

PANC
2017 SPRING CONFERENCE
Wrightsville Beach, N.C.
April 5, 2017

**TOP TEN (OR MORE) LEGAL
ISSUES FOR
SCHOOL ADMINISTRATORS
(2017)**

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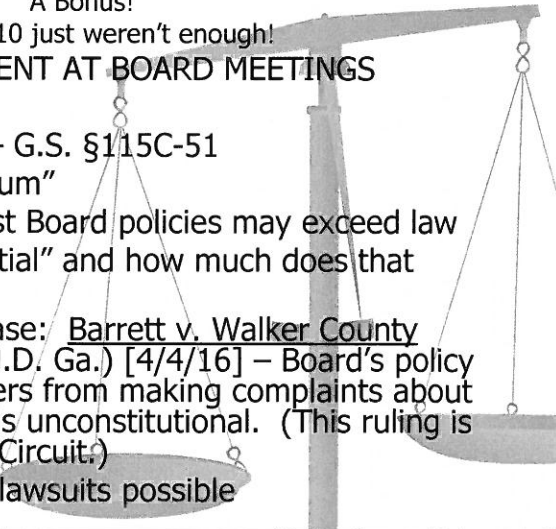
THE TOP 10

#11

A Bonus!

Because 10 just weren't enough!

PUBLIC COMMENT AT BOARD MEETINGS

- 
- Required by law – G.S. §115C-51
 - Classic "Open Forum"
 - Limitations in most Board policies may exceed law
 - What is "confidential" and how much does that matter?
 - Recent Georgia case: Barrett v. Walker County School District, (N.D. Ga.) [4/4/16] – Board's policy prohibiting speakers from making complaints about school personnel is unconstitutional. (This ruling is on appeal to 11th Circuit.)
 - First Amendment lawsuits possible

THE TOP 10 #10

ESSA: Every Student Succeeds Act

- Replaces NCLB as the latest incarnation of ESEA
- Enacted: December 2015; Effective: July 1, 2017
- More State choice/fewer Federal mandates
- Greater flexibility in assessing schools, testing, and evaluating teachers
- State plan: "Challenging academic standards and assessments"
- Accountability – 5 components:
 - Establishment of Long-Term Goals;
 - Indicators of Academic Success;
 - Annual Meaningful Differentiation;
 - Identification of Schools labeled for "comprehensive support and improvement"; and
 - Annual Measurement of Achievement (subgroups)
- Testing:
 - Beyond Math, Reading/ Language Arts and Science courses, additional standardized testing is left to the discretion of the State.
 - States may administer assessments through a single summative or multiple state-wide interim assessments conducted throughout the year which result in a single summative score.

THE TOP 10 #10

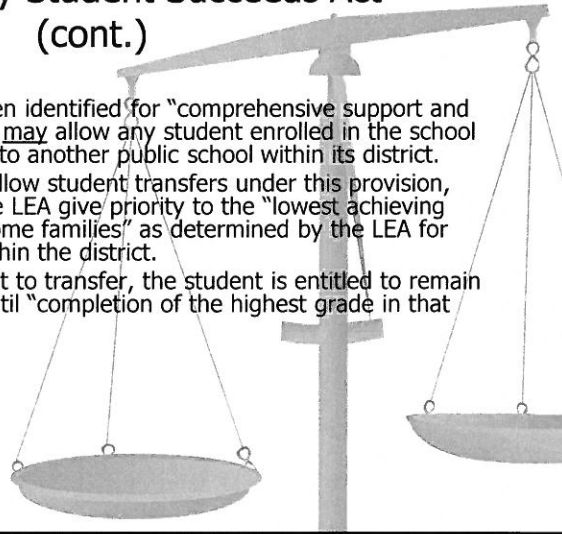
ESSA: Every Student Succeeds Act (cont.)

- The State, each LEA, and each school must maintain disaggregated assessment data for the following subgroups:
 - Race and ethnicity;
 - Economically disadvantaged students as compared to students who are not economically disadvantaged;
 - Children with disabilities as compared to children without disabilities;
 - English proficiency status;
 - Gender; and
 - Migrant status.
- Once a school is given notice that it has been identified for "comprehensive support and improvement" by the State, the LEA, in conjunction with local "stakeholders," must "develop and implement a comprehensive support and improvement plan" designed to improve student outcomes.

THE TOP 10 #10

ESSA: Every Student Succeeds Act (cont.)

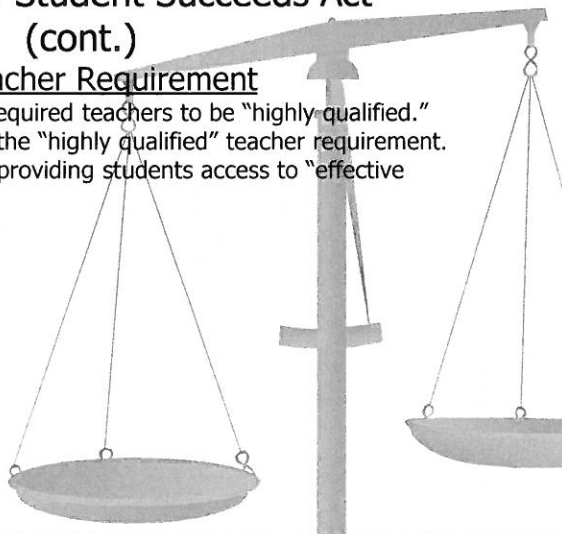
- School Choice
 - Once a school has been identified for “comprehensive support and improvement” an LEA may allow any student enrolled in the school the option to transfer to another public school within its district.
 - If an LEA decides to allow student transfers under this provision, ESSA requires that the LEA give priority to the “lowest achieving children from low-income families” as determined by the LEA for allocation of funds within the district.
 - If LEA allows a student to transfer, the student is entitled to remain at their new school until “completion of the highest grade in that school.”



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ESSA: Every Student Succeeds Act (cont.)

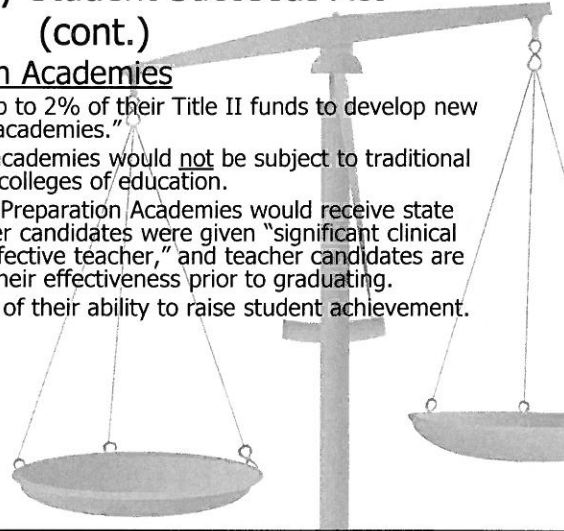
- Highly Qualified Teacher Requirement
 - No Child Left Behind required teachers to be “highly qualified.”
 - ESSA does away with the “highly qualified” teacher requirement.
 - ESSA’s emphasis is in providing students access to “effective teachers.”



THE TOP 10
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ESSA: Every Student Succeeds Act
(cont.)

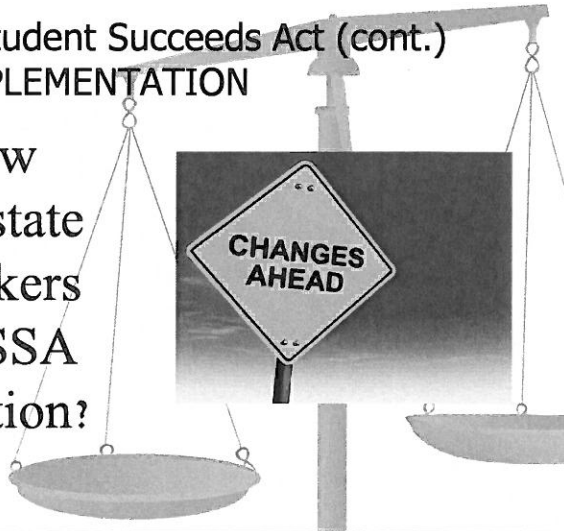
- Teacher Preparation Academies
 - States can now use up to 2% of their Title II funds to develop new "teacher preparation academies."
 - Teacher preparation academies would not be subject to traditional state regulations and colleges of education.
 - Under ESSA, Teacher Preparation Academies would receive state authorization if teacher candidates were given "significant clinical training" under an "effective teacher," and teacher candidates are able to demonstrate their effectiveness prior to graduating.
 - E.g., a demonstration of their ability to raise student achievement.



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ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION

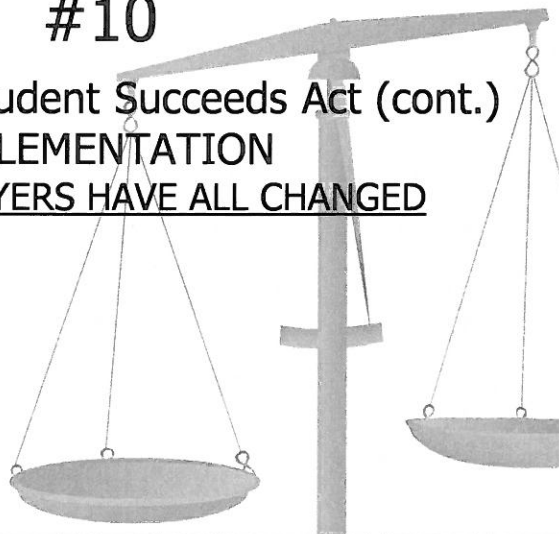
- How will new federal and state decision makers influence ESSA implementation?



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ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION
THE KEY PLAYERS HAVE ALL CHANGED



THE TOP 10

#10

ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION
THE KEY PLAYERS HAVE CHANGED



OBAMA → TRUMP



KING, JR. → DEVOS



McCORMY → COOPER



ATKINSON → JOHNSON

THE TOP 10 #10

ESSA: Every Student Succeeds Act (cont.) IMPLEMENTATION

- Spring/Summer 2016:
 - DOE released "proposed" ESSA regulations through a negotiated rulemaking process
- Nov. 29, 2016:
 - "Final" Regulations Issued by DOE
 - "Final" Regulations were to become effective January 30, 2017
- January 20, 2017
 - On inauguration day, Trump administration issued a "Regulatory Freeze" delaying the implementation date for any new regulations, including ESSA regulations, until March 21, 2017

THE TOP 10 #10

ESSA: Every Student Succeeds Act (cont.) IMPLEMENTATION

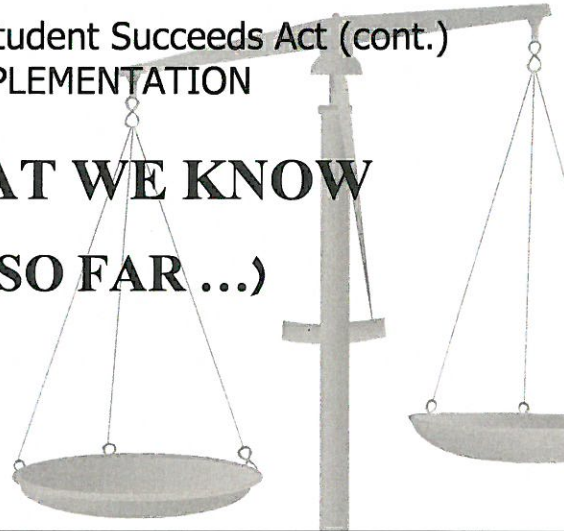
- February, 6 2017:
 - Sec. DeVos published a guidance letter updating States on the status of implementation, in light of proposed (and now enacted) legislation rescinding ESSA Final Regulations.
- March 9, 2017:
 - Congress passed H.J. Res. 57 & H.J. Res. 58, rescinding earlier "final regulations" related to "accountability," "state plans" and "teacher preparation" issued by the DOE.
- March 13, 2017
 - Sec. DeVos provided a new "revised template" for States to use as a guide in submitting their State Plans
 - The "revised template" allows states to include only what is "absolutely necessary" for the DOE to consider a State Plan

THE TOP 10

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ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION

**WHAT WE KNOW
(SO FAR ...)**

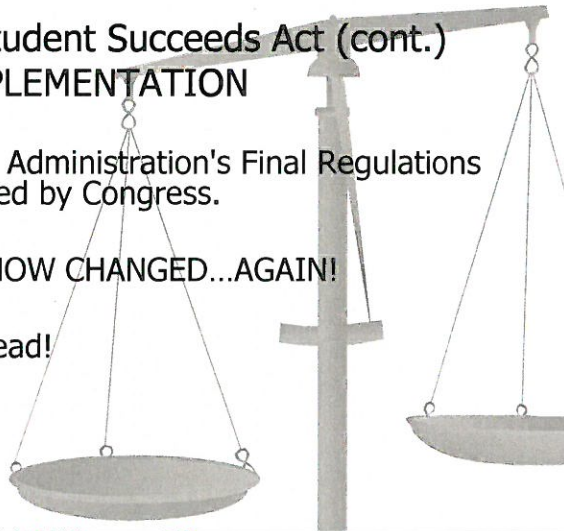


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ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION

- Most of the Obama Administration's Final Regulations have been eliminated by Congress.
- TIMELINES HAVE NOW CHANGED...AGAIN!
- More Change is Ahead!



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ESSA: Every Student Succeeds Act (cont.) IMPLEMENTATION

- **The Congressional Review Act**
 - Congress has 60 days within which it may review any rules or regulations passed by a federal agency.
 - By majority vote, Congress can invalidate any rules or regulations submitted by a federal agency.
- **Congress voted to invalidate DOE's Final Regulations**
 - H.J. Res. 57 and 58 were passed, invalidating the rules submitted by DOE relating to "accountability and State plans" and "teacher preparation issues."
 - Such rules "shall have no force or effect."
 - Signed into law by Pres. Trump on 3/27/17.
- **The DOE may draft new proposed ESSA regulations but the new regulations cannot be "substantially similar" to the previous regulations**

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ESSA: Every Student Succeeds Act (cont.) CHANGE IN TIMELINES

- **2016-17 was designed to be a transition year for school systems**
 - ESSA required that the new law be implemented in the 2017-18 school year, and that 2016-17 would be for transition and planning.
- **Under the U.S. DOE's "Final" Rules:**
 - States were granted an extension to the implementation timelines
 - States had until April 3 or September 18, 2017 to submit their State Plans.
 - States had until 2018-19 to identify schools in need of "comprehensive improvement."
 - By 2019-20 States had to identify schools where subgroups of students are "consistently underperforming."

THE TOP 10 #10

ESSA: Every Student Succeeds Act (cont.) CHANGE IN TIMELINES

- As of today:
 - The DOE will still accept State Plans either April 3, or September 18, 2017.
 - 17 States have indicated that they will submit their State Plan on April 3, 2017.
 - North Carolina has indicated that it would submit its State Plan September 18, 2017.
 - H.B. 87: If passed, would not allow the SBE to submit North Carolina's State Plan to the U.S. DOE any earlier than seven business days preceding the latest date established by the U.S. Department of Education for submission of a consolidated State Plan.
 - No current timeline for States to identify schools in need of "comprehensive improvement."
 - No current timeline for States to identify schools where subgroups of students are "consistently underperforming."

THE TOP 10 #10

ESSA: Every Student Succeeds Act (cont.) IMPLEMENTATION

- Congress eliminated all ESSA regulations dealing with "accountability," "state plans" and "teacher preparation" programs.
- Regulations concerning:
 - Assessments for special education students and English language learners, and the Innovative Assessment Pilot were not eliminated by Congress.
 - BUT:
 - How and when DOE will choose to implement these regulations is still an open question

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ESSA: Every Student Succeeds Act (cont.) INVALIDATED REGULATIONS

- School Ratings

- ESSA requires states to develop accountability systems that includes academic factors (e.g., test scores, graduation rates, ELP) and at least one other factor chosen by the state (e.g., school climate, access to advanced classwork, chronic absenteeism, etc.).
 - Must identify schools for "comprehensive improvement" (lowest performing schools and those where less than two-thirds of students graduate) and "targeted improvement" schools (where subgroups are struggling).
 - The draft regulations required states to develop a "summative" overall rating for schools (e.g., A-F scale, number grade, etc.).
 - "Final" regulations would have allowed states to use other descriptors, including the ESSA ratings of "comprehensive improvement" or "targeted support" as their summative ratings and do not have to use a number grade or A-F scale unless desired.
- INVALID →

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ESSA: Every Student Succeeds Act (cont.) INVALIDATED REGULATIONS

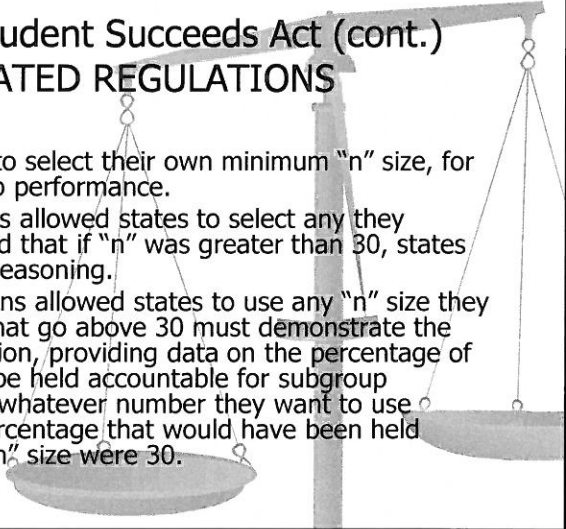
- School Quality Indicators

- The "other factor" selected by states is required by ESSA.
 - The draft regulations stated that the "other factor" had to be something that research demonstrates contributes to student achievement or higher graduation rates.
 - The "final" regulations stated that states could pick any factor if research shows a positive impact on student learning as defined by a wide range of factors including grades, credit accumulation, post-secondary enrollment, performance in advanced classes, persistence, etc. This was intended to add flexibility for the selection of the "other factor."
- INVALID →

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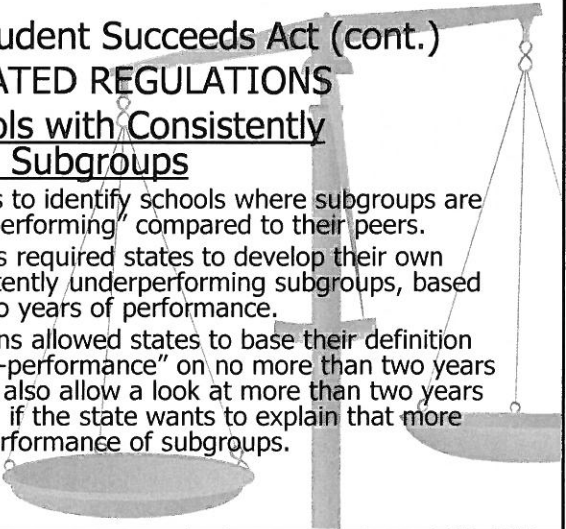
ESSA: Every Student Succeeds Act (cont.) INVALIDATED REGULATIONS

- "n" Sizes
 - ESSA allows states to select their own minimum "n" size, for measuring subgroup performance.
 - The draft regulations allowed states to select any they wanted, but required that if "n" was greater than 30, states had to justify their reasoning.
 - The "final" regulations allowed states to use any "n" size they choose, but those that go above 30 must demonstrate the impact of that decision, providing data on the percentage of schools that would be held accountable for subgroup performance under whatever number they want to use compared to the percentage that would have been held accountable if the "n" size were 30.
- INVALID→
- 

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ESSA: Every Student Succeeds Act (cont.) INVALIDATED REGULATIONS

- Identifying Schools with Consistently Underperforming Subgroups
 - ESSA requires states to identify schools where subgroups are "consistently underperforming" compared to their peers.
 - The draft regulations required states to develop their own definitions of consistently underperforming subgroups, based on no more than two years of performance.
 - The "final" regulations allowed states to base their definition of "consistent under-performance" on no more than two years of performance, but also allow a look at more than two years of performance data if the state wants to explain that more time will help the performance of subgroups.
- INVALID→
- 

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ESSA: Every Student Succeeds Act (cont.)

INVALIDATED REGULATIONS

- Testing Participation and Opting Out
 - ESSA requires schools to test both 95% of students overall and for subgroups, but any penalties for failing to meet those thresholds would be up to the states, not the federal government.
 - The draft regulations provided states with options to take serious actions against schools who did not meet these targets.
 - The "final" regulations allowed states to develop potentially serious penalties but also to develop alternative remedies to consider the varying degrees to which a school may have missed the target of 95%. The state's system must be "sufficiently rigorous" to try to resolve the problem of low test participation rates.

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ESSA: Every Student Succeeds Act (cont.)

INVALIDATED REGULATIONS

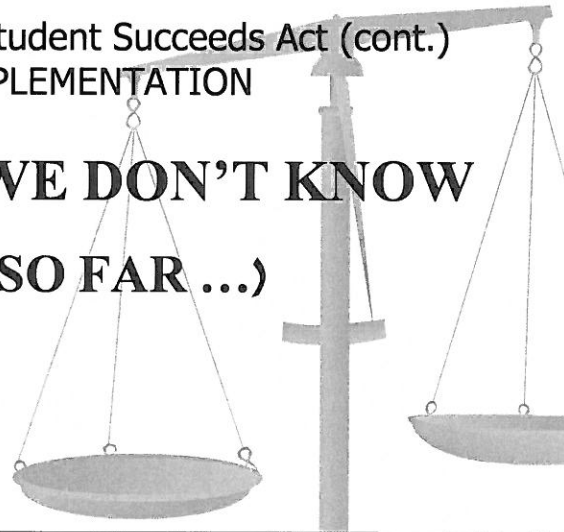
- English Language Proficiency (ELP)
 - The original proposed regulations did not set a maximum timeline for students to develop proficiency.
 - The "final" regulations required states to develop a maximum timeline that is "research based" for English language learners to become proficient.

THE TOP 10

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ESSA: Every Student Succeeds Act (cont.)
IMPLEMENTATION

**WHAT WE DON'T KNOW
(SO FAR ...)**

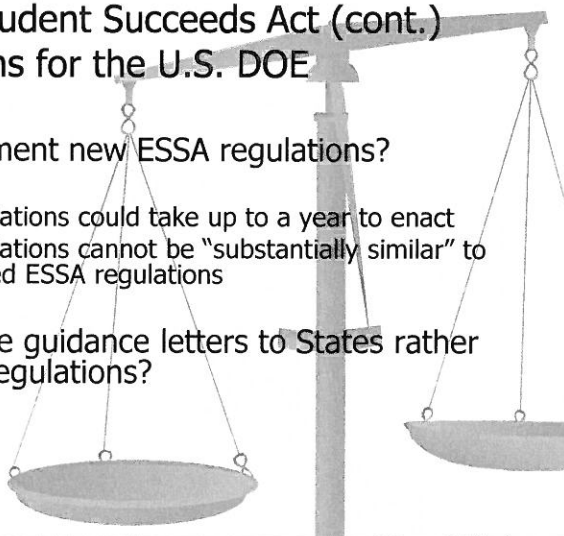


THE TOP 10

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ESSA: Every Student Succeeds Act (cont.)
Decisions for the U.S. DOE

- Will the DOE implement new ESSA regulations?
 - If so, when...
 - New proposed regulations could take up to a year to enact
 - New proposed regulations cannot be "substantially similar" to previously invalidated ESSA regulations
- Will the DOE provide guidance letters to States rather than develop new regulations?

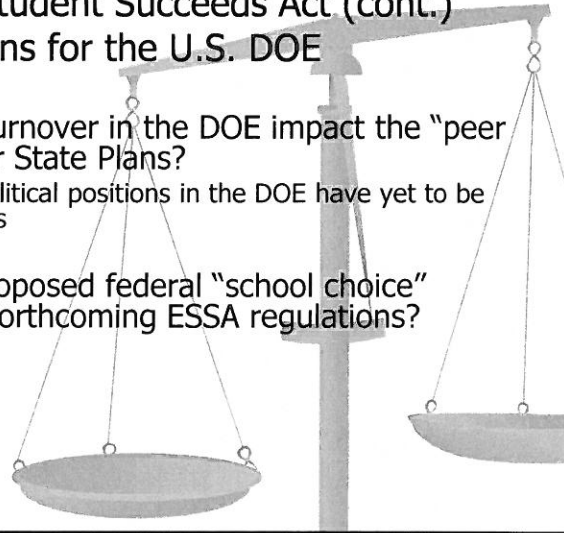


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ESSA: Every Student Succeeds Act (cont.) Decisions for the U.S. DOE

- How will political turnover in the DOE impact the "peer review" process for State Plans?
 - Many of the top political positions in the DOE have yet to be filled by Sec. DeVos
- Will potential or proposed federal "school choice" legislation impact forthcoming ESSA regulations?

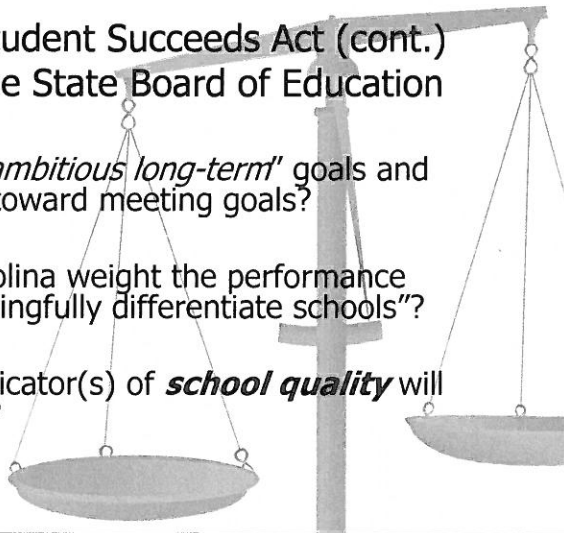


THE TOP 10

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ESSA: Every Student Succeeds Act (cont.) Decisions for the State Board of Education

- What constitutes "*ambitious long-term*" goals and "*interim progress*" toward meeting goals?
- How will North Carolina weight the performance indicators to "meaningfully differentiate schools"?
- What additional indicator(s) of **school quality** will North Carolina use?



THE TOP 10

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ESSA: Every Student Succeeds Act (cont.)
Decisions for the State Board of Education

- Will North Carolina administer a single summative assessment or *interim* assessments?
- Will new assessments be developed internally or externally?
- Will North Carolina apply for the Innovative Assessment Pilot?

THE TOP 10

#10

ESSA: Every Student Succeeds Act (cont.)
WHAT DOES IT ALL MEAN?

- Less regulation by the federal government, not necessarily less regulation by the State.
- For now, more questions than answers
- **STAY TUNED!!**

THE TOP 10

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ESSA: Every Student Succeeds Act (cont.) HELPFUL LINKS

- ESSA Full Text
 - <https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf>
- "Final" ESSA Regulations issued 11/29/16
 - <http://www2.ed.gov/policy/elsec/leg/essa/essaaccountstplans1129.pdf>
- March 13, 2017 Letter from Secretary Betsy DeVos
 - <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-announces-release-updated-essa-consolidated-state-plan-template>

THE TOP 10

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FAIR LABOR STANDARDS ACT (FLSA) CHANGES

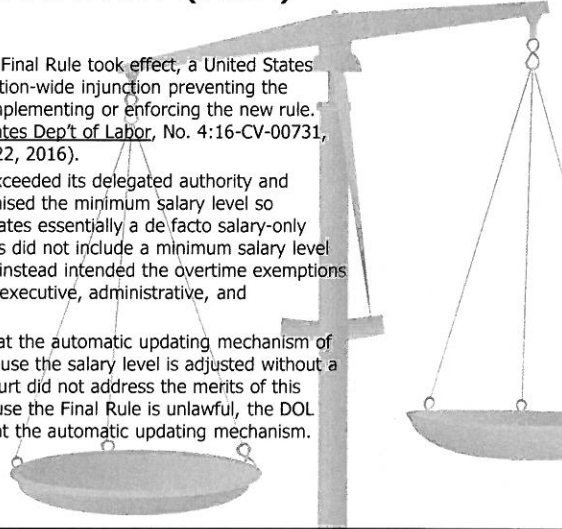
On May 23, 2016, the Department of Labor published its Final Rule revising overtime regulations. The Final Rule was to take effect 12/1/2016 and provided the following:

- Exempt v. Non-Exempt Employees:
 - Teachers Remain Exempt
- White Collar Exemption Test:
 - Salary Basis - NO CHANGE
 - Duties- NO CHANGE
 - Salary Level
 - Min. Salary Threshold increases for highly compensated employees (HCEs) – from \$100,000 to \$134,004/yr.
 - Min. Salary Threshold increases for non – HCEs – from \$455/week (\$23,660/yr.) to \$913/week (\$47,476/yr.)
 - Automatic Updating Min. Salary every 3 years beginning 1/1/2020
 - Inclusion of Nondiscretionary bonuses in min. salary
- The rules governing what time is compensable remained the same.
- LEAs could continue to use comp time up to 240 hours (160 x 1.5)

THE TOP 10 #9

FAIR LABOR STANDARDS ACT (FLSA) CHANGES

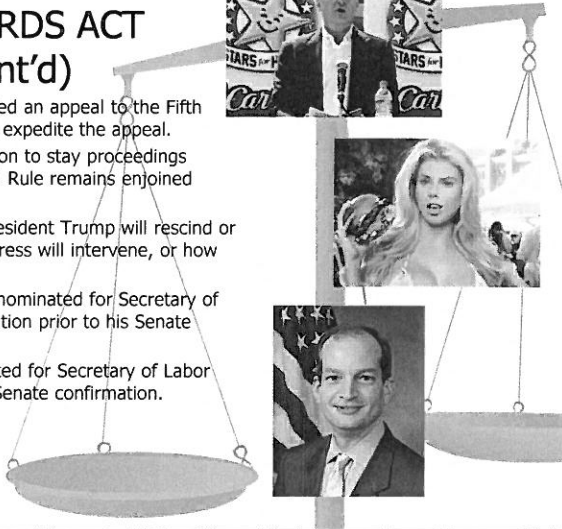
- On November 22, 2016, before the Final Rule took effect, a United States District Court in Texas entered a nation-wide injunction preventing the Department of Labor (DOL) from implementing or enforcing the new rule. State of Nevada, et al. v. United States Dep't of Labor, No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2016).
- The court reasoned that the DOL exceeded its delegated authority and ignored Congress's intent when it raised the minimum salary level so significantly that the Final Rule "creates essentially a de facto salary-only test." The court noted that Congress did not include a minimum salary level when it defined the exemption and instead intended the overtime exemptions to apply to employees doing actual executive, administrative, and professional duties.
- The plaintiffs additionally argued that the automatic updating mechanism of the Final Rule violates the APA because the salary level is adjusted without a notice and comment period. The court did not address the merits of this argument, but concluded that because the Final Rule is unlawful, the DOL also lacks the authority to implement the automatic updating mechanism.



THE TOP 10 #9

FAIR LABOR STANDARDS ACT (FLSA) CHANGES (Cont'd)

- The Department of Labor (DOL) has filed an appeal to the Fifth Circuit, which granted DOL's motion to expedite the appeal.
- The Fifth Circuit denied the DOL's motion to stay proceedings pending appeal, meaning that the Final Rule remains enjoined during the pendency of the appeal.
- **Unknowns:** Whether the DOL under President Trump will rescind or withdraw the Final Rule, whether Congress will intervene, or how the Courts may rule.
- Andrew Pudzer, CEO of Carl's Jr., was nominated for Secretary of Labor. Pudzer withdrew from consideration prior to his Senate confirmation hearing.
- February 17, 2017 Alex Acosta nominated for Secretary of Labor position by President Trump, pending Senate confirmation.

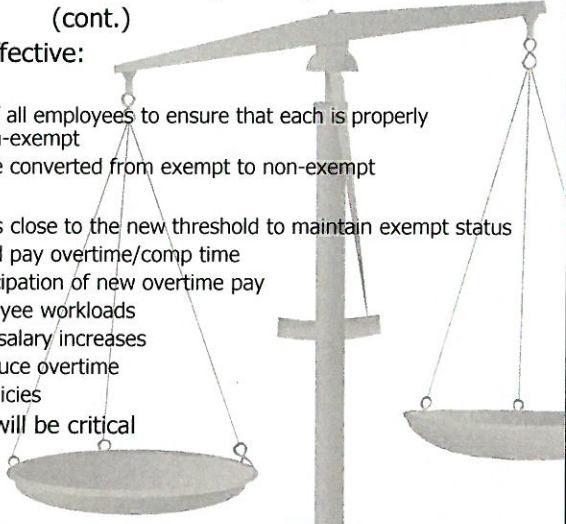


THE TOP 10 #9

FAIR LABOR STANDARDS ACT (FLSA) CHANGES

(cont.)

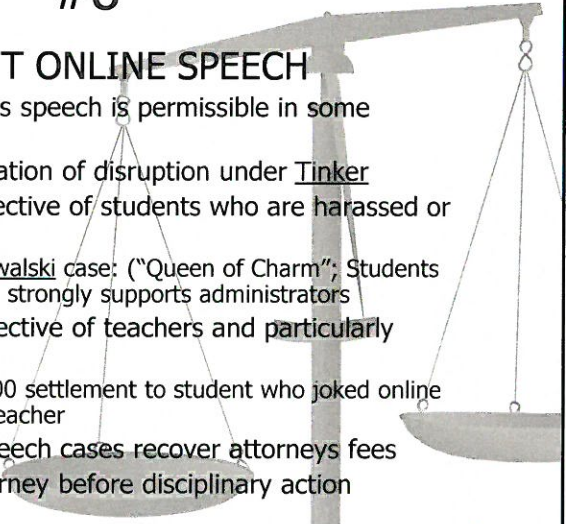
If the Final Rules become effective:

- Plan ahead:
 - Review the classification of all employees to ensure that each is properly classified as exempt or non-exempt
 - Identify any positions to be converted from exempt to non-exempt
 - Options/choices to consider
 - Raise salaries of employees close to the new threshold to maintain exempt status
 - Keep salaries the same and pay overtime/comp time
 - Reduce base salary in anticipation of new overtime pay
 - Evaluate and realign employee workloads
 - Lay off employees to fund salary increases
 - Hire new employees to reduce overtime
 - Review/adjust overtime policies
 - Timekeeping requirements will be critical
 - Flex time?
 - Work from home?
 - Train supervisors
- 

THE TOP 10

#8

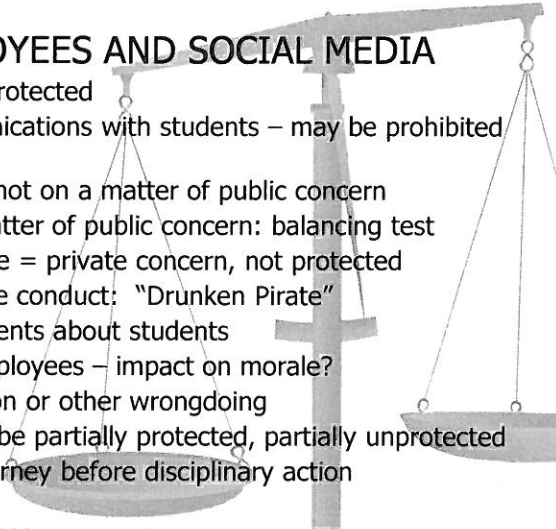
STUDENT ONLINE SPEECH

- Suspension for off-campus speech is permissible in some circumstances
 - Test: Reasonable anticipation of disruption under Tinker
 - Courts are generally protective of students who are harassed or bullied on-line
 - BUT, Fourth Circuit's Kowalski case: ("Queen of Charm"; Students Against Shay's Herpes"), strongly supports administrators
 - Courts might be less protective of teachers and particularly administrators
 - Sagehorn case: \$325,000 settlement to student who joked online about making out with teacher
 - Students who win free speech cases recover attorneys fees
 - Consult school board attorney before disciplinary action
- 

THE TOP 10

#7

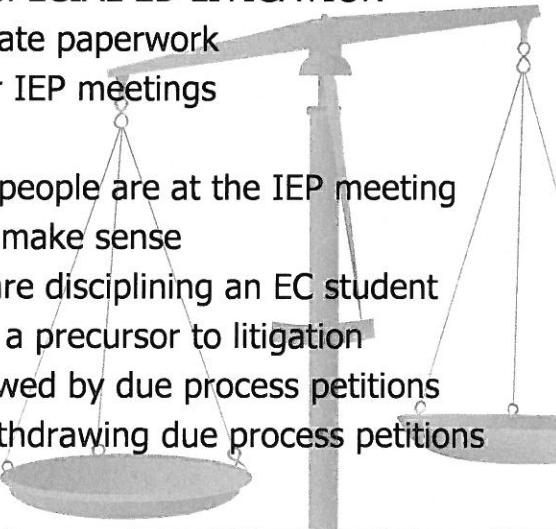
SCHOOL EMPLOYEES AND SOCIAL MEDIA

- Not all online speech is protected
 - Employee online communications with students – may be prohibited or regulated
 - Speech is unprotected if not on a matter of public concern
 - Even if speech is on a matter of public concern: balancing test
 - Employment grievance = private concern, not protected
 - Employee disreputable conduct: "Drunken Pirate"
 - Unprofessional comments about students
 - Criticism of fellow employees – impact on morale?
 - Exposing discrimination or other wrongdoing
 - Tricky: Online rants may be partially protected, partially unprotected
 - Consult school board attorney before disciplinary action
- 

THE TOP 10

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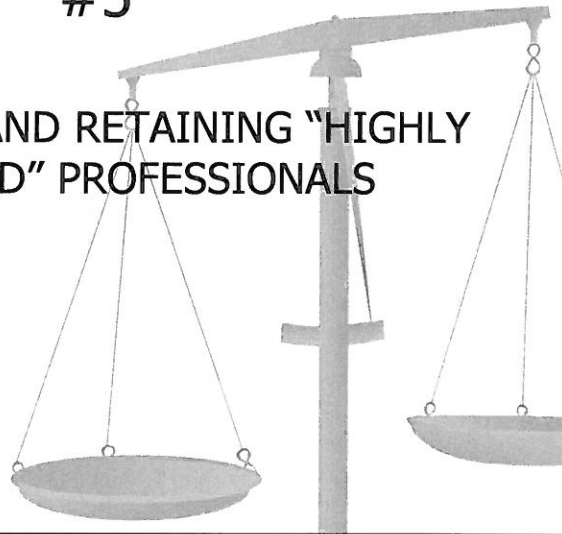
AVOIDING SPECIAL ED LITIGATION

- Thorough and accurate paperwork
 - Plan and prepare for IEP meetings
 - Listen to parents
 - Make sure the right people are at the IEP meeting
 - Make decisions that make sense
 - Know whether you are disciplining an EC student
 - Records requests as a precursor to litigation
 - DPI complaints followed by due process petitions
 - Filing and quickly withdrawing due process petitions
- 

THE TOP 10

#5

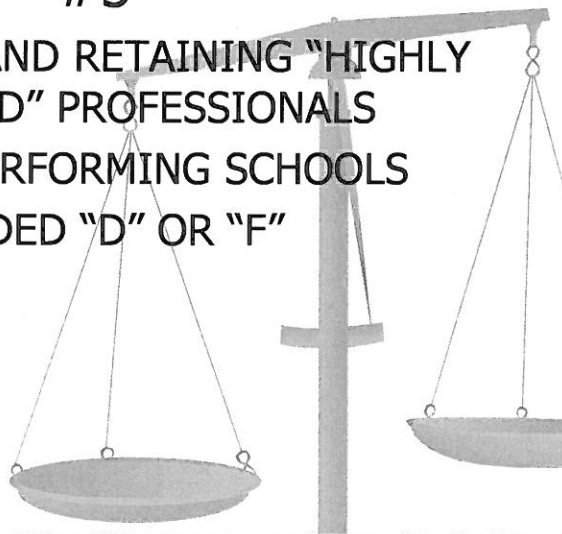
RECRUITING AND RETAINING "HIGHLY
QUALIFIED" PROFESSIONALS



THE TOP 10

#5

RECRUITING AND RETAINING "HIGHLY
QUALIFIED" PROFESSIONALS
TO LOW PERFORMING SCHOOLS
GRADED "D" OR "F"



THE TOP 10

#5

RECRUITING AND RETAINING "HIGHLY QUALIFIED"
PROFESSIONALS
TO LOW PERFORMING SCHOOLS
GRADED "D" OR "F"
WHILE WEEDING OUT POOR PERFORMERS
AS THE PIPELINE NARROWS

- Cost and competition
- Equity issues
- Compensation
- Negligent hiring issues (background checks; references; past performance)
- Documentation of poor performance
- New N.C. Teacher Corps
- Attractiveness/Public Perception of teaching profession

THE TOP 10

#4

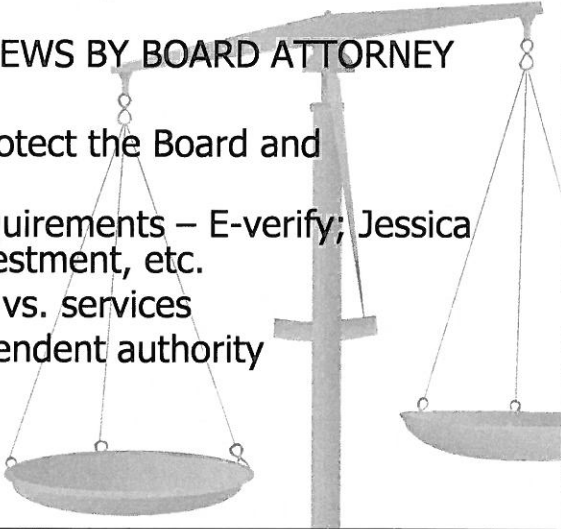
PROTESTS DURING NATIONAL ANTHEM

- Black Lives Matter/Blue Lives Matter/All Lives Matter
- National Anthem
- Pledge of Allegiance
- First Amendment – Freedom of Speech vs. Disruption (Tinker)
- For employees: Garcetti standard – speech while on the job enjoys less protection
- Where and When Protest Activities Occur
- Extracurricular School Activities and Events
- Coaches/Team Members/Band Members
- Spectators and Guests

THE TOP 10

#3

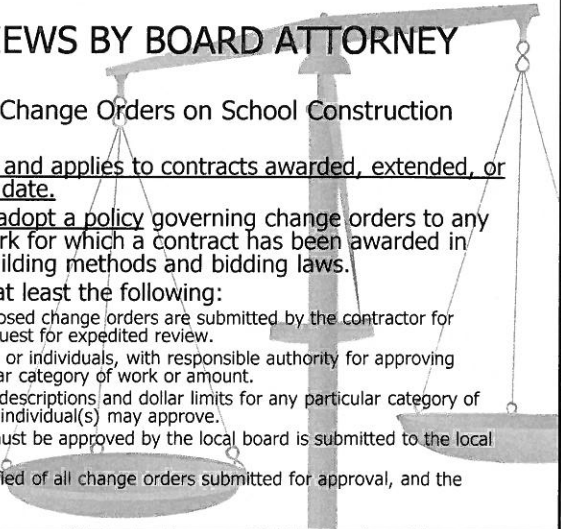
CONTRACT REVIEWS BY BOARD ATTORNEY

- Board Policies – Protect the Board and Superintendent
 - Legal Contract Requirements – E-verify; Jessica Lunsford; Iran Divestment, etc.
 - Purchase of goods vs. services
 - Board vs. Superintendent authority
 - Change Orders
- 

THE TOP 10

#3

CONTRACT REVIEWS BY BOARD ATTORNEY

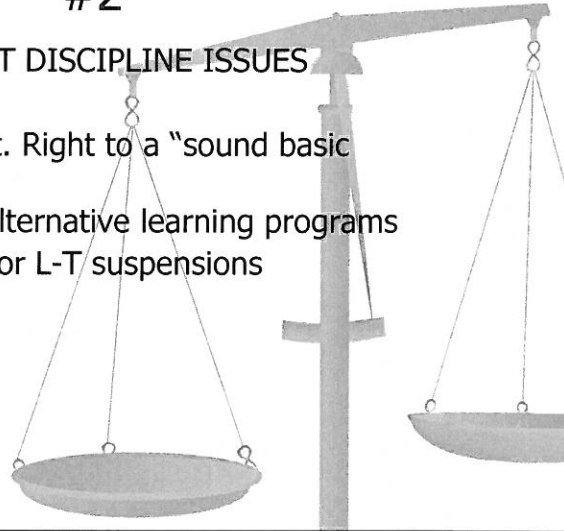
- S.L. 2016-58 (S.B. 330) – Change Orders on School Construction Projects
 - Effective Date: 10/1/16, and applies to contracts awarded, extended, or renewed on or after that date.
 - Requires local boards to adopt a policy governing change orders to any construction or repair work for which a contract has been awarded in accordance with State building methods and bidding laws.
 - The policy shall address at least the following:
 - The process by which proposed change orders are submitted by the contractor for approval, including any request for expedited review.
 - Identify who the individual, or individuals, with responsible authority for approving change orders of a particular category of work or amount.
 - Identify the corresponding descriptions and dollar limits for any particular category of work or amount that those individual(s) may approve.
 - How a change order that must be approved by the local board is submitted to the local board.
 - How the local board is notified of all change orders submitted for approval, and the resulting actions taken.
- 

THE TOP 10

#2

STUDENT DISCIPLINE ISSUES

- Leandro: N.C. Const. Right to a "sound basic education."
- State law requires alternative learning programs
- State law provides for L-T suspensions

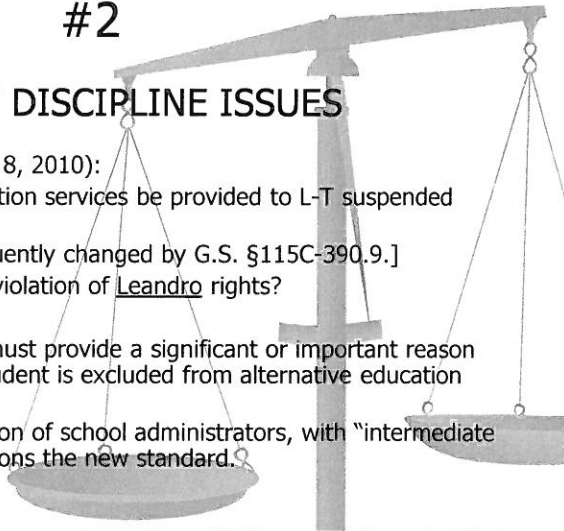


THE TOP 10

#2

STUDENT DISCIPLINE ISSUES

- King v. Beaufort CBE (Oct. 8, 2010):
 - Must alternative education services be provided to L-T suspended students?
 - No. [This was subsequently changed by G.S. §115C-390.9.]
 - Is failure to provide a violation of Leandro rights?
 - No.
 - BUT, Superintendent must provide a significant or important reason why L-T suspended student is excluded from alternative education services.
 - Court defers to discretion of school administrators, with "intermediate scrutiny" of their decisions the new standard.



THE TOP 10

#2

STUDENT DISCIPLINE ISSUES

- Long-Term Suspensions
 - L-T suspension restricted to serious offenses that threaten safety or substantially disrupt
 - Written notice to parent describing incident, rules violated and hearing process
 - Stricter timeframes
 - Notify parent of:
 - Right to retain attorney
 - Advocate involvement
 - Right to review records
 - Appeal rights
 - L-T suspended students must be offered alternative education services unless Superintendent provides "significant or important reasons" for declining to offer them.

THE TOP 10

#2

STUDENT DISCIPLINE ISSUES

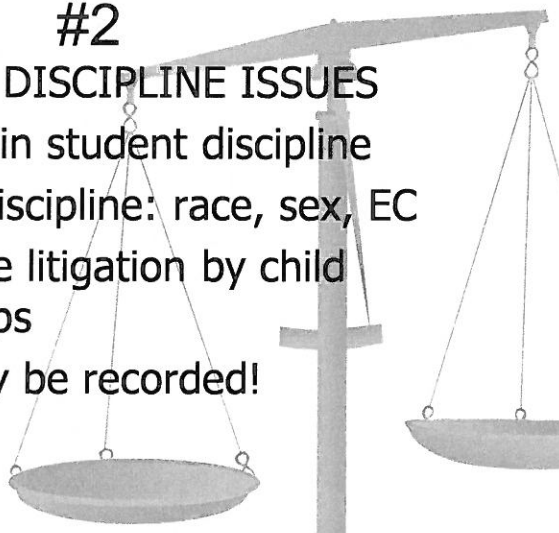
- SROs involved in student discipline

THE TOP 10

#2

STUDENT DISCIPLINE ISSUES

- SROs involved in student discipline
- Disparities in discipline: race, sex, EC
- Anticipate more litigation by child advocacy groups
- Everything may be recorded!

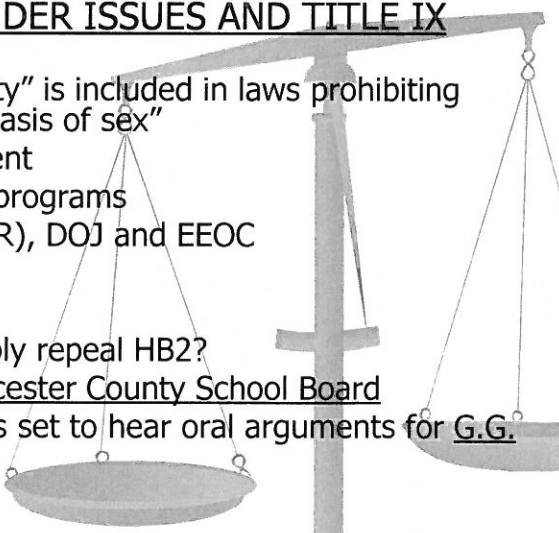


THE TOP 10

#1

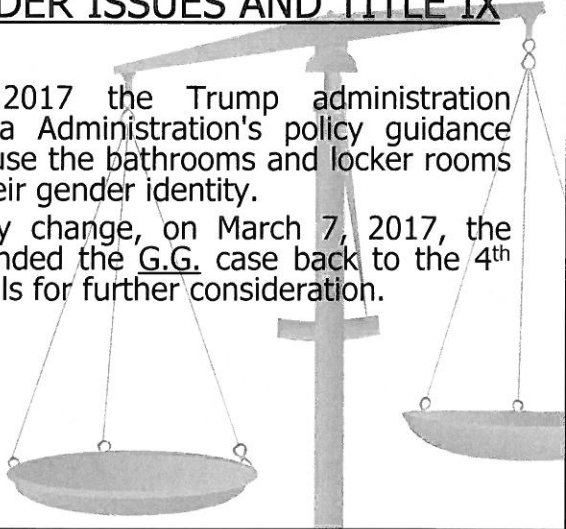
HB2, TRANSGENDER ISSUES AND TITLE IX

- Whether "gender identity" is included in laws prohibiting discrimination "on the basis of sex"
 - Title VII – Employment
 - Title IX – Education programs
- U.S. DOE (including OCR), DOJ and EEOC
- Federal Courts – split
- HB2 and N.C. cases
- Did the General Assembly repeal HB2?
- 4th Circuit: G.G. v. Gloucester County School Board
- U.S. Supreme Court was set to hear oral arguments for G.G. case in March, 2017....
- BUT WAIT!



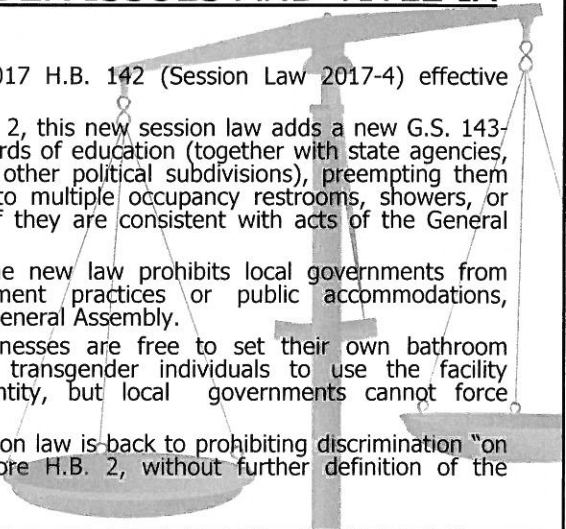
THE TOP 10

HB2, TRANSGENDER ISSUES AND TITLE IX

- On February 22, 2017 the Trump administration rescinded the Obama Administration's policy guidance allowing students to use the bathrooms and locker rooms that correspond to their gender identity.
 - In light of the policy change, on March 7, 2017, the Supreme Court remanded the G.G. case back to the 4th Circuit Court of Appeals for further consideration.
 - STAY TUNED!!
- 

THE TOP 10

HB2, TRANSGENDER ISSUES AND TITLE IX

- H.B. 2 was repealed by 2017 H.B. 142 (Session Law 2017-4) effective 3/30/17.
 - In addition to repealing H.B. 2, this new session law adds a new G.S. 143-760 that applies to local boards of education (together with state agencies, counties, cities, towns and other political subdivisions), preempting them from "regulation of access to multiple occupancy restrooms, showers, or changing facilities," except if they are consistent with acts of the General Assembly.
 - Until December 1, 2020, the new law prohibits local governments from regulating private employment practices or public accommodations, reserving that power to the General Assembly.
 - Private employers and businesses are free to set their own bathroom policies, including allowing transgender individuals to use the facility matching their gender identity, but local governments cannot force businesses to do so.
 - N.C. employment discrimination law is back to prohibiting discrimination "on account of ... sex," as before H.B. 2, without further definition of the meaning of that phrase.
- 

THE TOP 10
BONUS ROUND!

PRAYER AT BOARD MEETINGS

- Town of Greece case – U.S. Supreme Court 2014 – allowed prayer to begin town council meeting
- Lund v. Rowan County – On 9/19/16, in a 2-1 decision, the 4th Circuit ruled that the Board of County Commissioners' practice of opening meetings with sectarian, non-proselytizing, non-disparaging prayers by individual commissioners does not violate the Establishment Clause.
 - On 10/31/16 the 4th Circuit announced that it will reconsider this decision *en banc*. Hearing was held on March 22, 2017.
- Potential impact on school board practices
- Potential U.S. Supreme Court decision

THE TOP 10
SECOND BONUS ROUND!
SCHOOL GOVERNANCE STRUCTURE

- **FOURTH EXTRA LEGISLATIVE SESSION**
- General Assembly on its own and without notice convened Fourth Extra Session on December 14, 2016, immediately following Third Extra Session (for Hurricane Matthew relief)

THE TOP 10

SECOND BONUS ROUND!

SCHOOL GOVERNANCE STRUCTURE

- S.L. 2016-126 (H.B. 17) – Modify Certain Appointments/Employment
- Strips authority from the State Board of Education (SBE) and Delegates more authority to the State Superintendent of Public Instruction ("Superintendent"):
 - Superintendent will co-supervise the Achievement School District (ASD) with the SBE. The Superintendent (rather than Lt. Gov.) will appoint the ASD superintendent
 - Superintendent, rather than the Governor, will appoint two high school students, and a local superintendent as advisors to the SBE
 - Duties of Superintendent are no longer "subject to the direction, control, and approval of" the SBE. The head of DPI is no longer the SBE, but rather the Superintendent
 - Superintendent, rather than the SBE, shall administer special funds within DPI to manage funds received as grants from nongovernmental sources
 - Superintendent, rather than the SBE, may appoint exempt positions within DPI. Increases the number of exempt positions designated by Superintendent to 70 policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater, and 70 managerial positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater

THE TOP 10

SECOND BONUS ROUND!

SCHOOL GOVERNANCE STRUCTURE

- S.L. 2016-126 (H.B. 17) – Modify Certain Appointments/Employment (cont.)
Strips the Governor of authority:
 - All of the Governor's cabinet appointments require Senate approval.
 - Governor stripped of authority to appoint four members of the UNC Board of Trustees. Instead, the four members will be appointed by the General Assembly: two by the recommendation of the President Pro Tempore of the Senate and two by the recommendation of the Speaker of the House.
 - Reduces from 1,500 to 425 the number of exempt positions that the Governor may appoint.
 - Governor may not appoint any exempt positions in the Office of State Budget and Management or the Office of State Human Resources.

**THE TOP 10
SECOND BONUS ROUND!
SCHOOL GOVERNANCE STRUCTURE**

- **S.L. 2016-126 (H.B. 17) – Modify Certain Appointments/Employment (cont.)**
North Carolina Charter Schools Advisory Board (Advisory Board) and Office of Charter Schools (OCS):
 - Previously, the Governor appointed three members of the Advisory Board, including the chair; Senate appointed 3, House appointed 3, and SBE appointed one.
 - Now, four (4) members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, four (4) members appointed by the General Assembly upon the recommendation of the Speaker of the House, and 2 members appointed by the SBE. Members appointed by the SBE may not be current members of the SBE and must be charter school advocates in North Carolina.
 - OCS is no longer "subject to the supervision, direction, and control" of the SBE.
 - Superintendent, not the SBE, appoints the Executive Director of OCS.

**THE TOP 10
SECOND BONUS ROUND!
SCHOOL GOVERNANCE STRUCTURE**

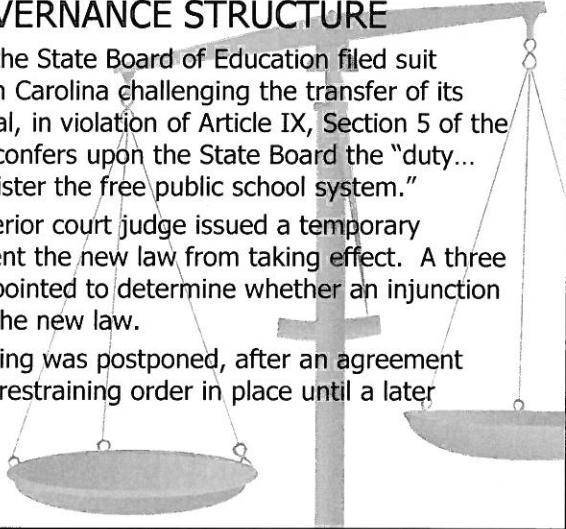
- **S.L. 2016-126 (H.B. 17) – Modify Certain Appointments/Employment (cont.)**
Center for Safer Schools
 - Effective December 15, 2016, the Center for Safer Schools is moved to DPI, Division of Safe and Healthy Schools Support.
 - New 25-member Task Force for Safer Schools established within DPI.

Note: Portions of this law are being legally challenged both by Gov. Cooper and SBE as unconstitutional.

THE TOP 10

SECOND BONUS ROUND!

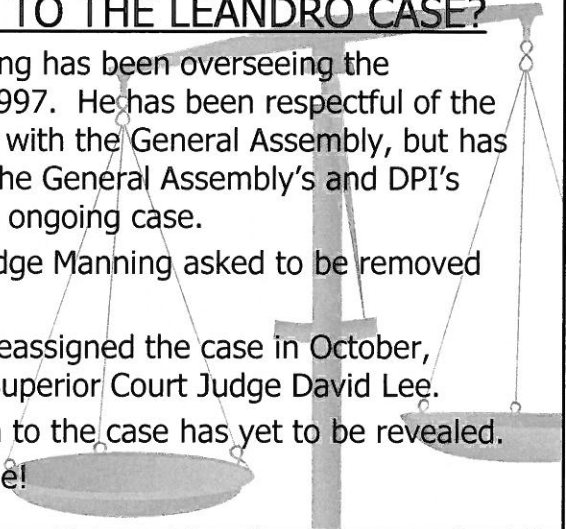
SCHOOL GOVERNANCE STRUCTURE

- On December 29, 2016, the State Board of Education filed suit against the State of North Carolina challenging the transfer of its powers as unconstitutional, in violation of Article IX, Section 5 of the N.C. Constitution, which confers upon the State Board the "duty... [to] supervise and administer the free public school system."
 - On that same day, a superior court judge issued a temporary restraining order to prevent the new law from taking effect. A three judge panel was then appointed to determine whether an injunction would be issued against the new law.
 - January 6 injunction hearing was postponed, after an agreement was reached to keep the restraining order in place until a later hearing can be held.
 - Stay tuned!
- 

THE TOP 10

THIRD BONUS ROUND!

WHAT HAPPENS TO THE LEANDRO CASE?

- Judge Howard Manning has been overseeing the Leandro case since 1997. He has been respectful of the separation of powers with the General Assembly, but has sought to hold both the General Assembly's and DPI's feet to the fire in this ongoing case.
 - In October, 2016, Judge Manning asked to be removed from the case.
 - Chief Justice Martin reassigned the case in October, 2016 to Emergency Superior Court Judge David Lee.
 - Judge Lee's approach to the case has yet to be revealed.
 - Stay tuned on this one!
- 

THE TOP 10 FINAL BONUS ROUND!

SPECIAL ED – 2 U.S. SUPREME COURT DECISIONS

- Endrew F. v. Douglas County School District – Argued 1/11/17; Decided 3/22/17.
- Issue: What level of educational benefit must school systems provide children with disabilities in order to meet the “free appropriate public education” (FAPE) standard mandated by the IDEA?
- Supreme Court may revisit the Rowley standard, in effect since 1982: School district does not have to provide the “best” education available, as long as it provides some meaningful educational benefit and meets the procedural requirements of IDEA.
- Lower courts are now divided on whether providing “some” educational benefit is sufficient or whether it must be “meaningful” educational benefit.
- Plaintiffs argued that schools must provide children with disabilities “substantially equal opportunities to achieve academic success, attain self-sufficiency and contribute to society.”
- Obama Justice Department suggested a new standard, that children have an opportunity to make “significant educational progress.”
- School district argued that, while student was not learning as quickly as his parents would have liked, he was making some measurable progress, which is enough to satisfy the law and demonstrate he was not denied FAPE.

THE TOP 10 FINAL BONUS ROUND!

SPECIAL ED – 2 U.S. SUPREME COURT DECISIONS

- Holding: In an 8-0 decision, the Court found that, to meet its substantive obligation under the IDEA, a school must offer an individualized education program reasonably calculated to enable a child to make progress that is appropriate “in light of the child’s circumstances.”
 - Normally, this will mean an educational program that is designed to allow a child to progress from grade to grade.
 - However, when grade-to-grade progress is not possible, schools must provide students with a program that is appropriately ambitious in light of the child’s circumstances.
 - The Court stressed that “every child should have the chance to meet challenging objectives.”
 - The Court rejected the standard set forth by the Tenth Circuit, which interpreted Rowley as requiring that an IEP be reasonably calculated to produce educational benefit that was “merely more than *de minimis*.”
 - The Court indicated that the IDEA “demands more” than a *de minimis* standard which barely provides any education at all to children with disabilities.
 - Also rejected was the parents’ proposed standard: that FAPE should provide a child “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”
 - The Court indicated that this standard is “entirely unworkable . . . requiring impossible measurements and comparisons.”
 - The Court emphasized that the analysis of whether progress is “appropriate” needs to be done on a case-by-case basis.

THE TOP 10 FINAL BONUS ROUND!

SPECIAL ED – 2 U.S. SUPREME COURT DECISIONS

- WHAT DOES THIS MEAN FOR ROWLEY?
- Endrew F. did not overturn the Rowley decision, but distinguished it.
 - Rowley was based on the facts of a student who was educated in a regular education setting and was progressing smoothly in the general education curriculum.
 - Thus, Rowley did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.
- The standard articulated in Endrew F. is meant to be a more generally applicable standard than Rowley, emphasizing that each case is fact specific, as students with disabilities each have unique needs and circumstances, and there can be no bright-line rule governing the appropriateness of all FAPE cases.
- The Court specifically upheld the principle set forth in Rowley which requires deference to be given to the educational decisions of school authorities.
 - However, school authorities should be able to provide a cogent and responsive explanation to show that an IEP is reasonably calculated to enable a child to make progress appropriate in light of his or her circumstances.

THE TOP 10 FINAL BONUS ROUND!

SPECIAL ED – 2 U.S. SUPREME COURT DECISIONS

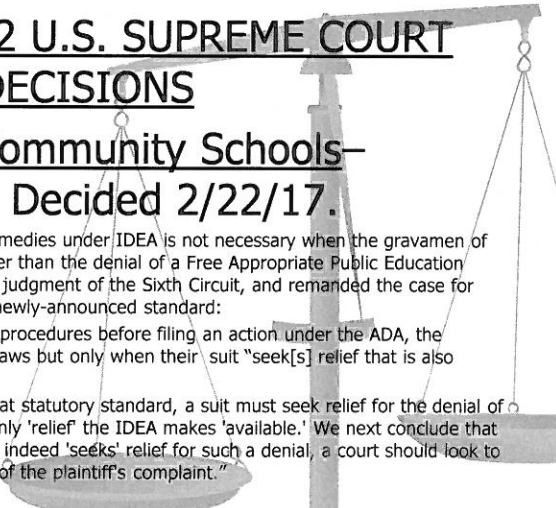
- Fry v. Napoleon Community Schools – Argued 10/31/16; Decided 2/22/17.
- Issue: Whether IDEA requires parents to exhaust state administrative procedures under IDEA before filing a civil action seeking monetary and declaratory relief under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (Sec. 504).



**THE TOP 10
FINAL BONUS ROUND!
SPECIAL ED – 2 U.S. SUPREME COURT
DECISIONS**

**Fry v. Napoleon Community Schools–
Argued 10/31/16; Decided 2/22/17.**

Background: The family in this case brought suit for money damages under Title II of the ADA and Section 504 of the Rehabilitation Act, alleging that their daughter had suffered “emotional distress and pain, embarrassment [and] mental anguish” as a result of the school district’s decision not to allow the student’s service dog, Wonder, to attend school with her. The district court granted the school district’s motion to dismiss, and the Sixth Circuit affirmed, finding that the parents had alleged injuries that were “educational” in nature, and thus subject to IDEA’s exhaustion requirement.



**THE TOP 10
FINAL BONUS ROUND!
SPECIAL ED – 2 U.S. SUPREME COURT
DECISIONS**

**Fry v. Napoleon Community Schools–
Argued 10/31/16; Decided 2/22/17.**

Holding: Exhaustion of administrative remedies under IDEA is not necessary when the gravamen of the plaintiff’s complaint is something other than the denial of a Free Appropriate Public Education (FAPE). The Supreme Court vacated the judgment of the Sixth Circuit, and remanded the case for that Court to analyze the case under its newly-announced standard:

Parents must exhaust IDEA’s procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws but only when their suit “seek[s] relief that is also available” under the IDEA.

“We first hold that to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only ‘relief’ the IDEA makes ‘available.’ We next conclude that in determining whether a suit indeed ‘seeks’ relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff’s complaint.”

**THE TOP 10
FINAL BONUS ROUND!
SPECIAL ED – 2 U.S. SUPREME COURT
DECISIONS**

**Fry v. Napoleon Community Schools–
Argued 10/31/16; Decided 2/22/17.**

The Court specifically declined to reach the question of whether exhaustion would be required when the plaintiff alleges a denial of FAPE but the remedy sought is not one that an IDEA hearing officer may award (such as the money damages sought here). In addition to the "history of the proceedings," the Court offered two additional "clues" to assist courts in deciding whether the gravamen of a complaint against a school district concerns the denial of FAPE: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school - say a public theater or library? And second, could an adult at the school -- say an employee or visitor -- have pressed essentially the same grievance?" If the answer to these questions is yes, the complaint is unlikely to address a denial of FAPE. Justice Alito, joined by Justice Thomas, concurring in part and concurring in the judgment, found these "clues" more likely to confuse than to assist lower courts.

In this case, the Court noted, the parties were in apparent agreement that the family is not alleging a denial of FAPE. But the Sixth Circuit, on remand, must determine whether "the gravamen" of the family's complaint is actually a denial of FAPE.

Your Session Is Now Over!

