Long Island Association for Supervision and Curriculum Development

Legal Update for Administrators

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Focus Today

- ESSA Highlights
- New State and Federal Statutes and Regulations
- Recent State and Federal Guidance
- Select Topics/Decisions of Interest

Every Student Succeeds Act (ESSA)

- Reauthorizes the Elementary and Secondary Education Act of 1965 (ESEA). Signed into law on December 10, 2015 (Public Law 114-95).
- Replaces the previous reauthorization of ESEA – No Child Left Behind Act (NCLB).

Paradigm Shift

- ESSA seeks to provide greater control to states and local school districts and more flexibility over certain decisions (*e.g*. standards, accountability and educator evaluation).
- ESSA prohibits the U.S. Secretary of Education and the USDOE from mandating or controlling standards, curricula, assessments, teacher certification and evaluation systems.
- Eliminates provisions relating to Highly Qualified Teachers, annual yearly progress (AYP) and requirements for supplementary educational services.

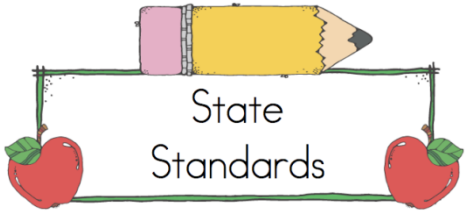
Timeline

- ESSA took effect upon enactment but certain provisions are delayed or have later effective dates.
- SED has characterized the 2016-2017 school year as a "soft launch" of ESSA.
- Most of the provisions of ESSA, particularly those relating to non-competitive formula grants (*e.g.* Title I, Part A and Title II, Part A) do not take effect until the 2017-2018 school year.
- Competitive grant programs are effective October 1, 2016.
- New accountability provisions and State systems to take effect in 2017-2018. Transition underway.
- McKinney-Vento (Homeless) changes are effective October 1, 2016.

Implementation

- U.S. Department of Education issued Notices of Proposed Rulemaking on Accountability, State Plans and Data Reporting (comments due by August 1, 2016) and Assessments (comments due by September 9, 2016).
- SED has started the process of developing its new State Accountability Plan/System with stakeholder engagement. Under the proposed federal regulations, state plans must be submitted in either March 2017 or July 2017.
- State regulations to implement changes to McKinney-Vento are anticipated in September 2016.

ESSA - Standards



- ESSA requires states to adopt "challenging State academic standards", aligned with college and career and technical education requirements/standards, for all public schools in mathematics, reading/language arts and science, with not less than 3 levels of achievement (§1111[b]).
- State may adopt alternate academic achievement standards for students with the most significant cognitive disabilities. State plan must include English language proficiency standards.
- States are **not** required to submit the State standards to USDOE for approval.

What about the Common Core?

- "… [T]he Secretary shall **not** attempt to influence, incentivize or coerce State – adoption of the Common Core State Standards …" (§1111[j]). The decision whether to use any or all of the Common Core State Standards is left up to the individual states.

Common Core (cont'd)

- ESSA **prohibits** the Secretary and USDOE from mandating, directing or controlling a state or school's specific instructional content, academic standards and assessments, curricula or program of instruction developed and implemented to meet the requirements of the Act , including any requirement, direction, or mandate to adopt the Common Core State Standards (§8526A).

- ESSA **prohibits** USDOE from using any funds provided to USDOE under the Act (whether through a grant, contract or cooperative agreement) to "endorse, approve, develop, require or sanction any curriculum, including any curriculum aligned to the Common Core State Standards …" (§8527[b]).

ESSA - Assessments

- ESSA still requires annual testing in ELA and Math in grades 3-8, and at least once in grades 9-12; and in science, at least once during grades 3-5, 6-9 and 10-12. Includes provisions for testing of ELLs and SWDs.
- Law provides new flexibility:
  - Permits partial delivery in form of portfolios, projects or extended performance tasks;
  - Includes an exception for 8th grade students taking advanced math;
  - Permits states to develop and administer computer adaptive assessments; and
  - Authorizes local educational agencies, with State approval, to substitute a nationally-recognized high school academic assessment.

95% Participation Rate

- ESSA continues, for accountability purposes, the requirement that the State annually measure the achievement on State assessments of not less than 95% of all students and 95% of all students in each subgroup (§1111[c]).
- Left to the State to determine how it will factor the 95% participation rate into its accountability system.

What about Opt-Out?

- ESSA states that nothing in the Act "preempts any state or local law regarding the decision of a parent to not have the parent's child participate in the [state] academic assessments…" (§1111[b][2][K]).
- Parental notification requirements include the obligation to notify parents of any policy, procedure or parental right to opt out, where applicable (§1112[e]).
- Proposed federal regulations (§200.15) would require states to take actions against schools with low participation rates. Schools with low participation rates would also be required to develop a plan to increase participation rates.

ESSA - Accountability

- Current State ESEA flexibility waiver expires August 1, 2016.
- New State accountability systems and support and improvement systems take effect 2017-2018.
- State accountability system must:
  - Establish ambitious long-term goals;
  - Measure indicators for all students and subgroups;
  - Provide for meaningful differentiation of schools;
  - Include a methodology for the identification of schools in need of intervention and a process for determining state and district action in such schools.
- In New York State, ESSA "Think Tank" assembled and development process underway.

Accountability - Changes

- ESSA requires "substantial weight" to be based on assessment results and graduation rates but also permits the use of not less than one indicator of school quality or student success (*e.g*. student engagement, school climate and safety; college readiness or other indicator selected by the State).
- New terminology:
  - Schools in Need of Comprehensive Support and Improvement (lowest performing in State);
  - Schools in Need of Targeted Support and Improvement (those identified based on subgroup underperformance).
- School choice optional; supplemental educational services no longer required.

ESSA – Teacher Evaluation

- ESSA prohibits the Secretary or USDOE from prescribing "any aspect or parameter of a teacher, principal, or other school leader evaluation system" or any "indicators or specific measures of teacher, principal or other school leader effectiveness or quality." (§1111[e] *see also* §2302).
- Subgrants to LEAs may be used for developing or improving a rigorous, transparent, and fair evaluation and support system for teachers, principals and other school leaders that is based in part on evidence of student achievement which *may* include student growth and which must include multiple measures of performance (§2103[b]).
- Remember APPR is in New York Law.

ESSA – Teacher Qualifications

- Former NCLB requirements for Highly Qualified teachers repealed.
- Federal government prohibited from mandating, directing or controlling teacher, principal or other school leader professional standards, certification or licensing (§2302[a]).

ESSA – McKinney-Vento (Homeless)

- ESSA amends McKinney-Vento Homeless Assistance Act effective October 1, 2016.
- Among other things, the amendments:
  - Expand the defn. of "school of origin" to include preschool and feeder schools;
  - Remove the definition of "awaiting foster care placement" from the definition of homeless;
  - Require continued enrollment and transportation during any enrollment dispute pending final resolution of the dispute, including *all* available appeals;
  - May require transportation to the school of origin through the end of the school year in which the student is permanently housed (SED is awaiting guidance from USDOE);
  - Include various provisions to ensure homeless students do not face barriers to enrollment, retention, academic and extra-curricular activities, receipt of credit for prior coursework.
  - Increase the responsibilities of the homeless liaison.

McKinney-Vento (cont'd)

- SED is seeking further guidance from USDOE on several interpretation issues.
- SED anticipates adopting emergency regulatory amendments to §100.2(x) of the Commissioner's regulations in September 2016.
- SED plans to introduce a legislative proposal in the Winter of 2017 to make necessary conforming amendments to State law.
- On July 27, 2016 USDOE issued updated Guidance regarding homeless students and ESSA. Available at: http://www2.ed.gov/programs/homeless/legislation.html

Foster Care

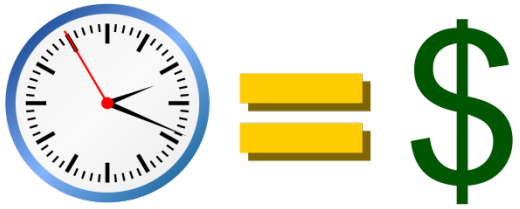
- ESSA adds provisions to ensure educational stability for students in foster care.
- No later than 1 year after ESSA enacted, LEAs required to develop and implement clear written procedures governing how transportation to maintain foster care children in their school of origin when in their best interest will be provided, arranged, and funded during their time in foster care. Such procedures shall ensure that those that need it will receive transportation in a cost-effective manner and, if there are additional costs, the LEA will provide transportation if the child welfare agency agrees to pay the cost, the LEA agrees to pay the cost, or they agree to share the cost (§1112[c][5]).

Parents Right-to-Know

- ESSA includes a number of requirements for LEAs to provide notification to parents about such matters as:
  - The qualifications of a student's teachers; including timely notice in the event a student is assigned/taught for 4 or more consecutive weeks by a teacher who is not certified/licensed in the area to which assigned;
  - Testing transparency and information on assessments;
  - English proficiency for ELL parents;
  - Information on the level of a student's achievement.

Wages and Benefits

Fair Labor Standards Act (FLSA) Basics

- Key Wage and Hour Requirements: 
  - Unless an employee is exempt, an employer must pay a minimum wage established under law (currently $7.25/hour) for the first 40 hours worked, and not less than 1.5 times an employee's regular rate of pay for hours worked in excess of 40 hours in a workweek.

"White Collar" Exemption

- FLSA exempts from the minimum wage and overtime requirements individuals who are employed in a *bona fide* administrative, executive or professional capacity, including teachers and academic administrators. See FLSA §213 and 29 C.F.R. Part 541.
- FLSA also provides an exemption for certain highly compensated employees ("HCE") who earn above a certain annual compensation level and who satisfy a minimal duties test.

General Rule for Determining If Exemption Applies

- In order to qualify for exemption, a white collar employee generally must be:
  - Salaried, *i.e.* paid a fixed, predetermined salary not subject to diminishment based on quality of work (the "salary basis test");
  - Paid more than a specified salary amount on a weekly or less frequent basis (the "salary level test"); and
  - Primarily performs administrative, executive and/or professional duties (the "duties test").
- Teachers are **not** subject to the first two tests.

DOL Final Overtime Rule

- In May 2016, the DOL published its final rule updating the overtime regulations to increase the salary thresholds for determining eligibility for these exemptions, significantly expanding the universe of employees entitled to overtime pay, effective December 1, 2016.

Teachers and School Administrators

- Under the FLSA, bona fide teachers (*e.g.* regular classroom teachers, teachers of SWDs, occupational education teachers etc.) are exempt from the minimum wage and overtime provisions **regardless** of their salary levels. **Teachers are not impacted by new OT rule.**
- Under the FLSA, administrators (*e.g.* superintendents, assistants, principals and vice-principals) exempt status is subject to salary test but it is not anticipated that any administrators will be impacted by new OT rule.

Comparison Current vs. New Rule

	Current regulations (Until Effective Date of Final Rule)	Final Rule (Effective December 1, 2016)
Salary Level	$455 weekly ($23,660 for a full-year worker)	$913 weekly ($47,476 for a full-year worker) 40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)
HCE Total Annual Compensation Level	$100,000 annually	$134,004 annually 90th percentile of full-time salaried workers nationally
Automatic Adjusting	None	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level.	Up to 10% of standard salary level can come from nondiscretionary bonuses, incentive payments, and commissioners, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of executive, administrative and professional duties.	No changes to the standard duties test.

NYS Minimum Wage Law

- The 2016-17 State Budget Legislation (Chapter 54 of the Laws of 2016, Part K) amends the NYS Minimum Wage Act.
- The State minimum wage will increase from $9.00 per hour to $15.00 per hour in stages over the next several years, with schedules varying by county.
- Teachers are generally exempt from the minimum wage and overtime pay requirements of both the FLSA and the NYS Minimum Wage Act since they are employed in a bona fide professional capacity. *See,* 29 U.S.C. §213(a)(1); NYS Department of Labor , RO No. 09-0107 (2009); Labor Law §651(5)(c).

Nassau, Suffolk, and Westchester

- For workers in Nassau, Suffolk, and Westchester Counties, the minimum wage will increase as follows:
  - $10.00 per hour on and after December 31, 2016;
  - $11.00 per hour on and after December 31, 2017;
  - $12.00 per hour on and after December 31, 2018;
  - $13.00 per hour on and after December 31, 2019;
  - $14.00 per hour on and after December 31, 2020; and
  - $15.00 per hour on and after December 31, 2021.

Who Is An "Employer" under the Family Medical Leave Act (FMLA)?

- *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2d Cir. 2016)

- A terminated employee brought an action for FMLA interference and retaliation against employing entity **and** her individual supervisor and the HR Director.
- 2d Circuit applied the "economic reality" test for the first time to analyze individual liability under the FMLA.
- Determined that an HR Director could be found by a jury to be an "employer" for purposes of the FMLA under the facts of this case.

Graziadio

- Economic Reality Test: whether the individual "possessed the power to control the worker in question".
- Ask whether the individual:
  - has the power to hire and fire employees;
  - supervises or controls employee work schedules or conditions of employment;
  - determines the rate and method of payment;
  - maintains employment records.
    - **No one factor alone is dispositive. Must consider the totality of circumstances.**

Graziadio (cont'd)

- Second Circuit found the Director of Human Resources "appears to have played an important role in the decision to fire *Graziadio*" and a rational jury could find "under the totality of circumstances, [the Director of Human Resources] exercised sufficient control over *Graziadio's* employment to be subject to liability under the FMLA".
  - HR Director made a joint decision to fire, with a VP of the CIA.
  - HR Director exercised "control" over employee's hours and schedule in that Director would decide if employee received FMLA and when she would return.

Case serves as a reminder to proceed carefully and comply with the letter of FMLA when handling leave requests.

De Oliveira v. Cairo-Durham Cent. School Dist., 2016 WL 703968 (2d Cir. 2016)

- In *De Oliveira*, the district excessed plaintiff as the fourth-least-senior elementary teacher. She sued, claiming, *inter alia,* that the district interfered with her FMLA rights because it did not inform her prior to her FMLA leave that she would not continue to accrue service credit/seniority during the unpaid portion of her FMLA leave.
- The 2d Circuit Court of Appeals agreed: the district's policy, which would restore plaintiff to an equivalent position after FMLA leave, but would not allow her to accrue service credit during unpaid leave, was used by the district as a "basis for restoration", and thus the district should have given plaintiff notice of this policy *before* she took FMLA leave.
- Failure to do so violated 29 CFR §825.604; lawsuit allowed to proceed to determine whether this failure amounted to interference with plaintiff's FMLA rights.

Recent FMLA Guidance

- U.S. DOL recently issued a new general FMLA Notice Poster that can be used interchangeably with its current FMLA posting.
  - Poster does not contain much new information, but is intended to be more reader friendly.

- DOL also issued a new guide to help employers navigate and administer the FMLA - the *Employer's Guide to the Family and Medical Leave Act,* which can be accessed at *https://www.dol.gov/whd/fmla/employerguide.pdf*

New York's Paid Family Leave Benefits Law

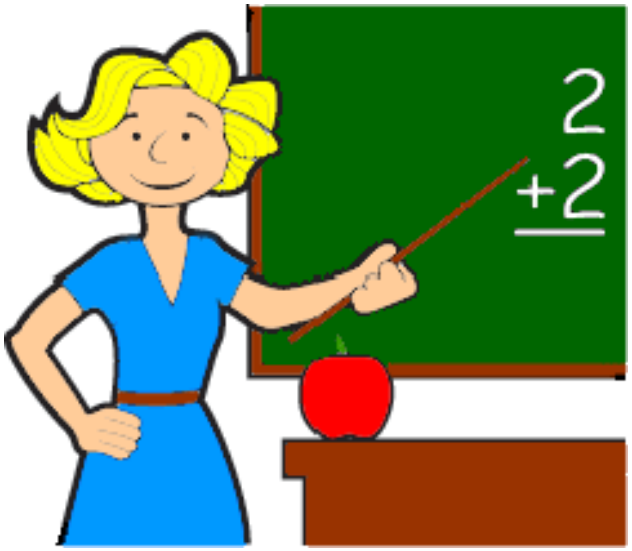
- The 2016-17 State Budget, Chapter 54 of the Laws of 2016, enacted paid family leave legislation.
- Unlike FMLA, benefits are afforded only for *family* leave. (*e.g.*, to care for newborn or family member with a serious health condition).
- Benefits will be phased-in beginning in 2018 and fully implemented by 2021 (from maximum of 8 to up to 12 weeks paid leave; from payment of 50% average weekly wage to 67% of average weekly wage).
- Participation by school districts is ***optional.***

New York's Paid Family Leave Benefits Law

- Benefits will be funded through payroll deductions imposed on employees – similar to State disability benefits; no cost imposed on employers (administrative costs?)
- Beginning 6/1/17, the Superintendent of Financial Services will set a maximum employee contribution based on actuarial principles and reports.
  - Estimate: weekly payroll tax of $1 per employee.
- Employee must be employed for 26 or more consecutive weeks to be eligible.
- Employee organizations may, pursuant to collective bargaining, opt-in.

New York's Paid Family Leave Benefits Law

- Job protections are:
  - Employee has the right to restoration to same or comparable position.
  - Employer must retain existing health benefits during leave.
  - Retaliatory action is prohibited.
  - Law does not diminish any rights, etc., under any CBA or employment contract.
  - Employer may offer the employee the option to charge all or part of the time used as family leave to unused vacation time or personal leave and receive full salary, or not charge against accruals and receive the benefit set in law.



Teacher Evaluation and Certification

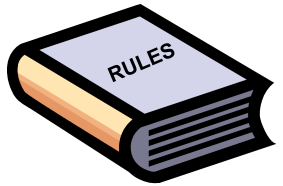
APPR – What's New

- Transition APPR scores and ratings required for school years 2015-16 through 2018-19.
- Chapter 73 of the Laws of 2016, Part L – State aid deadline for new §3012-d plans extended to December 31, 2016.
- Availability of annual hardship waivers from the Independent Evaluator requirements.
- *Lederman* decision.

"Transition" APPR Scores and Ratings

- In early December 2015, the Governor's Common Core Task Force ("Task Force") issued its Report including a series of recommendations regarding the implementation of the Common Core Standards, curriculum and assessments in New York State.
- With respect to APPR, the Task Force recommended a 4-year transition period during which results from assessments aligned to the Common Core (i.e. State 3-8 ELA and/or Math assessments) would **not** have any consequences for teachers.

Transition Regulations



- On December 15, 2016, the Regents adopted emergency regulations to implement the recommendation of the Task Force for Transition APPR scores and ratings for those teachers and principals whose APPRs conducted for the 2015-16 through the 2018-19 school years are based, in whole or in part, on State assessments and/or State provided growth scores on Regents examinations (for h.s. principals).
- Revised regulations adopted February 23, 2016 effective March 14, 2016. Permanent adoption effective June 1, 2016.

Transition Regulations (cont'd)

- Create a 4-yr transition period for APPRs for the 2015-16 through the 2018-19 school year.
- Direct the Commissioner to establish procedures in guidance for the calculation of transition scores and ratings for teachers/ principals whose APPRs conducted under §§3012-c and 3012-d are based in whole or in part on State assessments (i.e. the State 3-8 ELA and/or Math assessments) and/or on State-provided growth scores on Regents exams (for h.s. principals).
- Require use of alternate SLOs for 2016-17 through 2018-19.
- **During the transition period, the transition scores and ratings must replace the original APPR scores and ratings for such teachers/principals for purposes of all employment decisions (e.g. tenure and discipline) and for mandated TIPs/PIPs.**

Transition Regulations (cont'd)

- During the transition period, State-provided growth scores will continue to be calculated and districts are required to calculate the original APPR score/rating for advisory purposes only. Teachers/ principals to receive both original and transition scores/ratings.
- For purposes of State reporting, both the original APPR scores/ ratings and transition scores/ratings are to be reported.
- For purposes of APPR disclosure to parents (upon request), both the original APPR composite score and/or rating and the transition composite score and/or rating are to be disclosed together with an explanation of the transition composite score and/or rating.
- Only the transition score and/or rating (as opposed to the original APPR score/rating) shall be reflected in an individual's employment record.

Timeline for Compliance with §3012-d

- On June 23, 2016, Governor signed into law Chapter 73 of the Laws of 2016, Part L, extending until December 31, 2016 the deadline for school districts to implement a new APPR plan pursuant to §3012-d in order to ensure a district's receipt of State aid for the 2015-16 and 2016-17 school years. Thus, all districts must have a §3012-d compliant APPR Plan approved **by January 3, 2017** (extended from 12/31 due to holiday and weekend).
- Any district without an approved §3012-d plan before September will start the 2016-17 school year implementing the district's §3012-c plan and then transition to a new §3012-d plan when approved by SED.

APPR Litigation

- Lederman v. King, et al (Albany Co. Sup. Ct.)

  Lawsuit filed October 2014 by a teacher rated I in the student growth portion of her APPR for 2013-14 thereby lowering her overall composite score to E. Motion to dismiss for lack of standing denied on May 28, 2015. In a decision dated May 10, 2016, the judge vacated petitioner's growth score and Ineffective rating for the 2013-14 school year finding that petitioner had established that her growth score and rating for 2013-14 were "indisputably arbitrary and capricious."

Registration and CTLE Requirements

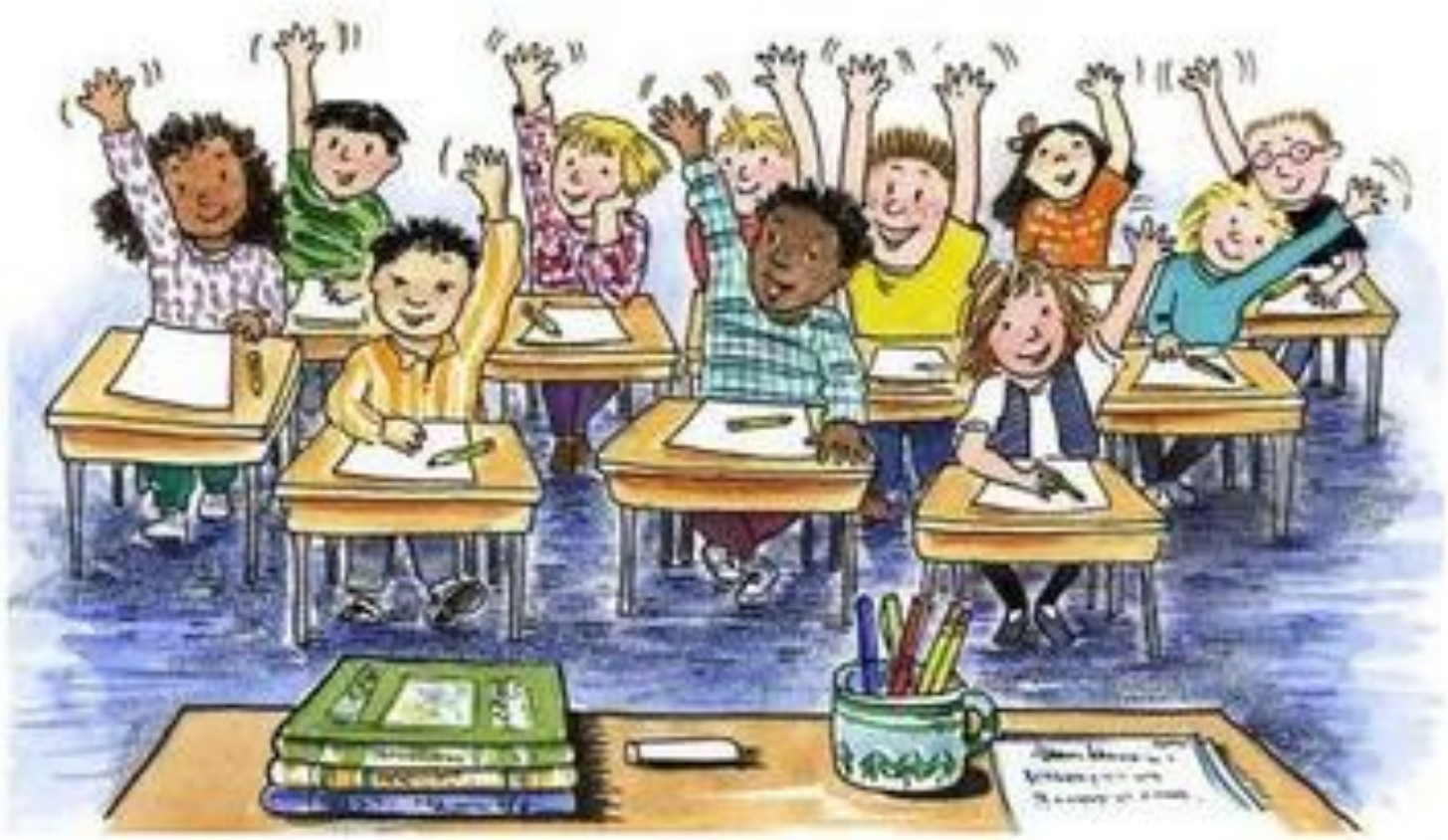
- **New Subpart 80-6 (effective March 22, 2016)**– Implements the new registration requirements (for permanent, professional and TA Level III certificate holders) and continuing teacher and leader education (CTLE) requirements (for professional and TA Level III certificate holders) that take effect July 1, 2016 pursuant to Ch. 56 of the Laws of 2015. Regulations prescribe rules for registration every five years and implementation of new 100-hour CTLE requirements during each five-year registration period.

Substitute Teachers

- Effective July 27, 2016, a district or BOCES may employ a substitute teacher without a teaching certificate beyond the current 40-day limit for up to an additional 50 days (up to 90 days total in a school year) in "extreme circumstances" where there is: 1) an urgent need for a substitute; and 2) the district/BOCES has undertaken a good faith recruitment search and there are no available certified candidates.
- In "rare circumstances" a district/BOCES may hire an uncertified substitute beyond the 90 days if the superintendent attests that a good faith recruitment search has been conducted, there are still no certified candidates available and there is a particular need for the substitute to work with student until the end of the school year.

Other New Regulations

- New certification requirements for qualified out-of-state teachers/leaders; extension of certification testing safety nets; and additional pathway options for CTE.



Student Issues

New Joint Federal Guidance – Transgender Students

- On May 13, 2016, OCR and DOJ issued new joint federal guidance on Title IX and transgender students.
- Guidance reiterates OCR's prior position that discrimination against transgender students is a form of sex discrimination prohibited by Title IX.
- Accompanying materials refer to prior SED Guidance (July 2015) issued under DASA.

New Transgender Guidance

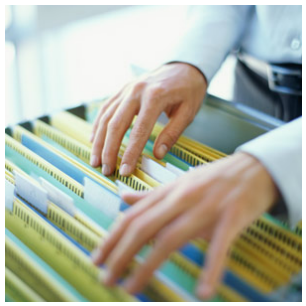
- Title IX requires schools to provide equal access to educational programs and activities even in circumstances in which other students, parents or community members raise objections or concerns. This includes:
  - Providing a safe and nondiscriminatory environment;
  - Using pronouns and names consistent with the transgender student's gender identity, regardless of whether the student's records have been changed accordingly;
  - Allowing transgender students to access sex-segregated facilities and participate in sex-segregated activities consistent with their gender identity; and
  - Protecting students' privacy related to their transgender status.

New Joint Federal Guidance

- Schools may make individual-user options available to all students who voluntarily seek additional privacy, but may not force transgender students to use individual-user options when other students are not required to.
- Guidance does not have the force of law, but the 2d Circuit has held in another context that courts will defer to agency guidance unless it is plainly erroneous or inconsistent with statute or regulation.

Areas That Are Implicated

- Bathrooms
- Locker Rooms
- Changing Areas
- Student Records
- Student Names
- Sports Participation



Bathrooms and Locker Rooms

- Try to balance the transgender student's rights with the sensibilities of other students.
- BUT OCR makes clear: the rights of the transgender student are controlling.
  - Barring a transgender student from a bathroom or locker room that matches his/her gender identity is sex discrimination.
  - Requiring a transgender student to use a gender-neutral (unisex) bathroom rather than the one that matches his/her gender identity is discrimination.

Transgender Litigation

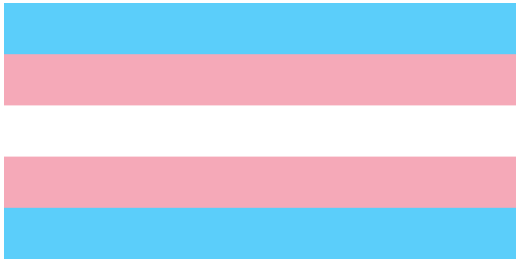
- Following issuance of the OCR/DOJ guidance several states joined together to bring a lawsuit challenging the federal government's actions. On August 21, 2016, the federal district court issued a preliminary injunction barring the federal government from enforcing the joint guidance while the lawsuit is pending. *State of Texas, et al. v. United States* (N.D. Tex. filed May 25, 2016).
- Other lawsuits pending around the country. Second Circuit has yet to address the issues.
- Remember, New York's Dignity Act (DASA) prohibits discrimination based on a person's actual or perceived sex, including a person's gender identity or expression.

G.G. v. Gloucester County School Board, 2015 WL 5560190 (E.D. Vir. 2015)

- Transgender high school student (FTM) G.G. claimed he should be able to use school restrooms that match his gender identity (male), and can't be forced to use the restroom that corresponds with his physical characteristics (female) or an "alternative" restroom.
- G.G. was assigned the female sex at birth, but his gender identity is male and he presents as a boy in all aspects of his life.
- G.G. and his mother notified administrators of his male gender identity at the beginning of his sophomore year so that he could socially transition in all aspects of his life. With permission from school administrators, G.G. used the boys' restroom for almost two months without incident.
- After receiving complaints from some parents, the school board adopted a new policy on that effectively prohibited G.G. from using the boys' restroom.

G.G. Lawsuit

- ACLU sued and filed a motion for preliminary injunction (with DOJ's support) asking the court to rule in time for G.G. to be able to use the same restroom as other boys when classes resumed for the 2015-16 school year.
- First time the federal government tried to make the case for student transgender rights in a court, filing an amicus brief on behalf of G.G.
- DOJ : "Under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex...As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX." DOJ also argued that policy violated G.G. 's rights under the Equal Protection Clause of the Constitution.
- The district court denied the injunction and ***dismissed G.G. 's claim under Title IX.***



G.G. Lawsuit

- The District Court was urged to defer to OCR's interpretation of Title IX (which maintains that a policy that segregates bathrooms based on biological sex and without regard to the a student's gender identity violates Title IX).
- The Court's response: "To defer to [OCR's] newfound interpretation would be nothing less than to allow [OCR] to 'create *de facto* a new regulation' through the use of a mere letter and guidance document."

G.G. Lawsuit – On Appeal to 4th Circuit

- *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 2016 WL 1567467 (4th Cir. 2016).
- On Appeal to the U.S. Court of Appeals for the Fourth Circuit, the Court overturned the District Court's decision and reinstated G.G.'s Title IX claim.
- "Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine ***whether a transgender individual is a male or female*** for the purpose of access to sex-segregated restrooms…[t]he regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity."

G.G. 4th Circuit Appeal

- 4th Circuit:
  - OCR's interpretation is not clearly erroneous or in conflict with statute or regulation.
  - OCR's interpretation was a result of fair and considered judgment.
  - Remanded to District Court.
- School District's appeal to the 4th circuit asking for an *en banc* hearing was denied on May 31, 2016.
- On remand, District Court issued an order granting G.G. a preliminary injunction allowing him to use the boys' bathroom.
- School district filed an appeal with the U.S. Supreme Court seeking to halt the order, arguing irreparable harm and violation of the privacy rights of other students.
- On August 3, 2016, U.S. Supreme Court issued an order temporarily staying the lower court order (that would permit student to use boys' bathroom) until Supreme Court decides whether it will hear the case.

Child Protective Services Investigations

- In *Phillips v. County of Orange*, 10-CV-00239 (SDNY August 19, 2015), CPS investigated a report made to the Statewide Central Register regarding the alleged sexual abuse of a five-year-old child by her father. The source did not have direct knowledge of the information on which the allegation was based.
- CPS went to the child's school to interview and the school allowed the interview to take place without parental consent/notification.
- CPS then conducted a home visit and concluded that the allegations were unfounded.
- Parents sued district, claiming that the interview violated the Constitutional protection against unreasonable search and seizure under the Fourth Amendment.

Phillips

- The court found that CPS did not have "probable cause" to question the child, *i.e.*, there was no "reason to believe child abuse or maltreatment occurred."
- Court: the report to the registry, standing alone, did not meet the above standard because the reporter did not have first- hand knowledge and refused to reveal her source.

And then……..

- An article published in NYSSBA's 3/28/16 edition of *OnBoard* based upon this case advised not allowing CPS to interview children in school without parental consent :
  - "In the absence of a court order or warrant, the most conservative and safest approach would be to refuse to permit CPS access to the child unless CPS provides the school district with a signed letter from the County Attorney's office stating that an investigation into whether there is a reasonable basis for believing that abuse and imminent danger exist has been conducted and concluded in the affirmative."
    - Beth Sims & Michael Lambert, *What Should School Officials Do When Child Protective Services Shows Up?,* NYSSBA *OnBoard*, March 28, 2016.
- Chaos ensues! Do we need a warrant? Court order? A letter?

SED Supports Cooperation With CPS

- SED issues guidance: Denying CPS access to children is "an over-reaction to a decision that did not significantly change the law[.]"
- SED "urges school districts to critically examine their policies and procedures relating to in-school interviews of students in child abuse investigations with that in mind and not to make decisions solely based on fear of liability."

OCFS Issues Guidance, Too!

- OCFS: The Court's "order pertains only to Orange County and should not change other local social services districts' procedures or protocols."
- OCFS urges county CPSs to consider certain factors before seeking parental consent:
  - Whether a parent is the subject of the report;
  - The reliability of the source of the report;
  - Whether the source of the report is a mandated reported; and
  - Other relevant factors on the circumstances of the report.

OCFS Then Issues Emergency Regulations

- Regulations effective 5/23/16, set forth district obligations in CPS investigations. Require schools to assist investigations by providing CPS:
  - access to records relevant to the investigation of suspected abuse or maltreatment.
  - access to any child named as a victim in a report of suspected child abuse or maltreatment or any sibling or other child residing in the same home as the victim, without court order or parental consent, *when CPS encounters circumstances that warrant interviewing the child apart from the family or household members or home where the abuse allegedly occurred.*

Emergency Regulations

- No info may be required as a condition of interview except identification and name of child.
- School official may be present, if school requests.
- CPS can be required to comply with reasonable visitor policies or procedures that are not contrary to this new regulation.

FAPE and Bullying

- Do parents of a disabled child have a right to ask a school district to consider the impact of bullying on their child's ability to receive a FAPE?
- In *T.K. v. NYC Dep't of Education,* 810 F.3d 869 (2d Cir. 2016), the Second Circuit Court of Appeals said YES, and that refusal to consider the impact of bullying constitutes a denial of FAPE.
  - The Court based its decision on the procedural rights of parents under the IDEA to participate in the development of their child's IEP.

FAPE and Bullying

- 3rd grader bullied—pinched, stomped on her toes, treating a pencil she touched as contaminated because of her poor hygiene, tripping her, calling her stupid, fat, ugly; teachers did little to stop it.
- The student *did* make progress during the school year and was at or approaching grade level in all subjects—but the Court still found bullying affected academic and non-academic development.
  - Late to school 16 times in one semester, fearful of classmates, began bringing doll to school to help calm fears, trouble concentrating.

FAPE and Bullying

- Parents tried to raise bullying at CSE meeting but were rebuffed.
- Parents withdrew child from school-private school placement; sued for reimbursement of tuition.
- Court awarded tuition: student was denied FAPE, the private placement was appropriate and equitable considerations weighed in favor of the parents.

FAPE and Bullying

- Parents had a reasonable concern that bullying was interfering with their child's ability to receive meaningful educational benefit.
- The district's refusal to discuss bullying at CSE meeting significantly impeded the parents' right to participate in the development of the IEP.
  - The district's actions potentially affected the content of the IEP and prevented the parents from assessing its adequacy.

Administration and Governance

State Aid

- Chapter 54, Part A, of the Laws of 2016 amended Education Law §3602(17)(h) to specify that the Gap Elimination Adjustment for the 2016–17 school year and thereafter shall equal zero.
- Chapter 54, Part A, amended Education Law §3602 to require certain districts with struggling schools to set aside a specific portion of the total foundation aid to use to support the transformation of school buildings into community hubs to deliver co-located or school-linked academic, mental health, nutrition, counseling, legal, and/or other services to students and their families, including, but not limited to providing a community school site coordinator, or to support other costs incurred to maximize students' academic achievement.

Tax Cap Litigation

- *NYS United Teachers, et al. v. State*, 46 Misc. 3d 250, *aff'd* 140 A.D. 3d 90 (May 5, 2016) – Plaintiffs challenge to the constitutionality of New York's tax cap legislation (Education Law §2023-a) dismissed. Court also rejected the plaintiffs' argument that the supermajority requirement in law impairs the right to vote.

School Safety

- Effective July 1, 2016, Chapter 54 , Part B, of the Laws of 2016 amended Education Law §§807, 2801-a, and 3604 with respect to district-wide school safety plans and building-level school safety plans (now referred to as building-level emergency response plans in the statute), fire and emergency drills, and to add a "credible threat to student safety" as an acceptable reason to have fewer than 180 days of school and receive full State aid.

School Safety (cont'd)

- Law also:
  - Requires policies and procedures for responding to threats of suicide and for contacting parents;
  - Mandates certification to the Commissioner of the completion of annual school safety training of staff including components on violence prevention and mental health;
  - Requires designation of a Chief Emergency Officer (who may be the Superintendent or designee);
  - Adds new requirements for building-level plans; and
  - Provides for optional (rather than mandatory) student participation on district-wide school safety team.

- Implementing regulations adopted by Regents, effective July 1, 2016 (amending 8 NYCRR §155.17).

Lead Testing of School Water

- On September 6, 2016, new legislation was enacted to require all school districts and BOCES to periodically test the drinking water in their occupied school buildings for lead contamination and report the results (Ch. 296 of the Laws of 2016).
- The State Department of Health issued emergency regulations (10 NYCRR Subpart 67-4) specifying the standards for testing, the schedule for testing, reporting requirements and other steps that must be taken after testing is completed.
- Initial testing for schools serving children in any of the levels prekindergarten through grade five must be completed by September 30, 2016, and initial testing for schools serving children in any of the levels grades six through twelve, and all other applicable buildings, must be completed by October 31, 2016.

School District Liability

- In *Lewis v. Bd. of Educ. of Lansingburgh Cent. School Dist.*, 137 A.D.3d 1521 (3d Dept 2016), the plaintiff student suffered from osteogenesis imperfecta, a congenital disorder characterized by brittle bones that fracture easily.
- During the school day, the student left his wheel chair without permission, walked to a chair and was directed to return to the wheel chair. The student fell and fractured his leg.
- The court found that where "a school is aware that a student has a particular disability that makes him or her more susceptible to harm, the school must […] exercise care commensurate with that known disability."

DASA Liability

- *Motta v. Eldred Cent. School Dist.*, 2016 WL 3619331 (3d Dept. July 7, 2016) - Appellate Division, Third Department, affirmed lower court's dismissal of bullying complaint alleged to be in violation of DASA. "There is no explicit private right of action in the [DASA] statutory scheme nor can one be implied from the statutory language and the legislative history." Court permitted plaintiffs' claims for negligent supervision to proceed.

THANK YOU!

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