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From: Kevin H. Harren

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COURT DECISION INVALIDATING KEY PROVISIONS OF REGENTS' APPR REGULATIONS

In a written decision issued today, Judge Michael C. Lynch of the New York State Supreme Court (Albany County), ruled in favor of NYSUT and invalidated key portions of the May 16, 2011 regulations of the Board of Regents implementing the 2010 statute that mandates formal Annual Professional Performance Reviews (APPR) for all classroom teachers and principals. Despite this ruling, the bulk of the Regents' APPR regulations remain intact, which means that school districts will continue to face a great deal of uncertainty about their legal obligations as they work toward implementation of the statutorily mandated process.

Judge Lynch's decision opens with a rejection of the State's claim that the case is not yet ripe for resolution because it is not effective until after September 1, 2011. The court explained that, "there is a present controversy for which petitioners have standing to pursue this challenge. The disputed regulations have an immediate impact on the statutorily mandated negotiation process in which petitioners clearly have a vested interest."

Next, Judge Lynch accepted the parties' joint invitation to decide the merits of the case, rather than simply deciding the initially-posed question of whether a preliminary injunction should be issued holding the implementation of the regulations in abeyance pending the ultimate resolution of the case.

The first substantive issue addressed was whether the regulations could properly allow State assessment results to be used as the second 20% of the evaluation. The court explained, "[t]here is no dispute that the first 20% component is based on 'student growth data' as measured by state assessments or comparable measures . . . The dispute concerns the second 20% category, and calls into question [the regulations] which authorize the use of 'student achievement on State assessments' as a locally selected measure." The Court held that the statute contemplates that the second 20% component requires consideration of "multiple measures of effectiveness," and that ". . . to allow a single state assessment measuring student growth to determine 40% of the student achievement category . . . would contravene this multiple measures mandate." Accordingly, this section of the regulation was declared to be inconsistent with the statute and therefore invalid.

The next issue addressed was the regulations' mandate as to how the remaining 60% of the evaluation score should be calculated. Specifically, NYSUT objected to the requirements that "at least 40 of these 60 points shall be based

on classroom observations,” and that “. . . no more than 5 of the 60 points may be assigned to evidence that a teacher sets and pursues professional growth goals.” The court also invalidated these requirements, holding that, “[w]hether and to what extent classroom observation and professional growth are utilized in defining the 60 point evaluation component must necessarily be determined through negotiations . . .”

The court also invalidated a portion of the regulation giving SED authority to “. . . order a corrective action plan, including a requirement to utilize independent evaluators, where appropriate.” On this point, the Court stated that although SED has authority to enforce the Education Law and properly drafted regulations, it does not have the authority to appoint independent evaluators because the “. . . evaluation process defined [in the statute] is subject to collective bargaining – a mandate that certainly embraces the identity of the evaluator.”

NYSUT failed to prevail, however, on its next argument that concerns the regulations’ requirement that any APPR appeal procedure “. . . provide for the timely and expeditious resolution of any appeal.” Although NYSUT argued that the statute calls for negotiation of appeals procedures without any further guidance from SED, the court held that, “the challenged regulation speaks to a general objective of a timely appellate process, not the specifics of that process. As such the regulation is valid.”

NYSUT resumed its winning ways with respect to its argument that the regulation improperly included a statement that school districts “retain the authority ‘to terminate probationary teachers or deny tenure to a probationary teacher during the pendency of an appeal pursuant to this section.’” This provision, which was added to the regulation at the request of school officials who wanted reassurance that the APPR appeals process did not strip boards of education of their ultimate authority to dismiss probationary teachers, was deemed by the court to be in conflict with the APPR statute, which provides that performance reviews “. . . shall be a significant factor for employment decisions including but not limited to, promotion, retention, tenure determination, termination . . . [emphasis added by the court]. The underscored terms clarify that tenure determinations, which include both the granting and denial of tenure, must be performed in compliance with the statute. To the extent these regulations provide otherwise, the regulations are invalid.”

The final argument raised by NYSUT concerned the regulations’ mandated scoring ranges that provided that any teacher achieving a composite score lower than 65 must be rated “ineffective.” NYSUT argued that since 40% of a teacher’s score was dependent upon student achievement (i.e. the first and second 20% categories), it is conceivable that a teacher earning the full 60 points from the locally negotiated portion of the evaluation would still be deemed ineffective if the student achievement measures earned the teacher only 4 of the available 40 points. The Court was swayed by this argument, holding that, “[s]ince multiple measures must be considered, the scoring ranges developed by the Commissioner must allow for the 60 point category to have meaningful impact on the composite score, even in an instance of poor student achievement. . . While [SED] may well be correct in asserting that a teacher would rarely be classified as ‘ineffective’ based solely on poor student achievement as measured in the 40% category, that prospect renders the regulation invalid.

Now that the decision has been issued, two important points must be considered.

First, the court’s decision invalidated only the specific portions of the regulations that were found to be inconsistent with the statute. The APPR statute itself was not invalidated, nor were the bulk of the Regents’ regulations. This means that the school districts must still comply with all the remaining APPR regulations, including the requirement that APPR plans be adopted by September 1, 2011.

Second, it must be recognized that this decision was issued by a trial-level court, and it is subject to appeal by the State. At this point, the SED has a decision to make. It can re-issue new regulations to replace those invalidated by Judge Lynch, and perhaps face a new challenge if those revised regulations do not have the concurrence of NYSUT, or it could appeal the decision to the Appellate Division, Third Department. If it does appeal, the issue would not be resolved for about a year, but, due to a special provision of New York State Law, the very regulations that were invalidated by Judge Lynch would remain in effect until the Appellate Division issues its decision. This provision of law, found at Civil Practice Law and Rules 5519(a), is entitled “stay of enforcement,” and provides that, “[s]ervice upon the adverse party of a notice of appeal. . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where . . . the appellant or moving party is the state . . .”

The best advice that can be given at this time is that no one should assume that the APPR process is going away, and that school districts would be wise to utilize the time it will take to clear up all the legal issues to negotiate appropriate APPR processes with the unions representing their teachers and principals.