

R. Impact of August 2011 Court Decision Declaring Certain Provisions of the APPR Regulations (Subpart 30-2) Invalid

- R1. To what extent have the provisions of Subpart 30-2 been declared invalid by a State Supreme Court Justice in the New York State United Teachers v. Board of Regents litigation?

On August 24, 2011, Justice Lynch of State Supreme Court, Albany County issued a Decision and Order in New York State United Teachers, et al. v. Board of Regents, Sup. Ct. Albany Co., (Lynch J.) 8/24/11, Index No. 4320-11, RJI No. 01-11-104073, finding sections 30-2.4(c)(3)(i)(d)¹, 30-2.4(d)(1)(iii), 30-2.4(d)(1)(iv)(c), 30-2.12(b), 30-2.1(d) and 2.11(c), and 30-2.6(a)(1) of the proposed regulations invalid to the extent set forth in the Decision and Order. Only those specific provisions of the regulations were challenged in the litigation—the remainder of the regulations remains in full force and effect. An appeal is being taken by the Board of Regents and the Commissioner from that Decision and Order.

The specific provisions that were declared invalid are discussed below.

- R2. Are the provisions invalidated by the State Supreme Court Decision and Order enforceable while an appeal by the State Education Department is pending?

No. The terms of the Decision and Order declare the challenged provisions of the regulations to be invalid, but do not direct any action by the Board of Regents or the Department or otherwise provide for enforcement. In such circumstances, the provisions declared invalid remain invalid to the extent provided in the Decision and Order while an appeal is pending. Therefore, to the extent provided in the Decision and Order, the invalidated provisions are not enforceable, and should not be relied upon as valid by school districts and BOCES unless and until they are determined to be valid on appeal.

Actions taken by the Board of Regents to extend the effectiveness of the emergency rule promulgating Subpart 30-2 while an appeal is pending are intended to preserve the Department's right to appeal, and any invalidated provisions included in such emergency rules will be treated by the Department as unenforceable and not binding on school districts, BOCES, teachers or principals unless and until they are declared valid on appeal.

¹ The Decision and Order incorrectly references one of the provisions being declared invalid to be section 30-2.4(c)(3)(d), but it is clear from the decision that the intended reference is to section 30-2.4(c)(3)(i)(d).

R3. How should school districts and BOCES proceed with teacher and principal evaluations in the 2011-2012 school year?

The vast majority of the provisions in Subpart 30-2 are not affected by the lawsuit and some of the provisions declared to be invalid will not have a direct impact on the conduct of teacher and principal evaluations in the 2011-2012 school year. For example, invalidation of the regulatory provisions in sections 30-2.1[d] and 2.11[c] relating to tenure and dismissal of probationary teachers and the provisions of §30-2.12[b] on the Commissioner's authority to order appointment of independent evaluators will not directly impact the conduct of evaluations in 2011-2012.

We anticipate that judicial appeals will be completed before the end of the 2011-2012 school year, so that final regulations can be adopted to prescribe the requirements for critical components of the evaluations such as scoring bands. In the interim, school districts and BOCES should complete the negotiations needed to implement the new APPR system, assuming the provisions declared invalid are not in effect.

R4. To what extent does the Court's decision preclude the use of State assessments as a locally-selected measure of student achievement?

Section 30-2.4(c)(3)(i)(d) of the proposed APPR regulations adopted as an emergency rule in May 2011 authorized the use of "student achievement on State assessments, Regents examinations and/or Department approved alternative examinations" for the 20% locally selected measures subcomponent without restriction. The Court's Decision and Order declared a part of this provision to be invalid while leaving in place the option for districts to choose local measures based on State assessments in some circumstances.

Specifically, the Court's decision precludes Districts from choosing as a local assessment the same measure of student achievement utilized under the first State assessment or comparable measures ("growth") subcomponent of evaluation. The Court concluded that this would violate the multiple measures requirement of the statute.

However, the Court held that "§30-2.4[c][3][d] of the regulations is invalid only to the extent that the same 'student growth measures' utilized to measure the first 20% category of §30-2.4[c][3][e] may not be utilized to measure the second category." Thus, the decision permits school districts and BOCES to select different measures of student achievement for local assessments even if they use data from the same State assessment other than the growth data that is used for the first "growth" subcomponent.

The Department interprets the decision to mean that the use of the same State-provided student growth measure on both the growth and local subcomponents is prohibited. However, use of student achievement on the same state

assessment (e.g. % of students achieving levels 3 or 4) rather than student growth or a measure involving student growth for student subpopulations only, or other "distinctly different measures of student achievement" should be permissible. We recommend that districts and BOCES consult with their school attorneys over the range of options available to them in light of the Court's decision.

Similarly, SED interprets the Court decision to mean that when there is no State-provided growth measure for a State assessment, (for example, 7th grade Spanish) and a "comparable growth measure" is used, districts must choose a different locally-selected measure from the one utilized as a comparable growth measure in the first 20% State assessment or comparable measures or "growth" subcomponent.

The Court also states, however, that the measures of student achievement from State assessments applied for the locally-selected measures evaluation category must be developed locally through collective bargaining.

- R5. How should school districts and BOCES implement the remaining 60 points of the evaluation in light of the Court's decision striking down the provisions of the APPR regulations requiring that 40% of the remaining 60 points of the evaluation be dedicated to classroom observations, that multiple observations be held and that no more than 5 points be used for teacher progress on professional growth goals?

The Court invalidated these provisions relating to classroom observations and the remaining 60 points of the evaluation on the basis that Education Law §3012-c requires that the evaluation measures for the 60 point category be collectively bargained. Under the Court's decision, school districts and BOCES are not prohibited from bargaining for provisions that provide for multiple observations, require that 40 of the 60 points be dedicated to classroom observations and set a 5 point limit on teacher professional growth goals.

We recommend that districts and BOCES negotiate such provisions, since they will be imposed if we are successful on appeal.

This recommendation is grounded in research that supports the use of multiple and rigorously designed classroom observations as an effective means of evaluating teacher performance. Such research indicates that multiple classroom observations provide a more valid and reliable gauge of teacher effectiveness than a single observation. Also, no other measure of teacher practice has been found to be as reliable as classroom observation.

It should also be noted that the Court decision did not invalidate the provisions of the regulations that require that a teacher's performance under the "60 percent

other measures” category be based on a Department-approved teacher practice rubric that, among other things, broadly covers the New York State Teaching Standards. To fully and effectively utilize these rubrics and assess every New York State Teaching Standard at least once a year for all teachers, as the regulations require, would effectively necessitate multiple classroom observations by the lead evaluator.

- R6. How should school districts and BOCES negotiate provisions relating to scoring bands in light of the Court’s invalidation of the scoring bands established in the APPR regulation?

The Court declared the scoring bands prescribed in the proposed APPR regulation and included in the emergency rule adopted in May 2011 to be invalid to the extent they violate the multiple measures requirement of the statute. In so doing, the Court explicitly upheld the Commissioner’s authority to prescribe the minimum and maximum scoring ranges for each rating category. The scoring bands will be prescribed in the Commissioner’s regulations and not in collective bargaining agreements, and the Department will be appealing on this issue. We recommend that districts and BOCES consult with their school attorneys regarding the range of options available to them in light of the Court’s decision.

- R7. How does the Court decision affect the regulations around evaluation for building principals?

Although the Court’s decision did not explicitly address the regulatory provisions regarding evaluation for principals, we interpret the decision as applying to principals to the same extent that it applies to teachers since the language of Education Law §3012-c relied upon by the Court applies equally to teachers and building principals.

Accordingly, SED interprets the Court’s decision to invalidate for principals as well as for teachers the provisions of the regulations to the extent they can be interpreted to allow Districts to select as a local assessment the same measure of student achievement utilized under the first State assessment or comparable measures (“growth”) subcomponent of evaluation. Specifically, the provisions of §30-2.4(c)(4)(b)-(d) may not be interpreted to allow the same student growth measures from State assessments to be used for both the State assessment or comparable measures (growth) and the locally-selected assessment subcomponents. However, districts may select as local measures different measures based on the same State assessments, among other options. In other words, such provisions must be interpreted to permit the use of measures from State assessments for principals to the same extent as the use of such measures are permitted for teachers.

Similarly, the provisions of §30-2.4(d)(2)(iii) that require that at least 40 of the 60 points assigned to other measures of principal performance be based upon the principal’s leadership and management actions and incorporate one or more

visits by a supervisor, even though not challenged in the litigation, would conflict with the holding in the Court's decision that this subcomponent of the evaluation must be determined through collective bargaining. While we regard such provisions to be unenforceable at present, we are appealing the Court's decision and recommend that school districts and BOCES negotiate such provisions, since they will be imposed if we are successful on appeal.

It should also be noted that the Court decision did not invalidate the provisions of the regulations that require that a teacher's or a principal's performance under the "60 percent other measures" category be based on a Department-approved teacher or principal practice rubric. Principal practice rubrics must be grounded in research about leadership practice and, among other things, broadly cover the Leadership Standards. To fully and effectively utilize these rubrics and assess every Leadership Standard at least once a year for all building principals, as the regulations require, would effectively necessitate one or more school visits by the principal's supervisor and an assessment of the building principal's leadership and management actions.

- R8. What did the Court determine with respect to the provisions of the regulations that provided that nothing in Subpart 30-2 shall be construed to affect the statutory right of a school district or BOCES to terminate a probationary teacher or restrict their discretion in making tenure determinations or to terminate or deny tenure to a probationary teacher during the pendency of an appeal from an APPR rating?

The Court's Decision and Order cited to the language of Education Law §3012-c requiring that the APPR be a significant factor for employment decisions, including tenure determinations and termination and stated that "tenure determinations, including both the granting and denial of tenure, must be performed in compliance with the statute." The Court then held that the provisions of §30-2.1(d) and 2.11(c) are invalid "[t]o the extent these regulations provide otherwise."

The Court did not explain what "compliance with the statute" means or how the APPR must be made a significant factor in employment decisions. The Department is appealing the Decision and Order. In the interim, school districts and BOCES should consult with their school attorneys regarding the impact of the Decision and Order on the law governing employment and tenure decisions.

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