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**LEGAL ADVISORY:**

**BOARD OF EDUCATION REVISIONS  
TO EDUCATOR EVALUATION REGULATIONS**

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**I. INTRODUCTION**

On February 28, 2017, the Massachusetts Board of Education approved certain revisions to the regulations pertaining to educator evaluation, codified at 603 CMR 35.00. The amendments, scheduled to take effect upon publication by the Secretary of State on March 24, 2017, affect the evaluation system for all educators, including administrators, but this memorandum focuses primarily on the effect upon teacher evaluation. Among the most notable changes, the proposed revisions remove references to district-determined measures (DDMs) and individual impact ratings, replacing them with a new “student learning indicator.” A redlined copy of these amendments, as well as a Memorandum from the Commissioner dated March 10, 2017, can be found at the DESE website ([www.doe.mass.edu](http://www.doe.mass.edu)). According to that Memorandum, school districts are not required to report student impact ratings for 2016-2017, but they are expected to incorporate the regulatory amendments into their evaluation systems by the beginning of the 2017-2018 school year. Under former and new regulations, the Department of

Elementary and Secondary Education (DESE) retains the right to review all collectively bargained evaluation systems and amendments for consistency with the regulations.

The former regulations required the development of DDMs and separate individual impact ratings for teachers in the evaluation process. Efforts to fold those elements into contract evaluation provisions have netted limited success at the bargaining table. In light of these difficulties, beginning in the summer of 2016 the Department of Elementary and Secondary Education (“DESE”) began circulating for review and comment potential adjustments to the regulations. These early conversations resulted in DESE’s development of proposed revisions to the regulations, which revisions DESE presented to the Board of Education this past fall. The Board, in turn, posted a notice soliciting public comment for the draft revisions. As noted, the Board of Education adopted the amended regulations at its February 28, 2017 meeting.

The amended regulations eliminate or revise several provisions in the regulations, the three most significant of which are addressed in this advisory. First, and most notable, the concept of utilizing DDMs and an individual impact rating are deleted from the new regulations. In their place, the Board added a new “student learning indicator” to “Standard II: Teaching All Students.” See 603 CMR 35.03(c).

Second, the proposed regulations incorporate a measurement of whether an educator has demonstrated the “expected impact” on student learning gains. The determination of whether an educator has or has not met the “expected impact” is based on the evaluator’s professional judgment applied to multiple measures of student learning, growth, and achievement, student learning gains and common assessments, and state-wide student growth measures. The “expected impact” also may include consideration of the teacher’s student population and specific learning context. See 603 CMR 35.02 and 35.06(3)(e)(2).

Third, the amended regulations require a conversation between the evaluator and the educator when there is a discrepancy between the evaluator's ranking on the "Teaching All Students" standards and the evidence of the educator's impact on student learning, growth, and achievement.

Section II of this memo discusses the Board of Education's broad policy-making authority relative to adopting educator evaluation standards, including measures for student learning, growth, and achievement. Section III discusses the collective bargaining implications of implementing further changes to the educator evaluation system.

## **II. BOARD OF EDUCATION AUTHORITY – ADOPTION OF STANDARDS AND INDICATORS**

The Board of Education is charged with helping to create and monitor educational opportunities for students. The duties of the Board and DESE are statutorily defined to ensure that (1) every classroom provides conditions for students to fully engage in meaningful learning; (2) a consistent financial commitment and resources are made available to provide high quality public education; (3) a deliberate process for establishing and achieving educational performance goals of every child exists; and (4) there is "an effective mechanism for monitoring progress towards those goals and for holding educators accountable for their achievement." G.L. c. 69, §1. It is beyond dispute that the law charges the Board with creating an educator accountability system for student achievement. Indeed, it is hard to imagine a meaningful educator evaluation process that does not consider student outcomes.

In furtherance of these broad goals, the Commissioner must assess the effectiveness and improvement of schools in every school district. G.L. c. 69, §1A. The statutory focus on improving learning opportunities for every student, increasing funding, and measuring student learning growth and achievement has resulted in additional statutory language that requires the

Board of Education to publish information on student achievement and performance goals, and to establish qualifications for teachers. *See* G.L. c. 69, §1B. More narrowly, the Board must “establish guidelines for establishing a system of personnel evaluation, including teacher performance standards.” *Id.* at paragraph 13. Toggling between assessing teacher performance and district performance, the legislature has determined that a school’s improvement or failure to improve is “defined by student acquisition of the skills, competencies and knowledge” necessary to satisfy the academic standards and educational goals adopted by the Board pursuant to G.L. c. 69, §1D. The determination of whether students have acquired skills, competency, and knowledge is left to the Commissioner, who is authorized to collect information from districts “for the purposes of evaluating individual public schools, school districts [... and] assessing the effectiveness of district evaluation systems and assuring effective teaching and administrative leadership.” *See* G.L. c. 69, §1I, paragraphs 4 & 5.<sup>1</sup>

Given the statutory framework, the adoption of evaluation regulations is a permissible exercise of the Board’s authority. The Board’s recent modifications to the original regulations are also in furtherance of its purposes and authority. The Board can determine whether DDMs and individual impact ratings are appropriate devices to assess and measure teacher effectiveness or, as it has done, determine whether to replace those portions of the regulations with student learning indicators and an assessment of whether a teacher meets expectations.

The Board has chosen to modify the standards and indicators contained in 603 CMR 35.03 by adding a new subsection (f). The new regulations focus on Standard II: “Teaching All Students.” The new subsection includes a new student learning indicator which assesses whether an educator “[c]onsistently demonstrates expected impact on student learning based on

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<sup>1</sup> The legislature has acknowledged that, while district results are matters of public interest and are to be reported in the aggregate, any information related to a specific teacher is considered to be “personnel information,” exempt from disclosure under the public records statute pursuant to G.L. c. 4, §7, cl. 26(c).

multiple measures of student learning, growth, and achievement.” For teachers who are responsible for direct instruction, these measures must include student progress on common assessments and, where available, state-wide student growth measures. *Id.* Assessing an educator’s “expected impact” depends on whether:

[...] the educator meets or exceeds anticipated student learning gains on multiple measures of student learning, growth, and achievement. The evaluator shall use professional judgment to determine whether the educator is having expected impact on student learning, based on student learning gains on common assessments and, where available, statewide student growth measures. The evaluator’s professional judgment may include, but is not limited to, consideration of the educator’s student population and specific learning context. Anticipated student learning gains must be consistent across the district for common assessments and agreed upon by the educator and evaluator for other assessments. The Department shall establish anticipated student learning gains for statewide student growth measures in guidance.

*Id.*

The focus on whether an educator meets or fails to meet expectations relates to the development of self-directed growth plans in the evaluation cycle. Experienced educators<sup>2</sup> who are rated proficient or exemplary and whose impact on student learning *is at least* as expected, may adopt a self-directed educator plan for two years. For those experienced educators rated proficient or exemplary whose impact *is less than* expected, a self-directed plan of one year’s duration will be implemented, and the evaluator shall discuss with the educator the educator’s impact on student learning, growth, and achievement. For those experienced, proficient, or exemplary educators whose impact is less than expected, the self-directed growth plan will also examine goals, elements, and practices contributing to the less-than-expected impact.

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<sup>2</sup> Experienced teachers rated “proficient” or “exemplary” and who have achieved at least the expected impact will be evaluated every two years.

**III - A. COLLECTIVE BARGAINING IMPLICATIONS – G.L. c 71, §38 and G.L. c. 150E**

On the local level, the principles of evaluation established by the Board must be applied by the Superintendent to all teachers, principals and administrators. See G.L. c. 71, §38. Additionally, a School Committee may require the utilization of supplemental performance standards if consistent with the Board of Education principles. *Id.* Local school district autonomy is limited by the statutory scheme set out in §38, the rules established by G.L. c. 69, G.L. c. 150E, and the regulatory framework at 603 CMR 35.00, *et seq.*, regarding evaluations.

Although the requirement that evaluations be conducted is not subject to collective bargaining, the procedures by which these evaluations are conducted is “subject to the collective bargaining provisions of chapter one hundred and fifty E.” See G.L. c. 71, §38. Additionally, “all teacher performance standards” are determined through negotiations “for a reasonable period of time.” *Id.* Before sitting down with the local Union to negotiate performance standards, the Committee is obligated to convene a public hearing and solicit comments on the standards. In this instance, we believe that means that the provisions of Standard #2 relative to “Teaching All Students” are subject to the public hearing requirements of §38. Thereafter, if the School Committee and Union are unable to reach agreement after a reasonable period of negotiations, “teacher performance standards shall be determined by binding interest arbitration.”<sup>3</sup> *Id.*

Many districts completed the first round of teacher evaluation negotiations without resort to interest arbitration. There have been one or two cases in which arbitrators were called upon to

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<sup>3</sup>Most arbitrations in the public sector are “rights” arbitrations, in which the arbitrator determines the rights of the parties in relation to an existing but disputed contract clause. Interest arbitration, in contrast, requires that the arbitrator draft the contract language that will govern the parties’ obligations and behavior. While the parties are free to propose evaluation standards authored from any state or national organizations, it would be rare to find an arbitrator experienced in the drafting of a teacher evaluation instruments and establishment of standards of performance for educators. Nevertheless, that is the process the legislature has created.

draft evaluation language.<sup>4</sup> The provisions of G.L. c. 71 §38 establish the rules for negotiating the new evaluation language relative to student indicators and whether educators meet expected impact on students. The law expressly requires that “subsequent modifications of performance standards must be made pursuant to §38.” Given the current climate, we do not anticipate arriving at a speedy resolution of the issues presented by the proposed regulations.

The law requires negotiation, but a working definition of the requirement that the parties “undertake for a reasonable period of time to agree on teacher performance standards” is not readily ascertainable. The use of the word “reasonable” makes it clear that neither party may unilaterally pre-determine the duration of negotiations. It also implies an objective perspective on the amount of time spent on negotiations, the behavior of the parties, and the totality of the circumstances. See, e.g., *School Committee of Newton v. Labor Relations Commission*, 388 Mas. 557 (1983); *Plymouth and AFSCME Council 93*, 23 MLC 175 (1997). Given the required interest arbitration process, normal impasse procedures available in successor negotiations (proceeding to mediation and fact finding with a return to the bargaining table), and the impasse proceedings in midterm bargaining (negotiating in good faith to impasse with a managerial right to implement a proposal consistent with those on the bargaining table at the point of impasse) are probably inapplicable. However, we have little doubt that even if the provisions of §38 relative to interest arbitration are the exclusive means for resolving this dispute, school districts implementing changes to their evaluation systems will find themselves defending unfair labor charges at the Division of Labor Relations, a notoriously inhospitable forum for management.

As early as 1977 the Division of Labor Relations acknowledged that, while the requirement that evaluations be conducted is not subject to collective bargaining, the negotiation of evaluation procedures does not impinge “upon the non-delegable of the responsibilities of a

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<sup>4</sup> Cases in Lawrence and Spencer-East Brookfield are on record.

school committee.” *Town of Danvers and Local 2038*, 3 MLC 1570 (1977). Over time, the Division of Labor Relations has determined that new evaluation criteria are a mandatory subject of bargaining. *See Comm. of Mass. and SEIU Local 509*, 18 MLC 1161, 1165 (1991). Further, while changes to an evaluation process which “merely measure the same performance criteria which have been measured in the past” do not violate the law, *Town of Wayland and IBPO*, 5 MLC 38 (1979), in our view, the proposed DESE regulations relative to student learning indicators and the issue of whether teachers meet expectations relative to student learning would constitute “new criteria” within the meaning of the precedent. While it may be argued that §38’s process of interest arbitration preempts G.L. c. 150E and renders the precedent inapplicable, the deference paid to a well-developed body of law under G.L. c. 150E could undermine the position.

#### **111– B. IMPACT ON EXISTING EVALUATION AGREEMENTS**

School districts came to agreements on an evaluation process following the adoption of the regulations and the model agreement in 2012-2013. As noted in the introduction to this memo, §38 requires submission to DESE of any amendments to the existing agreements. Further, assuming there has been a public hearing before the Committee meets with the Union to negotiate for a reasonable period of time on the potential regulatory changes, questions remain on the status and utility of the existing agreement in the absence of agreed upon amendments.

The regulations are clear. The 2013 regulations<sup>5</sup> state:

All evaluation systems and changes to evaluation systems shall be subject to the Department’s review to ensure the systems are consistent with the Board’s Principles of Evaluation. *A district may continue to use its existing evaluation system until the district has fully implemented its new system.*

603 CMR 35.11(2).

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<sup>5</sup> Under the new regulations, this provision is slightly modified and located at 603 CMR 35.10(2).



As noted above, the Commissioner's expectation is that evaluation systems will be in alignment with the amended regulations as of the beginning of the 2017-2018 school year. In the absence of an agreement, the existing and proposed regulations require that the present agreement on evaluation continue and must be utilized. We do not read the regulatory use of the words "may continue" to provide an option to discontinue the existing practice. The mandatory provisions of the statute relative to the creation of an evaluation system in accordance with Board of Education principles do not provide an opt-out if there is a lack of agreement on a modified plan. While one might argue that the phrase "may continue" permits the cessation of the existing agreement or the portions of it repealed by the new regulations, such as the deletion of DDMs and the individual impact rating, we believe this aggressive interpretation sails too close to the wind.

#### **IV. CONCLUSION**

As adopted by the Board, the new regulations will require a change in indicators of evaluation standards. We anticipate that the primary bargaining focus will be on whether an educator "demonstrates the expected impact" on student learning. School Committees should work closely with their local counsel to assess how these new regulations will affect their existing evaluation systems and school districts.

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