

EDUCATION LAW UPDATES

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AGENDA

- Recent Changes to 3020-a
 - Unpaid suspension
 - Expedited proceedings
 - Procedural changes
 - Addition of new 3020-b
- APPR Related Issues
 - 3012-d developments
 - Probationary appointments
 - Litigation
 - Local assessment opt out
- Transgender Students

New Categories of Proceedings

- **Standard** §3020-a;
- **Probable cause** hearing for an unpaid suspension on charges of physical or sexual abuse of a student;
- **Expedited** hearing on charges of misconduct constituting physical or sexual abuse of a student;
- **Expedited** hearing based upon revocation of a teaching certificate;
- **Expedited** hearing pursuant to §3020-b for two (2) Ineffective composite APPR ratings;
- **Expedited** hearing pursuant to §3020-b for three (3) Ineffective composite APPR ratings.

RECENT AMENDMENTS TO 3020-A

Suspension Without Pay in Student Abuse Proceeding

- Currently, must suspend with pay unless employee has pled guilty to/ been convicted of certain felony crimes or had certificate revoked.
- Districts may now suspend teachers **charged with physical or sexual abuse of a student without pay.**
 - The unpaid suspension cannot exceed 120 days and only includes compensation, not other benefits (e.g., health ins.)
 - **BUT** the unpaid suspension is subject to a separate probable cause hearing.
- Must be conducted within 10 days of the decision to suspend
- The Commissioner will maintain a list of impartial hearing officers and will appoint the next available person from that list

Probable Cause Hearing for Student Abuse Unpaid Suspension

- The impartial hearing officer ("IHO") makes a decision as to whether the decision to suspend an employee without pay should be continued or reversed.
- The IHO may reverse the decision and reinstate the employee's pay upon a finding that:
 - probable cause does not support the charges; or
 - suspension without pay is grossly disproportionate in light of all surrounding circumstances

Thus, the probable cause hearing is essentially a hearing on the merits for the case in chief.

Probable Cause Hearing for Student Abuse Unpaid Suspension

- **The employee is eligible for reimbursement of the withheld pay and 6% annually accrued interest if the hearing officer finds in the employee's favor, at either the probable cause hearing, or in a final determination at the conclusion of the expedited hearing.**
 - So, even if successful at the probable cause hearing, if unsuccessful at the actual §3020-a hearing, the employee will still be entitled to backpay with interest that has been accruing for a longer period of time.
 - Unclear whether either hearing officer has the ability to reinstate pay *without* ordering backpay and/or interest.
- **Therefore, we recommend that districts steer clear of these unpaid suspensions.**

Expedited Proceeding for Charges of Student Abuse

- Expedited hearing based on charges of physical or sexual abuse of a student:
 - Hearing must be commenced within 7 days of the pre-hearing conference and be completed within 60 days of the conference.
 - Adjournments may not be granted, unless the hearing officer determines that the delay is:
 - substantially beyond control of the requesting party, and
 - an injustice would result if the adjournment were not granted.
- Hearing officer's written decision due 10 days after hearing

Expedited Proceeding for Certification Revocation

- Reason for revocation of certificate does not matter.
- Limited to one day for hearing.
- Decision within 10 days of hearing.
- Hearing must start within 7 days of pre-hearing conference.

Alternative for Child Witness Testimony

- Child Witnesses
- Under 14 years;
- Not limited to certain types of charges;
- Hearing Officer decides harm to child from "live" testimony and whether live closed-circuit television ("cctv") would limit such harm
- Clear and convincing standard to determine if cctv testimony appropriate
- Testimony taken in accordance with the rules under NYS Criminal Procedure Law §65.30.

Reciprocal Discovery

- Important right for districts: statute now explicitly requires that respondents disclose evidentiary information to district prior to hearing.
- Regulations: "The hearing officer shall have the power to . . . set a schedule for full and fair disclosure of witnesses and evidence for both parties; including but not limited to:
 - (i) bills of particular; and
 - (ii) requests for production of relevant and material evidence and information, including, witness statements, investigatory statements or notes, exculpatory evidence, or any other evidence, including district or student records."

Consideration of Penalty Recommendations

- Hearing Officer no longer required to consider employer's efforts at correcting employee's behavior, but may consider at employee's request.
- Hearing Officer must now give serious consideration to District's penalty recommendation and if rejected, such rejection must be based on the record and expressed in the decision.

New Section 3020-b: APPR Termination

- New Section 3020-b added to NY Education Law
- Replaces existing expedited hearing for “pattern of ineffective teaching” under existing 3020-a process
 - Pattern of ineffective teaching was defined as 2 consecutive annual Ineffective APPR ratings under §3012-c(6).
- Now: 2 consecutive Ineffective ratings on APPR – District maintains discretion to charge.
- But adds: 3 consecutive Ineffective ratings on APPR – District is required to charge.

New Section 3020-b: APPR Termination

- If charges are brought pursuant to 2 Ineffective APPR ratings, the charges must allege that the district has developed and substantially implemented a TIP or PIP for the employee immediately following the employee’s first Developing or Ineffective APPR rating.
- If charges are brought for 3 Ineffective ratings, the Commissioner selects the hearing officer.
- §3020-b does not include the requirement in §3020-a that charges be brought between the opening and closing of school.

New Section 3020-b: APPR Termination

- New Section 3020-b applies to ALL charges brought on or after July 1, 2015, whether ratings are pursuant to §3012-c or §3012-d APPR system.
- Possible to have one Ineffective rating from §3012-c APPR Plan and one Ineffective rating from §3012-d APPR Plan.
- Can still bring regular incompetency charges under §3020-a with or without the ineffective ratings required under the new §3020-b.
 - Consider for teachers who may get terrible observation scores but decent test scores due to student population
 - No longer have to worry about panel option in APPR or non-APPR incompetency case

New Section 3020-b: Legal Standard

- Previously, a teacher’s Ineffective ratings constituted “very significant evidence” of incompetence.
- Now, 2 consecutive Ineffective ratings are:
 - *prima facie evidence of incompetence that can only be overcome by clear and convincing evidence that the employee is not incompetent in light of all surrounding circumstances.*
 - And 3 consecutive Ineffective ratings are:
 - *prima facie evidence of incompetence that can only be overcome by clear and convincing evidence that the calculation of one or more of the APPR components was fraudulent.*
- In either case, if presumption is not overcome, the ratings shall be just cause for removal, absent extraordinary circumstances

Timelines for §3020-b Proceedings

- Reduced timelines for selecting hearing officer, holding pre-hearing conference, and commencing hearing.
- The hearing must be completed within 90 days from the request for a hearing in the case of 2 Ineffective ratings.
- The hearing must be completed within 30 days from the request for hearing in the case of 3 Ineffective ratings.
- In either case, decision must be rendered within 10 days of close of hearing.

Implications of New §3020-b

- Limited use of the prior APPR hearing process under §3020-a since only a couple years of APPR scores under §3012-c
 - Especially on long island where there were few Ineffective rated teachers and districts mistrusted the scoring system that led to Ineffective rating.
- New APPR structure = greater rating import for State growth scores and other State-approved assessments.
 - Purpose in revising existing scheme: teachers scoring too well.
 - Anticipate greater numbers of lower rated teachers going forward, which may lead to greater use of the new §3020-b.

APPR RELATED ISSUES

Hardship Waivers

- Hardship Waiver and Implementation Timeline:
 - Plans approved prior to March 1, 2016 must be implemented for the 2015-2016 school year
 - 1st Hardship Waiver in effect until March 15, 2016
 - 2nd Hardship Waiver application window: February 15th to March 1st
 - 2nd Hardship Waiver in effect from March 15th to July 15th
 - 3rd Hardship Waiver: June 1st to July 1st application window for waiver period of July 15th through August 31st
 - **Drop dead date for approval of plan: September 1, 2016**
 - SED's submission deadline of July 1 conflicts with third waiver period

Student Performance Category

- SLOs:
 - SLOs: non-negotiable.
 - Can account for SPGS factors in SLOs (poverty, ELL, disability, prior academics) but no attendance weighting allowed.
- **Do not have to submit targets or SLOs to SED but ongoing authority to reject or require modification.**
- New APPR Plans must include back-up SLOs for State assessment teachers to treat with opt out movement.
- Back-up SLOs must be based on the State assessment -- use the students in the class that took the test unless the number is too small to calculate a score (district determination as to that number), in which case the teacher should get the building score.

Student Performance Category

- SLO Assessments:
 - Revised RFQ allows for district submission of locally developed exams for use in SLOs. No longer have to submit technical data.
 - Form H: one page of assurances
 - Rigorous (same as current plan requirement)
 - Valid and reliable under APA Standards to the extent practicable (same as current plan requirement)
 - One year of growth measured
 - Differentiated results, or if not differentiated, the results are consistent with performance on other assessment measures
- SLO assessment list now available: <http://usny.nysed.gov/rftt/teachers-leaders/assessments/approved-list-3012-d.html>

SLO/Performance Category HEDI Ranges

| Percent of Students Meeting Target | Scoring Range |
|------------------------------------|---------------|
| 0-24% | 0 |
| 25-37% | 1 |
| 38-49% | 2 |
| 50-61% | 3 |
| 62-73% | 4 |
| 74-85% | 5 |
| 86-97% | 6 |
| 98-100% | 7 |
| 31-42% | 8 |
| 43-54% | 9 |
| 55-66% | 10 |
| 67-78% | 11 |
| 79-90% | 12 |
| 60-66% | |
| 67-74% | |
| 75-82% | 15 |
| 83-90% | 16 |
| 91-98% | 17 |
| 90-92% | |
| 93-96% | |
| 97-100% | |

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Student Performance Category

- Implications of the new scoring range for the student performance category:
 - Even with the max 50/50 weighting to state scores and second measure, since 60% of the range is now Ineffective, it is a skewed calculation
 - Limits usefulness of optional measures in pulling up lower State/SLO scores
 - Take current teachers' 20% State scores and convert them into the above chart to see stark difference in teacher ratings for this category
 - No evidence that SED is changing its growth formula

Student Performance Category

Optional subcomponent:

- Second but different use of SPGS:
 - 3) Locally computed school - or group -wide results based on all or subset of SPGS.
- More flexibility since first two options are State provided scores and this is District calculated.
 - For HS, can use elements from the principals' score, such as just the ELA or Algebra Regents.
 - Compare students to state average
- **Supplemental Assessment:**
- Currently approved supplemental assessments – STAR, aimsweb, iReady, NWEA
- aimsweb has incorrect HEDI band but others did move average growth to midpoint of Effective (16)
- Scoring crosswalks will give you an idea of average expected growth (useful if currently using the assessment)

Student Performance Category

- If selected, the optional measure must be applied in a consistent manner across the district to the extent practicable, meaning:
 - Districts should not use optional measures for certain teachers and not others, and
 - Teachers should be subject to the same choice of assessment or measure where possible (but at least by grade and subject).

Observation Category

- **Observations:**
 - At least one classroom observation by Principal or other trained administrator (worth between 80 and 90%, subject to negotiations)
 - At least one classroom observation by an independent trained evaluator **selected by district** (worth between 10 and 20%, subject to negotiations)
 - May be district employee, as long as not in same school building, [according to BEDS code]
 - District-wide BEDS code is acceptable.
 - 80/90% evaluation – can have more than one of these, and if so, they can be weighted differently; doesn't have to be same BEDS code as teacher.

Observation Category

- Now only required to evaluate the **observable** teaching standards (rather than all under 3012-c)
 - District determination as to which standards/domains are observable
 - Meaning Danielson domain 4 does not need to be evaluated
 - If you want to evaluate it: can no longer use artifacts unless they are tied to an observation cycle (eg: pre and post observation conference)
 - All other details of category, such as length of observations, which one will be unannounced, etc are subject to negotiations
 - Can still weight domains differently as long as scored on a 1-4 scale

Probationary Appointments

- 4 year probationary terms for all teaching and supervisory staff appointed on or after July 1.
- For those subject to APPR, three out of the four years must be Effective or Highly Effective and the last year cannot be Ineffective to be eligible for tenure.
- Must include this in appointment resolutions and letters

Exceptions to 4 year probationary period

- **Prior Substitute Service (Jarema Credit) can reduce the period up to two years.**
 - If substiting as a classroom teacher, must have received an APPR score under §3012-c (or §3012-d) to receive credit for that year. So, to get credit for 2 years = need 2 scores. (min. credit = 1 semester)
- **Previous tenure award by another district or in another tenure area can reduce the period by one year.**
 - If teacher was not given a §3012-c (or §3012-d) APPR score in the **final year of service** at that district or tenure area, he or she will not receive the reduced probationary period.
 - This would affect teachers who have been out for several years or those moving from a non-APPR tenure area, such as school counselor, to a classroom teacher position

Eligibility for tenure: Exceptions to four year probationary period

- **In either case, doesn't have to be a specific APPR rating to count towards reduction.**
 - It appears that the carried over ratings are part of the "preceding four years" of ratings required to be eligible for tenure.
 - So if teacher arrives with a Developing from prior district, she will have to obtain all Effective or Highly Effectives in the next 3 years of probation to be eligible for tenure vs. a teacher who arrives with an Effective may have a year of Developing during her 3 year probationary period.

APPR Tenure Requirements

- Upon expiration of the probationary period, the teacher remains in probationary status until the end of the school year in which he/she has obtained 3 years of Effective or Highly Effective AND a last year score that is not Ineffective.
 - Intended to eliminate the acquisition of tenure by estoppel arguments.
 - Tenure may not be granted while awaiting the final year's APPR score unless it is a contingent award of tenure subject to receipt of a qualifying rating. Otherwise, Board can wait for scores to take action.

APPR Requirements for Tenure

- Statute only requires “consideration” of the APPR ratings as a significant factor for tenure determinations. Tenure can still be denied for other factors.
 - Ensure any “non-observable” factors (attendance, getting along with peers, etc) are considered separate and apart from APPR to provide non-APPR bases for termination (outside of misconduct/ non-performance issues).
- Take advantage of the revised provision that allows termination of probationers for performance reasons without regard to APPR - terminate well in advance of tenure eligibility!

APPR Litigation

- Matter of Lederman v. King, Index No.: 5443-14
 - Great Neck teacher brought Article 78 proceeding against SED based on her receipt of an “ineffective” State growth score.
 - Suit challenges the validity of the State growth score methodology.
 - Lederman found to have standing despite overall rating of “Effective”.
 - Win by Lederman will most certainly be appealed by SED
 - A win could potentially upset the entire APPR system but would likely be years away, since implementation of such a decision would be subject to a stay request by SED.
 - This litigation led to SED’s review of its growth model and creation of a State level growth score appeals process.

APPR Litigation

Bases for other APPR related litigation:

- Under 3012-c and d, local assessments have to be valid and reliable as defined by the APA’s Testing Standards (to the extent practicable) and local assessments must now also show one year’s growth
- Section 3012-d supplemental assessments will be subject to the same normative growth models with similar issues to the State’s
- Timeline – if district forced to implement plan retroactively for this school year
- Possible PERB actions regarding negotiability of certain items

Local Assessment Opt Out

- **Parents do not have a right to dictate curriculum which includes testing**
 - “there is no fundamental right of every parent to tell a public school what his/her child will and will not be taught because this would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.” Leebaert v. Harrington, 332 F.3d 134 (2003).
- Cases cited to by advocacy groups are not on point.
- Very risky to allow for these local opt-outs. We strongly discourage it!

Local Opt Out Form Letter – Other Issues

- Request for opt out from certain directory information under FERPA may need to be compiled with (assuming timeframe in annual notice is met).
- Includes a request for non-participation in online programs or applications. May require clarification.
 - Under FERPA, cannot opt out of student information systems.
 - If referring to educational programs used in class, the District probably should deny due to the landslide effect it could have in instructional methods and congruency.
- Lastly, the letter demands that the child be given no digital homework, which for the same reason, should not be honored (unless part of a child's IEP or 504 plan).

TRANSGENDER STUDENTS

Transgender Students

- USDOE has stated that transgender students have protection under Title IX.
- In NY, they have protection under DASA which prohibits discrimination based on gender identity.

Transgender Students

- Identification of Student
 - Will depend on student and circumstances (what their preferences are for name and pronoun use)
 - Extent of staff sharing will also vary by student but typically, the principal will inform all staff dealing with the child that the child's chosen name is now John instead of Jane and the child's gender should be referred to as male.
 - Documentation of transition is not required for change in gender identity at school
 - Parental involvement may vary -- can't require parents' okay for child to transition gender identity in school

Transgender Students

- Student Records
 - Keep any records with birth name and gender in separate confidential file
 - Ensure privacy and confidentiality of student's records and gender identity transition
 - Change current records (can be upon request of student or parent) to reflect new name and gender (eg: IEP, transcript, attendance, etc).
 - No documentation required for changing name and gender in local records

Transgender Students

- Facilities
 - Have to let them use bathroom and locker rooms of their gender identity, no exceptions
 - Can offer alternate private setting if student requests but cannot make child use separate facilities
 - If separate facilities are used, must do so with caution to ensure child is not disadvantaged/outed
 - Separate facilities should be made available for any students who wish to use them

Transgender Students

- Activities
 - Have to let them participate in physical education, sports, and other activities of their gender identity.
 - NYSPHSAA is coming out with guidance re: interscholastic athletic participation for transgender students
 - Field trips – they must be treated according to their gender identity, including sharing room with students aligned with the child's gender identity.
- Dress Code
 - Ensure district policies and procedures are not gender biased, such as requiring girls to wear dresses at awards ceremony or graduation
 - Students can dress according to their gender identity as long as it does not violate school's dress code