State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
255 Westminster Street
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Deborah A. Gist
Commissioner

September 26, 2014

Re: Interpretation of RIGL §16-12-11

Dear Colleagues:

Over the past several weeks, I have received several requests, both formal and informal, for legal advisory opinions relating to interpretation of Senate Bill 2738 Sub A, the law that recently created RIGL §16-12-11. I addressed many of the questions regarding this recent legislation in guidance contained in my Field Memo on August 1, 2014, but apparently some educators are still confused or misinformed about the implications of this legislation. Their confusion is due in part to misinterpretations of the law that have been widely circulated. To alleviate any remaining confusion and to correct misinformation, I am issuing this advisory opinion.

Interpretation of school law

The General Assembly has specifically and uniquely delegated the Commissioner of Elementary and Secondary Education with the duty to "interpret school law" (RIGL §§ 16-1-5(10), 16-60-6(9)(viii)), as well as to "require the observance of all laws relating to elementary and secondary schools and education." RIGL §§ 16-1-5(9) and 16-60-6(9)(vii) In addition, the Rhode Island Supreme Court has emphasized that: "[i]f a statute expressly delegates power to interpret and define certain legislation to an agency, regulations promulgated pursuant to that power are legislative rules having the force of law." *Lerner v. Gill*, 463 A.2d 1352 (R.I.1983), citing *Batterton v. Francis*, 432 U.S. 416, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977). The Court has also made clear that "a presumption of validity attaches to a legislative rule that a challenger must rebut." *See Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, 356–57 (R.I.1989), citing *Henry v. Earhart,* 553 A.2d at 126–27 & 126–27 n. 1 (R.I. 1989) and *American Hoechst Corp. v. Norberg,* 462 A.2d 369, 372 (R.I. 1983). In other words, the Commissioner's interpretation of §16-12-11 is presumed to be correct and controlling, while others' opinions are just that – their opinions.

Statutes and regulations

The first misperception regarding the law, or statute, on the frequency of teacher evaluations is that this new law invalidates the Rhode Island Educator Evaluation System Standards (EESS), which are regulations that the Rhode Island Board of Regents for Elementary and Secondary Education promulgated. Under Rhode Island law, lawfully promulgated regulations have the same legal force and effect as statutes, unless there is an actual conflict with a statute, in which case the statute governs. *In re Advisory Opinion to the Governor*, 732 A.2d 55, 75 (R.I. 1999). Accordingly, we must be extremely careful when reading the law on the frequency of

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evaluations to discern those very limited areas in which the law invalidates portions of the EESS regulations.

Frequency of evaluations

Generally speaking, the new law introduces limitations to the *frequency* with which certain tenured teachers may be evaluated. The legislation does not overturn the regulatory requirement that the EESS regulations set forth, which requires each LEA to have and to implement an approved evaluation system. The EESS regulations mandate annual evaluations for all educators; the new law modifies that requirement for tenured teachers who obtain or earn a rating of highly effective or effective. Tenured teachers rated highly effective "shall, subsequent to that evaluation, be evaluated not more than once every three (3) years thereafter." Tenured teachers rated effective "shall, subsequent to that evaluation, be evaluated not more than once every two (2) years thereafter." This language obviously contravenes the language in the EESS regulations requiring annual evaluation for all educators (*R.I. Educator Evaluation System Standards*, Standard 4(a)), but only to the degree that the new law expressly overrides the EESS regulations. That means that the "not more than once every three years" language in the new law becomes the minimum as well as the maximum number of evaluations for any qualifying teacher, i.e., tenured teachers who have earned the rating of highly effective. The same, of course, holds true for teachers who can be evaluated "not more than once every two years," that is, tenured teachers who have earned the rating of effective. Because the statute limits the regulatory requirement of annual evaluation only by its express terms, the statute and the EESS regulations read together effectively mean that teachers earning the rating of effective or highly effective are to be evaluated not more *and not less* than every two or three years, respectively (except in regard to provisions within the law that would allow for more frequent evaluations in specified instances).

Evaluations during the current school year

The second misinterpretation of the law on the frequency of evaluations is the idea that a tenured teacher who has earned the rating of "effective" or "highly effective" in the previous (2013-14) school year cannot be evaluated during the current (2014-15) school year. At least one individual has publicly stated that evaluating a tenured teacher with an "effective" or "highly effective" rating in both the previous and current school years would illegally increase the frequency of evaluation. This "interpretation" of the law is patently incorrect, for two distinct reasons.

The bill that created the law on the frequency of evaluations took effect on August 14, 2014. The bill is not retroactive in application. Courts generally disfavor retroactive application of a bill, particularly without an explicit expression of retroactive application in the bill itself. *Direct Action for Rights and Equality v. Gannon*, 819 A.2d 651, 658 (R.I. 2003). Given that there is no such intent expressed in the bill, the new law can be applied only prospectively, that is, going forward from the date of August 14.

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If a teacher earned a rating of "effective" or "highly effective" in the previous school year (2013-14), that year becomes the baseline year that triggers the protections of the statute. The plain meaning of the language should be clear to anyone: "not more than two (or three) years" explicitly refers to the two or three years "thereafter," that is, after the teacher earned the effective or highly effective rating. We cannot count the baseline year as part of two-year or three-year restriction, which can occur only *after* the teacher earned the effective or highly effective rating. Clearly, the two years "thereafter" for effective teachers are the current (2014-15) and the next (2015-16) school years. Just as clearly, the teacher can be formally evaluated in only one of those two years – but *there is nothing in the statute that prevents the evaluation of an "effective" teacher in 2014-15.*

Similarly, the three years "thereafter" for highly effective teachers are the current (2014-15) and the next two (2015-16 and 2016-17) school years. Just as clearly, the tenured teacher who earned a rating of highly effective can be formally evaluated in only one of those three years. *There is nothing in the statute, however, that prevents the evaluation of a "highly effective" teacher in 2014-15.* In short, nothing in the law in any way prohibits evaluation in consecutive years.

Goals and objectives

I have also received a request for an advisory opinion regarding the implementation of Professional Growth Goals (PGGs) and Student Learning Objectives (SLOs), specifically, whether schools and districts may elicit PGGs and SLOs from tenured teachers "during the intervals between evaluations" or only during the evaluation periods. We see no connection between evaluating the effectiveness of teachers and requiring teachers to offer professional goals for themselves and learning objectives for their students. Although there may be some overlap between the establishment of goals and objectives and the evaluation process, each has separate and valuable purposes and we should not conflate the two processes. Rather, we should distinguish between the summative evaluations that occur within an approved educator-evaluation system and the ongoing supervision of staff for instructional improvement that our Basic Education Program requires in all LEAs. *Basic Education Program Regulations*, § G-13-1.2).

Ongoing supervision may include practices such as observations, conferencing, examining student performance, and other forms of providing feedback that result in the improvement of teaching and learning. Schools and districts may use information from ongoing supervision for locally determined purposes, but this information does not result in a summative-evaluation score and need not be part of the evaluation process in order to take place.

Summary

The new law on the frequency of teacher evaluations, RIGL § 16-12-11, does not reference SLOs or PGGs nor does it prevent evaluations in the current (2014-15) school year for tenured teachers who last year earned the rating of highly effective and effective. The two-year and three-year periods during which tenured teachers earning the ratings of effective and highly

effective, respectively, are to be evaluated only once (unless other provisions in the law trigger additional evaluations) begin in the current school year (2014-15).

I stand by these legal opinions and by the guidance we disseminated on August 1, which I am attaching for your convenience. This letter constitutes my formal legal advisory opinion, issued pursuant to my statutory authority. The contents of this letter are for advisory purposes only, and I have based this letter on the facts presented in your request for a legal advisory opinion. As such, this advisory opinion would be subject to review in a formal hearing should an interested party request any such hearing.

Very truly yours,

Deborah A. Gist
Commissioner of Education

DAG/crb

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