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LAMB & BARNOSKY, LLP

ATTORNEYS AT LAW

MEMORANDUM

DATE: **MARCH 12, 2012**

TO: **OUR SCHOOL DISTRICT AND BOCES CLIENTS**

FROM: **LAMB & BARNOSKY, LLP**

RE: **APPR UPDATE**

On February 16, 2012, an agreement on a proposal to modify the APPR law (Education Law §3012-c) was reached by the Governor, the State Education Department ("SED") and the New York State United Teachers. Legislation to implement this agreement will be submitted with the Governor's legislative proposals for the State's annual budget. Among other things, the proposed bill would resolve issues regarding the Commissioner's APPR regulations which are the subject of litigation in *NYSUT et al. v. Board of Regents et al.,* presently on appeal to the Appellate Division, Third Department in Albany. This will include requiring that most APPR – related matters must be negotiated rather than be subject to unilateral implementation by school districts and BOCES.

If the proposed legislation and related Executive Budget Bill amendments are enacted, you will need to fully implement APPR requirements by January 17, 2013, as demonstrated by documentation of the Commissioner's approval of your plan, in order to qualify for an increase in school aid. However, applicants for a School District Management Efficiency Grant may receive bonus points if the Commissioner approves their APPR plans by September 1, 2012. The other relevant implementation dates are listed at pages 5-7 of this memorandum.

The proposed legislation, if enacted, will continue the general model of the current law and regulations, but will also make some significant changes to specific requirements. As under the current law, 40 points of the composite 100 point evaluation score will continue to be based upon measures of student academic achievement. As before, 20 of those 40 points will be derived from State assessments and the remaining 20 points will be based upon locally selected, collectively negotiated measures of student achievement. (As in the current law, these percentage points will change to 25 and 15, respectively, commencing in school year 2012-13 for grades and subjects for which the Board of Regents approves a value added assessment model that will be used by districts.) The remaining 60 point "other measures" of effectiveness component, including the selection of rubrics, will also be the subject of collective bargaining, based upon regulatory standards to be prescribed by the Commissioner.

Further, APPRs will continue to be a "significant factor for employment decisions including but not limited to, promotion, retention, tenure determination, termination and supplemental

compensation." These decisions, while themselves the prerogative of districts and BOCES, will still be made pursuant to collectively negotiated procedures. However, the Bill recognizes that districts retain the right to terminate a probationary teacher or principal for reasons other than professional performance including, but not limited to, misconduct, even during the pendency of an appeal, Similarly, APPRs will also continue to be a "significant factor" regarding "teacher and principal development, including but not limited to, coaching, induction support and differentiated professional development." As under the current law, these development programs will be established through collective bargaining.

Additional details regarding the proposed legislation are described below.

First year phase (2011-12 school year)

- The first year will continue to be applicable to Common Branch, ELA and Mathematics teachers in Grades 4-8 and their building principals.

- However, the first year phase will now include BOCES.

Evaluation scoring ranges

- Composite evaluation score ranges for the 2011-12 and 2012-13 school years will now be:

Highly Effective:	91-100 points
Effective:	75-90 points
Developing:	65-74 points
Ineffective:	0-64 points

- These composite scoring ranges are set forth in the Bill (along with ranges for the two 20 point student achievement subcomponents), but only for the 2011-12 and 2012-13 school years.

- With regard to the 2013-14 school year and subsequent years, the Bill requires the Commissioner "to review the specific scoring ranges for each of the rating categories annually before the start of each school year" and to "recommend any changes to the Board of Regents for consideration." This implies that any changes to the composite scoring ranges and the ranges for the two 20 point student achievement subcomponents, once the time frames in the proposed bill expire, will be promulgated via regulation.

- However, starting with the 2011-12 school year, the scoring ranges for the 60 point component will be established through collective bargaining and not set by the State.

Locally selected measures of student achievement (the second 20 point subcomponent)

- Measures of student achievement which may be locally selected through the bargaining process for the 2011-12 school year (the first 20 point component will be established by the State) are:

a) State assessments (if different than those in the first 20 point component); b) SED-approved third party assessments; and c) locally developed tests subject to SED review and approval.

- For subsequent school years, the Bill details the various locally selected measures of student achievement which may be selected for this subcomponent through collective bargaining for teachers and principals in grades and subjects for which there either is an approved value added model or no approved value added model approved by the Board of Regents.

The "other measures" of effectiveness (60 point component)

- This component will be locally developed through collective bargaining, consistent with standards prescribed by the Commissioner's regulations.

- For the 2011-12 school year, a majority (at least 31 points) of the 60 points for classroom teachers will be based on multiple classroom observations, which may be performed in person or through the use of video, by principals or trained administrators. In addition, these observations must include at least one unannounced observation. This standard represents a potential decrease from the 40 points which, as prescribed by the Commissioner's regulations, were to be based upon observations. (As we reported in our memorandum to clients dated September 16, 2011, that 40 point regulatory standard was held to be inconsistent with the statute by the first level court in the NYSUT litigation.)

- Commencing with the 2012-13 school year, for classroom teacher evaluations, the remaining (up to 29) points in the 60 point component will be based upon one or more of the following: a) observations by independent trained evaluators (these evaluators could be teachers or former teachers) selected by a district; b) observations by trained in-school peer teachers; c) use of a State-approved instrument for parent or student feedback; and/or d) evidence of student achievement shown "through lesson plans, student portfolios and other artifacts of teacher practices through a structured review process."

- For principals, a majority of the 60 points for the 2011-12 school year "shall be based on a broad assessment of the principal's leadership and management actions based on the principal practice rubric by the building principal's supervisor, a trained administrator or a trained independent evaluator, with one or more visits conducted by the supervisor." The remaining points will be based on "other forms of evidence of principal effectiveness" prescribed in the Commissioner's regulations.

- For the 2012-13 school year and subsequent years, a majority of the 60 point component for principals "must incorporate multiple school visits by a supervisor, a trained administrator or other trained evaluator, with at least one visit conducted by the supervisor and at least one unannounced visit." The balance of the points, in addition to the 2011-12 requirements described above, will include "at least two other sources of evidence from the following options: feedback from teachers, students and/or families using state-approved instruments; school visits by other trained evaluators; and/or review of school documents, records and/or state accountability processes." These "remaining points shall be assigned based on the results

of one or more ambitious and measurable goals set collaboratively with principals and their superintendents or district superintendents." At least one of these goals "must address the principal's contribution to improving teacher effectiveness." This goal "shall include one or more of the following: improved retention of high performing teachers, the correlation between student growth scores of teachers granted tenure as opposed to those denied tenure; or improvements in the proficiency rating of the principal on specific teacher effectiveness standards in the principal practice rubric." Other goals will be required to address measurable "improvements in academic results or the school's learning environment such as student or teacher attendance."

Point assignment process

- The process for assigning points in subcomponent scoring ranges; i.e., the method of translating student scores on assessments to point values in various evaluation categories, must be transparent and available to those being rated before the beginning of each school year. This method must also make it possible for a teacher or principal to obtain each point in the relevant scoring ranges, including zero. While SED will determine this method for the 20 point state assessment subcomponent, the method must be negotiated with regard to the 20 point subcomponent for locally selected measures of student achievement and for the 60 point "other measures" component.

Certification of APPR plan by district and union

- The Bill provides that, "[t]he superintendent, district superintendent or chancellor and the president of the collective bargaining representative (where one exists) shall certify in its plan that the process will use the narrative descriptions of the standards for the scoring ranges provided in the regulations to effectively differentiate a teacher or principal's performance in each of the subcomponents and in their overall ratings to improve student learning and instruction."

Additional Commissioner/SED authority and duties

- The Commissioner will now have the authority to approve or reject an APPR plan. If a plan is rejected, the Commissioner "shall describe each deficiency in the submitted plan and direct that such deficiency be resolved through collective bargaining to the extent required under" the Taylor Law.

- SED will be required to "annually monitor and analyze trends in teacher and principal evaluation results and data to identify districts … and/or schools where evidence suggests that a more rigorous evaluation system is needed."

- The Commissioner will have the authority to order a corrective action plan in view of SED's analysis. The plan may include requirements that the district "arrange for additional professional development, provide additional in-service training and/or utilize independent

trained evaluators to review the efficacy of the evaluation system, provided that the plan shall be consistent with law and not in conflict with any applicable collective bargaining agreement."

Appeal process

- Appeal processes must be timely, expeditious and negotiated locally. (There is also an additional agreement and a separate bill with regard to the appeal process in the NYC school system.)

- Clarifying an ambiguity in the lower court's decision, the Bill recognizes that, even during the pendency of an appeal, districts retain the right to terminate a probationary teacher or principal for reasons other than professional performance including, but not limited to, misconduct. However, the fact that this is a limited exception to the general rule that APPRs must be a "significant factor for employment decisions" underscores the need for a prompt negotiated appeal process. In particular, districts would be best served by resisting negotiation demands for APPR appeals to arbitration, which is generally a slower process than an appeal that culminates with; e.g., a Superintendent's determination. In addition, a document review appeal process would be more expeditious than one which involves meetings, conferences, hearings; etc.

Implementation dates

- By July 1, 2012, each district must adopt a plan on a form prescribed by the Commissioner. However, if by July 1, 2012 or any subsequent year "all the terms of the plan have not been finalized as a result of unresolved collective negotiations, the entire plan shall be submitted" to the Commissioner upon resolution of all its terms, consistent with the Taylor Law. This provision appears designed to undercut any strategy for a district to unilaterally implement APPR procedures on an emergency basis to satisfy New York State requirements. In other words, the extension of the July 1 deadline for plan submission would not render a district or BOCES out of compliance with statutory or SED requirements and thus there would be no compelling argument, under PERB's *Wappinger's Falls* decision, in support of a unilateral implementation or submission of a plan for approval to avoid non-compliance.

- SED will approve or reject each plan by September 1, 2012 "or as soon as practicable thereafter."

- Before completion of the overall APPR, teachers and principals must be given their scores and ratings in writing on the second 20 point component (if available) and the 60 point component by the last day of the school year for which they are being rated. This early rating indicator will not be appealable, as an appeal may only be submitted pursuant to negotiated procedures after an overall APPR is received by a teachers or principal. Thus, the Bill provides that this early rating indicator will not "trigger" an appeal.

- Evaluations must be completed and provided to teachers and principals by September 1 of each year. Again, however, there may be an extension of this September 1 deadline if the APPR

plan is not submitted to the Commissioner by July 1 for approval due to unresolved collective bargaining issues. The precise length of an extension for this reason of the time to complete and distribute evaluations is not addressed in the Bill. Presumably, though, the length of such an extension would be a reasonable period after final submission of the plan to the Commissioner once collective bargaining issues are resolved.

- Any teacher and principal improvement plans for those rated as "ineffective" or "developing" must be developed through negotiations and put in place no later than 10 school days after the start of classes for the school year. This represents a slight extension of the deadline under current law, which requires that these plans be implemented no later than 10 calendar days after the date on which teachers are required to report to school.

- As noted above, districts must be able to demonstrate full implementation of all requirements by January 17, 2013 or risk losing eligibility for an increase in school aid. This deadline appears in the Governor's 30 day amendments to the Aid to Localities budget bill, which is separate from the proposed APPR legislation that would amend Education Law §3012-c.

- Bonus points: Finally, in a related Executive Budget amendment to the Aid to Localities Budget Bill, it is proposed that "a school district that submits documentation that has been approved by the commissioner by September 1, 2012 demonstrating that it has fully implemented new standards and procedures" for teacher and principal APPRs "shall receive bonus points in its scoring for a grant application" for a School District Management Efficiency Grant.

Issues regarding January 17, 2013 deadline

- It remains unclear if the extension for submitting a plan to the Commissioner by July 1, 2012, until collective bargaining issues are resolved (and any related extension for implementing the plan by September 1, 2012 as described above), would last beyond the January deadline. Arguably, the January 17 date for having documentation of full APPR implementation is an outside limit on extensions when APPR collective bargaining issues are not resolved. Thus, unless this requirement is further clarified, districts and BOCES should make it a priority to finalize APPR negotiations in time to meet the January 17 deadline for documenting approval of a plan by the Commissioner.

- If negotiations are not completed in time to meet the January 17 deadline, as a last resort, districts and BOCES may consider a unilateral implementation and submission of the plan to the Commissioner to avoid losing a school aid increase. Under these circumstances, any submission to the Commissioner should be made in sufficient time to be able to obtain documentation of plan approval by January 17, 2013. However, there is a real possibility that the Commissioner would decline to approve a plan that is not certified by the union. If the plan is not approved, there would still be a risk of losing a school aid increase. In addition, a unilateral implementation and submission of a plan would likely be met with an improper practice charge filed by a union. In that case, a district or BOCES could continue to negotiate while asserting a *Wappinger's Falls* defense that it had no choice but to implement the plan and

submit it for approval in order to comply with State requirements. In view of the uncertainties and risks involved in unilaterally implementing and submitting a plan, this is generally not a recommended approach.

There has been much said in the public arena about the new APPR agreement, though not all of these statements are reflected in the proposed legislation as presently drafted. In addition, the SED is updating its APPR guidance and will most likely issue further guidance for implementation of the law, including the use of rubrics selected in collective bargaining from an SED-approved list. As of this writing, the SED recently released additional information in anticipation of the Bill's enactment that, with regard to rubrics, states that the plan submission form being developed will require a recitation of "[d]ecisions about teacher and principal practice rubrics." Pending further guidance, once the Bill is enacted, the rubrics should be locally selected through collective bargaining and their use should be bargained consistent with the Commissioner's regulations, i.e., the scoring ranges and assignment of points should be negotiated to apply the standards set forth in the selected rubric. We will continue to monitor relevant developments and provide you with updates as information becomes available.

At this point, however, it is notable that the proposed legislation would require districts to negotiate over matters which arguably were not mandatory subjects of negotiation pursuant to the present law; e.g., the choice of the locally selected measures of student achievement. Similarly, the process by which points are assigned in that subcomponent, as well as assignment of points and selection of rubrics in the "other measures" (60 point) component of the APPR, would be rendered a subject of negotiation by the proposed legislation.

Please contact us if you have any questions regarding the agreement or the proposed legislation.

THIS MEMORANDUM IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT LAW, THE NEW APPR AGREEMENT AND THE ASSOCIATED LEGISLATIVE PROPOSALS. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.