of beneficiary  
 33 form with the state comptroller must file an application with the state comptroller for a survivor's  
 34 benefit under this section within six months after the death of such employee in order to qualify  
 35 for the survivor's benefit provided by this section. For good cause shown, the state comptroller  
 36 may waive this time requirement.

37 11. The provisions of this section shall apply to retired state employees who retire or terminate  
 38 their service, as defined by subdivision one of this section, on or before June thirtieth, nineteen  
 39 hundred seventy-four, provided, however, that nothing herein shall be deemed to apply to any

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1 employee who retired on or before September thirtieth, nineteen hundred sixty-six and who died  
2 prior to the effective date of this subdivision.

3 12. Notwithstanding any other provision of this section to the contrary, at least one-half of any  
4 survivor's benefits payable under this section shall be paid to the member's surviving spouse, if  
5 any, unless the member elects (in a manner that accords with this subdivision 12) that the surviving  
6 spouse receive less than one-half of the survivor's benefits, and:

7 a. (i) the member's surviving spouse consented, on or after the date of the  
8 member's marriage, in writing to the member's election;

9 (ii) the surviving spouse's consent is on a plan form that sets forth:

10 (A) the amount of the member's survivor's benefits, and of the spouse,  
11 if the spouse were entitled to half those benefits;

12 (B) a statement to the effect that (absent valid consent to the contrary)  
13 the surviving spouse is entitled to at least half of the survivor's benefits;

14 (C) a statement to the effect that the surviving spouse has the right to  
15 prevent any future member elections regarding the member's survivor's  
16 benefits without the surviving spouse's consent unless the consent of the  
17 surviving spouse expressly permits member elections without any  
18 further consent by the surviving spouse; and

19 (D) the fact that consenting to the member's election would result in the  
20 surviving spouse receiving either no survivor's benefits or smaller  
21 survivor's benefits than the surviving spouse would otherwise receive  
22 under this subdivision;

23 (iii) the consent includes an acknowledgement that the surviving spouse  
24 understands that, absent the surviving spouse's consent to the member's  
25 election, the surviving spouse would be entitled to be paid at least one-half of  
26 the survivor's benefits, and that the surviving spouse's consent to the member's  
27 election would result in the elimination or reduction of such survivor's benefits;

28 (iv) the surviving spouse signed the spousal survivor consent, and the signature  
29 was witnessed by a notary public or a representative of the retirement system,  
30 and

31 (v) the system receives the completed consent and the member's election before  
32 the member's death;

33 b. the member and the surviving spouse were legally separated when the member's  
34 election was filed with the retirement system;

35 c. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a)  
36 of Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date  
37 of the member's death;

38 d. it is established to the satisfaction of the retirement board of the system that the

1 surviving spouse could not have been located if the member had been willing  
 2 and able to exercise due diligence to locate the surviving spouse on the date of  
 3 the member's death; or

4 e. there is no surviving spouse.

5 13. Notwithstanding any other provision of this section to the contrary, a member's election must  
 6 comply with the terms of subdivision 12 of this section to be effective.

7 14. If the retirement board of the system acts with the care, skill, prudence, and diligence under  
 8 the circumstances then prevailing that a prudent person acting in a like capacity and familiar with  
 9 such matters would use in the conduct of an enterprise of a like character and with like aims, in—

10 a. relying on a consent referred to in paragraph (a) of subdivision 12 of this section,  
 11 or

12 b. determining that at least one of paragraphs b, c, d or f of subdivision i of this  
 13 section is true,

14 then (without implication as to what liability the retirement system and the board might have in  
 15 the absence of this subdivision fourteen) such consent or determination shall be treated as valid  
 16 for purpose of discharging the retirement system and the board from liability to the extent of  
 17 payments made pursuant to such action; provided that the foregoing discharges shall not act to  
 18 deprive the surviving spouse of any rights to recover amounts from any party other than the  
 19 retirement system or the board.

20  
 21  
 22 Section 21. Section 13-148 of the administrative code of the City of New York, as amended by L.  
 23 1992, ch. 749, § 4, is amended to read as follows:

24  
 25 § 13-148. Death benefits; ordinary death benefits.

26  
 27 Upon the death of a member or of a former member, there shall be paid to his or her estate, or to  
 28 such person as he or she has nominated or shall nominate by written designation duly executed  
 29 and filed with such board during the lifetime of the member:

30  
 31 1. Such member's accumulated deductions, if any; and, in addition thereto;

32 2. (a) If he or she is a member who is in city-service or is on a civil service preferred  
 33 eligible list by reason of city-service, unless a pension by payable by the city  
 34 under the provisions of section 13-149 of this chapter, a sum which, subject to  
 35 the provisions of paragraph four of subdivision e of section 13-638.4 of this title,  
 36 shall consist of:

37 (i) an amount equal to the compensation earnable by such member while a  
 38 member, during the six months immediately preceding his or her death; or

39 (ii) if the total number of years in which allowable service was rendered

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1 exceeds ten, including service which was allowable during former  
 2 membership, then an amount equal to the compensation earnable by such  
 3 member in city-service while a member during the twelve months  
 4 immediately preceding his or her death; or

5 (iii) if such member, at the time of his or her death, held a career pension plan  
 6 position, and if the total number of years in which allowable service was  
 7 rendered includes twenty or more years of career pension plan qualifying  
 8 service, including career pension plan qualifying service which was  
 9 allowable during former membership, then an amount equal to twice the  
 10 compensation earnable by him or her in city-service while a member during  
 11 the twelve months immediately preceding his or her death; and

12 (iv) in addition to the amount payable under item (i), (ii) or (iii) of this  
 13 subparagraph (a), the reserve-for-increased-take-home-pay, if any.

14 (b) If the sum of such pension payments made and payable under section 13-149  
 15 of this chapter plus the reserve-for-increased-take-home-pay, if any, payable as  
 16 a lump sum under such section, is a lesser sum, then there shall be paid hereunder  
 17 the difference between the total of such lesser pension sum and reserve, if any,  
 18 and the greater amount herein provided as ordinary death benefit.

19 (c) Where any member, by any designation heretofore or hereafter filed pursuant  
 20 to the foregoing provisions of this subdivision a and in effect at the time of the  
 21 death of such member, nominated or shall nominate any person to receive the  
 22 amount payable under item (i), (ii) or (iii) of subparagraph (a) of this paragraph  
 23 two, the reserve-for-increased-take-home-pay, if any, of such member payable  
 24 under item (iv) of such subparagraph (a) shall be paid to the person so  
 25 nominated.

26 (d) Payment of the expense of burial not exceeding three hundred dollars to a  
 27 relative or friend who shall assume responsibility therefor in the absence or  
 28 failure of the designated beneficiary may be authorized by the comptroller on  
 29 certificate of the executive director and actuary of the retirement system; such  
 30 payment by a like amount shall reduce the amount payable to such designated  
 31 beneficiary or estate.

32 b. Until the first payment has been made on account of a retirement benefit without optional  
 33 selection of a member, such member shall be construed by such board to have been in city-service  
 34 and the benefits provided in this section shall be paid in lieu of the retirement allowance.

35 c. 1. The member, or on the death of the member, the person nominated by him or her  
 36 to receive either his or her accumulated deductions, if any, his or her death  
 37 benefit, or both, may provide by written designation duly executed and filed with  
 38 such board that the actuarial equivalent of the benefit otherwise payable in a  
 39 lump sum shall be paid to the person designated in the form of an annuity  
 40 payable in installments not more often than once a month, the amount of such

1 annuity to be determined at the time of the member's death on the basis of the  
2 age of the beneficiary at that time.

- 3 2. Where any such designation mentioned in paragraph one of this subdivision c was  
4 heretofore or is hereafter filed by a member with respect to a benefit otherwise  
5 payable pursuant to the provisions of item (i), (ii) or (iii) of subparagraph (a) of  
6 paragraph two of subdivision a of this section, and such designation was or is in  
7 effect at the time of the death of such member, or where any such designation  
8 was heretofore or is hereafter filed by any person so nominated to receive such  
9 benefit, the actuarial equivalent of the reserve-for-increased-take-home-pay, if  
10 any, of such member shall be paid to the person named in such designation as  
11 beneficiary with respect to such benefit under such item (i), (ii) or (iii), in the  
12 form of an annuity and in the manner and in accordance with the method of  
13 computation prescribed by paragraph one of this subdivision c.

14 d. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
15 benefits payable under this section, including any accumulated deductions or the reserve-for-  
16 increased-take-home-pay remaining at the time of the member's death, payable under this section  
17 shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that  
18 accords with this subdivision d) that the surviving spouse receive less than one-half of the death  
19 benefits, and:

- 20 1. (a) the member's surviving spouse consented, on or after the date of the  
21 member's marriage, in writing to the member's election;  
22 (b) the surviving spouse's consent is on a plan form that sets forth:  
23 (i) the amount of the member's death benefits, and of the spouse, if the  
24 spouse were entitled to half those benefits;  
25 (ii) a statement to the effect that (absent valid consent to the contrary)  
26 the surviving spouse is entitled to at least half of the death benefits;  
27 (iii) a statement to the effect that the surviving spouse has the right to  
28 prevent any future member elections regarding the member's death  
29 benefits without the surviving spouse's consent unless the consent of the  
30 surviving spouse expressly permits member elections without any  
31 further consent by the surviving spouse; and  
32 (iv) the fact that consenting to the member's election would result in the  
33 surviving spouse receiving either no death benefits or smaller death  
34 benefits than the surviving spouse would otherwise receive under this  
35 subdivision;  
36 (c) the consent includes an acknowledgement that the surviving spouse  
37 understands that, absent the surviving spouse's consent to the member's  
38 election, the surviving spouse would be entitled to be paid at least one-half of  
39 the death benefits, and that the surviving spouse's consent would result in the  
40 elimination or reduction of such death benefits;

1 (d) the consent includes a signature by the surviving spouse that was witnessed  
 2 by a notary public or a representative of the retirement system; and

3 (e) the system receives the completed consent and the member's election before  
 4 the member's death;

5 2. the member and the surviving spouse were legally separated when the member's  
 6 election was filed with the retirement system;

7 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 8 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 9 the member's death;

10 4. it is established to the satisfaction of the retirement board of the system that the  
 11 surviving spouse could not have been located if the member had been willing  
 12 and able to exercise due diligence to locate the surviving spouse on the date of  
 13 the member's death; or

14 5. there is no surviving spouse.

15 e. Notwithstanding any other provision of this section to the contrary, a member's election must  
 16 comply with the terms of subdivision d of this section to be effective.

17 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 18 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 19 matters would use in the conduct of an enterprise of a like character and with like aims, in—

20 1. relying on a consent referred to in paragraph one of subdivision d of this section,  
 21 or

22 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 23 d of this section is true,

24 then (without implication as to what liability the retirement system and the board might have in  
 25 the absence of this subdivision f) such consent or determination shall be treated as valid for purpose  
 26 of discharging the retirement system and the board from liability to the extent of payments made  
 27 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 28 surviving spouse of any rights to recover from any party other than the retirement system or the  
 29 board.

30  
 31  
 32 Section 22 Section 13-177 of the administrative code of the City of New York, as amended by L.  
 33 1985, ch. 901, § 1, is amended to read as follows:

34 § 13-177. Retirement; options in which retirement allowances may be taken.

35  
 36 Until the first payment on account of any benefit is made, the beneficiary, or, if such beneficiary  
 37 is an incompetent, then the husband or wife of such beneficiary or, if there be no husband or wife,  
 38 a committee of the estate, may elect to receive such benefit in a retirement allowance payable

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1 throughout life, or the beneficiary or the husband or wife or committee so electing may then elect  
 2 to receive the actuarial equivalent at that time of his or her annuity, if any, his or her pension, or  
 3 his or her retirement allowance in a lesser annuity, if any, or a lesser pension or a lesser retirement  
 4 allowance, payable throughout life with the provision that:

5 Option 1.

6 a. If he or she dies before he or she has received in payments the present value  
 7 of his or her annuity, if any, his or her pension, or his or her retirement  
 8 allowance, as it was at the time of his or her retirement, the balance shall be paid,  
 9 in the form of a lump sum or the actuarial equivalent in the form of an annuity,  
 10 to his or her legal representatives or to such person as the beneficiary, or the  
 11 husband or wife or committee so electing, has nominated or shall nominate by  
 12 written designation duly acknowledged and filed with the board.

13 b. A retired member, or upon the death of a retired member, the person  
 14 nominated by him or her as his or her beneficiary, may provide by written  
 15 designation duly executed and filed with such board that the actuarial equivalent  
 16 of a benefit otherwise payable in a lump sum shall be paid to the person  
 17 designated in the form of an annuity payable in installments not more than once  
 18 a month.

19 Option 2. Upon his or her death, his or her annuity, if any, his or her pension, or his or  
 20 her retirement allowance, shall be continued throughout the life of and paid to  
 21 such person as the beneficiary, or the husband or wife or committee so electing,  
 22 has nominated or shall nominate by written designation duly acknowledged and  
 23 filed with the board at the time of his or her retirement.

24 Option 3. Upon his or her death, one-half of his or her annuity, if any, his or her  
 25 pension, or his or her retirement allowance, shall be continued throughout the  
 26 life of and paid to such person as the beneficiary, or the husband or wife or  
 27 committee so electing, has nominated or shall nominate by written designation  
 28 duly acknowledged and filed with the board at the time of his or her retirement.

29 Option 4. Upon his or her death, some other benefit or benefits shall be paid to such  
 30 other person or persons as the beneficiary, or the husband or wife or committee  
 31 so electing, has nominated or shall nominate, provided such other benefit or  
 32 benefits, together with such lesser annuity, if any, or lesser pension, or lesser  
 33 retirement allowance, shall be certified by the actuary of the board to be of  
 34 equivalent actuarial value to his or her annuity, if any, his or her pension or his  
 35 or her retirement allowance, and shall be approved by such board.

36 For purposes of this section, the words “pension” and “retirement allowance” shall be deemed to  
 37 include the pension-providing-for-increased-take-home-pay, if any.

38  
 39 1. Notwithstanding any other provision of this section to the contrary, with the spouse as the  
 40 member’s beneficiary, a member’s retirement allowance payable under this section shall be paid

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1 as Option 3, so that upon his or her death, if the member has a surviving spouse who was married  
 2 to the member on the date the member filed his or her retirement application, or on the date the  
 3 member filed his or her last effective option selection, if any, whichever is later, unless the member  
 4 (a) elects that the surviving spouse receive survivor benefit payments in amounts that are greater  
 5 than the benefit payments that would be paid to the surviving spouse under Option 3, if the spouse  
 6 were the member's beneficiary; or (b) elects (in a manner that accords with this subdivision one)  
 7 that the surviving spouse receive no survivor benefit payments or survivor benefit payments, in  
 8 amounts that are smaller than the benefit payments that would be paid to the surviving spouse  
 9 under Option 3, if the spouse were the member's beneficiary, and:

10 a. (i) the member's surviving spouse consented on or after the date of the member's  
 11 marriage, in writing to the member's election;

12 (ii) the spousal survivor consent is on a written plan form that sets forth:

13 (A) the amount of the Option 3 monthly benefit entitlements of the  
 14 member and of the spouse, if the spouse were the member's beneficiary,  
 15 and when the member and the surviving spouse would each be entitled  
 16 to those benefits;

17 (B) a statement to the effect that (absent valid consent to the contrary)  
 18 the surviving spouse is entitled to survivor benefit payments in amounts  
 19 that are greater or equal to the amounts of the retirement allowance  
 20 payments that would be paid to the surviving spouse under Option 3, if  
 21 the spouse were the member's beneficiary;

22 (C) a statement to the effect that the surviving spouse has the right to  
 23 prevent any future member elections regarding the member's survivor  
 24 benefits without the surviving spouse's consent unless the consent of the  
 25 surviving spouse expressly permits member elections without any  
 26 further consent by the surviving spouse; and

27 (D) the fact that consenting to the member's survivor benefit election  
 28 would result in the surviving spouse receiving no survivor benefits or  
 29 smaller survivor benefits than the surviving spouse would otherwise  
 30 receive under this subdivision;

31 (iii) the consent includes an acknowledgement that the surviving spouse  
 32 understands that, absent the surviving spouse's consent to the member's  
 33 election, the surviving spouse would be entitled paid lifetime survivor benefit  
 34 payment amounts that are at least the amounts that would be paid to the surviving  
 35 spouse under Option 3, if the spouse were the member's beneficiary, and that  
 36 the surviving spouse's consent to the member's election would result in the  
 37 elimination or reduction of such survivor benefits;

38 (iv) the consent includes a signature by the surviving spouse that was witnessed  
 39 by a notary public or a representative of the retirement system; and

1 (v) the system receives the completed consent and the member's election before  
 2 the date the member filed his or her retirement application, or the date the  
 3 member filed his or her last effective option selection, if any, whichever is later;

4 b. the member and the surviving spouse were legally separated when the member's  
 5 election, and that the surviving spouse's consent would eliminate or reduce those  
 6 survivor benefits;

7 c. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 8 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 9 the filing of the member's application for a retirement allowance;

10 d. the surviving spouse could not be located on the date the member's election was  
 11 filed with the retirement system, unless the date when the member's last  
 12 effective option selection was filed with the retirement systems was later, in  
 13 which case, the surviving spouse could not be located between the date the  
 14 member's election was filed with the retirement system, and the date the  
 15 member's last effective option selection was filed with the retirement system;  
 16 or

17 e. there is no surviving spouse.

18 2. Notwithstanding any other provision of this section to the contrary, a member's election must  
 19 comply with the terms of subdivision a of this section to be effective.

20 3. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 21 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 22 matters would use in the conduct of an enterprise of a like character and with like aims, in—

23 a. relying on a consent referred to in paragraph a of subdivision 1 of this section,  
 24 or

25 b. determining that at least one of paragraphs b, c, d, or e of subdivision 1 of this  
 26 section is true,

27 then (without implication as to what liability the retirement system and the board might have in  
 28 the absence of this subdivision 3) such consent or determination shall be treated as valid for  
 29 purpose of discharging the retirement system and the board from liability to the extent of payments  
 30 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 31 surviving spouse of any rights to recover from any party other than the retirement system or the  
 32 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 33 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 34 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 35 may not thereby reduce any of those benefit payments by more than 10%.

36  
 37  
 38 Section 23. Section 13-243 of the administrative code of the City of New York, as amended by L.  
 39 1985, ch. 907, § 1, is amended to read as follows:  
 40

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 § 13-243. Death benefits; ordinary death benefits.

2  
3 Upon the death of a member or of a former member, there shall be paid to his or her estate, or to  
4 such person as he or she has nominated or shall nominate by written designation duly executed  
5 and filed with such board during the lifetime of the member:  
6

7 1. His or her accumulated deductions; and, in addition thereto,

8 2. If such member is in city-service or is on a civil service preferred eligible list by  
9 reason of city-service, unless a pension be payable by the city under the  
10 provisions of section 13-244 of this subchapter, an amount equal to the  
11 compensation earnable by him or her while a member, during the six months  
12 immediately preceding his or her death, and, if the total number of years in which  
13 allowable service was rendered exceeds ten, then an amount equal to the  
14 compensation earnable by him or her in city-service while a member during the  
15 twelve months immediately preceding his or her death, and in addition, in either  
16 such case, the reserve-for-increased-take-home-pay.

17 b. Until the first payment has been made on account of a retirement benefit without optional  
18 selection of a member, such member may be construed by such board to have been in city-service  
19 and the benefits provided in this section may be paid in lieu of the retirement allowance.

20 c. The member, or on the death of the member, the person nominated by him or her to receive  
21 either his or her accumulated deductions, his or her death benefit, together with the reserve-for-  
22 increased-take-home-pay, or both, may provide by written designation duly executed and filed  
23 with such board that the actuarial equivalent of the benefit otherwise payable in a lump sum shall  
24 be paid to the person designated in the form of an annuity payable in installments not more often  
25 than once a month, the amount of such annuity to be determined at the time of the member's death  
26 on the basis of the age of the beneficiary at that time.

27 D. Notwithstanding the foregoing provisions of this section, and in lieu of any lesser amount  
28 thereby prescribed, upon the death of a member, prior to the first payment of a retirement benefit,  
29 who has attained the minimum age or completed the minimum period of service, as elected by him  
30 or her for retirement, and whether or not such member shall have filed application for retirement,  
31 there shall be paid to his or her estate, or to such person as he or she has nominated or shall  
32 nominate by written designation duly executed and filed in accordance with the requirements of  
33 this subchapter:

34 1. His or her accumulated deductions; and in addition thereto,

35 2. The amount of reserve equal to the present value of the pension he or she would  
36 have received if he or she had retired and became entitled to pension on the day  
37 immediately preceding his or her death.

38 The beneficiary of such deceased member shall have the right to accept such benefits in lump sum  
39 or in such periodic payments, on an annuity basis, as such beneficiary shall elect.

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 e. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 2 benefits payable under this section, including any accumulated deductions and the reserve-for-  
 3 increased-take-home-pay remaining at the time of the member's death, payable under this section  
 4 shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that  
 5 accords with this subdivision e) that the surviving spouse receive less than one-half of the death  
 6 benefits, and:

7 1. (A) the member's surviving spouse consented, on or after the date of the  
 8 member's marriage, in writing to the member's election;

9 (B) the surviving spouse's consent is on a plan form that sets forth:

10 (i) the amount of the member's death benefits, and of the spouse, if the  
 11 spouse were entitled to half those benefits;

12 (ii) a statement to the effect that (absent valid consent to the contrary)  
 13 the surviving spouse is entitled to at least half of the death benefits;

14 (iii) a statement to the effect that the surviving spouse has the right to  
 15 prevent any future member elections regarding the member's death  
 16 benefits without the surviving spouse's consent unless the consent of the  
 17 surviving spouse expressly permits member elections without any  
 18 further consent by the surviving spouse; and

19 (iv) the fact that consenting to the member's election would result in the  
 20 surviving spouse receiving either no death benefits or smaller death  
 21 benefits than the surviving spouse would otherwise receive under this  
 22 subdivision;

23 (C) the consent includes an acknowledgement that the surviving spouse  
 24 understands that, absent the surviving spouse's consent to the member's  
 25 election, the surviving spouse would be entitled to be paid at least one-half of  
 26 the death benefits, and that the surviving spouse's consent would result in the  
 27 elimination or reduction of such death benefits;

28 (D) the consent includes a signature by the surviving spouse that was witnessed  
 29 by a notary public or a representative of the retirement system, and

30 (E) the system receives the completed consent and the member's election before  
 31 the member's death;

32 2. the member and the surviving spouse were legally separated when the member's  
 33 election was filed with the retirement system;

34 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 35 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 36 the member's death;

37 4. it is established to the satisfaction of the retirement board of the system that the  
 38 surviving spouse could not have been located if the member had been willing  
 39 and able to exercise due diligence to locate the surviving spouse on the date of

1 the member's death; or

2 5. there is no surviving spouse.

3 f. Notwithstanding any other provision of this section to the contrary, a member's election must  
4 comply with the terms of subdivision e of this section to be effective.

5 g. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
6 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
7 matters would use in the conduct of an enterprise of a like character and with like aims, in—

8 1. relying on a consent referred to in paragraph one of subdivision e of this section,  
9 or

10 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
11 e of this section is true,

12 then (without implication as to what liability the retirement system and the board might have in  
13 the absence of this subdivision g) such consent or determination shall be treated as valid for  
14 purpose of discharging the retirement system and the board from liability to the extent of payments  
15 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
16 surviving spouse of any rights to recover from any party other than the system or the retirement  
17 board.

18  
19  
20 Section 24. Section 13-261 of the administrative code of the City of New York, as amended by L.  
21 1987, ch. 775, § 3, is amended to read as follows:

22  
23 § 13-261. Retirement; options in which retirement allowances may be taken.

24 a. Until the first payment on account of any benefit is made, except pursuant to the provisions of  
25 section 13-261.2 of this subchapter, the beneficiary, or, if such beneficiary is an incompetent, then  
26 the husband or wife of such beneficiary, or, if there be no husband or wife, a committee of the  
27 estate, may elect to receive such benefit in a retirement allowance payable throughout life, or the  
28 beneficiary or the husband or wife or committee so electing may then elect to receive the actuarial  
29 equivalent at that time of his or her annuity, his or her pension, or his or her retirement allowance  
30 in a lesser annuity or a lesser pension or a lesser retirement allowance, payable throughout life  
31 with the provision that:

32 Option 1. If he or she die before he or she has received in payments the present value  
33 of his or her annuity, his or her pension, or his or her retirement allowance, as it  
34 was at the time of his or her retirement, the balance shall be paid to his or her  
35 legal representatives or to such person as the beneficiary, or the husband or wife  
36 or committee so electing, has nominated or shall nominate by written  
37 designation duly acknowledged and filed with the board.

38 Option 2. Upon his or her death, his or her annuity, his or her pension, or his or her  
39 retirement allowance, shall be continued throughout the life of and paid to such

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1 person as the beneficiary, or the husband or wife or committee so electing, has  
 2 nominated or shall nominate by written designation duly acknowledged and  
 3 filed with the board at the time of his or her retirement.

4 Option 3. Upon his or her death, one-half of his or her annuity, his or her pension, or  
 5 his or her retirement allowance, shall be continued throughout the life of and  
 6 paid to such person as the beneficiary, or the husband or wife or committee so  
 7 electing, has nominated or shall nominate by written designation duly  
 8 acknowledged and filed with the board at the time of his or her retirement.

9 Option 4. Upon his or her death, some other benefit or benefits shall be paid to such  
 10 other person or persons as the beneficiary, or the husband or wife or committee  
 11 so electing, has nominated or shall nominate, provided such other benefit or  
 12 benefits, together with such lesser annuity, or lesser pension, or lesser retirement  
 13 allowance, shall be certified by the actuary to be of equivalent actuarial value to  
 14 his or her annuity, his or her pension or his or her retirement allowance, and shall  
 15 be approved by such board.

16  
 17 b. For purposes of this section, the terms “pension” and “retirement allowance” shall be deemed  
 18 to include the pension-providing-for-increased-take-home-pay, if any.

19  
 20 c. Notwithstanding any other provision of this section to the contrary, a member’s retirement  
 21 allowance shall be paid as Option 3, with the spouse as the member’s beneficiary, so that upon his  
 22 or her death, if the member has a surviving spouse who was married to the member on the date the  
 23 member filed his or her retirement application, or on the date the member filed his or her last  
 24 effective option selection, if any, whichever is later, unless the member (a) elects that the surviving  
 25 spouse receive survivor benefit payments in amounts that are greater than the benefit payments  
 26 that would be paid to the surviving spouse under Option 3, if the spouse were the member’s  
 27 beneficiary; or (b) elects (in a manner that accords with this subdivision c. that the surviving spouse  
 28 receive either no survivor benefit payments or survivor benefit payments, in amounts that are  
 29 smaller than the benefit payments that would be paid to the surviving spouse under Option 3, if  
 30 the spouse were the member’s beneficiary, and:

31 1. (a) the member’s surviving spouse consented on or after the date of the  
 32 member’s marriage, in writing to the member’s election;

33 (b) the surviving spouse’s consent is on a plan form that sets forth:

34 (i) the amount of the Option 3 monthly benefit entitlements of the  
 35 member and of the spouse, if the spouse were the member’s beneficiary,  
 36 and when the member and the surviving spouse would each be entitled  
 37 to those benefits;

38 (ii) a statement to the effect that (absent valid consent to the contrary)  
 39 the surviving spouse is entitled to survivor benefit payments in amounts  
 40 that are greater or equal to the amounts of the retirement allowance  
 41 payments that would be paid to the surviving spouse under Option 3, if

1 the spouse were the member's beneficiary;

2 (iii) a statement to the effect that the surviving spouse has the right to  
 3 prevent any future member elections regarding the member's survivor  
 4 benefits without the surviving spouse's consent unless the consent of the  
 5 surviving spouse expressly permits member elections without any  
 6 further consent by the surviving spouse; and

7 (iv) the fact that consenting to the member's survivor benefit election  
 8 result in the surviving spouse receiving no survivor benefits or smaller  
 9 survivor benefits than the surviving spouse would otherwise receive  
 10 under this subdivision;

11 (c) the consent includes an acknowledgement that the surviving spouse  
 12 understands that, absent the surviving spouse's consent to the member's  
 13 election, the surviving spouse would be entitled to be paid lifetime survivor  
 14 benefit payment amounts that are at least the amounts that would be paid to the  
 15 surviving spouse under Option 3, if the spouse were the member's beneficiary,  
 16 and that the surviving spouse's consent would result in the elimination or  
 17 reduction of such survivor benefits;

18 (d) the consent includes a signature by the surviving spouse that was witnessed  
 19 by a notary public or a representative of the retirement system; and

20 (e) the system receives the completed consent and the member's election before  
 21 the date the member filed his or her retirement application, or the date the  
 22 member filed his or her last effective option selection, if any, whichever is later;

23 2. the member and the surviving spouse were legally separated when the member's  
 24 election was filed with the retirement system;

25 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 26 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the  
 27 filing of the member's application for a retirement allowance;

28 4. it is established to the satisfaction of the retirement board of the system that the  
 29 surviving spouse could not have been located if the member had been willing and  
 30 able to exercise due diligence to locate the surviving spouse on the later of the date  
 31 the member's retirement application was filed with the retirement system, or the date  
 32 the member's last effective option selection was filed with the retirement system; or

33 5. there is no surviving spouse.

34 d. Notwithstanding any other provision of this section to the contrary, a member's election must  
 35 comply with the terms of subdivision c of this section to be effective.

36 e. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 37 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 38 matters would use in the conduct of an enterprise of a like character and with like aims, in—

- 1        1. relying on a consent referred to in paragraph one of subdivision c of this section,  
 2        or  
 3        2. determining that at least one of paragraphs two, three, four or five of subdivision  
 4        one of this section is true,

5        then (without implication as to what liability the retirement system and the board might have in  
 6        the absence of this subdivision e.) such consent or determination shall be treated as valid for  
 7        purpose of discharging the retirement system and the board from liability to the extent of payments  
 8        made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 9        surviving spouse of any rights to recover from any party other than the retirement system or the  
 10       board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 11       computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 12       system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 13       may not thereby reduce any of those benefit payments by more than 10%.

14  
 15  
 16 Section 25. Section 13-346 of the administrative code of the City of New York, as amended by L.  
 17 1985, ch. 907, § 1, is amended to read as follows:  
 18

19 § 13-346. Death benefits; ordinary death benefits.

20 a. Upon the death of an original plan member not subject to article eleven (as defined in subdivision  
 21 four-c of section 13-313 of this subchapter) who has not completed the period of service, as elected  
 22 by him or her for retirement, or upon the death of a former original plan member not subject to  
 23 article eleven, there shall be paid to his or her estate, or to such person as he or she has nominated  
 24 or shall nominate by written designation duly executed and filed with such board during the  
 25 lifetime of the member:

- 26        1. His or her accumulated contributions, that is, his or her contributions without  
 27        interest; and, in addition thereto,  
 28        2. If such member is in city-service or is on a civil service preferred eligible list by  
 29        reason of city-service, unless a retirement allowance be payable by the city under  
 30        the provisions of section 13-347 of this subchapter, an amount equal to the  
 31        compensation earnable by him or her while a member, during the six months  
 32        immediately preceding his or her death, and, if the total number of years in which  
 33        allowable service was rendered exceeds ten, then an amount equal to the  
 34        compensation earnable by him or her in city-service while a member during the  
 35        twelve months immediately preceding his or her death, and in addition, in either  
 36        such case, the accumulation-for-increased-take-home-pay, if any.

37 A-1. Upon the death of an improved benefits plan member not subject to article eleven (as defined  
 38 in subdivision four-i of such section 13-313) or of a former improved benefits plan member not  
 39 subject to article eleven, there shall be paid to his or her estate, or to such person as he or she has  
 40 nominated or shall nominate by written designation duly executed and filed with such board during

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- 1 the lifetime of the member:
- 2 1. His or her accumulated deductions; and, in addition thereto,
- 3 2. If such member is in city-service or is on a civil service preferred eligible list by  
 4 reason of city-service, unless a pension be payable by the city under the  
 5 provisions of section 13-347 of this subchapter, an amount equal to the  
 6 compensation earnable by him or her while a member, during the six months  
 7 immediately preceding his or her death, and, if the total number of years in which  
 8 allowable service was rendered exceeds ten, then an amount equal to the  
 9 compensation earnable by him or her in city-service while a member during the  
 10 twelve months immediately preceding his or her death, and in addition, in either  
 11 such case, the reserve-for-increased-take-home-pay.
- 12 b. Until the first payment has been made on account of a retirement benefit without optional  
 13 selection of an original plan member not subject to article eleven or an improved benefits plan  
 14 member not subject to article eleven, such member may be construed by such board to have been  
 15 in city-service and the applicable benefits provided in this section may be paid in lieu of the  
 16 retirement allowance.
- 17 c. The original plan member not subject to article eleven or the improved benefits plan member  
 18 not subject to article eleven, or on the death of any such member, the person nominated by him or  
 19 her to receive, in the case of an original plan member not subject to article eleven, his or her  
 20 accumulated contributions or his or her death benefit, together with the accumulation-for-  
 21 increased-take-home-pay, or both, or, in the case of an improved benefits plan member not subject  
 22 to article eleven, the person nominated by him or her to receive either his or her accumulated  
 23 deductions, his or her death benefit, together with the reserve-for-increased-take-home-pay, or  
 24 both, may provide by written designation duly executed and filed with such board that the actuarial  
 25 equivalent of the benefit otherwise payable in a lump sum shall be paid to the person designated  
 26 in the form of an annuity payable in installments not more often than once a month, the amount of  
 27 such annuity to be determined at the time of such member's death on the basis of the age of the  
 28 beneficiary at that time.
- 29 D. Upon the death of an original plan member not subject to article eleven who has completed the  
 30 period of service, as elected by him or her for retirement, but who shall not have filed application  
 31 for retirement or who, having filed application for retirement shall die prior to the first payment  
 32 on account of the benefits thereunder, there shall be paid to his or her estate, or to such person as  
 33 he or she has nominated or shall nominate by written designation duly executed and filed with  
 34 such board:
- 35 1. His or her accumulated contributions, that is his or her contributions without  
 36 interest; and in addition thereto,
- 37 2. The present value of the pension he or she would have received if he or she had  
 38 retired and had become entitled to a pension for service on the day immediately  
 39 preceding the day of his or her death.

1 e. Notwithstanding the foregoing provisions of this section, and in lieu of any lesser amount  
 2 thereby prescribed, upon the death of an improved benefits plan member not subject to article  
 3 eleven, prior to the first payment of a retirement benefit, who has completed the minimum period  
 4 of service, as elected by him or her for retirement, and whether or not such member shall have  
 5 filed application for retirement, there shall be paid to his or her estate, or to such person as he or  
 6 she has nominated or shall nominate by written designation duly executed and filed in accordance  
 7 with the requirements of this subchapter:

- 8 1. His or her accumulated deductions; and in addition thereto,
- 9 2. The amount of reserve equal to the present value of the pension he or she would  
 10 have received if he or she had retired and became entitled to a pension on the  
 11 day immediately preceding his or her death.

12 The beneficiary of such deceased member shall have the right to accept such benefits in lump sum  
 13 or in such periodic payments, on an annuity basis, as such beneficiary shall elect.

- 14 f. 1. The provisions of the preceding subdivisions of this section applicable to original plan  
 15 members not subject to article eleven shall apply to an original plan member subject  
 16 to article eleven (as defined in subdivision four-d of such section 13-313), except to  
 17 the extent and in the manner that any such provision is modified by article eleven.
- 18 2. The provisions of the preceding subdivisions of this section applicable to improved  
 19 benefits plan members not subject to article eleven shall apply to an improved  
 20 benefits plan member subject to article eleven (as defined in subdivision four-j  
 21 of such section 13-313), except to the extent and in the manner that any such  
 22 provision is modified by article eleven.

23 g. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 24 benefits payable under this section, including any accumulated contributions, accumulated  
 25 deductions, the accumulation for-increased-take-home-pay, or the reserve-for-increased-take-  
 26 home-pay remaining at the time of the member's death, payable under this section shall be paid to  
 27 the member's surviving spouse, if any, unless the member elects (in a manner that accords with  
 28 this subdivision g) that the surviving spouse receive less than one-half of the death benefits, and:

- 29 1. (A) the member's surviving spouse consented, on or after the date of the  
 30 member's marriage, in writing to the member's election;
- 31 (B) the surviving spouse's consent is on a plan form that sets forth:
  - 32 (i) the amount of the member's death benefits, and of the spouse, if the  
 33 spouse were entitled to half those benefits;
  - 34 (ii) a statement to the effect that (absent valid consent to the contrary)  
 35 the surviving spouse is entitled to at least half of the death benefits;
  - 36 (iii) a statement to the effect that the surviving spouse has the right to  
 37 prevent any future member elections regarding the member's death  
 38 benefits without the surviving spouse's consent unless the consent of the  
 39 surviving spouse expressly permits member elections without any

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1 further consent by the surviving spouse; and

2 (iv) the fact that consenting to the member's election would result in the  
 3 surviving spouse receiving either no death benefits or smaller death  
 4 benefits than the surviving spouse would otherwise receive under this  
 5 subdivision;

6 (C) the consent includes an acknowledgement that the surviving spouse  
 7 understands the surviving spouse would be entitled to be paid at least one-half  
 8 of the death benefits absent the surviving spouse's consent to the member's  
 9 election, and that the surviving spouse's consent to the member's election would  
 10 result in the elimination or reduction of such death benefits;

11 (D) the consent includes a signature by the surviving spouse that was witnessed  
 12 by a notary public or a representative of the retirement system, and

13 (E) the system receives the completed consent and the member's election before  
 14 the member's death;

15 2. the member and the surviving spouse were legally separated when the member's  
 16 election was filed with the retirement system; or

17 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 18 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 19 the member's death;

20 4. it is established to the satisfaction of the retirement board of the system that the  
 21 surviving spouse could not have been located if the member had been willing  
 22 and able to exercise due diligence to locate the surviving spouse on the date of  
 23 the member's death; or

24 5. there is no surviving spouse.

25 h. Notwithstanding any other provision of this section to the contrary, a member's election must  
 26 comply with the terms of subdivision g of this section to be effective.

27 i. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 28 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 29 matters would use in the conduct of an enterprise of a like character and with like aims, in—

30 1. relying on a consent referred to in paragraph one of subdivision g of this section,  
 31 or

32 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 33 g of this section is true,

34 then (without implication as to what liability the retirement system and the board might have in  
 35 the absence of this subdivision i) such consent or determination shall be treated as valid for purpose  
 36 of discharging the retirement system and the board from liability to the extent of payments made  
 37 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 38 surviving spouse of any rights to recover from any party other than the retirement system or the

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1 [board.](#)  
 2  
 3

4 Section 26. Section 13-369 of the administrative code of the City of New York, as amended by L.  
 5 1988, ch. 198, § 1, is amended to read as follows:

6  
 7 § 13-369. Retirement of original plan members; options in which retirement allowances may be  
 8 taken.

9 a. Subject to the provisions of subdivision b of this section, until the first payment on account of  
 10 any benefit is made, except pursuant to the provisions of subdivision c of this section, any  
 11 beneficiary who was an original plan member at the time of his or her retirement, or, if such  
 12 beneficiary is an incompetent, then the spouse of such beneficiary, or, if there be no spouse, a  
 13 committee of the estate, may elect to receive such benefit in a retirement allowance payable  
 14 throughout life, or any such beneficiary or the spouse or committee so electing may then elect to  
 15 receive the actuarial equivalent at the time of his or her retirement allowance in a lesser retirement  
 16 allowance, payable throughout life with the provision that:

17 Option 1. If he or she dies before he or she has received in payments the present value  
 18 of his or her retirement allowance, as it was at the time of his or her retirement,  
 19 the balance shall be paid to his or her legal representatives or to such person as  
 20 such beneficiary, or the spouse or committee so electing, has nominated or shall  
 21 nominate by written designation duly acknowledged and filed with the board.

22 Option 2. Upon his or her death, his or her retirement allowance shall be continued  
 23 throughout the life of and paid to such person as such beneficiary, or the spouse  
 24 or committee so electing, has nominated or shall nominate by written  
 25 designation duly acknowledged and filed with the board at the time of his or her  
 26 retirement.

27 Option 3. Upon his or her death, one-half of his or her retirement allowance shall be  
 28 continued throughout the life of and paid to such person as such beneficiary, or  
 29 the spouse or committee so electing, has nominated or shall nominate by written  
 30 designation duly acknowledged and filed with the board at the time of his or her  
 31 retirement.

32 Option 4. Upon his or her death, some other benefit or benefits shall be paid to such  
 33 other person or persons as such beneficiary, or the spouse or committee so  
 34 electing, has nominated or shall nominate, provided such other benefit or  
 35 benefits, together with such lesser retirement allowance, shall be certified by the  
 36 actuary to be of equivalent actuarial value to his or her retirement allowance,  
 37 and shall be approved by such board.

38 b. In the case of an original plan member subject to article eleven (as defined in subdivision four-  
 39 d of section 13-313 of this subchapter) or any beneficiary who was an original plan member subject  
 40 to article eleven at the time of such member's retirement, the provisions of subdivision a of this

1 section shall apply except to the extent and in the manner that any such provision is modified by  
2 article eleven.

3 c. If a member who is otherwise eligible for retirement pursuant to section 13-352 or 13-353 of  
4 this subchapter dies within thirty days after the filing with the pension board of the application for  
5 retirement pursuant to section 13-352 or 13-353 of this subchapter and it is established that the  
6 physical or mental impairment or incapacitation of the applicant specified in such application was  
7 directly related to the cause of the applicant's death, such applicant shall be approved by the  
8 pension board effective one day before the date of the applicant's death, provided however that:

- 9 (1) if a member is entitled to an ordinary disability retirement allowance under the  
10 provisions of this subchapter, the benefits provided pursuant to section 13-352  
11 of this subchapter shall be payable unless the member would otherwise be  
12 entitled to a greater benefit pursuant to section 13-346 of this subchapter, in  
13 which event the greater benefit shall be payable; or
- 14 (2) if a member is entitled to an accidental disability retirement allowance under the  
15 provisions of this subchapter, the benefits provided pursuant to section 13-353  
16 of this subchapter shall be payable unless the member would otherwise be  
17 entitled to a greater benefit pursuant to section 13-348 of this subchapter, in  
18 which event the greater benefit shall be payable.

19 D. Notwithstanding any law to the contrary, for the purpose of electing an option pursuant to this  
20 section, the pension board shall notify the surviving spouse of any applicant described in  
21 subdivision c of this section, or, if no such spouse exists, the personal representative of the estate  
22 of such applicant of the right of election pursuant to this section and such surviving spouse or  
23 personal representative of such estate may elect any such option within thirty days after receipt of  
24 such notice.

25 e. Notwithstanding any other provision of this section to the contrary, a member's retirement  
26 allowance shall be paid as Option 3, with the spouse as the member's beneficiary, so that upon his  
27 or her death, if the member has a surviving spouse who was married to the member on the date the  
28 member filed his or her retirement application, or on the date the member filed his or her last  
29 effective option selection, if any, whichever is later, unless the member (a) elects that the surviving  
30 spouse receive survivor benefit payments in amounts that are greater than the benefit payments  
31 that would be paid to the surviving spouse under Option 3, if the spouse were the member's  
32 beneficiary; or (b) elects (in a manner that accords with this subdivision e) that the surviving spouse  
33 receive either no survivor benefit payments or survivor benefit payments, in amounts that are  
34 smaller than the benefit payments that would be paid to the surviving spouse under Option 3, if  
35 the spouse were the member's beneficiary, and:

36 (1) (a) the member's surviving spouse consented on or after the date of the  
37 member's marriage, in writing to the member's election;

38 (b) the surviving spouse's consent is on a plan form that sets forth:

39 (i) the amount of the Option 3 monthly benefit entitlements of the  
40 member and of the spouse, if the spouse were the member's beneficiary,

1 and when the member and the surviving spouse would each be entitled  
 2 to those benefits;

3 (ii) a statement to the effect that (absent valid consent to the contrary)  
 4 the surviving spouse is entitled to survivor benefit payments in amounts  
 5 that are greater or equal to the amounts of the retirement allowance  
 6 payments that would be paid to the surviving spouse under Option 3, if  
 7 the spouse were the member's beneficiary;

8 (iii) a statement to the effect that the surviving spouse has the right to  
 9 prevent any future member elections regarding the member's survivor  
 10 benefits without the surviving spouse's consent unless the consent of the  
 11 surviving spouse expressly permits member elections without any  
 12 further consent by the surviving spouse; and

13 (iv) the fact that consenting to the member's survivor benefit election  
 14 would result in the surviving spouse receiving no survivor benefits or  
 15 smaller survivor benefits retirement allowance than the surviving spouse  
 16 would otherwise receive under this subdivision;

17 (c) the consent includes an acknowledgement that the surviving spouse  
 18 understands the surviving spouse would be entitled to be paid lifetime survivor  
 19 benefit payment amounts that are at least the amounts that would be paid to the  
 20 surviving spouse under Option 3, if the spouse were the member's beneficiary,  
 21 and that the surviving spouse's consent would result in the elimination or  
 22 reduction of such survivor benefits; and

23 (d) the consent includes a signature by the surviving spouse that was witnessed  
 24 by a notary public or a representative of the retirement system; and

25 (e) the system receives the completed consent and the member's election before  
 26 the date the member filed his or her retirement application, or the date the  
 27 member filed his or her last effective option selection, if any, whichever is later;

28 (2) the member and the surviving spouse were legally separated when the member's election  
 29 was filed with the retirement system;

30 (3) any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 31 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of the  
 32 filing of the member's application for a retirement allowance;

33 (4) it is established to the satisfaction of the retirement board of the system that the  
 34 surviving spouse could not have been located if the member had been willing  
 35 and able to exercise due diligence to locate the surviving spouse on the later of  
 36 the date the member's retirement application was filed with the retirement  
 37 system, or the date the member's last effective option selection was filed with  
 38 the retirement system; or

39 (5) there is no surviving spouse.

1 f. Notwithstanding any other provision of this section to the contrary, a member's election must  
2 comply with the terms of subdivision e of this section to be effective.

3 g. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
4 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
5 matters would use in the conduct of an enterprise of a like character and with like aims, in—

6 (1) relying on a consent referred to in paragraph one of subdivision e of this section,  
7 or

8 (2) determining that at least one of paragraphs two, three, four, or five of subdivision  
9 e of this section is true,

10 then (without implication as to what liability the retirement system and the board might have in  
11 the absence of this subdivision g) such consent or determination shall be treated as valid for  
12 purpose of discharging the retirement system and the board from liability to the extent of payments  
13 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
14 surviving spouse of any rights to recover from any party other than the retirement system or the  
15 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
16 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
17 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
18 may not thereby reduce any of those benefit payments by more than 10%.  
19  
20

21 Section 27. Section 13-370 of the administrative code of the City of New York, as amended by L.  
22 1990, ch. 288, § 1, is amended to read as follows:

23 § 13-370. Retirement of improved benefits plan members; options in which retirement allowances  
24 may be taken.

25 32. Subject to the provisions of subdivision c of this section, until the first payment on account  
26 of any benefit is made, except pursuant to the provisions of subdivision d of this section  
27 any beneficiary who was an improved benefits plan member at the time of his or her  
28 retirement, or, if such beneficiary is an incompetent, then the spouse of such beneficiary,  
29 or, if there be no spouse, a committee of the estate, may elect to receive such benefit in a  
30 retirement allowance payable throughout life, or any such beneficiary or the spouse or  
31 committee so electing may then elect to receive the actuarial equivalent at the time of his  
32 or her annuity, his or her pension, or his or her retirement allowance in a lesser annuity or  
33 a lesser pension or a lesser retirement allowance, payable throughout life with the provision  
34 that:

35 Option 1. If he or she dies before he or she has received in payments the present value  
36 of his or her annuity, his or her pension, or his or her retirement allowance, as it  
37 was at the time of his or her retirement, the balance shall be paid to his or her  
38 legal representatives or to such person as such beneficiary, or the spouse or  
39 committee so electing, has nominated or shall nominate by written designation  
40 duly acknowledged and filed with the board.

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- 1 Option 2. Upon his or her death, his or her annuity, his or her pension, or his or her  
 2 retirement allowance, shall be continued throughout the life of and paid to such  
 3 person as such beneficiary, or the spouse or committee so electing, has  
 4 nominated or shall nominate by written designation duly acknowledged and  
 5 filed with the board at the time of his or her retirement.
- 6 Option 3. Upon his or her death, one-half of his or her annuity, his or her pension, or  
 7 his or her retirement allowance, shall be continued throughout the life of and  
 8 paid to such person as such beneficiary, or the spouse or committee so electing,  
 9 has nominated or shall nominate by written designation duly acknowledged and  
 10 filed with the board at the time of his or her retirement.
- 11 Option 4. Upon his or her death, some other benefit or benefits shall be paid to such  
 12 other person or persons as such beneficiary, or the spouse or committee so  
 13 electing, has nominated or shall nominate, provided such other benefit or  
 14 benefits, together with such lesser annuity, or lesser pension or lesser retirement  
 15 allowance, shall be certified by the actuary to be of equivalent actuarial value to  
 16 his or her annuity, his or her pension or his or her retirement allowance, and shall  
 17 be approved by such board.
- 18 b. For purposes of this section, the terms “pension” and “retirement allowance” shall be deemed  
 19 to include the pension-providing-for-increased-take-home-pay, if any.
- 20 c. In the case of an improved benefits plan member subject to article eleven (as defined in  
 21 subdivision four-j of section 13-313 of this subchapter) or any beneficiary who was an improved  
 22 benefits plan member subject to article eleven at the time of such member’s retirement, the  
 23 provisions of subdivisions a and b of this section shall apply except to the extent and in the manner  
 24 that any such provision is modified by article eleven.
- 25 D. If a member who is otherwise eligible for retirement pursuant to this section dies within thirty  
 26 days after the filing with the pension board of the application for retirement pursuant to this section  
 27 and it is established that the physical or mental impairment or incapacitation of the applicant  
 28 specified in such application was directly related to the cause of the applicant’s death, such  
 29 application shall be approved by the pension board effective one day before the date of the  
 30 applicant’s death, provided however that:
- 31 (1) if a member is entitled to an ordinary disability retirement allowance under the  
 32 provisions of this subchapter, the benefits provided pursuant to section 13-352  
 33 of this subchapter shall be payable unless the member would otherwise be  
 34 entitled to a greater benefit pursuant to section 13-346 of this subchapter, in  
 35 which event the greater benefit shall be payable; or
- 36 (2) if a member is entitled to an accidental disability retirement allowance under the  
 37 provisions of this subchapter, the benefits provided pursuant to section 13-353  
 38 of this subchapter shall be payable unless the member would otherwise be  
 39 entitled to a greater benefit pursuant to section 13-348 of this subchapter, in  
 40 which event the greater benefit shall be payable.

1 e. Notwithstanding any law to the contrary, for the purpose of electing an option pursuant to this  
 2 section, the pension board shall notify the surviving spouse of any applicant described in  
 3 subdivision d of this section, or, if no such spouse exists, the personal representative of the estate  
 4 of such applicant of the right of election pursuant to this section and such surviving spouse or  
 5 personal representative of such estate may elect any such option within thirty days after receipt of  
 6 such notice.

7 f. Notwithstanding any other provision of this section to the contrary, a member's retirement  
 8 allowance shall be paid as Option 3, with the spouse as the member's beneficiary, so that upon his  
 9 or her death, if the member has a surviving spouse who was married to the member on the date the  
 10 member filed his or her retirement application, or on the date the member filed his or her last  
 11 effective option selection, if any, whichever is later, unless the member (a) elects that the surviving  
 12 spouse receive survivor benefit payments in amounts that are greater than the benefit payments  
 13 that would be paid to the surviving spouse under Option 3, if the spouse were the member's  
 14 beneficiary; or (b) elects (in a manner that accords with this subdivision f) that the surviving spouse  
 15 receive either no survivor benefit payments or survivor benefit payments, in amounts that are  
 16 smaller than the benefit payments that would be paid to the surviving spouse under Option 3, if  
 17 the spouse were the member's beneficiary, and:

18 (1) (a) the member's surviving spouse consented on or after the date of the member's  
 19 marriage, in writing to the member's election;

20 (b) the surviving spouse's consent is on a plan form that sets forth:

21 (i) the amount of the Option 3 monthly benefit entitlements of the  
 22 member and of the spouse, if the spouse were the member's beneficiary,  
 23 and when the member and the surviving spouse would each be entitled  
 24 to those benefits;

25 (ii) a statement to the effect that (absent valid consent to the contrary)  
 26 the surviving spouse is entitled to survivor benefit payments in amounts  
 27 that are greater or equal to the amounts of the retirement allowance  
 28 payments that would be paid to the surviving spouse under Option 3, if  
 29 the spouse were the member's beneficiary;

30 (ii) a statement to the effect that the surviving spouse has the right to  
 31 prevent any future member elections regarding the member's survivor  
 32 benefits without the surviving spouse's consent unless the consent of the  
 33 surviving spouse expressly permits member elections without any  
 34 further consent by the surviving spouse; and

35 (iv) the fact that consenting to the member's survivor benefit election  
 36 would result in the surviving spouse receiving no survivor benefits or  
 37 smaller survivor benefits than the surviving spouse would otherwise  
 38 receive under this subdivision;

39 (c) the consent includes an acknowledgement that the surviving spouse  
 40 understands the surviving spouse would be entitled to be paid lifetime survivor

1 benefit payment amounts that are at least the amounts that would be paid to the  
 2 surviving spouse under Option 3, if the spouse were the member's beneficiary,  
 3 and that the surviving spouse's consent would result in the elimination or  
 4 reduction of such survivor benefits;

5 (d) the consent includes a signature by the surviving spouse that was witnessed  
 6 by a notary public or a representative of the retirement system; and

7 (e) the system receives the completed consent and the member's election before  
 8 the date the member filed his or her retirement application, or the date the  
 9 member filed his or her last effective option selection, if any, whichever is later;

10 (2) the member and the surviving spouse were legally separated when the member's  
 11 election was filed with the retirement system;

12 (3) any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 13 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 14 the filing of the member's application for a retirement allowance;

15 (4) it is established to the satisfaction of the retirement board of the system that the  
 16 surviving spouse could not have been located if the member had been willing  
 17 and able to exercise due diligence to locate the surviving spouse on the later of  
 18 the date the member's retirement application was filed with the retirement  
 19 system, or the date the member's last effective option selection was filed with  
 20 the retirement system; or

21 (5) there is no surviving spouse.

22 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 23 comply with the terms of subdivision f of this section to be effective.

24 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 25 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 26 matters would use in the conduct of an enterprise of a like character and with like aims, in—

27 (1) relying on a consent referred to in paragraph one of subdivision f of this section,  
 28 or

29 (2) determining that at least one of paragraphs two, three, four or five of subdivision  
 30 f of this section is true,

31 then (without implication as to what liability the retirement system and the board might have in  
 32 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 33 purpose of discharging the retirement system and the board from liability to the extent of payments  
 34 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 35 surviving spouse of any rights to recover from any party other than the retirement system or the  
 36 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 37 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 38 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 39 may not thereby reduce any of those benefit payments by more than 10%.

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1  
2  
3 Section 28. Section 13-542 of the administrative code of the City of New York, as amended by L.  
4 1985, ch. 907, § 1, is amended to read as follows:

5  
6 § 13-542. Death benefits; ordinary death benefits.

7 a. Upon the death of a contributor before retirement there shall be paid to his or her estate or to  
8 such person as he or she shall have nominated by written designation duly executed and filed with  
9 the retirement board:

10 1. His or her accumulated deductions; and, in addition thereto,

11 2. A sum consisting of:

12 (i) His or her reserve-for-increased-take-home-pay, if any, which shall be paid  
13 out of the contingent reserve fund; and

14 (ii) An amount, payable out of the contingent reserve fund in the case of a new  
15 entrant and out of pension reserve fund number two in the case of a present-  
16 teacher, equal to the salary earnable by him or her during the six months  
17 immediately preceding his or her death, provided that at the time of his or her  
18 death he or she had obtained the age of sixty-five years or had a total-service of  
19 thirty-five years and was eligible for service retirement.  
20

21 b. Where any contributor, by any designation heretofore or hereafter filed pursuant to subdivision  
22 a of this section and in effect at the time of the death of such contributor, nominated or shall  
23 nominate any person to receive the amount payable under subparagraph (ii) of paragraph two of  
24 subdivision a of this section, the reserve-for-increased-take-home-pay, if any, of such member,  
25 payable under subparagraph (i) of such paragraph two shall be paid to the person so nominated.

26 c. (1) The retirement board may adopt rules and regulations providing that in any case where a  
27 contributor or designated beneficiary authorized by the applicable provisions of this  
28 chapter to nominate a beneficiary to receive a lump sum benefit pursuant to section  
29 13-542 or section 13-543 of this chapter represents to the retirement system that a  
30 specified person has been designated by such contributor or designated beneficiary as  
31 a trustee of an inter vivos or testamentary trust for the purposes of this subdivision c,  
32 such person shall be eligible to be nominated to receive, in the capacity of trustee, such  
33 lump sum benefit pursuant to the applicable provisions of either of such sections.

34 (2) Any proceeds received by a trustee under this section shall not be subject to the  
35 debts of the member or to transfer or estate taxes to any greater extent than if  
36 such proceeds were payable to the beneficiaries named in the trust and not to the  
37 estate of the member.

38 (3) A payment made in good faith under this section (a) to a person so represented to  
39 the retirement system to be a trustee of an inter vivos trust, or (b) to a person  
40 who is designated as a successor trustee of an inter vivos trust and who provides

1 a copy of his or her appointment or, (c) to a person who is designated as a trustee  
 2 or successor trustee of a testamentary trust and who provides a copy of the letters  
 3 of trusteeship, provided such payment is made to such payee in the capacity of  
 4 trustee, shall be a complete discharge to the retirement system to the extent of  
 5 the payment. Such discharge shall not be impaired or affected by an adjudication  
 6 that a trust is invalid or that a person represented to be or designated as a trustee  
 7 is not entitled to receive the proceeds, if payment is made in good faith under  
 8 this section before notice to the retirement system of the claim of invalidity or  
 9 lack of entitlement on which such adjudication is based.

10 (4) (a) If no person to whom the retirement system is authorized to make payment  
 11 in the capacity of trustee, as provided for in paragraph three of this subdivision  
 12 c, claims the proceeds within eighteen months after the death of the member,  
 13 payment shall be made to the deceased member's estate and such payment shall  
 14 be a complete discharge to the retirement system to the extent of the payment.

15 (b) If satisfactory evidence is furnished within such period of eighteen months  
 16 that there is or will be no trustee to receive the proceeds, payment shall be made  
 17 to the deceased member's estate.

18 (5) In the event that after a person represented to have been designated as a trustee of  
 19 an inter vivos or testamentary trust is nominated pursuant to rules and  
 20 regulations adopted under paragraph one of this subdivision c, the contributor or  
 21 designated beneficiary authorized to make a nomination shall, in compliance  
 22 with the applicable provisions of this chapter, nominate for receipt of the same  
 23 lump sum benefit:

24 (a) a beneficiary other than a person so represented to have been designated as a  
 25 trustee; or

26 (b) a person represented to have been designated as a trustee under a different  
 27 inter vivos or testamentary trust; a payment made in good faith under this section  
 28 to the last such nominee as of the date of death, whether he or she is a beneficiary  
 29 not represented to have been designated as trustee or a person represented to  
 30 have been so designated, shall be a complete discharge to the retirement system  
 31 to the extent of the payment, provided, however, that if payment is made to a  
 32 person represented to have been designated as a trustee, the retirement system  
 33 shall be so discharged if payment is made to such person in the capacity of  
 34 trustee and if there is compliance with the requirements of paragraph three of  
 35 this subdivision c with respect to submission of copies. In any case where the  
 36 last such nominee is a person represented to have been designated as a trustee,  
 37 the provisions of paragraph four of this subdivision c shall apply.

38 D. Notwithstanding any other provision of this section to the contrary, at least one-half of any  
 39 death benefits payable under this section, including any accumulated deductions, or reserve-for-  
 40 increased-take-home-pay remaining at the time of the member's death, payable under this section  
 41 shall be paid to the member's surviving spouse, if any, unless the member elects (in a manner that

1 accords with this subdivision d) that the surviving spouse receive less than one-half of the death  
 2 benefits, and:

- 3 1. (a) the member's surviving spouse consented, on or after the date of the  
 4 member's marriage, in writing to the member's election;  
 5 (b) the surviving spouse's consent is on a plan form that sets forth:
    - 6 (i) the amount of the member's death benefits, and of the spouse, if the  
 7 spouse were entitled to half those benefits;
    - 8 (ii) a statement to the effect that (absent valid consent to the contrary)  
 9 the surviving spouse is entitled to at least half of the death benefits;
    - 10 (iii) a statement to the effect that the surviving spouse has the right to  
 11 prevent any future member elections regarding the member's death  
 12 benefits without the surviving spouse's consent unless the consent of the  
 13 surviving spouse expressly permits member elections without any  
 14 further consent by the surviving spouse; and
    - 15 (iv) the fact that consenting to the member's election would result in the  
 16 surviving spouse receiving either no death benefits or smaller death  
 17 benefits than the surviving spouse would otherwise receive under this  
 18 subdivision;
  - 19 (c) the consent includes an acknowledgement that the surviving spouse  
 20 understands that, absent the surviving spouse's consent to the member's  
 21 election, the surviving spouse would be entitled to be paid at least one-half of  
 22 the death benefits, and that the surviving spouse's consent would result in the  
 23 elimination or reduction of such death benefits;
  - 24 (d) the consent includes a signature by the surviving spouse that was witnessed  
 25 by a notary public or a representative of the retirement system, and
  - 26 (e) the system receives the completed consent and the member's election before  
 27 the member's death;
- 28 2. the member and the surviving spouse were legally separated when the member's  
 29 election was filed with the retirement system;
  - 30 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 31 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 32 the member's death;
  - 33 4. it is established to the satisfaction of the retirement board of the system that the  
 34 surviving spouse could not have been located if the member had been willing  
 35 and able to exercise due diligence to locate the surviving spouse on the date of  
 36 the member's death; or
  - 37 5. there is no surviving spouse.

38 e. Notwithstanding any other provision of this section to the contrary, a member's election must

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1 comply with the terms of subdivision d of this section to be effective.

2 f. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 3 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 4 matters would use in the conduct of an enterprise of a like character and with like aims, in—

5 1. relying on a consent referred to in paragraph one of subdivision d of this section,

6 or

7 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 8 d of this section is true,

9 then (without implication as to what liability the retirement system and the board might have in  
 10 the absence of this subdivision f.) such consent or determination shall be treated as valid for  
 11 purpose of discharging the retirement system and the board from liability to the extent of payments  
 12 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 13 surviving spouse of any rights to recover from any party other than the retirement system or the  
 14 board.

15  
 16  
 17 Section 29. Section 13-543 of the administrative code of the City of New York, as amended by L.  
 18 1985, ch. 907, § 1, is amended to read as follows:

19  
 20 § 13-543. Special death and retirement benefits.

21 a. Upon the death of a contributor, before retirement or within thirty days after the effective date  
 22 of his or her service retirement, or within thirty days after the filing of his or her application for  
 23 disability retirement, in lieu of any retirement allowance, or optional benefit, or any death benefit,  
 24 there shall be paid to his or her estate or to such person as he or she shall have nominated by written  
 25 designation duly executed and filed with the retirement board:

26 1. His or her accumulated deductions; and in addition thereto,

27 2. A sum consisting of:

28 i. His or her reserve-for-increased-take-home-pay, if any, which shall be paid  
 29 out of the contingent reserve fund; and

30 ii. In the case of any contributor whose death heretofore occurred or occurs  
 31 hereafter and prior to July first, nineteen hundred seventy, an amount, payable  
 32 out of the contingent reserve fund in the case of a new-entrant and out of pension  
 33 reserve fund number two in the case of a present-teacher, equal to (a) six per  
 34 cent of his or her average salary multiplied by the number of his or her years of  
 35 city-service rendered prior to April tenth, nineteen hundred twenty-nine plus (b)  
 36 five per cent of his or her average salary multiplied by the number of his or her  
 37 years of city-service rendered subsequent to such date. In the case of a teacher  
 38 appointed prior to such date the years of credit under (a) and (b) shall not exceed  
 39 thirty-five years in total and in the case of a teacher appointed subsequent to

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1 such date, the years of credit shall not exceed twenty years in total. In no event  
 2 shall such amount be less than one-half of his or her average salary, except that  
 3 in the case of a teacher who has a total city-service of six months or more and  
 4 less than five years such amount shall be six times the average monthly salary  
 5 earnable by him or her during his or her city-service immediately preceding his  
 6 or her death. If the contributor was a present-teacher, there shall be included a  
 7 further amount in addition thereto equal to five per cent of his or her average  
 8 salary multiplied by five sevenths of the number of his or her years of prior-  
 9 service. The total credit for prior-service so allowed shall not exceed twenty-  
 10 five years. If in the case of any deceased contributor the total amount payable  
 11 under this subparagraph (ii) of this paragraph two of this subdivision is greater  
 12 than the largest maximum annual salary paid to any contributor, such total  
 13 amount payable shall not be greater than two and three-fourths times the average  
 14 salary of the deceased contributor, nor less than the largest maximum annual  
 15 salary paid to any contributor; or

16 iii. in the case of any contributor whose death occurs on or after July first,  
 17 nineteen hundred seventy, a sum consisting of:

18 (a) an amount equal to the salary earnable by him or her while in city-service,  
 19 during the six months immediately preceding his or her death; or

20 (b) if the total number of years of city-service credited to him or her is ten or  
 21 more, then an amount equal to the salary earnable by him or her while in city-  
 22 service during the twelve months immediately preceding his or her death; or

23 (c) if the total number of years of city-service credited to him or her is twenty  
 24 or more, then an amount equal to twice the salary earnable by him or her  
 25 while in city-service during the twelve months immediately preceding his or  
 26 her death.

27 3. Where any contributor, by any designation heretofore or hereafter filed pursuant to  
 28 the preceding provisions of this subdivision and in effect at the time of the death  
 29 of such contributor, has nominated or shall nominate any person to receive the  
 30 amount payable under subparagraph (ii) or (iii) of paragraph two of this  
 31 subdivision a, the reserve-for-increased-take-home-pay, if any, of such  
 32 contributor payable under subparagraph (i) of such paragraph two shall be paid  
 33 to the person so nominated.

34 b. A contributor eligible for retirement pursuant to section 13-545 or 13-557 of this chapter,  
 35 however, may file with the retirement board an application setting forth that he or she elects to be  
 36 retired at a time not less than thirty nor more than ninety days after the filing of such application,  
 37 provided such contributor shall agree in his or her application that such application shall be  
 38 irrevocable from the date of filing. Such application shall retire such contributor on the date he or  
 39 she elected to be retired, if then living, and such contributor, on retirement, shall be entitled to  
 40 receive any annuity, pension, pension-providing-for-increased-take-home-pay to which he or she  
 41 may be entitled, if any, retirement allowance, or any optional benefit he or she may have selected

1 at the time of the filing of such application or prior thereto pursuant to the provisions of this section.

2 c. 1. A contributor at any time may file with the retirement board his or her election to  
 3 have paid to his or her beneficiary, in the event of his or her death, his or her  
 4 accumulated salary deductions or death benefit, or both, in accordance with one  
 5 of the following options:

6 Option A. Upon the death of the contributor the actuarial value of his or her  
 7 accumulated salary deductions or death benefit, or both, shall be paid in an  
 8 annuity in monthly installments throughout the life of such beneficiary as he or  
 9 she shall nominate by written designation duly acknowledged and filed with  
 10 such board; or

11 Option B. Upon the death of the contributor the actuarial value of his or her  
 12 accumulated salary deductions or death benefit, or both, shall be paid in a lesser  
 13 annuity in monthly installments to such beneficiary as the contributor shall  
 14 nominate by written designation duly acknowledged and filed with such board  
 15 with a provision that should such beneficiary die before he or she has received  
 16 the total actuarial value of the accumulated salary deductions or death benefit,  
 17 or both, as certified at the time of the death of the contributor, the balance shall  
 18 be paid to the estate of the contributor or to such other beneficiary or  
 19 beneficiaries as shall have been nominated by the contributor by written  
 20 designation duly acknowledged and filed with such board; or

21 Option C. Upon the death of the contributor, that some other benefit or benefits  
 22 shall be paid to such beneficiary or beneficiaries as he or she shall have  
 23 nominated by written designation duly acknowledged and filed with such board,  
 24 provided such other benefit or benefits shall be certified to by the actuary of such  
 25 board to be of equivalent actuarial value of the accumulated salary deductions  
 26 or death benefit, or both, and shall be approved by such board.

27 2. Where any contributor, by any designation heretofore or hereafter filed pursuant to  
 28 paragraph one of this subdivision c and in effect at the time of the death of such  
 29 contributor, nominated or shall nominate any beneficiary or beneficiaries to  
 30 receive payment of his or her death benefit in accordance with any option  
 31 mentioned in such paragraph one, the reserve-for-increased-pay, if any, of such  
 32 contributor shall be paid to such beneficiary or beneficiaries in the same manner  
 33 and in accordance with the same methods of computation as are prescribed in  
 34 such paragraph one with respect to payment of such death benefit pursuant to  
 35 such option.

36 d. 1. Where a designated beneficiary has been named to receive either the accumulated salary  
 37 deductions or death benefit, or both, but where no election of an option has been made  
 38 under the provisions of this section, the designated beneficiary may elect to receive  
 39 the amount or amounts payable upon the death of the contributor in a lump sum or he  
 40 or she may elect to have the amount paid under any one of the above options in the  
 41 same manner as if the contributor had designated the option under which such amount

1 would have been paid.

- 2 2. Where any designated beneficiary named as specified in paragraph one of this  
 3 subdivision d, has heretofore made or shall hereafter make an election pursuant  
 4 to such paragraph one with respect to receipt of the death benefit, the reserve-  
 5 for-increased-take-home-pay, if any, of the contributor shall be paid to the same  
 6 beneficiary or beneficiaries, in the same manner, and in accordance with the  
 7 same methods of computation as are prescribed by such paragraph one with  
 8 respect to payment of the death benefit pursuant to such election.

9 e. The effective date of retirement under section 13-545, 13-547, 13-549 or 13-557 of this chapter,  
 10 shall be the date specified in the application as the date for retirement, provided that the date so  
 11 specified is subsequent to the date of filing. In case of disability retirement, the effective date of  
 12 retirement shall be the date of the medical examination or such other date within thirty days  
 13 subsequent to the medical examination as shall be mutually agreed upon by the contributor and  
 14 such board.

15 f. This section shall not apply to a contributor who prior to the tenth day of October, nineteen  
 16 hundred twenty-nine shall have filed with such board a statement in writing that he or she elected  
 17 not to come within the provisions of this section.

18 g. Notwithstanding any other provision of this section to the contrary, at least one-half of any death  
 19 benefits payable under this section, including any accumulated salary deductions or the reserve-  
 20 for-increased-take-home-pay remaining at the time of the member's death, payable under this  
 21 section shall be paid to the member's surviving spouse, if any, unless the member elects (in a  
 22 manner that accords with this subdivision g.) that the surviving spouse receive less than one-half  
 23 of the death benefits, and:

24 1. (a) the member's surviving spouse consented, on or after the date of the  
 25 member's marriage, in writing to the member's election;

26 (b) the surviving spouse's consent is on a plan form that sets forth:

27 (i) the amount of the member's death benefits and of the spouse, if the  
 28 spouse were entitled to half those benefits;

29 (ii) a statement to the effect that (absent valid consent to the contrary)  
 30 the surviving spouse is entitled to at least half of the death benefits;

31 (iii) a statement to the effect that the surviving spouse has the right to  
 32 prevent any future member elections regarding the member's death  
 33 benefits without the surviving spouse's consent unless the consent of the  
 34 surviving spouse expressly permits member elections without any  
 35 further consent by the surviving spouse; and

36 (iv) the fact that consenting to the member's election would result in the  
 37 surviving spouse receiving either no death benefits or smaller death  
 38 benefits than the surviving spouse would otherwise receive under this  
 39 subdivision,

1 (c) the consent includes an acknowledgement that the surviving spouse  
 2 understands that, absent the surviving spouse's consent to the member's  
 3 election, the surviving spouse would be entitled to be paid at least one-half of  
 4 the death benefits, and that the surviving spouse's consent to the member's  
 5 election would result in the elimination or reduction of such death benefits;

6 (d) the consent includes a signature by the surviving spouse that was witnessed  
 7 by a notary public or a representative of the retirement system; and

8 (e) the system receives the completed consent and the member's election before  
 9 the member's death;

10 2. the member and the surviving spouse were legally separated at the time the  
 11 member's election was filed with the retirement system;

12 3. any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 13 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 14 the member's death;

15 4. it is established to the satisfaction of the retirement board of the system that the  
 16 surviving spouse could not have been located if the member had been willing  
 17 and able to exercise due diligence to locate the surviving spouse on the date of  
 18 the member's death; or

19 5. there is no surviving spouse.

20 h. Notwithstanding any other provision of this section to the contrary, a member's election must  
 21 comply with the terms of subdivision i of this section to be effective.

22 i. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 23 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 24 matters would use in the conduct of an enterprise of a like character and with like aims, in—

25 1. relying on a consent referred to in paragraph one of subdivision g of this section,  
 26 or

27 2. determining that at least one of paragraphs two, three, four, or five of subdivision  
 28 g of this section is true.

29 then (without implication as to what liability the retirement system and the board might have in  
 30 the absence of this subdivision i) such consent or determination shall be treated as valid for purpose  
 31 of discharging the retirement system and the board from liability to the extent of payments made  
 32 pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 33 surviving spouse of any rights to recover from any party other than the retirement system or the  
 34 board.

35  
 36  
 37 Section 30. Section 13-558 of the administrative code of the City of New York, as amended by L.  
 38 2004, ch. 447, § 1, is amended to read as follows:

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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1 § 13-558. Retirement; options in which retirement allowances may be taken.

2  
3 a. A contributor may at any time file with such board his or her election to receive on retirement  
4 his or her benefits in a retirement allowance payable throughout life or to receive the actuarial  
5 equivalent of his or her annuity, his or her pension, or his or her retirement allowance in a lesser  
6 annuity, or a lesser pension, or a lesser retirement allowance, payable throughout life, with the  
7 provision that;

8 Option I. If he or she dies before he or she has received in payments the present value  
9 of his or her annuity, his or her pension, or his or her retirement allowance, as it  
10 was at the time of his or her retirement, the balance shall be paid to his or her  
11 legal representative or to such person as he or she shall nominate by written  
12 designation duly acknowledged and filed with such board. The contributor may  
13 provide by written designation duly acknowledged and filed with such board,  
14 that if such balance shall be in the sum of ten thousand dollars or more, the same  
15 shall be paid to the person designated in accordance with one of the following  
16 options:

17 Option Ia. Upon the death of the contributor such balance shall be paid to the person  
18 designated in the form of an annuity, in monthly installments, throughout his or  
19 her life. The annuity to the beneficiary, if payable, shall be calculated on the  
20 basis of regular interest and the mortality table for Option A; or

21 Option Ib. Upon the death of the contributor such balance shall be paid in a lesser  
22 annuity in monthly installments to the person designated with a provision that  
23 should such beneficiary die before he or she has received the total actuarial value  
24 of such balance, the unused portion shall be paid to the estate of the contributor  
25 or to such other person as he or she shall nominate by written designation duly  
26 acknowledged and filed with such board. The lesser annuity to the beneficiary,  
27 if payable, shall be calculated on the basis of regular interest and the mortality  
28 table for Option B.

29 In the event that the contributor has made no election of Option Ia or Option Ib, the designated  
30 beneficiary may elect to receive the balance payable upon the death of the contributor in a lump  
31 sum or he or she may elect to have such balance paid under any one of the above options in the  
32 same manner as if the contributor had designated the option under which such balance would have  
33 been paid. The beneficiary nominated in such designation may be changed by the contributor at  
34 any time either before or after retirement by a new designation or designations filed prior to the  
35 death of the contributor.

36 Option II. Upon his or her death, his or her annuity, his or her pension, or his or her  
37 retirement allowance, shall be continued throughout the life of and paid to such  
38 person as he or she shall nominate by written designation duly acknowledged  
39 and filed with such board.

40 Option III. Upon his or her death, one-half of his or her annuity, his or her pension, or  
41 his or her retirement allowance, shall be continued throughout the life of and  
42 paid to such person as he or she shall nominate by written designation duly

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1 acknowledged and filed with such board.

2 Option IV. Some other benefit or benefits shall be paid either to the contributor or to  
3 such person or persons as he or she shall nominate, provided such other benefit  
4 or benefits together with such lesser annuity, or lesser pension, or lesser  
5 retirement allowance shall be certified by the actuary of such board to be of  
6 equivalent actuarial value and shall be approved by such board.

7 b. For purposes of this section, the words “pension” and “retirement allowance” shall be deemed  
8 to include the pension-providing-for-increased-take-home-pay.

9 c. Notwithstanding any other provision of this title to the contrary, a twenty-year pension plan  
10 contributor who has made an election, pursuant to subdivision a of this section, prior to the  
11 effective date to his or her retirement, may, at any time before his or her retirement allowance as  
12 such a contributor begins, change any such election made by or her to any other election authorized  
13 by such subdivision, by filing such changed election with the board. Any such changed election  
14 may, at any time before such retirement allowance begins, be further changed in the same manner  
15 to any other election authorized by such subdivision. Any such changed election last filed shall  
16 supersede all elections previously filed.

17 D. (1) The retirement board may adopt rules and regulations providing that in any case where  
18 a contributor or designated beneficiary authorized by the applicable provisions of this  
19 chapter to nominate a beneficiary to receive a lump sum benefit under this section  
20 represents to the retirement system that a specified person has been designated by such  
21 contributor or designated beneficiary as a trustee of an inter vivos or testamentary trust  
22 for the purpose of this subdivision d, such person shall (a) be eligible to be nominated  
23 to receive, in the capacity of trustee, a lump sum benefit under Option I and (b) be  
24 eligible to be nominated to receive, in the capacity of trustee, any benefit under Option  
25 IV which the retirement board shall deem appropriate.

26 (2) Any proceeds received by a trustee under this section shall not be subject to the  
27 debts of the member or to transfer or estate taxes to any greater extent than if  
28 such proceeds were payable to the beneficiaries named in the trust and not to the  
29 estate of the member.

30 (3) A payment made in good faith under this section (a) to a person so represented to  
31 the retirement system to be a trustee of an inter vivos trust, or (b) to a person  
32 who is designated as a successor trustee of an inter vivos trust and who provides  
33 a copy of his or her appointment, or (c) to a person who is designated as a trustee  
34 or successor trustee of a testamentary trust and who provides a copy of the letters  
35 of trusteeship, provided such payment is made to such payee in the capacity of  
36 trustee, shall be a complete discharge to the retirement system to the extent of  
37 the payment. Such discharge shall not be impaired or affected by an adjudication  
38 that a trust is invalid or that a person represented to be or designated as a trustee  
39 is not entitled to receive the proceeds, if payment is made in good faith under  
40 this section before notice to the retirement system of the claim of invalidity or  
41 lack of entitlement on which such adjudication is based.

1 (4) If no person to whom the retirement system is authorized to make payment in the  
 2 capacity of trustee, as provided for in paragraph three of this subdivision d,  
 3 claims the proceeds within eighteen months after the death of the retired  
 4 member, payment shall be made to the deceased retired member's estate and  
 5 such payment shall be a complete discharge to the retirement system to the  
 6 extent of the payment.

7 (a) If satisfactory evidence is furnished within such period of eighteen months  
 8 that there is or will be no trustee to receive the proceeds, payment shall be made  
 9 to the deceased retired member's estate.

10 (5) In the event that after a person represented to have been designated as a trustee of  
 11 an inter vivos or testamentary trust is nominated pursuant to rules and  
 12 regulations adopted under paragraph one of this subdivision d, the contributor  
 13 or designated beneficiary authorized to make a nomination shall, in compliance  
 14 with the applicable provisions of this chapter, nominate for receipt of the same  
 15 lump sum benefit:

16 (a) a beneficiary other than a person so represented to have been designated as a  
 17 trustee; or

18 (b) a person represented to have been designated as a trustee under a different  
 19 inter vivos or testamentary trust;

20 a payment made in good faith under this section to the last such nominee as of the date  
 21 of death, whether he or she is a beneficiary not represented to have been designated as  
 22 trustee or a person represented to have been so designated, shall be a complete  
 23 discharge to the retirement system to the extent of the payment, provided, however,  
 24 that if payment is made to a person represented to have been designated as a trustee,  
 25 the retirement system shall be so discharged if payment is made to such person in the  
 26 capacity of trustee and if there is compliance with the requirements of paragraph three  
 27 of this subdivision d with respect to submission of copies. In any case where the last  
 28 such nominee is a person represented to have been designated as a trustee, the  
 29 provisions of paragraph four of this subdivision d shall apply.

30 e. Notwithstanding section 13-565 and any other provision of this title, an option selection  
 31 previously filed by a contributor or retired contributor may be changed no later than thirty days  
 32 following the date of payability of his or her retirement allowance. A retired contributor who has  
 33 been retired for disability may change an option selection previously filed no later than (1) thirty  
 34 days following the date on which such contributor's application for disability retirement was  
 35 approved by the retirement board or (2) thirty days following the date on which the contributor  
 36 was retired for disability, whichever is later.

37 f. Notwithstanding any other provision of this section to the contrary, a member's retirement  
 38 allowance shall be paid as Option III, with the spouse as the member's beneficiary, so that upon  
 39 his or her death, if the member has a surviving spouse who was married to the member on the date  
 40 the member filed his or her retirement application, or on the date the member filed his or her last

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1 effective option selection, if any, whichever is later, unless the member (a) elects that the surviving  
 2 spouse receive survivor benefit payments in amounts that are greater than the benefit payments  
 3 that would be paid to the surviving spouse under Option III, if the spouse were the member's  
 4 beneficiary; or (b) elects (in a manner that accords with this subdivision f) that the surviving spouse  
 5 receive either no survivor benefit payments or survivor benefit payments, in amounts that are  
 6 smaller than the benefit payments that would be paid to the surviving spouse under Option III, if  
 7 the spouse were the member's beneficiary, and:

8 (1) (a) the member's surviving spouse consented on or after the date of the  
 9 member's marriage, in writing to the member's election;

10 (b) the surviving spouse's consent is on a plan form that sets forth:

11 (i) the amount of the Option III monthly benefit entitlements of the  
 12 member and of the spouse, if the spouse were the member's beneficiary,  
 13 and when the member and the surviving spouse would each be entitled  
 14 to those benefits;

15 (ii) a statement to the effect that (absent valid consent to the contrary)  
 16 the surviving spouse is entitled to survivor benefit payments in amounts  
 17 that are greater or equal to the amounts of the retirement allowance  
 18 payments that would be paid to the surviving spouse under Option III, if  
 19 the spouse were the member's beneficiary;

20 (iii) a statement to the effect that the surviving spouse has the right to  
 21 prevent any future member elections regarding the member's survivor  
 22 benefits without the surviving spouse's consent unless the consent of the  
 23 surviving spouse expressly permits member elections without any  
 24 further consent by the surviving spouse; and

25 (iv) the fact that consenting to the member's survivor benefit election  
 26 would result in the surviving spouse receiving no survivor benefits or  
 27 smaller survivor benefits than the surviving spouse would otherwise  
 28 receive under this subdivision;

29 (c) the consent includes an acknowledgement that the surviving spouse  
 30 understands that, absent the surviving spouse's consent to the member's  
 31 election, the surviving spouse would be entitled to be paid lifetime survivor  
 32 benefit payment amounts that are at least the amounts that would be paid to the  
 33 surviving spouse under Option III, if the spouse were the member's beneficiary,  
 34 and that the surviving spouse's consent would result in the elimination or  
 35 reduction of such survivor benefits;

36 (d) the consent includes a signature by the surviving spouse that was witnessed  
 37 by a notary public or a representative of the retirement system; and

38 (e) the system receives the completed consent and the member's election before  
 39 the date the member filed his or her retirement application, or the date the  
 40 member filed his or her last effective option selection, if any, whichever is later;

1 (2) the member and the surviving spouse were legally separated when the member's  
 2 election was filed with the retirement system;

3 (3) any of the conditions set forth in subparagraphs (1) through (6) of paragraph (a) of  
 4 Section 5-1.2 of the estates, powers, and trusts law were satisfied on the date of  
 5 the filing of the member's application for a retirement allowance;

6 (4) it is established to the satisfaction of the retirement board of the system that the  
 7 surviving spouse could not have been located if the member had been willing  
 8 and able to exercise due diligence to locate the surviving spouse on the later of  
 9 the date the member's retirement application was filed with the retirement  
 10 system, or the date the member's last effective option selection was filed with  
 11 the retirement system; or

12 (5) there is no surviving spouse.

13 g. Notwithstanding any other provision of this section to the contrary, a member's election must  
 14 comply with the terms of subdivision f of this section to be effective.

15 h. If the retirement board of the system acts with the care, skill, prudence, and diligence under the  
 16 circumstances then prevailing that a prudent person acting in a like capacity and familiar with such  
 17 matters would use in the conduct of an enterprise of a like character and with like aims, in—

18 (1) relying on a consent referred to in paragraph one of subdivision f of this section,  
 19 or

20 (2) determining that at least one of paragraphs two, three, four, or five of subdivision  
 21 f. of this section is true,

22 then (without implication as to what liability the retirement system and the board might have in  
 23 the absence of this subdivision h) such consent or determination shall be treated as valid for  
 24 purpose of discharging the retirement system and the board from liability to the extent of payments  
 25 made pursuant to such action; provided that the foregoing discharges shall not act to deprive the  
 26 surviving spouse of any rights to recover from any party other than the retirement system or the  
 27 board. The retirement system may recover the actuarial equivalent of such discharged payments,  
 28 computed using the plan's actuarial factors, from the surviving spouse with offsets against the  
 29 system's monthly annuity benefit payments to the surviving spouse payable under this section, but  
 30 may not thereby reduce any of those benefit payments by more than 10%.

31  
 32  
 33 Section 31. The provisions of this act shall be severable, and if any clause, sentence, paragraph,  
 34 subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to  
 35 be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be  
 36 confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof  
 37 directly involved in the controversy in which such judgment shall have been rendered.  
 38  
 39

1 Section 32. This act shall not change the law pertaining to any domestic relations order or a support  
 2 order. This act shall not change the law pertaining to a prenuptial agreement or a postnuptial  
 3 agreement executed on or before December 31 of the year immediately after the year the bill is  
 4 enacted.

5 This act shall take effect for all benefit payments beginning after December 31 of the year  
 6 immediately after the year the bill is enacted other than those payments made pursuant to a benefit  
 7 designation executed on or before December 31 of the year immediately after the year the bill is  
 8 enacted.

9  
 10

NEW YORK STATE \_\_\_\_\_

MEMORANDUM IN SUPPORT OF LEGISLATION

Submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: \_\_\_\_\_

SPONSOR: \_\_\_\_\_

TITLE OF BILL: **AN ACT** to amend the retirement and social security law, and the education law in relation to enacting the “Equity for Surviving Spouses Act,” which would which would amend the terms of the eight defined benefit public retirement plans for employees of the State of New York or New York localities, including the City of New York, to provide that: (1) a retired employee’s surviving spouse, if any, is entitled by default to the survivor portion of the joint and 50% survivor annuity form of the retiree’s retirement benefits; and (2) an employee’s surviving spouse, if any, is entitled by default to 50% of the employee’s lump sum death benefits. The surviving spouse could waive the right to receive payments at least equal to those he or she would receive under either of the defaults by executing and filing with the plan a written consent on a plan form. The amendment would enhance the protections for surviving spouses of New York public employees, recognize that marriage is an economic partnership, and encourage public employees and their spouses to prepare together for the eventualities of old age and death.

The amendment was developed in response to concerns raised about deficiencies in protections for surviving spouses of New York public employees and of former employees who are members of public employee retirement plans. While mourning, a member’s surviving spouse may be devastated to learn that they will not receive any survivor or death benefits; some, as a result, may spend the remainder of their lives in destitution. The spousal right of election, which applies to the member’s benefits from New York public employee retirement plans, is often of little utility because there may be no survivor benefits to elect against, and the surviving spouse may not learn of the death benefits in time to recover any benefits.

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There are three reasons that surviving spouses of members of public employee retirement plans are not adequately protected. First, a member's current default retirement benefit is a single life annuity benefit with no survivor benefits. Second, a member's surviving spouse may currently receive none of the member's death benefits. Third, a member's spouse may currently receive no notice of the member's form of retirement annuity benefit election, or of the beneficiary election for annuity or death benefits.

The amendment would remedy these deficiencies with three plan term changes. First, the default retirement annuity benefit for a member with a surviving spouse would become the joint and 50% survivor annuity, with the member's surviving spouse as beneficiary. Second, the default beneficiary of 50% of the death benefit for a member with a surviving spouse would become the member's surviving spouse. Third, the member would be unable to elect a retirement benefit or a death benefit that would provide the surviving spouse, if any, with smaller payments than those the surviving spouse would receive under either default benefit without the spouse's written consent.

The amendment would align New York State public employee retirement practice with that of the federal government, the District of Columbia, most states, and most private-employers, all of which similarly protect the surviving spouses of their employees. The legislation is modeled on the Retirement Equity Act of 1984's enhancement of the surviving spouse protections of the Employee Retirement Income Security Act of 1974 (ERISA). Forty years after surviving spouses of employees of private employers were afforded stronger equitable protections, the amendment would do the same for surviving spouses of New York public employees.

The surviving spouse's consent, like those used in the Retirement Equity Act of 1984, must be on a form that sets forth the surviving spouse's entitlement to the default benefit, and the consequences of consenting to an alternate form of benefit, or a different beneficiary. This consent must be executed on or after the date of the member's marriage. The consent would, moreover, be effective only if the surviving spouse acknowledges understanding the consent and signs the form before a notary public or plan representative. The consent for the annuity benefit must be filed with the plan on or before the date the retirement benefit election is finalized and for the death benefit on or before the date of death.

The amendment would not change the law pertaining to a domestic relations order or a support order. The amendment would govern all benefit payments beginning after December 31 of the year immediately after the year the amendment is enacted. The amendment would not affect payments made pursuant to an annuity or death benefit designation executed on or before such December 31. On the other hand, death benefit or retirement benefit applications executed after this date would be subject to the provisions of the amendment.

As is now the case for the spousal right of election, the amendment's surviving spouse protections would not require any minimum marriage period, and the surviving spouse survivor benefits would not be limited to those accrued during the member's marriage or to those accrued after the amendment's effective date. Furthermore, any individual who is not a surviving spouse for purposes of exercising the spousal right of election would not be a surviving spouse for purposes of the amendment.

The amendment would not affect the current plan benefit rules for New York public employees or

former New York public employees who are plan members who are not married on the later of the date the member files an application for retirement, or elects a form of retirement payment. Marriages occurring after these dates would not confer any surviving spouse rights under the amendment.

The amendment would affect the terms of the eight New York public employee retirement plans:

- New York State and Local Retirement System;
- New York State and Local Police and Fire Retirement System; and
- New York State Teachers' Retirement System,
- New York City Employees' Retirement System;
- New York City Fire Pension Fund;
- New York City Board of Education Retirement System;
- New York City Police Pension Fund; and
- Teachers' Retirement System of the City of New York.

as follows:

#### Education Law § 512. Withdrawal and death benefits

This Section applies to members of the New York State Teachers' Retirement System who die prior to retirement. Under current law, the death benefit, including the accumulated member contributions, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision i, which provides that the member's surviving spouse, if any, is entitled to at least half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated. The current statute references Section 103-a of the decedent estate law, which was repealed effective September 1, 1967. Thus, the reference is replaced by one to the current counterpart, Section 1310 of the Surrogate's Court Procedure Act.

#### Education Law § 513. Optional allowances

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This Section sets forth the forms in which a member of the New York State Teachers' Retirement System may elect to receive his or her retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision five, which provides that the default benefits are paid pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option 3 and be filed with the plan on or before the date the member filed his or her retirement application, or on the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

#### Retirement and Social Security Law § 51. Refunds and Withdrawals

This Section applies to members of the New York State and Local Employees' Retirement System who die prior to retirement. Under current law, the death benefit, including the accumulated member contributions, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision f, which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill,

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prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

#### Retirement and Social Security Law § 60. Ordinary death benefit

This Section applies to members of the New York State and Local Employees' Retirement System who die while actively employed and prior to retirement. Under current law, the death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (g), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

#### Retirement and Social Security Law § 60-c. Death benefit for vested members who die prior to retirement

This Section applies to members of the New York State and Local Employees' Retirement System who have at least ten years of credited service, who are not in active service, and who die prior to retirement. Under current law, the death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (d),

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which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

#### Retirement and Social Security Law § 90. Options

This Section sets forth the forms in which a member of the New York State and Local Employees' Retirement System may receive his or her retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (f), which provides that the default benefits are paid pursuant to Option Three, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option Three and be filed with the plan on or before the date the member finalized his or her retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of

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payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%. References in subdivisions aa. and cc to a designation being made in writing on a blank is replaced by a reference to a designation being made in writing on a form.

#### Retirement and Social Security Law § 351. Refunds and Withdrawals

This Section applies to members of the New York State and Local Police and Fire Retirement System who die prior to retirement. Under current law, the death benefit, including the accumulated member contributions, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (f), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

#### Retirement and Social Security Law § 360. Ordinary death benefit

This Section applies to members of the New York State and Local Police and Fire Retirement System who die prior to retirement while actively employed. The death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. A member is not currently required to designate his or her spouse as a beneficiary for any portion of the member's death benefit.

The measure adds subdivision (h), which provides that the member's surviving spouse, if any, is entitled to is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time

of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 360-c. Death benefit for vested members who die prior to retirement

This Section applies to members of the New York State and Local Police and Fire Retirement System who have at least ten years of credited service, who are not in active service, and who die prior to retirement. Under current law, the death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 390. Options

This Section sets forth the forms in which a member of the New York State and Local Police and Fire Retirement System may receive his or her retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or

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designate his or her spouse as beneficiary. The measure adds subdivision (f), which provides that the default benefits are paid pursuant to Option Three, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option Three and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

#### Retirement and Social Security Law § 448. Death benefits

This Section applies to members who joined a public employee retirement system of the State or City of New York between July 1, 1973, and June 30, 1976 (between July 1, 1976, and July 1, 2009, for police officers and firefighters), and who die prior to retirement while actively employed. Under current law, the death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. The measure adds subdivision (h), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The

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statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 448-a. Death benefit for vested members who die prior to retirement

This Section applies to members who joined a public employee retirement system of the State or City of New York between July 1, 1973, and June 30, 1976 (between July 1, 1976, and July 1, 2009, for police officers and firefighters). Upon the death of a member prior to retirement who has at least ten years of credited service, under current law, the death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 508. Death benefits

This Section applies to members who joined a retirement system of the State or City of New York on or after July 1, 1976, and die prior to retirement while actively employed. Under current law, the death benefit, including the accumulated member contributions, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (g), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not

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be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 508-a. Death benefit for vested members who die prior to retirement

This Section applies to members who joined a public employee retirement system of the State or City of New York on or after July 1, 1976, and die prior to retirement with at least ten years of credited service. Under current law, a death benefit is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 514. Options

This Section sets forth the forms in which members who joined a retirement system of the State or City of New York on or after July 1976, may receive their retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor

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annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (e), which provides that the default benefits are paid pursuant to Option Two with fifty as the percent, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option Two with fifty as the percent and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

#### Retirement and Social Security Law § 606. Death benefits

This Section applies to members who joined a retirement system of the State or City of New York on or after July 1, 1976, (April 1, 2012, for police officers and firefighters), and die prior to retirement while in active employment. Under current law, the death benefit is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (f), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the

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retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

Retirement and Social Security Law § 606-a. Death benefit for vested members who die prior to retirement

This Section applies to members who joined a public employee retirement system of the State or City of New York on or after July 1, 1976 (April 1, 2012, for police officers and firefighters). Upon the death of a member with at least ten years of credited service who dies prior to retirement, under current law, a death benefit, including the reserve-for-increased-take-home-pay, is payable to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated. The measure also corrects the spelling of the word "at" in clause 2 of subsection a.

Retirement and Social Security Law § 610. Options

This Section sets forth the forms in which members who joined a retirement system of the State or City of New York on or after July 1, 1976 (April 1, 2012, for police officers and firefighters), may receive their retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (g), which provides that the default benefits are paid pursuant to Option two with fifty as the percent, so that upon the death of the member after retirement, the member's

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surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option two with fifty as the percent and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

Retirement and Social Security Law § 657. Survivor's benefit for retired state employees

This Section provides that upon the death of a state employee who retired before June 30, 1974, a survivor's benefit, including the reserve-for-increased-take-home-pay, is payable under current law as a lump sum to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's survivor's benefit. The measure adds subdivision twelve, which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action.

N.Y.C. Admin. Code § 13-148. Death benefits; ordinary death benefits.

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This Section provides that upon the death of a member or former member of the New York City Employees' Retirement System, a death benefit, including accumulated member contributions and the reserve-for-increased-take-home-pay, is payable under current law to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefits. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

N.Y.C. Admin. Code § 13-177. Retirement; options in which retirement allowances may be taken.

This Section sets forth the forms in which members of the New York City Employees' Retirement System may receive their retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds a paragraph one which provides that the default benefits are paid pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option 3 and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the

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circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

N.Y.C. Admin. Code § 13-243. Death benefits; ordinary death benefits.

This Section provides that upon the death of a member or former member of the New York City Police Pension Fund, a death benefit, including accumulated member contributions and the reserve-for-increased-take-home-pay, is payable under current law to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefit. The measure adds subdivision e, which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

N.Y.C. Admin. Code § 13-261. Retirement; options in which retirement allowances may be taken.

This Section sets forth the forms in which members of the New York City Police Pension Fund may receive their retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (c), which provides that the default benefits are paid

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pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option 3 and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

N.Y.C. Admin. Code § 13-346. Death benefits; ordinary death benefits.

This Section provides that upon the death of a member or former member of the New York City Fire Pension Fund, a death benefit, including accumulated contributions, the accumulation for-increased-take-home-pay and the reserve-for-increased-take-home-pay is payable under current law to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefit. The measure adds subdivision (g), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who

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may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

N.Y.C. Admin. Code § 13-369. Retirement of original plan members; options in which retirement allowances may be taken.

This Section applies to members who joined the New York City Fire Pension Fund before July 1, 1981, and sets forth the forms in which retirement benefits may be paid. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision e, which provides that the default benefits are paid pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option 3 and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

N.Y.C. Admin. Code § 13-370. Retirement of improved benefits plan members; options in which retirement allowances may be taken.

This Section applies to members who joined the New York City Fire Pension Fund after June 30, 1981, and sets forth the forms in which retirement benefits may be paid. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (f), which provides that

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the default benefits are paid pursuant to Option 3, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option 3 and be filed with the plan on or before the date the member finalized his retirement benefit election. Such consent must include an acknowledgment that the surviving spouse understands the consent. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

N.Y.C. Admin. Code § 13-542. Death benefits; ordinary death benefits.

This Section provides that upon the death of a member of the New York City Teachers' Retirement System, a death benefit, including accumulated deductions, and the reserve-for-increased-take-home-pay is are payable under current law to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefit. The measure adds subdivision (d), which provides that the member's surviving spouse, if any, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference

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describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

N.Y.C. Admin. Code § 13-543. Special death and retirement benefits.

This Section provides that upon the death of a member of the New York City Teachers' Retirement System before retirement, within thirty days after the effective date of his or her service retirement, or within thirty days after filing an application for disability retirement, a death benefit, including accumulated deductions, and the reserve-for-increased-take-home-pay is payable under current law to the member's designated beneficiary, or, in the absence of a designated beneficiary, the member's estate. Under current law, a member need not designate his or her spouse as a beneficiary for any portion of the member's death benefit. The measure adds subdivision (g), which provides that the member's surviving spouse, if any and the surviving spouse was married to the member on the date of the earlier of the member's death, or of the filing of the member's application for a retirement allowance, is entitled to a minimum death benefit of half of the benefit payable under this Section, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. Such consent must include an acknowledgment that the surviving spouse understands the consent and be filed with the plan before the member's death. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time or times; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. The statutory reference describing who may be paid the member's benefits if the member dies before retiring, but has no beneficiary designation in effect, is updated.

N.Y.C. Admin. Code § 13-558. Retirement; options in which retirement allowances may be taken.

This Section sets forth the optional forms in which members of the New York City Teachers' Retirement System may receive their retirement allowance. Under current law, in the absence of an election, benefits are paid as a single life annuity. i.e., only for the life of the member. The member may, alternatively, elect an optional form of benefit that pays the member an actuarially reduced benefit, and, upon the death of the member, a lifetime survivor annuity to the member's designated beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. Under current law, a member need not elect any option or designate his or her spouse as beneficiary. The measure adds subdivision (f), which provides that the default benefits are paid pursuant to Option III, so that upon the death of the member after retirement, the member's surviving spouse, if any, is entitled to lifetime survivor annuity payments that are at least 50% of the annuity payments made to the member under such option if the surviving spouse

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
ESSA May 22, 2023

is the beneficiary, unless the surviving spouse otherwise consented by signing a written consent on a plan form before a notary public or plan representative. The consent must include an acknowledgment that the surviving spouse understands the consequences of waiving benefits payable under Option III and be filed with the plan on or before the date the member finalized his retirement benefit election. No consent is required if the member and the surviving spouse were legally separated at the time of the member's contrary election, or if the surviving spouse could not be located between the time of the member's contrary election and the member's death. If the retirement board acts in accordance with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in determining that the member was unmarried; that the member and the surviving spouse were legally separated; that the member could not locate the surviving spouse at the relevant time; or that at the relevant time the surviving spouse would have been disqualified from exercising elective share rights, the retirement system and the board shall be discharged from liability to the extent of payments pursuant to such action. Moreover, the board may recoup any such discharged payments by reducing each of the surviving spouse's monthly lifetime annuity benefits by no more than 10%.

#### LEGISLATIVE HISTORY:

None. New proposal.

#### FISCAL NOTE AND BUDGET IMPLICATIONS:

Those individual surviving spouses, who would otherwise get no survivor benefits, would benefit significantly from implementing the bill.

The administrative cost of implementing the bill would be insignificant. ERISA plans and federal plans, which have been subject to even more stringent spousal survivor requirements for almost forty years, have not found that the requisite procedures constitute a significant plan burden.

For ordinary death benefits, the benefit form of payment will not change. The only change is that the member's spouse will become entitled to at least 50% of the ordinary death benefit payment, absent a consent to waive the benefit. Thus, this would not affect the plan's cost of those benefits.

For annuity benefits, the benefit form of payment may change. The employee's surviving spouse will be entitled to survivor annuity benefit payments at least equal to 50% of the employee's lifetime annuity benefit payments, absent a spousal consent to waive the benefit. There do not appear to public records disclosing the current plan assumptions about the actual or the expected proportion of different benefit form elections, so it is not possible to estimate the likely changes in those proportions, the extent of the actuarial cost of such a change, if any, or the effect, if any, on the plan funding requirements. For survivor annuity benefits, aggregate plan benefit costs may increase because survivor benefits are COLA adjusted only for beneficiaries who are the member's surviving spouse. N.Y. RETIRE. & SOC. SEC. L. §§ 78-a, 378-a, and N. Y. EDUC. L. § 532. This

EXPLANATION—Matter (underscored) is new; matter in brackets [-] is old law to be omitted  
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speculative cost increase would result from the bill achieving its equitable goal of improving the access of a public employee's surviving spouse to the employee's retirement plan benefits. Moreover, there would be offsetting government cost reductions to the extent the bill would prevent some individual surviving spouses from otherwise being left impoverished on an employee's death, and dependent on New York government public funds.

**SCOPE OF COVERAGE, EFFECTIVE DATE, AND SEVERABILITY:**

If enacted, the bill would not change the law pertaining to the effects of a domestic relations order or a support order. Nor would the bill change the law with respect to a prenuptial agreement or a postnuptial agreement executed on or before December 31 of the year immediately after the year the bill is enacted. The bill shall take effect for all benefit payments beginning after December 31 of the year immediately after the year that the bill is enacted other than those payments made pursuant to a benefit designation executed on or before December 31 of the year immediately after the year the bill is enacted. The bill includes a severability section.

# Explaining ESSA: A Proposal To Protect the Surviving Spouses of New York Public Employees

By Albert Feuer and Anna Masilela



In New York, surviving spouses are protected by the right of election. But the surviving spouses of New York public employees are not always so protected, as there is an unjust and avoidable flaw in those protections. The widow of a retired New York City public employee learned of this flaw firsthand upon the death of her husband who had worked for the city for 20 years and was receiving a monthly pension after he retired. Soon after burying her late husband after 50 years of marriage, the widow was abruptly informed that she would receive no plan survivor benefits. The right of election was of no help, as there was nothing to elect against. As a result, the widow was impoverished, lost her home, and was forced to seek public assistance.

The proposed Equity for Surviving Spouses Act (ESSA) fixes the unjust flaw with a tried-and-true approach that has been protecting the spouses of 100 million private employees, and of three million civilian and military federal employees.

## New York Right of Election

Under New York law, a decedent's surviving spouse generally has the right to elect to obtain a minimum portion of the value of the property owned by the decedent at the time of death. As a rule, absent a surviving spouse's waiver of these rights, the surviving spouse is entitled to the greater of \$50,000 or one-third of the value of the prop-

erty subject to election.<sup>1</sup> The property subject to election includes the decedent's employer retirement plan benefits.<sup>2</sup> The elective share is an amount calculated on the basis of the value of the decedent's elective estate assets rather than a fraction of each of the decedent's assets.<sup>3</sup>

In particular, the surviving spouse of a New York public employee whose only asset was the employee's death benefit from a retirement plan, may elect to receive one-third of the value of such asset, if one-third of the benefit exceeds the \$50,000 right of election minimum threshold. If one-third of the benefit does not exceed \$50,000, the surviving spouse may elect to receive \$50,000 or the entire benefit, whichever is smaller. For example, if the death benefit were \$300,000, the surviving spouse may elect to receive \$100,000, and if it were \$90,000, the surviving spouse may elect to receive \$50,000, and if it were \$30,000, the surviving spouse may elect to receive the entire \$30,000. Similarly, the surviving spouse of a New York public employee whose only asset was the employee's survivor annuity benefits from such a plan may elect to receive one-third of the value of such annuity benefits if one-third of the benefit exceeds the \$50,000 right of election minimum threshold. If one-third of the benefit does not exceed \$50,000, the surviving spouse may elect to receive \$50,000 or the entire benefit, whichever is smaller. When the retirement benefit

is a single-life annuity, there are no survivor benefits, and nothing to elect against.

### **Three Simple Changes Would Protect Surviving Spouses**

ESSA would protect surviving spouses with three simple changes to the terms of the eight New York public employee retirement plans that provide annuity benefits. These changes would provide a surviving spouse of a participant in any of those plans with a minimum annuity benefit and a minimum death benefit.

First, ESSA would change the plans' default retirement benefit to a joint and 50% survivor benefit with the surviving spouse as the beneficiary. Each of the eight New York public employee retirement plans currently permit their plan participants to choose a joint and 50% survivor benefit.

Second, ESSA would only permit a participant to elect a smaller benefit payment to the surviving spouse if the surviving spouse consents to such election in writing on a plan form that explains the effect of such consent, including the precise benefit being waived. Thus, no spousal consent would be needed if the participant elects a joint and 100% survivor annuity with the spouse as the beneficiary, in which the survivor annuity payments are the same as the participant's annuity payments, because the surviving spouse would get more than under the joint and 50% survivor benefit.

Third, ESSA would entitle the surviving spouse to at least half the death benefit, absent the surviving spouse's written consent.

This would prevent a recurrence of the widow's devastating tragedy, as well as the lesser tragedy of a surviving spouse of a retired New York public employee, who, soon after the retiree's funeral, is informed that the surviving spouse must retrench financially because there will be no further pension benefits.

### **ESSA's Three Simple Changes Are Part of a Tried-and-True Approach**

ESSA's three simple changes are part of a tried-and-true approach that has been used for almost 40 years by private pension plans subject to the Retirement Equity Act of 1984 (REACT). Those plans now have almost 100 million active participants, i.e., participants who are not yet collecting plan benefits. This approach has also been used for more than 40 years by the federal employee pension plans, which now have more than three million active participants.

## **The Eight New York Public Employee Retirement Plans**

The eight New York public employee retirement plans consist of two groups of plans that cover different public employees.

First are the three plans for state employees and employees of localities other than New York City, which together had almost a million active participants at the end of June 2022:

1. New York State and Local Retirement System;
2. New York State and Local Police and Fire Retirement System; and
3. New York State Teachers' Retirement System.

Second are the five plans that pertain only to employees of New York City, which together had almost a half-million active participants at the end of June 2022:

1. New York City Employees' Retirement System;
2. New York City Fire Pension Fund;
3. New York City Board of Education Retirement System;
4. New York City Police Pension Fund; and
5. Teachers' Retirement System of the City of New York.

### **What Is the Current Default Retirement Benefit?**

The default retirement benefit for each of the eight New York public employee retirement plans is a single-life annuity, in which the monthly annuity benefit payments begin after the participant files a retirement application and end with the death of the participant. Under such benefit option no one is entitled to any survivor benefits. ESSA would protect surviving spouses by changing the default to a joint and 50% survivor annuity.

### **May a Participant Currently Choose a Retirement Benefit With Survivor Benefits?**

The participant may do so by completing and filing a plan benefit option form. The participant may choose any single individual beneficiary, who may, but need not, be the participant's surviving spouse. ESSA would build upon the current benefit options, which allow participants to choose joint and survivor benefits.

## **What Is the Effect on the Participant's Annuity Payments if the Participant Chooses a Benefit Option With Survivor Benefits for the Surviving Spouse?**

If a plan participant chooses a benefit option with survivor benefits, then the participant's annuity payments would usually decrease by less than 10-15%. This reduction would be affected by the difference between the ages of the participant and the spouse. For example, a participant who is entitled to monthly payments of \$2,000 as a single-life annuity, could be entitled to monthly payments of \$1,800, if the participant chose a joint and 50% survivor annuity. The surviving spouse would receive a monthly lifetime annuity of \$900, i.e., one-half of the reduced benefit paid to the participant. ESSA would insure that the participant's surviving spouse would get annuity benefit payments at least this large.

## **Would ESSA Permit Participants To Choose a Pop-Up Benefit?**

ESSA would permit participants to choose a pop-up benefit, but would require spousal consent because the surviving spouse's annuity payments would be less than the amounts payable under the joint and 50% survivor option. Each of the eight New York public employee retirement plans currently offers "pop-up" joint and 50% survivor options. A pop-up benefit permits the participant to provide the beneficiary with survivor benefits and permits the participant to obtain the maximum benefit if the beneficiary predeceases the participant. For example, a participant who is entitled to monthly payments of \$2,000 with the single-life annuity option, and \$1,800 with the joint and 50% survivor annuity option, could be entitled to \$1,700 with the pop-up joint and 50% survivor annuity option. For the pop-up option, if the spouse survives the participant, the spouse would be entitled to \$850 payments. If, however, the participant survives the spouse, the participant would be entitled to \$2,000 payments as of the passing of the spouse.

## **Do the Eight New York Public Employee Retirement Plans Pay Death Benefits?**

Each of the eight New York public employee retirement plans pays death benefits if a participant in a plan dies before beginning to receive retirement benefits. Those benefits are generally paid as a lump-sum, other than accidental death benefits, which are always payable as annuities to the surviving spouse, if any. The current default beneficiary for death benefits other than accidental death benefits is the participant's estate. The participant may complete and file a plan form to choose any person or persons to receive death benefits other than accidental-death benefits.

The eight New York public employee retirement plans each provide accidental (line-of-duty) death benefits, payable to beneficiaries of participants who die as a natural and proximate result of an accident sustained in the performance of duty. These benefits, unlike other death benefits, are not generally paid as lump sums, but as periodic annuity payments, whose annual amounts generally are 50% of the participant's final annual salary.

Participants do not choose their accidental death benefit beneficiaries. Instead, statutes set forth successive "statutory beneficiaries." First priority is always given to the participant's surviving spouse, if any, who is entitled to the benefit payments as long as the surviving spouse stays alive and unmarried. Second priority is always given to the participant's surviving minor children, if any, until they reach age 18.

New York State provided special COVID accidental-death benefits for public employees who contracted COVID and died within a brief period after reporting for work and used the same statutory beneficiaries.<sup>4</sup> These COVID accidental death beneficiaries were paid to the same statutory beneficiaries as all other accidental-death benefits.

ESSA would protect surviving spouses by providing that, absent a spousal consent, at least half of the death benefits, other than accidental death benefits, is payable to the surviving spouse. ESSA does not address accidental death benefits because they are payable to surviving spouses, if any.

## **Will ESSA Be Retroactive?**

There would be a transition period between the date of enactment and ESSA's effective date.

## **What Is the ESSA Effective Date?**

ESSA would be effective on January 1 of the second year immediately after the year the ESSA bill is enacted.

## **How Long Would the ESSA Transition Period Be?**

ESSA provisions would govern all benefit designations executed after December 31 of the year immediately after the year the ESSA bill is enacted. ESSA would not affect payments made pursuant to a benefit designation executed on or before such December 31.

Thus, marriages solemnized after the appropriate December 31 would not affect death benefit designations executed on or before the same December 31. For example, a designation of the participant's sibling before the same December 31 would remain effective whether the partici-

pant marries the participant's surviving spouse before such designation, at the time of the designation, or after the designation.

On the other hand, death benefit or retirement benefit applications executed after the same December 31 would be subject to the ESSA provisions. The participant's spouse would have the right to the ESSA minimum surviving spouse annuity or death benefits in such cases, absent a spousal valid consent to the contrary.

### **Would ESSA Affect Individuals Who Are Receiving Plan Benefits Before the ESSA Effective Date?**

ESSA would not affect individuals receiving plan benefits before the ESSA effective date. If they chose to receive monthly retirement benefits that would end when they pass away, those benefit payments would not be changed, and there would be no survivor benefits.

### **How Would ESSA Affect the Equitable Distribution Rules that Govern Marital Dissolutions and Separations?**

ESSA would not change the law pertaining to the rights of a public employee's divorced or separated spouse to an equitable portion of the employee's retirement benefits under the New York equitable distribution rules.

The Court of Appeals held unanimously in *Majauskas v. Majauskas* that courts may issue domestic relations orders that may, but need not, allocate a portion of the participant's retirement benefits from a New York public employee retirement plan to the former spouse.<sup>5</sup> In particular, the court allocated part of the participant's lifetime benefits to the former spouse.

### **Would ESSA Change the Law Pertaining to a Domestic Relations Order or a Support Order?**

ESSA would not change the law pertaining to a domestic relations order or a support order. This is because ESSA would only affect the plan terms. Domestic relations orders and support orders may override participant lifetime payment entitlements under the terms of a New York public employee retirement plan as in *Majauskas*. This implies that these orders may also override a participant's beneficiary designations and/or benefit option elections under the terms of the plan. Moreover, ESSA explicitly declares that it shall not change the law pertaining to a domestic relations order or a support order.

### **Would ESSA Change the Law Pertaining to Separation Agreements?**

ESSA would not change the law pertaining to separation agreements. The Court of Appeals held unanimously that separation agreements may overrule beneficiary designations that participants had made pursuant to the terms of a New York public employee retirement plan.<sup>6</sup>

### **Is There a Minimum Marriage Period for a Participant's Surviving Spouse To Have ESSA Rights to Minimum Annuity Benefits?**

The surviving spouse is entitled to the ESSA minimum annuity benefits, absent a valid consent to the contrary by the surviving spouse, regardless of the length of the marriage. ESSA incorporates the EPTL 5-1.1-A right of election marriage rules. Those rules impose no minimum marriage requirements for a surviving spouse to have the right to elect to obtain a share of the participant's elective estate.

### **On What Date Is Marital Status Determined for the Participant's Surviving Spouse To Have ESSA Right to Minimum Retirement Annuity Benefits?**

The participant's marital status is determined for purposes of ESSA rights to minimum retirement annuity benefits on the date the participant filed his or her retirement application, or on the date the participant filed his or her last effective option selection, whichever is later. ESSA disregards changes in marital status between such time and the time of the participant's death.

### **Does a Participant's Marriage After the Plan Retirement Benefits Have Begun To Be Paid Give the Participant's New Spouse Any ESSA Rights to Annuity Survivor Benefits?**

The new spouse would have no ESSA surviving spouse rights. Generally, once retirement benefits commence, the option elected and the beneficiary, if any, designated become irrevocable under the plan terms. ESSA would not change this rule.

### **Is There a Minimum Marriage Period for a Participant's Surviving Spouse To Have ESSA Rights to Death Benefits?**

The participant's surviving spouse is entitled to at least half of the participant's death benefit, absent a valid consent to the contrary by the surviving spouse, regardless of the length of the marriage. ESSA incorporates the EPTL 5-1.1-A right of election marriage rules. Those rules impose no minimum marriage requirements for a surviving

spouse to have the right to elect to obtain a share of the participant's elective estate.

### **On What Date Is Marital Status Determined for the Participant's Surviving Spouse To Have ESSA Right to Minimum Death Benefits?**

The participant's marital status is determined for purposes of ESSA rights to minimum death benefits on the date the participant dies.

### **If a Participant's Spouse Abandons the Participant, Would the Spouse Have Any ESSA Surviving Spouse Rights?**

Such a spouse would have no ESSA surviving spouse rights. ESSA incorporates each of the equitable spousal disqualification rules of EPTL 5-1.2 that are part of the right of election rules. These rules include disqualification for abandonment that continues until the plan participant's death.

### **If a Participant Cannot Locate His Spouse Would the Spouse Have Any ESSA Surviving Spouse Rights?**

Such a spouse would have no ESSA surviving spouse rights. ESSA incorporates the REACT spousal disqualification rule that if a surviving spouse could not have been located, the surviving spouse has no ESSA rights. For ESSA purposes not located means could not have been located by the member if the member had been willing and able to exercise due diligence. This is an equitable expansion of the right of election spousal disqualification rules.

### **How Would ESSA Treat Prenuptial or Postnuptial Agreements?**

ESSA would not affect prenuptial and postnuptial agreements executed on or before the December 31 immediately following the enactment of ESSA, i.e., before the ESSA effective date.

Prenuptial and postnuptial agreements executed on or after the ESSA effective date would not affect the surviving spouse rights to annuity benefits or death benefits from any of the eight New York public employee retirement plans. On or after such date, surviving spouses would only be able to waive their ESSA rights to annuity benefits or death benefits from any of the eight New York public employee retirement plans by executing a plan form that describes the precise benefit being waived, the right to the benefit, and that contains an acknowledgement that the spouse understands the ESSA spousal benefit entitlement that the spouse is consenting to waive.

### **Would ESSA Use the Prudent Person of Care Standard to Determine if the Fiduciaries of the Eight New York Public Employee Retirement Plans Comply With Their ESSA Obligations?**

ESSA would determine the compliance of fiduciaries of the eight New York public employee retirement plans with their ESSA obligations, such as determining the need for a participant's surviving spouse to consent to a waiver of the surviving spouse's ESSA rights, by applying the same prudent person of care standard that governs the investment duties of the fiduciaries of each of the eight New York public employee retirement plans.<sup>7</sup>

### **Would ESSA Violate the New York State Constitution?**

ESSA would not violate the state constitution prohibition on the diminishment of benefits from New York public employee retirement plans. The Court of Appeals in *Majauskas* ruled unanimously that the provision in question, Section 7 of Article V of the New York State Constitution (adopted at the 1938 Constitutional Convention during the Great Depression), was intended to prevent any reduction in the value of the benefit distributions that a public employee retirement plan is required to make.<sup>8</sup> Thus, the provision did not preclude the diversion of a portion of the participant's lifetime benefit payments to the participant's former spouse under a domestic relations order. This implies that the provision does not preclude the ESSA requirements pertaining to whether the participant's surviving spouse is entitled to any of the participant's death benefits or survivor benefits.

### **Would ESSA Impose Undue Administrative Costs on Any of Eight New York Public Employee Retirement Plans?**

The ESSA rules would not impose undue administrative costs on any of those plans. A pension actuary reviewed two of the eight New York public employee retirement plans and found that ESSA would not materially affect the contribution obligation of the sponsors of those plans or the value of the benefits provided by those plans. There is no indication that the federal government, which has more than twice as many active participants than do all the eight New York public employee retirement plans in concert and has been applying similar rules to that of ESSA for more than 40 years, has found that the rules pose an undue administrative burden. Nor is there any indication that private employers, with approximately 100 million active participants, dealing with similar rules for almost 40 years, have found that the rules pose an undue administrative burden. Thus, it is reasonable to conclude that none of the eight New York public employee retirement plans



would find that ESSA would pose an undue administrative burden.

### Would ESSA Unduly Limit the Control of New York Employees Over Their Benefits?

ESSA would not unduly limit the control of New York public employees over their retirement plan benefits. New York laws apply equitable principles to those benefits. Individualized equitable principles are used by the equitable distribution rules to determine entitlements to a public employee's retirement benefits, including the survivor annuity benefits and the death benefits, on a marital dissolution or separation. General equitable principles are used to determine accidental death benefit beneficiaries. General equitable principles are used by the right of election rules and ESSA to determine entitlements to a deceased public employee's retirement plan benefits, including the participant's survivor annuity benefits and death benefits.

### Are the Eight New York Public Employee Retirement Plans Outliers by Failing To Provide Surviving Spouse Protections?

By failing to provide any surviving spouse protections, the eight New York public employee retirement plans are outliers.

Of the 50 states, 43 have public employee retirement plans that make the surviving spouse, if any, the beneficiary for either a lump-sum death benefit or a survivor annuity by law or require the spouse's consent to the participant's election of a less valuable benefit or designation of another person as beneficiary.

Four other states have plans that either make the spouse the default beneficiary, but do not require any spousal consent to the change in such beneficiary or provide notice to the spouse of the participant's election or designation of another person as the beneficiary.

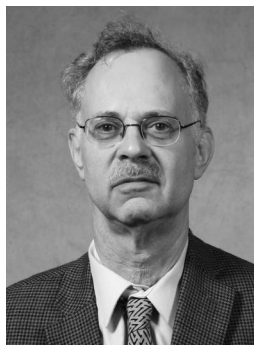
New York, Tennessee, and Alabama are the only states with no public retirement plans that provide any of these protections.

### Conclusion

ESSA would remedy an unjust flaw in surviving spouse protections by adopting a tried-and-true approach used for approximately 40 years by private and federal retirement plans with more than 100 million active plan participants. ESSA would enhance protections for surviving spouses of New York public employees.

### Endnotes

- 1 Estates Powers and Trusts Law (EPTL) 5-1.1-A(a).
- 2 See EPTL 5-1.1-A(b)(G).
- 3 See EPTL 5-1.1-A(a)(2).
- 4 See 2020 N.Y. Laws ch. 89.
- 5 See 61 N.Y.2d 481, at 493 (1984).
- 6 See *Kaplan v. Kaplan*, 82 N.Y.2d 300 (1993).
- 7 Retire & Soc. Sec. § 177.9(b).
- 8 See 61 N.Y.2d, at 493.



**Albert Feuer** is the principal of the Law Offices of Albert Feuer and chair of the Life Insurance and Employee Benefits Committee of the NYSBA Trusts and Estates Law Section.



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The authors would like to thank the members of the Life Insurance and Employee Benefits Committee, whose immense efforts made ESSA possible.

\*The views and opinions expressed in this article are those of the authors and do not necessarily reflect the views and opinions of any entities they represent.

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October 24, 2023

TO: Members of the Executive Committee

FROM: NYSBA Committee on Legal Aid

RE: COLA comment in support of Trusts and Estates Law Sections Affirmative  
Legislative Proposal – New York State Equity for Surviving Spouses Act

The Committee on Legal Aid (COLA) would like to co-sponsor the Trusts and Estates Law Sections Affirmative Legislative Proposal – New York State Equity for Surviving Spouses Act. As representatives of legal services programs that represent persons living in economic hardship, we often see the results of this inequity. At present, surviving spouses can be left completely unaware that their spouse chose a single-life annuity, which leaves the surviving spouse without any pension income upon the death of the employee. The consequences of this decision are horrific, often throwing what was a middle-class household into one of poverty. For all the above reasons, and those outlined in the memo by the New York State Bar Trusts & Estates Law Section, we lend our support to this bill.

**New York State Bar Association**  
*Committee on Diversity, Equity, and Inclusion*

October 3, 2023

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Dear Mr. Feuer:

The Association's Committee on Diversity, Equity, and Inclusion (the "Committee on DEI") has reviewed the Equity for Surviving Spouses Act ("ESSA") legislative proposal (the "ESSA Proposal") of the Association's Trusts & Estates Law Section, Life Insurance and Employee Benefits Committee (the "LIEB Committee"). Our comments on the ESSA Proposal of the LIEB Committee are as follows:

- **We Support the ESSA Proposal.**

We commend the LIEB Committee on its thoughtful and thorough legislative proposal, as well as the Committee's commitment to ensuring access to survivor benefits in New York State. We support the ESSA Proposal, including its stated goal of remedying inequalities in protections for the surviving spouses of New York public sector retirees.

Ensuring that spouses have access to survivor benefits is critical for many New York State families, and will support the economic stability of those impacted. Although this is true generally, it is particularly true in instances of large wage gaps between spouses, as well as for spouses who identify as women. Notably, a 2023 report from the New York State Department of Labor<sup>1</sup> found that in 2021, New Yorkers who identify as women earned only 88.2 cents for every dollar earned by those who identify as men, and that this wage gap can be found at every wage level and across a multitude of industries and occupations. This unconscionable disparity is even more significant for those with intersectional identities; for example, Black or African American women earn only 67.8 cents on the dollar and Hispanic or Latina women earn only 62.9 cents on the dollar. Ensuring that the surviving spouses of New York public sector retirees have access to survivor benefits offers couples and families an opportunity for economic stability in the face of the loss of a loved one, particularly in instances where wage disparities between spouses would result in an even more substantial financial loss to the surviving spouse.

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<sup>1</sup> See N.Y. ST. DEP'T OF LAB., THE GENDER PAY GAP IN THE PANDEMIC ERA (Mar. 14, 2023), <https://nysdolreports.com/gwg/2023-gwgreport/>.

Access to survivor benefits is also critically important for LGBTQ+ individuals who are married, as LGBTQ+ people also experience a substantial wage gap, resulting in the lack of survivor benefits having the capability to economically destabilize these couples and families. A recent study by the Human Rights Campaign<sup>2</sup> found that workers in the United States who identify as LGBTQ+ earn only about 90 cents for every dollar earned by non-LGBTQ+ workers. The wage gap experienced by LGBTQ+ folks is further exacerbated for those with intersectional identities. For example, LGBTQ+ Black workers earn only 80 cents for every dollar, LGBTQ+ Native American workers earn only 70 cents for every dollar, transgender men and women earn only 70 and 60 cents for every dollar respectively, and non-binary, genderqueer, genderfluid, and two-spirit workers earn only 70 cents for every dollar. By remedying the inequalities in protections for the surviving spouses of New York public sector retirees, we work towards a goal of helping spouses and families, including those who already experience disparities in income and wages, maintain economic stability.

- **We Recommend Revisions to Reflect Gender Neutral Language.**

A review of the ESSA Proposal shows that there are various portions of the proposal—including the proposed legal amendments and explanatory narrative—use gendered terms and language, including, but not limited to, his and her. We would recommend revising the language in the ESSA Proposal to use gender neutral language in place of gendered language, in order to ensure that the ESSA Proposal reflects the gender identities and pronouns of all New Yorkers affected.

The Committee thanks the LIEB Committee for its work on this legislative proposal, and remains willing to collaborate with the LIEB Committee and the Trusts & Estates Section on this matter and others.

Signed,

Nihla Sikkander and Dena DeFazio on behalf of the New York State Bar Association's Committee on Diversity, Equity and Inclusion

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<sup>2</sup> See HUM. RIGHTS CAMPAIGN, THE WAGE GAP AMONG LGBTQ+ WORKERS IN THE UNITED STATES (2023), <https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states>.

**From:** [Robert Brown](mailto:Robert.Brown@robertbrownlaw.com)  
**To:** [mschwartz@daypitney.com](mailto:mschwartz@daypitney.com); [Richards, Thomas](mailto:Richards.Thomas@nysba.org)  
**Cc:** [albertfeuer@verizon.net](mailto:albertfeuer@verizon.net)  
**Subject:** FW: Equity for Surviving Spouses Act (ESSA)  
**Date:** Friday, August 18, 2023 4:32:47 PM

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I am happy to report that the GP Section supports the proposal.

**Robert E. Brown, Esq.**  
**Law Offices of Robert E. Brown, PC**

14 Wall Street, 20th Floor  
New York, NY 10005

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**From:** albertfeuer@verizon.net <albertfeuer@verizon.net>  
**Sent:** Thursday, August 17, 2023 10:31 PM  
**To:** Robert Brown <rbrown@robertbrownlaw.com>  
**Cc:** 'Tortora, Kate' <ktortora@nysba.org>; attorney@mampc.net; 'Tamara Kenworthy' <tkenworthy@kenwortheylaw.com>  
**Subject:** RE: Equity for Surviving Spouses Act (ESSA)

Dear Mr. Brown,

That is excellent news. Thanks for the efforts. Please send a confirmation to my Section Chair, Michael S. Schwartz ([mschwartz@daypitney.com](mailto:mschwartz@daypitney.com)) and to Thomas Richards, the NYSBA Deputy Counsel at [trichards@nysba.org](mailto:trichards@nysba.org), so they can add this to their records.

Enjoy the weekend,

Best wishes,

Albert

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**From:** Robert Brown <[rbrown@robertbrownlaw.com](mailto:rbrown@robertbrownlaw.com)>  
**Sent:** Thursday, August 17, 2023 6:53 PM

**albertfeuer@verizon.net**

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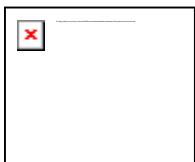
**From:** Fern Finkel <ffinkel@ffelderlaw.com>  
**Sent:** Friday, October 27, 2023 3:13 PM  
**To:** albertfeuer@verizon.net  
**Cc:** Michael S. Schwartz  
**Subject:** Re: Elder Law and Special Needs Section Reapproval of the Equity for Surviving Spouses Act (ESSA)

Hello Albert:

The Elder Law and Special Needs Section supports the Equity for Surviving Spouses Act (ESSA), as previously approved by the Section, and as amended in June.

Very truly yours,  
Fern J. Finkel  
Chair, NYSBA ELSN

**Fern J. Finkel, Esq.**  
Fern Finkel & Associates, PLLC  
Elder Law and Special Needs  
26 Court Street, Suite 2500  
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[Tel] 347-296-8200  
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On Thu, Oct 26, 2023 at 3:00 PM <[albertfeuer@verizon.net](mailto:albertfeuer@verizon.net)> wrote:

Dear Fern,

We have received formal confirmations from each of the other NYSBA Sections and Committees that like the Elder Law and Special Needs Section have decided to support ESSA. If your Section prefers to prepare more than a simple email of support feel free to do so, but I would prefer to go forward at this time with the simple email and then later submit the report.

Thank you again for helping persuade your Section to support ESSA.

Best wishes,

Albert

---

**From:** [albertfeuer@verizon.net](mailto:albertfeuer@verizon.net) <[albertfeuer@verizon.net](mailto:albertfeuer@verizon.net)>  
**Sent:** Tuesday, October 24, 2023 4:19 PM  
**To:** '[ffinkel@ffelderlaw.com](mailto:ffinkel@ffelderlaw.com)' <[ffinkel@ffelderlaw.com](mailto:ffinkel@ffelderlaw.com)>  
**Cc:** Michael S. Schwartz ([mschwartz@daypitney.com](mailto:mschwartz@daypitney.com)) <[mschwartz@daypitney.com](mailto:mschwartz@daypitney.com)>  
**Subject:** Elder Law and Special Needs Section Reapproval of the Equity for Surviving Spouses Act (ESSA)

Dear Fern,

I trust you enjoyed the return to normal life after the conclusion last week of the Elder Law and Special Needs Section fall meeting. I understand that the executive committee reapproved ESSA. Please send me confirmation of this approval, which can be in the form of an email addressed to me and my section chair Michael Schwartz at [mschwartz@daypitney.com](mailto:mschwartz@daypitney.com) or in a memo. I would like confirmation before the end of the week, so that I may complete the filing of the formal ESSA report to the House of Delegates.

Best wishes,

Albert



# NEW YORK STATE BAR ASSOCIATION

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## LOCAL AND STATE GOVERNMENT LAW SECTION

October 3, 2023

New York State Bar Association Executive Committee  
c/o Reports Group

**Via Email Only**

Attention: Greg Arenson, Liaison, Local and State Government Law Section  
[G Arenson@kaplanfox.com]

LISA M. COBB

Chair  
Wallace & Wallace, LLP  
[lcobb@wallacelaw.net](mailto:lcobb@wallacelaw.net)

STEVEN G. LEVENTHAL

First Vice-Chair  
Leventhal Mullaney & Blinkoff, LLP  
[steven@lmbesq.com](mailto:steven@lmbesq.com)

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Second Vice-Chair  
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CHRISTOPHER G. TRAPP

Secretary  
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MICHAEL E. KENNEALLY

Immediate Past Chair  
NYS Municipal Workers' Compensation  
Alliance  
[mkenneally@nycompliance.org](mailto:mkenneally@nycompliance.org)

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James D. Bilik  
*Delmar*

Darrin B. Derosia  
*Albany*

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*New York City*

Marisa Franchini  
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Drew Gamills  
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Michelle J. Kelson  
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A. Thomas Levin  
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Natasha E. Phillip  
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Robert Smith  
*New York City*

Daniel A. Spitzer  
*Buffalo*

Anna Vikse  
*Westbury*

Mindy Zoghlin  
*Rochester*

Michael S. Schwartz, Esq. [[mschwartz@daypitney.com](mailto:mschwartz@daypitney.com)]

Albert Feuer, Esq. [[albertfeuer@verizon.net](mailto:albertfeuer@verizon.net)]

Trusts and Estates Law Section

To the NYSBA Executive Committee and Messrs. Schwartz and Feuer,

I write on behalf of the Local and State Government Law Section in response to your solicitation of our Section's comments on the proposed Equity for Surviving Spouses Act (ESSA), as modified earlier this year. We appreciate your consultation with our Section on the impact that this proposed legislation may have on our Section's members and the state and local governments in New York.

Consistent with our response to the prior iteration of this proposed legislation, our Section's Executive Committee has decided not to take a formal position, because the proposal does not directly affect our individual Section members or the government entities for whom many of them work. That being said, and also consistent with our earlier approach to this matter, we have sought, and are passing along, the input received from some of the retirement systems that will be directly impacted by this proposed legislation. I have attached a joint letter from the five New York City retirement funds, all of which continue to oppose this proposal due to, among other things, important public policy concerns as well as the potentially significant adverse financial consequences that this proposal is likely to have for them and, in turn, for the public employers that participate in those retirement plans. The five funds have representatives of both public employee unions and government officials on their boards.

We encourage the Executive Committee of the New York State Bar Association to give careful consideration to the policy, administrative, fiscal and constitutional concerns raised by the pension systems directly impacted, including the fiscal burdens upon those systems that will necessarily be borne by all public employers that participate in the retirement plans affected.

Once again, we thank you for the opportunity for our Section to provide input on this issue. With kind regards,

Lisa M. Cobb

Chair, Local and State Government Law Section



September 25, 2023

**Via Electronic Mail Only**

lcobb@wallacelaw.net

Lisa M. Cobb  
Chair, Local and State Government Law Section  
New York State Bar Association

To the Executive Committee:

We are writing on behalf of the five New York City Retirement Funds and Systems ("NYCRFS"), regarding the Trusts and Estates Law Section's proposed legislation entitled the Equity for Surviving Spouses Act ("ESSA"). It is our understanding that these comments will be forwarded to ensure that they are appropriately considered during the State Bar Association's legislative review process. This is consistent with the approach taken by Mr. Kenneally as the preceding Section Chair, and we very much appreciate your willingness to continue that approach.

Last year, the NYCRFS unanimously and vociferously objected to this proposal on several grounds, including: (1) the significant restriction it places upon the core prerogatives of the City's employees, (2) the heightened risk of litigation on constitutional grounds, given the radical change that the proposal would make to long-established protected pension rights and benefits, and (3) the undue administrative burdens and costs it imposes upon the NYCRFS. The updated proposal does not alleviate NYCRFS's concerns. We recognize that the fiduciary standard has been modified – perhaps in an attempt to protect or assist the NYCRFS – but the proposal simply cannot avoid creating additional burdens and potential liability exposure.

The NYCRFS again emphasize the following points, in continued objection to the proposal:

First, at its foundational core, the proposed legislation will undoubtedly provoke constitutional challenges on grounds of impairment of contractual pension benefits under the New York State Constitution, Article V, Section 7, a prospect highlighted by the proposal's intended effect upon pensionable time earned before marriage to the required spousal beneficiary. In addition, because under this proposal the member is forced into a specific pension option, members could argue that their pension rights are diminished and impaired. The law currently provides for the ability to choose the pension option that best fits the member's needs at the time of retirement.

We see no reason to confront the complexities and uncertainties of such litigation or to encourage a bill that would certainly provoke it, particularly given our strong fundamental policy objections.

Second, the proposed legislation would strip our members of financial autonomy. It is a fundamental principle of NYCRFS, dating to the inception of the pension systems in the early 20<sup>th</sup> Century, that members should always possess and maintain this deserved right of choice with respect to the pensions they have spent their careers earning. This proposal is based in part upon a federal enactment from almost forty years ago that does not reflect the modern demographics of City employment. It fails to account for the complexities of modern families, which often include current and former spouses and partners, as well as minor and adult dependents who may have special needs. Rather, it seeks to impose a paternalistic, inflexible, and outdated notion of equity in all situations. As such, because this proposed legislation substantially and undeniably infringes on public employees' established rights, we must oppose it as a matter of public policy.

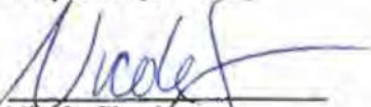
Third, the proposed legislation would impose significant and costly administrative burdens on the Fund. The burdens include, but are not limited to: (1) necessitating large scale changes to various pension administration software systems, which likely will not be possible within the window of as little as one year specified in the proposal; (2) complexities regarding required confirmation of marital status (and regular updating of such status); (3) potential increase in correspondence and client service interactions by members or beneficiaries arguing their right has been illegally taken away; as well as (4) related difficulties presented by the need to locate spouses for informational purposes and required payments.

Moreover, this proposal often would not promote the interests of justice. The seminal case of Majauskas v. Majauskas, 61 N.Y.2d 481 (1984), which already provides for an ex-spouse to receive half of the member's pension that was earned during the marriage, likely intersects with this proposal in ways that create complex scenarios as a matter of equity among members themselves, their various spouses, and their dependents or adult children. In addition, as noted above, the proposal wholly fails to account for the injustice created by a late marriage and needy dependents from earlier marriages. As a result, in the end, the proposal, by attempting to address one scenario, creates a variety of potential unjust outcomes. That is why these decisions are best left to members and an important reason why the proposal is fundamentally flawed.

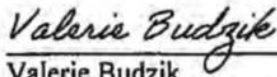
We respectfully conclude by noting that the NYCRFS remain adamant in their objection to this legislation upon which there is such a fundamental difference of views with the authors of the proposal, primarily on public policy grounds, but also as a result of the other burdens and challenges highlighted in this letter. That is why, when this legislation was first brought to the attention of the NYCRFS, employee representatives and public officials on the boards of the systems came together to oppose it. We continue to oppose this bill in its entirety and urge the

New York State Bar Association and its component committees and sections to cease pursuing a far-reaching initiative that is flawed at its very core.

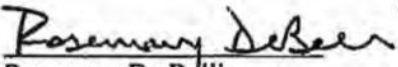
Respectfully,



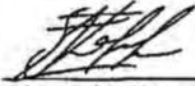
Nicole Giambarrèse  
General Counsel, New York City Police Pension Fund



Valerie Budzik  
General Counsel, Teachers' Retirement System of the City of New York

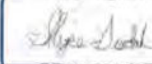


Rosemary De Bellis  
General Counsel, New York City Fire Pension Fund



Alexander Kazazis  
General Counsel, Board of Education Retirement System

DocuSigned by:



Ilyse Sisolak

General Counsel, New York City Employees Retirement System

cc:

Michael S. Schwartz, Esq., Chair, Trusts and Estates Law Section, via e-mail:  
[mschwartz@daypitney.com](mailto:mschwartz@daypitney.com)

Albert Feuer, Member, Trusts and Estates Law Section, via e-mail:  
[albertfeuer@verizon.net](mailto:albertfeuer@verizon.net)



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## PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

January 2, 2024

TO: Committee on Diversity, Equity, and Inclusion  
FROM: President's Committee on Access to Justice  
RE: Support of the Diversity Report Card Recommendations

The President's Committee on Access to Justice has reviewed the Committee on Diversity, Equity, and Inclusion and supports its findings and recommendations as it furthers the President's Committee on Access to Justice's mission of promoting and facilitating access to our justice system for all.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #13

REQUESTED ACTION: Approval of the Report and Recommendations of Committee in NYS Constitution.

Attached is the Report and Recommendations of the Committee on the New York State Constitution regarding the establishment of a temporary commission to study New York's Constitution and make recommendations.

The report argues that New York's Constitution is in need of review and revision, as it contains antiquated passages and duplicative material. The Committee on the New York State Constitution recommends that New York convene a temporary state commission to study the Constitution and recommend amendments.

The report is comprised of five (5) parts:

- I. Background of the Committee on the New York State Constitution.
- II. Overview of the constitutional amendment process in New York.
- III. Synopsis of New York's historical use of constitutional commissions.
- IV. Recommendation of the Committee to form a temporary commission to study the constitution and other important considerations.
- V. Conclusion

The report will be presented by the Committee on the New York State Constitution Chair Christopher Bopst, Esq., and Justin S. Teff, Esq.

**REPORT OF THE NEW YORK STATE BAR ASSOCIATION  
COMMITTEE ON THE NEW YORK STATE CONSTITUTION:  
*Establishing a Temporary State Commission to Study New York's Constitution  
and Make Recommendations***

**INTRODUCTION AND EXECUTIVE SUMMARY**

The constitutional commission has been an important component of New York's state constitutional tradition since 1872.<sup>1</sup> As New York does not permit ballot initiatives, constitutional amendment may be achieved only by legislatively initiated amendments or by constitutional convention, each a cumbersome vehicle.<sup>2</sup> To supplement our state's constitutional tradition, the legislature, as well as the executive, have established various constitutional commissions, either as predecessors to conventions or to vicennial ballot calls, or as standalone entities, for purposes of studying and suggesting revisions to New York's organic law.<sup>3</sup> These commissions have enhanced our state's constitutional evolution and been woven into its constitutional tapestry.

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<sup>1</sup> See PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 154-55 (Fordham University Press 1996) [hereinafter *ORDERED LIBERTY*]; see also generally Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285 (2001) [hereinafter *A Worthy Tradition*].

<sup>2</sup> N.Y. CONST. art. XIX; see also PETER J. GALIE & CHRISTOPHER BOPST, *THE NEW YORK STATE CONSTITUTION* 349-53 (Oxford University Press, 2d ed. 2012).

<sup>3</sup> See generally Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change*, in *DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK* 46 (Gerald Benjamin & Henrik N. Dullea, eds., Rockefeller Institute Press 1997); see also generally Galie & Bopst, *A Worthy Tradition*, supra note 1.

New York’s Constitution is undoubtedly in need of review and revision. The state’s fundamental charter survives in functional form, but is replete with antiquated passages, such as bond issuances long since expired, and the document has grown cumbersome and is littered with extraneous, duplicative material. New York’s most recent constitutional convention met in 1967, with ballot propositions for conventions having been rejected by the voters in 1977, 1997, and 2017. The legislative amendment process is sporadic and piecemeal and has produced few structural changes in the last half-century.<sup>4</sup> As the next convention referendum will likely not occur until 2037, the Committee on the New York State Constitution recommends that New York convene a temporary state commission to study the Constitution and recommend amendments.

This report is comprised of five parts. The first part summarizes the background of the Committee on the New York State Constitution and the issuance of the report. Part II provides an overview of the constitutional amendment process in New York. Part III supplies a synopsis of New York’s historical use of constitutional commissions. Part IV presents the Committee’s recommendations and pertinent considerations. Part V concludes that given the obligation of the coordinate branches of government to maintain the vitality of our state’s charter, New York should immediately establish a temporary advisory constitutional commission.

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<sup>4</sup> See Gerald Benjamin, *All or Nothing at All: Changing the Constitution – The Reform Dilemma*, in NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 286-87 (Peter J. Galie, Christopher Bopst, & Gerald Benjamin, eds., SUNY Press 2016) [hereinafter *All or Nothing*, in BROKEN CONSTITUTION]; see also GALIE, ORDERED LIBERTY, *supra* note 1, at 332 (recounting that in the 25 years since the 1967 convention, 4,437 constitutional amendments were proposed. Sixty-five of these were passed by the legislature and 43 were approved by the voters).

## **I. BACKGROUND OF THE REPORT**

In 2015 New York State Bar Association President David P. Miranda organized the Committee on the New York State Constitution (the Committee). Its function was to serve as a resource on matters related to our state’s Constitution, make recommendations for constitutional amendments, provide counsel regarding the 2017 referendum on whether to convene a constitutional convention, and promote initiatives designed to educate the legal community and public. The Committee has continued to the present day and has examined a wide range of state constitutional topics.

At its meeting held March 10, 2022, Committee Chair Christopher Bopst announced the formation of a subcommittee on constitutional commissions to evaluate the wisdom of convening such a body, and to possibly prescribe the parameters that govern such a commission. The subcommittee met on various occasions. Following extensive research and discussion, the subcommittee issued this Report, which was approved by a vote of the Committee on November \_\_, 2023.

## **II. AMENDING THE STATE CONSTITUTION**

Throughout its history, New York has adopted four state Constitutions: in 1777, 1821, 1846, and 1894. The final one, as amended, is the current constitution under which the state operates. The Constitution of 1777, drafted and approved by the Fourth Provincial Congress, contained no procedure for amending the document.<sup>5</sup> The 1821 Constitution, the first in the state to be ratified by electors

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<sup>5</sup> N.Y. CONST. of 1777; *see also* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 162-188 (1906); *also* Benjamin, *All or Nothing*, in BROKEN CONSTITUTION, *supra* note 4, at 288.



following a constitutional convention called solely for that purpose, established a process of amendment via legislative initiative.<sup>6</sup> This required passage of a proposed constitutional amendment by both houses of the legislature, which would thus be “referred to the legislature then next to be chosen.”<sup>7</sup> If the newly elected senate and assembly each passed the measure a second time, the proposal would be submitted to the voters for approval by a majority of the qualified electors casting a ballot on the amendment.<sup>8</sup> First passage required a simple majority of the elected members in each house while second passage required a two-thirds vote of the same group.<sup>9</sup> The 1846 Constitution modified the legislative amendment process to require a mere majority vote of the elected members of the legislature on second passage.<sup>10</sup> The process by which amendments are originated in the legislature has

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<sup>6</sup> N.Y. CONST. of 1821, art. VIII, § 1; *see also* VERNON A. O’ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK 38-39 (Johns Hopkins Press 1943) [hereinafter CONSTITUTION-MAKING] (noting that although the first constitution contained no amendment mechanism, there “was agitation for constitutional changes as early, at least, as 1811,” both in the legislature and by popular petitions for a convention. After an initial 1820 bill was vetoed by the Council of Revision, the legislature on March 13, 1821 passed a new bill providing for an April convention referendum vote; the “convention question carried by a vote of 106,346 to 34,901, with all but six of the fifty counties favoring the convention.” *See id.*, at 40-42.

<sup>7</sup> N.Y. CONST. of 1821, art. VIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 219. The current wording provides that after first passage, the proposal is to be “referred to the next regular legislative session convening after the succeeding general election of members of the assembly.” N.Y. CONST. art. XIX, § 1.

<sup>8</sup> N.Y. CONST. of 1821, art. VIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 219.

<sup>9</sup> *See id.* The 1821 Constitution did not include a provision for a constitutional convention, although the fact that such a convention could be called was beyond dispute.

<sup>10</sup> N.Y. CONST. of 1846, art. XIII, § 1; *see also* 1 LINCOLN, *supra* note 5, at 74. Article XIX also requires that all proposals be referred to the attorney general for a written opinion “as to the effect of such amendment or amendments upon other provisions of the constitution,” but that failure of the attorney general to render said opinion shall not “affect the validity of such proposed amendment or legislative action thereon.” N.Y. CONST. art. XIX, § 1.

remained largely unchanged in the intervening 175 years. The Constitution provides that if “the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon,” the same “shall become a part of the constitution on the first day of January next after such approval.”<sup>11</sup>

The 1846 convention and resulting Constitution constitutionalized the legislature’s authority to call at any time for a vote of the people to hold a constitutional convention.<sup>12</sup> Yet it also included a profound new mechanism for amendment and revision of the state Constitution that would bypass the legislature, in the form of a mandatory convention referendum to be held every 20 years.<sup>13</sup> This corrected a lacuna in the work of the 1821 convention described by Charles Z. Lincoln, one of New York’s preeminent state constitutional historians. As Lincoln noted, the 1821 Constitution “did not go far enough, for it did not provide for conventions. The legislature could still decline to recommend a convention, or

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<sup>11</sup> N.Y. CONST. art. XIX, § 1. Some states require a higher threshold. Tennessee, for instance, requires a proposed amendment to be submitted to the voters during a gubernatorial election and ratification of “such amendment or amendments by a majority of all the citizens of the state voting for governor...” See TENN. CONST. art XI, sec. 3; see also JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 11 (University Press of Kansas 2006) (explaining that in states with similar approval thresholds, “it has been practically impossible for legislative amendments to be ratified” and “[t]he only realistic opportunity to secure constitutional change...has been through constitutional conventions...”).

<sup>12</sup> N.Y. CONST. of 1846, art. VIII, § 2; see also 1 LINCOLN, *supra* note 5, at 275; also 2 LINCOLN, *supra* note 5, at 209-11.

<sup>13</sup> See *id.* Fourteen states have a constitutionally required periodic convention vote, including: Alaska, Hawaii, Iowa, New Hampshire, and Rhode Island, every ten years; Michigan every 16 years; and Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma every 20 years.

defer action indefinitely, even if there were a general public demand for such a convention.”<sup>14</sup>

The 1846 Constitution thus directed: “At the general election, to be held in the year eighteen hundred and sixty-six, and in each twentieth year thereafter, and also at such time as the legislature may by law provide, the question ‘shall there be a convention to revise the constitution, and amend the same?’ shall be decided by the electors qualified to vote for members of the legislature...”<sup>15</sup> New York was the third state to adopt an automatic convention referendum provision.<sup>16</sup> The 1894 Constitution made 1916 the operative date from which the 20-year referendum call would run,<sup>17</sup> and the convention of 1938 reset the commencement date to 1957 to henceforth avoid submission “during a national or state election year...”<sup>18</sup>

Many of the particulars of New York’s current provisions governing constitutional conventions such as membership, authority, and procedure, were established by the Constitution of 1894, drafted by a convention which was called in 1886 but delayed over delegate selection issues.<sup>19</sup> Lincoln explains, “while the

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<sup>14</sup> See 2 LINCOLN, *supra* note 5, at 210; see also O’ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 7, at 59 (detailing that “[t]he Convention of 1846 had been preceded by a similar situation to that prevailing before the Convention of 1821, that is, popular agitation and legislative inaction. In 1844, petitions from twenty-four counties had asked that the question of holding a convention be submitted to popular vote.”).

<sup>15</sup> See 1 LINCOLN, *supra* note 5, at 275.

<sup>16</sup> See Benjamin, *All or Nothing*, in BROKEN CONSTITUTION, *supra* note 4, at 289-93 (observing that New Hampshire was the first in 1792 and Indiana the second in 1816).

<sup>17</sup> N.Y. CONST. of 1894, art. XIV, § 2.

<sup>18</sup> See GALIE, ORDERED LIBERTY, *supra* note 1, at 255.

<sup>19</sup> See 3 LINCOLN, *supra* note 5, at 671.

people had the right to determine every twenty years whether a convention should be held...details concerning it, were left to the discretion of the legislature.”<sup>20</sup> The 1894 Constitution arrived at “apparently the ultimate practicable stage of evolution on this subject, by providing a convention scheme which is substantially independent of the legislature.”<sup>21</sup>

Article XIX of the Constitution prescribes that if the greater of the votes cast on the convention referendum consent, delegates will be chosen at the next general election, three from each senate district and 15 at-large voted upon by the entire state.<sup>22</sup> The delegates are to “convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.”<sup>23</sup> The convention’s proposals must be submitted to the electorate for potential ratification at an election “held not less than six weeks after the adjournment of such convention.”<sup>24</sup> If a majority of those voting on the proposals approve, the amendments or revision again take effect on the following January the first.<sup>25</sup>

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<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See* N.Y. CONST. art. XIX, § 2.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* Article XIX, § 3 provides that if an amendment is coincidentally proposed by a constitutional convention “relating to the same subject” as an amendment proposed by the legislature, the amendment submitted by the convention is controlling.

After New York’s colonial-era Fourth Provincial Congress became its first constitutional convention in 1777,<sup>26</sup> the state has held eight additional conventions: in 1801, 1821, 1846, 1867-68, 1894, 1915, 1938, and 1967.<sup>27</sup> Of these, the 1867-68, 1894, and 1938 conventions were held pursuant to mandatory twenty-year calls. Convention referendum propositions were rejected by the voters in 1858, 1916, 1957, 1977, 1997, and 2017.

Eighteen states authorize direct initiatives as a mode of constitutional amendment.<sup>28</sup> Others, such as Florida and Utah, have instituted permanent constitutional revision commissions.<sup>29</sup> In 1969 Utah adopted a statute creating a

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<sup>26</sup> New York’s Fourth Provincial Congress convened in White Plains on July 9, 1776, but to avoid the threat of British attack, “it became necessary for the Convention to move from place to place,” including Harlem, King’s Bridge, Odell’s in Phillipp’s Manor, Fishkill, Poughkeepsie, and finally Kingston, where the first state Constitution was adopted on April 20, 1777. *See* 1 LINCOLN, *supra* note 5, at 484, 491-2, 500. This was the only New York State Constitution that took effect without a vote of the people.

<sup>27</sup> The 1967 convention was proposed by the legislature and approved by the voters in 1965, the leading impetus being the U.S. Supreme Court decisions rendering New York State’s apportionment schemes unconstitutional. *See* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 28 (Greenwood Press 1991); *see also* Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 85 (Rose Mary Bailly & Scott F. Fein, eds., New York State Bar Association 2016) (observing that the 1967 convention “was an anomaly, precipitated by the U.S. Supreme Court decision declaring New York’s reapportionment scheme unconstitutional”) [hereinafter *Revision in the Empire State*, in MODERN CONSTITUTION].

<sup>28</sup> The states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See* Galie & Bopst, *Revision in the Empire State*, in MODERN CONSTITUTION, *supra* note 27 at 94.

<sup>29</sup> *See generally*, Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL’Y SYMP. 27, 40-46 (1996) [hereinafter *Changing State Constitutions*].

permanent Constitutional Revision Study Commission. This commission, which was not permitted to make recommendations directly to the people, existed for nearly 50 years but was repealed in 2018.<sup>30</sup> Florida is unique in that it has two constitutionally established permanent commissions having the power to submit proposals for constitutional amendments directly to the voters.<sup>31</sup> The first, the Florida Constitution Revision Commission,<sup>32</sup> was established when the state's 1968 Constitution was adopted. The second commission, the Taxation and Budget Reform Commission,<sup>33</sup> was designed as part of a 1988 constitutional amendment.<sup>34</sup> Each commission meets every 20 years, but the meeting dates are staggered to ensure that one of the commissions meets every ten years. These commissions have both succeeded in having certain of their proposals approved by the voters.

New York does not presently have either a constitutional initiative or a constitutional commission with authority to submit proposals directly to the electorate. The 1967 convention considered proposals for amendment by popular initiative and a permanent revision commission, but both were rejected by the delegates.<sup>35</sup> It seems the "closest New York has come to adopting an initiative was in 1935 when first passage for a constitutional initiative was obtained. The

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<sup>30</sup> *See id.*; *see also* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 14-17 (1996) [hereinafter *Things of the Past*].

<sup>31</sup> *See* Williams, *Things of the Past*, *supra* note 30, at 14-17.

<sup>32</sup> *See* FLA. CONST. art XI, § 2.

<sup>33</sup> *See* FLA. CONST. art XI, § 6.

<sup>34</sup> *See* Williams, *Things of the Past*, *supra* note 30, at 14-17.

<sup>35</sup> *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 212-13 (Rockefeller Institute Press 1997).

proposal failed to obtain the required second passage...,” and “[n]o constitutional convention in New York has proposed the adoption of an initiative in any form.”<sup>36</sup> No proposal for a Florida-style constitutional revision commission has ever gained serious traction in New York.

### **III. THE CONSTITUTIONAL COMMISSION IN NEW YORK**

Alongside the familiar avenues of constitutional revision, various states began experimenting with the constitutional commission as early as 1852.<sup>37</sup> There are two general types of constitutional commission: preparatory commissions, which are gathered to offer information and guidance in connection with an upcoming convention or convention vote, and study commissions, independent groups charged with analyzing and proposing amendments to a state’s constitution. During its history, New York has convened commissions of both stripes, all temporary in duration, counting as few as five and as many as 42 members.<sup>38</sup>

For each of its twentieth century conventions, New York formed preparatory commissions to aid the delegates. The Constitutional Convention Commission was created by the legislature in preparation for the 1915 convention;<sup>39</sup> the

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<sup>36</sup> Galie & Bopst, *Revision in the Empire State*, in MODERN CONSTITUTION, *supra* note 27, at 98-99.

<sup>37</sup> See Galie & Bopst, *Changing State Constitutions*, *supra* note 29, at 40-46; see also generally Williams, *Things of the Past*, *supra* note 30; see also ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968 33-49 (National Municipal League 1970).

<sup>38</sup> In 1875 New York created by legislative concurrent resolution a “commission to devise a plan for the government of cities” (S. Con. Res., 98th Sess., 1875 N.Y. Laws 831 [1875]) (the Tilden Commission), but it has been explained that this was “strictly speaking not a constitutional commission...” Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1293.

<sup>39</sup> L. 1914, ch. 261.

Constitutional Convention Committee (the Poletti Commission) was appointed by executive order of Governor Herbert H. Lehman in anticipation of the 1938 gathering;<sup>40</sup> and the Temporary State Commission on the Constitutional Convention was created by statute in advance of the 1967 convention.<sup>41</sup>

The state had formed a preparatory commission known as the Temporary Commission on the Constitutional Convention, chaired by Nelson Rockefeller, in advance of the 1957 referendum. The convention call was defeated by the voters that November.<sup>42</sup> Prior to the 1997 referendum, Governor Mario Cuomo issued an executive order in May of 1993 establishing a Temporary State Commission on Constitutional Revision.<sup>43</sup> The commission dutifully conducted its work, but again the voters declined to call a convention.<sup>44</sup>

In addition to New York's experiences with preparatory commissions, the state has seen marked success with independent constitutional study commissions.

Though the proposals of the convention of 1867-68 were largely rejected by the voters in 1869, the demand for constitutional reform survived. With the support of Governor John T. Hoffman, the legislature created a 32-member commission to propose revisions that could be adopted via the legislative amendment process.<sup>45</sup>

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<sup>40</sup> Exec. Order, July 8, 1937.

<sup>41</sup> L. 1965, ch. 443, extended by L. 1966, ch. 129.

<sup>42</sup> L. 1956, ch. 814; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1307.

<sup>43</sup> *See* Exec. Order No. 172, N.Y. COMP. CODES R & REGS. tit 9, § 4.172 (1993).

<sup>44</sup> *See*, Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1313-15.



The commission organized in Albany in December of 1872 and adjourned in March of 1873, later presenting its report to the respective houses of the legislature.<sup>46</sup> Many of the commission’s proposals received double passage in the senate and assembly, and were subsequently ratified by the voters in 1874. A “new mode of constitutional reform” was thus born in New York.<sup>47</sup>

In 1921 New York formed a 30-member hybrid group to offer amendments solely to the Constitution’s Judiciary Article.<sup>48</sup> Termed a constitutional convention by statute, this body possessed “all of the characteristics of a constitutional commission,” including the mandate that its proposals be submitted to the legislature for possible further action.<sup>49</sup> This body presented recommendations on subjects such as the jurisdiction of the Court of Appeals, the structure of the supreme court and appellate divisions, consolidation of the New York City courts, and service by Courts of Appeals judges and supreme court justices as constitutional convention delegates.<sup>50</sup> The legislature incorporated the majority of

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<sup>45</sup> L. 1872, ch. 884; *see also* 2 LINCOLN, *supra* note 5, at 469-73 (1906); *also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1290-92.

<sup>46</sup> *See* 2 LINCOLN, *supra* note 5, at 471.

<sup>47</sup> *See* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1291; *see also* JOHN HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 245 (Neale Publishing Co. 1915) (noting, “[t]he commission of 1872 was an innovation in constitutional evolution in this State”) [hereinafter CONSTITUTIONAL HISTORY].

<sup>48</sup> L. 1921, ch. 348. New York had previously convened a 38-member commission to propose amendments to the judiciary article in 1890 (L. 1890, ch. 189), but this group’s recommendations met with less immediate success than the 1921 commission. *See* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1296-98.

<sup>49</sup> Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1300.

<sup>50</sup> *See id.*, at 1301-1303.

this body’s submissions into a new Judiciary Article, which was approved by voters in 1925. The resulting modifications are said to “represent the most significant reform of the judiciary article in the twentieth century...,” and “the last systemic revision of the judiciary article until the adoption of a unified court system in 1961.”<sup>51</sup>

Following the voters’ rejection of the 1957 convention referendum, but in light of the sustained need for constitutional reform, the legislature in 1958 adopted a concurrent resolution creating a Special Legislative Committee on the Revision and Simplification of the Constitution.<sup>52</sup> Like the preparatory commission immediately preceding it, this committee was again chaired by Nelson Rockefeller. After Rockefeller assumed the governorship in 1959, the legislature created a Temporary Commission on the Revision and Simplification of the Constitution to succeed the Special Legislative Committee.<sup>53</sup> These two study commissions both produced comprehensive examinations of the state charter and set forth proposals, many of which were adopted, that led to the “simplification and removal of obsolete material from the constitution.”<sup>54</sup> The success of these commissions “provides ample evidence that important, if non-controversial, constitutional reform can be accomplished in the absence of a convention.”<sup>55</sup>

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<sup>51</sup> *See id.*, at 1302-03.

<sup>52</sup> Assembly Res. 164, 181st Sess. (N.Y. 1958); *see also* GALIE, ORDERED LIBERTY, *supra* note 1, at 264; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1308-09.

<sup>53</sup> L. 1959, ch. 4; *see also* Galie & Bopst, *A Worthy Tradition*, *supra* note 1 p. 1309.

<sup>54</sup> Galie & Bopst, *A Worthy Tradition*, *supra* note 1, at 1309.

<sup>55</sup> *See id.*, at 1311 (noting, “[t]he fact that the more controversial issues, such as reapportionment and state and local tax and debt limits, were the subject of careful scrutiny, but no action, suggests that such issues might require a convention or outside intervention”).

#### IV. RECOMMENDATIONS

The mounting divide between the form and the function of New York's fundamental charter has caused it to be characterized as a "Potemkin Constitution."<sup>56</sup> While the call for improvement is heard, no attempt at meaningful reform has garnered sufficient public or governmental interest to sustain it. Some reform efforts have met with frank opposition from those entrenched and others resistant to erosion of their vested interests.<sup>57</sup> Nonetheless, if New York's Constitution is of sufficient consequence to our state's government and the lives of its citizens to warrant maintaining its vitality, then the question remains how best to accomplish such reform in the near term.

A temporary study commission presents an effective solution to our state's perpetual constitutional stagnation. The Committee believes that creating such a body whose sole function is to recommend changes to the legislature will result in a better chance at achieving the desired reform. A commission would be less costly and cumbersome than a constitutional convention. The legislature would still be the sponsor of any constitutional change and the safeguards of the amendment process (double passage by two consecutively elected legislatures) would still be required for any constitutional change. However, the use of a commission would bring more focus and expertise to the amendment process.

The previous use of such bodies in New York and sister states suggests some prudent practices and alternatives. Necessary subjects of consideration when

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<sup>56</sup> See *BROKEN CONSTITUTION*, *supra* note 4, at 2-6.

<sup>57</sup> See Benjamin, *All or Nothing at All*, in *BROKEN CONSTITUTION*, *supra* note 4, at 300-302.

creating such a commission include the commission's mode of establishment, its duration, its scope of authority, the selection, composition, and compensation of its members, and associated costs of such a body.

New York and other states have formed constitutional commissions by various means, including constitutional provision, statute, legislative resolution, and executive order. This Committee recommends that the commission be established by statute, as contributions by both the legislature and governor in the creation and funding of the body will lend it greater credence and increase the chances that the commission's proposals will reflect the needs of the state. Further, the commission should be of a fixed and limited duration. Although some other states have established permanent periodic or standing bodies, the most successful study commissions in New York's history have been temporary bodies. A temporary commission will necessarily limit attendant expenditures. Draft legislation for the creation of such a constitutional commission is Appendix A to this report.

Previous commissions in New York and other states have differed in their scope of authority. Some bodies have been afforded unlimited power to recommend proposals to amend their state's Constitution, while others, such as New York's 1890 commission on the judiciary, have been constrained to certain subjects. The Committee believes the proposed commission should be unlimited in its purview. As the commission will ultimately submit its proposals to the legislature for possible further action, the oft-raised fear about a possible constitutional convention – that the removal of beloved provisions of the constitution could be proposed directly to the voters – is not present.

The commission's membership will bear profoundly on its legitimacy and the likelihood of favorable action on its proposals. The body ought to be sufficiently broad to encompass a diversity of participants and perspectives. The Committee proposes a group of 40 individuals, five selected by the governor, five by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts,<sup>58</sup> ten by the Speaker of the Assembly, five by the assembly minority leader, ten by the Temporary President of the Senate, and five by the senate minority leader. No more than three of the five appointments made by the governor and Chief Judge should be of the same partisan affiliation. Consideration was afforded by the Committee to a commission chosen solely by the legislature, but it is believed that adding commissioners selected by the executive and judicial branches will enhance deliberations addressed especially to those branches' concerns. Guidance is taken as well from the Florida Constitutional Revision Commission, whose members are chosen by, among others, the governor and the Chief Judge of the Florida Supreme Court. Mindful, however, that the governor and Chief Judge play no formal role in the amendment process, the Committee believes the majority of the commission members (30 out of 40) should be appointed by the legislative leaders. The Committee further proposes that the leader of the majority party in each house should have more appointments than the minority party, to better reflect the will of the people.

The commission's ranks should include professors of law and political science, similar to New York's Law Revision Commission.<sup>59</sup> The Committee

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<sup>58</sup> The Administrative Board of the Courts consists of the Chief Judge of the Court of Appeals and the presiding justice of each of the state's four judicial departments. *See* N.Y. CONST. art. VI, § 28(a).

<sup>59</sup> N.Y. LEG. LAW § 70.

proposes that currently-serving legislators and judicial officers not be permitted to serve as members of the commission, in order that the deliberations of the assembly be free from the existent political environment to the fullest extent and to obviate concerns regarding dual compensation and office-holding.<sup>60</sup> It is recommended that public sector retirees receiving state or municipal pensions be permitted to serve and be duly compensated, but that no further pension credit accrue based upon such service.

Compensation should be provided for the commissioners' devotion of their time and expertise at a level commensurate with current members of the legislature, together with allowance for travel and associated expenses. This will hopefully encourage diverse participation and simultaneously ward against the perception of elitism.

Consistent with this Committee's 2015 recommendation for a preparatory commission, we propose that any study commission be afforded "a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel."<sup>61</sup> The Committee echoes the 2015 report's further

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<sup>60</sup> See Gerald Benjamin, *Constitutional Change in New York State: Process and Issues*, in MODERN CONSTITUTION, *supra* note 27, at 67 (explaining, "[i]n 1969, the combined effect of the constitutional provisions that legislators' [Article III, § 6] and judges' [Article VI, § 25] pay not be increased or diminished while in office and that delegates be compensated at the level of Assembly members [Article XIX, § 2] resulted in all incumbents who were convention delegates getting double or near-double pay for the year. Additionally, statutes passed for both the 1938 and 1967 conventions allowed additional pension credits to accrue as a result of public officials serving as delegates, a practice condemned then and since as an indefensible boondoggle").

<sup>61</sup> See Report of the New York State Bar Association Committee on the New York State Constitution: *The Establishment of a Preparatory State Commission on a Constitutional Convention*, approved by the House of Delegates November 7, 2015, at 22, available at: <https://nysba.org/app/uploads/2020/02/Committee-on-State-Constitution-Report-1.pdf> (last visited September 16, 2023).

observations that “commission will require significant appropriations to accomplish [its] task” but that this would undoubtedly be “a wise investment.”<sup>62</sup> Acknowledging again both realities, adequate appropriations should be allotted for the commission’s compensation, the prerequisites of its labors, necessary support, and other justifiable expenditures.

## V. CONCLUSION

New Yorkers will likely not have occasion to vote on a constitutional convention until 2037.<sup>63</sup> Given the pressing need for revision of our state’s Constitution, the Committee on the New York State Constitution recommends the immediate formation of a temporary constitutional study commission to fill this void. The constitutional commission has a worthy tradition in New York and this Committee wholeheartedly recommends its revival.

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<sup>62</sup> See *id.*, at 22-23.

<sup>63</sup> Given that voters have rejected the last three convention calls in New York, and no constitutional convention has been held in any state since the early 1990s, approval in 2037 is hardly assured.

## **APPENDIX A**

### **Model Statute – Temporary Advisory Commission on the Constitution**

AN ACT creating a temporary advisory commission on the state constitution to make a comprehensive study of the state constitution and provide recommendations to the legislature for amendment and revision

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

Section 1. A temporary state commission is hereby created to be known as the temporary advisory commission on the state constitution. The commission shall make a comprehensive study of the state constitution and provide recommendations to the legislature for revision and simplification. The commission shall collect and compile such information and data as the commission deems useful to its purpose.

§ 2. The commission hereby created shall consist of forty residents of the state, of whom five shall be appointed by the governor, five by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts, ten by the Speaker of the Assembly, five by the assembly minority leader, ten by the Temporary President of the Senate, and five by the senate minority leader. No more than three of the five appointments made by the governor and by the Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts shall be of the same political affiliation. The governor, Chief Judge of the Court of Appeals in consultation with the Administrative Board of the Courts, Speaker of the Assembly, and Temporary President of the Senate shall each appoint at least one professor of law or political science from a duly accredited institution. Such members shall serve at the pleasure of the officer making the appointment. The members of the commission shall elect from its membership a chair and vice-chair, who shall appoint a steering committee. Vacancies in the membership of the commission and among its officers shall be filled in the manner provided for original appointments. Currently serving members of the legislature and currently serving judicial officers shall not be authorized to serve on the commission.

§ 3. For the accomplishment of its purpose the commission shall be authorized and empowered to employ an expert non-partisan staff and undertake any studies, inquiries, surveys, or analyses it may deem relevant through its own personnel or



in cooperation with any public or private agencies, including institutes, universities, foundations, or research organizations. The commission shall be empowered to make recommendations to the legislature regarding any aspect of the state constitution.

§ 4. The commission may employ and at pleasure remove such personnel as it may deem necessary for the performance of its function and fix their compensation within the amounts made available by appropriation.

§ 5. The commission may meet within and without the state, hold hearings, and shall have all the powers of a legislative committee pursuant to the legislative law.

§ 6. The members of the commission shall receive compensation equivalent to that of a member of the legislature and shall be allowed their actual and necessary expenses incurred in the performance of their duties. Public sector retirees shall be permitted to serve on the commission but shall accrue no further pension credit based upon such service.

§ 7. The commission may request and shall receive from any department, division, board, bureau, commission, or agency of the state of any political subdivision thereof such facilities, assistance, and data as it deems necessary or desirable to properly carry out its duties.

§ 8. The commission is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable, or proper to carry out the purposes of this statute.

§ 9. The commission shall make an interim report to the legislature on the progress of its work not later than six months from the date of the commission's initial meeting, with a final report to be issued not later than one year from the date of said meeting. It shall include in its reports such recommendations for revision and simplification of the constitution as it may deem necessary or desirable.

§ 10. Within thirty days of the date of the commission's initial meeting, it shall request from the legislature a list of constitutional issues, priorities, or other suggested modifications as the legislature may deem appropriate for consideration by the commission.



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #14**

REQUESTED ACTION: Not applicable.

President-Elect and Chair of the House of Delegates, Domenick Napoletano will speak to items that need to be shared with attendees.



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #15**

REQUESTED ACTION: Not applicable.

The next meeting of the House of Delegates will take place on Saturday, April 6, 2024, at the Bar Center in Albany and remote.

**The New York Bar Foundation  
Annual Meeting  
MINUTES**

**January 20, 2023  
New York City**

**PRESENT:** Ahn; Aidala; Alcott; Alomar; Arenson; Baum; Beecher; Beltran; Berman; Block; Braverman; Brown; Bucki; Buholtz; Campbell; Chandrasekhar; Chang; Christian; B. Cohen; D. Cohen; O. Cohen; Cohn; Davidoff; Degnan; Doyle; Dubowski; Effman; Feal; Fernandez; Fogel; French; Gerstman; Gilmartin; Gold, Grays; Gross; Haig; Harper; Heath; Jackson; Jacobson; Jaglom; James; Jamieson; Jones; Kamins; Karson; Kenney; Kiernan; Klass; Kobak; Koch; Kohlmann; LaMancuso; Lara-Garduno; LaRose; Lathrop; Lau-Kee; Leber; Lenci; Lessard; Levin Wallach; Lewis; Lisi; Loyola; Lustbader; Lynn; Madigan; Marinaccio; Markowitz; Maroney; Martin; Matthews; May; McCann; McGinn; McKeegan; McNamara; C. Miller; M. Miller; Minkoff; Moretti; Morrissey; Muller; Mulry; Napoletano; Nowotarski; Petterchak; Quaye; Riano; J. Richardson; Richter; Riedel; Rothberg; Russell; Santiago; Sargente; Seiden; Sen; Sharkey; Silkenat; Simon; Skidelsky; Sonberg; Stephenson; Sunshine; Swanson; Sweet; Tambasco; Vaughn; Wesson; Westlake; Wolff; Woodley; Yeung-Ha; Younger

President Carla M. Palumbo called the meeting to order.

**Approval of minutes:** On a motion duly made and carried, the minutes of the Annual Meeting of the New York Bar Foundation of January 22, 2022, were accepted.

**Report of Officers:** President Carla M. Palumbo noted the distribution of the 2022 Annual Report of the New York Bar Foundation, included with the House of Delegates materials. The Annual Report sets forth in detail the operations and activities of the Foundation during 2022. Ms. Palumbo shared highlights including:

- Honored John D. Feerick, dean emeritus and professor, Fordham Law School with the Foundation's Lifetime Achievement Award during the upcoming virtual Annual Assembly of the Fellows.
- Presented more than \$189,000 in fellowships and scholarships to 98 students in a multitude of legal practice areas.
- Allocated more than \$601,000 in grants to 97 programs. These grants served 1,291,404 people and impacted more than 2.7 million vulnerable individuals and families throughout New York State.
- Partnered with the Young Lawyers Section for our seventh year to raise funds to support the Foundation's grant program with a special focus on Veteran's legal services projects. This on-line campaign raised more than \$23,000 from donations by lawyers, their families, and friends from throughout New York State, as well as Connecticut, Colorado, Florida, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, South Carolina, and Virginia.

- Welcomed thirty-eight new Fellows from across New York State. The Fellows are invaluable partners in the success of the Foundation, exemplifying and demonstrating that the practice of law is a helping profession. Fellows are distinguished members of the bench and bar who are recognized for outstanding professional achievement and dedication to the legal profession.

Ms. Palumbo reported on the Foundation's first on-line and live auction and thanked the NYSBA and President Sherry Levin Wallach for the opportunity for the Foundation to be part of the Presidential Gala.

She invited Fellows to move into higher circles of giving and annual meeting attendees to donate to the Foundation in honor of annual meeting award recipients or section chairs. Ms. Palumbo closed her report reminding everyone that the Annual Meeting and Assembly of the Fellows will be held on January 27, 2023, and will honor Susan Lindenauer on receiving the Foundation's Lifetime Achievement Award, and Michael Getnick on receiving the Foundation's President's Award.

**Ratification and confirmation of actions of the Board:** A motion was made and adopted ratifying, confirming, and approving the actions of the Board of Directors since the 2022 Annual Meeting.

**Report of Nominating Committee:** Reporting on behalf of the Nominating Committee, Justice Cheryl Chambers placed in nomination the following slate of nominees presented by the Committee for the position of Director for terms commencing June 1, 2023, and concluding May 31, 2026:

- June Castellano, Rochester
- James Kobak, New York City
- Ellis Mirsky, Nanuet
- William T. Russell, New York City
- Mirna Santiago, Pawling

A motion was made and adopted electing said Directors.

Adjournment: There being no further business, the Annual Meeting of the Foundation was thereupon adjourned.

Respectfully submitted,

*Pamela McDevitt*

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Secretary



TO: Members of The New York Bar Foundation

FROM: Nominating Committee of The New York Bar Foundation  
Gioia Gensini, Chair  
Hon. Cheryl E. Chambers  
John Gross  
David Schraver  
Lucia Whisenand

DATE: January 19, 2024

RE: Report of the Nominating Committee

The Nominating Committee of The New York Bar Foundation is pleased to submit the following slate of incumbent Directors of The Foundation Board of Directors as recommended by the Nominating Committee to begin their next 3-year term:

Directors to begin their second term to commence June 1, 2024, concluding May 31, 2027

- Vincent Doyle, Buffalo
- Lauren Sharkey, Schenectady

Directors to begin their third term to commence June 1, 2024, concluding May 31, 2027

- Gioia Gensini, Syracuse
- Ellen Makofsky, Garden City

**Statement of Activities**  
**For the year ended December 31, 2023**  
**(Before Audit)**

**REVENUES:**

Contributions received:

Unrestricted	\$ 473,172
Restricted	247,881
Cy Pres	120,483
	<hr/> 841,536

Income from investments	275,820
Administrative income	15,000
Other	21,475
	<hr/> 312,295

**TOTAL REVENUES** **1,153,831**

**GRANTS AND DISTRIBUTIONS:**

Unrestricted grants	557,084
Grants from restricted contributions	56,500
Grants from Cy Pres funds	0
Distributions from restricted funds	299,597
	<hr/> 913,181

**EXPENSES:**

Auditing	13,075
Salaries & fringe	283,521
General and administrative	335,618
	<hr/> 632,214

**DEPRECIATION** **10,737**

**TOTAL GRANTS AND EXPENSES** **1,556,132**

**DECREASE IN NET ASSETS** **\$ (402,301)**

The New York Bar Foundation has adopted for 2023 a total return investment and expenditure policy under which 6% of the rolling five years of the net realized and unrealized appreciation is available for expenditure.

# Financial Report

## THE NEW YORK BAR FOUNDATION

As of December 31, 2023

(Before Audit)

### Statement of Financial Position

#### ASSETS

Cash, including interest bearing accounts	\$ 428,679
Investments	6,866,888
Cy Pres Fund	131,151
Endowed Funds	774,690
Catalyst Fund	798,430
Other	46,565
Accounts receivable Building Agreement	3,379,725
Furniture, fixtures and library, net	<u>16,872</u>

**TOTAL ASSETS** \$ 12,443,001

#### LIABILITIES AND FUND BALANCE

Deferred Income	9,050
Accounts Payable	<u>16,447</u>
	<b>25,497</b>

#### TOTAL LIABILITIES

#### BOARD DESIGNATED FOR:

Endowed Assets	774,690
Restricted Assets	1,169,564
Cy Pres Net Assets	131,151
Undesignated	<u>10,342,099</u>

**TOTAL NET ASSETS** **12,417,504**

**TOTAL LIABILITIES AND NET ASSETS** \$ 12,443,001