

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
State Board of Education**
(DLS Control No. 14-182)

Overview and Legal and Fiscal Impact

These regulations establish standards for the development of a local education agency-established evaluation system and a State Department of Education-established Default Model evaluation system, a three-year tenure cycle for teachers, and procedures for an evaluation report and an appeals process for evaluated teachers and principals.

The regulations present a potential legal issue of concern.

There is minimal fiscal impact on State or local agencies.

Regulations of COMAR Affected

State Board of Education:

School Personnel: Evaluation of Teachers and Principals: COMAR 13A.07.09.01-.08

Legal Analysis

Background

The Education Reform Act of 2010 included provisions that extended the probationary period before tenure to three years and established teacher and principal performance evaluations pursuant to the State's application for a federal Race to the Top (RTTT) grant. The Governor established by Executive Order 01.01.2010.12 (June 1, 2010) the Maryland Council for Educator Effectiveness (MCEE). The purpose of MCEE was to make recommendations for the development of a model teacher and principal performance evaluation system. The MCEE made several recommendations, initially in June 2011, and additional revisions in June 2012. These recommendations resulted in the promulgation of regulations in COMAR 13A.07.09 adopted July 23, 2012. The statute and regulations established a two-track system consisting of a department-developed performance evaluation system model and a local education agency-developed performance evaluation system. The existing regulations expire on September 30, 2014, including provisions that contain evaluation criteria set forth in the RTTT application that the 22 local education agencies that signed onto the RTTT application are required to comply with under the regulations. The RTTT grant also expires September 30, 2014, although the U.S. Department of Education (USDE) recently approved several one-year no cost extensions for department and local education agency RTTT projects that will not be completed by the deadline.

Ongoing pilot testing of the evaluation system framework has enabled the department to refine the framework adopted in existing regulations, and the passage of Chapter 544 of 2014 made changes to the statutory authority of the Education Reform Act of 2010. Chapter 544 clarifies that the department-developed performance evaluation criteria are to be the *default* model in the event that a local school system and exclusive employee representative do not agree on the performance evaluation criteria for that jurisdiction. Furthermore, the Act prohibits the use of student growth data based on State assessments for the purpose of making personnel decisions under the required student growth component of the performance evaluation criteria before the 2016-2017 school year.

Title I of the Elementary and Secondary Education Act of 1965 (ESEA), which was most recently authorized in 2001 as the No Child Left Behind Act (NCLB) focuses on accountability, improving standards, and eliminating achievement gaps. ESEA requires all students be assessed annually, among other things. During implementation of the federal Race to the Top reforms, the USDE began offering states Flexibility Waivers from specified provisions of NCLB and their associated regulatory, administrative, and reporting requirements (ESEA flexibility). Maryland requested a Flexibility Waiver, in part, under Principle 3 of the ESEA flexibility (Supporting Effective Instruction and Leadership), by submitting State developed guidelines for local teacher and principal and evaluation and support systems. The ESEA waiver amendment was granted conditioned on the State implementing its teacher and principal evaluation and support systems in line with the ESEA Flexibility requirement that data from assessments required under Title I of the ESEA of 1965, as amended, be used for determining student growth in teacher and principal evaluation systems. The January 9, 2013 letter of approval from USDE required the State's evaluation systems to: (1) require each teacher in a State-tested content area and school principal to include at least one SLO with a data point on student performance on State assessments; and (2) commit to using student growth, as measured by the common, high-quality assessments in the evaluation of teachers and principals, when available, including the Partnership for the Assessments of Readiness for College and Careers (PARCC). On March 25 of this year, the State requested a one-year extension of its Flexibility Waiver to be effective through the end of the 2014-2015 school year. USDE granted this extension on July 18 subject to the State's "commitment to continue working with [USDE] on Maryland's requested amendments to its teacher and principal evaluation and support systems, which may require additional flexibility."

Summary of Regulations

Regulation .01 states that the minimal general standards for performance evaluations apply to all teachers and principals in the State and that the evaluation criteria set forth in the RTTT application and amendments approved by the USDE apply to all local education agencies that signed onto the Race to the Top application. Regulation .02 sets forth definitions for terms related to teacher and principal performance evaluations. Regulation .03 incorporates by reference documents relating to standards for teacher and principal evaluations approved by the department and referenced in these regulations.

Regulation .04 establishes minimum general standards for local education agency-established teacher and principal performance evaluation criteria that are mutually agreed to with the exclusive employee representative of that local school system and approved by the department. This regulation requires that teacher performance evaluation criteria be based on standards approved by the department or other nationally-recognized standards for teaching, and

communicated and explained to teachers and the school community. A teacher evaluation is required to include:

- evaluation of a teacher’s professional practice and student growth, including specified minimum components;
- an overall rating of highly effective, effective, or ineffective;
- classroom observations that meet specified minimum criteria;
- claims and evidence that substantiate the observed behavior or behaviors of the teacher in classroom observations that may include examples from an illustrative list;
- demonstration of rigor demonstrated by:
 - the establishment of student growth as a “significant component” of the evaluation;
 - for the school years 2014-2015 and 2015-2016, “the use of student learning objectives (SLOs) based on and informed by data resulting from the State Assessments, . . . represent[ing] at least 20% of a teacher’s evaluation”;
 - department approval of the criteria; and
 - after the 2015-2016 school year, department approval subject to the department’s analysis of evaluation data obtained in the 2014-2015 and 2015-2016 school years, including an analysis of State assessment data as a direct measure of student growth; and
- focused professional development, resources, and a mentoring component for teachers rated ineffective and all non-tenured teachers.

Until the 2016-2017 school year, a local education agency may not use student growth data based on or derived from State Assessments to make personnel decisions.

This regulation also establishes minimum general standards for local education agency developed performance evaluation criteria for principals. These criteria are required to be based on the outcomes contained in the Maryland Instructional Leadership Framework, February 2005 and the Interstate Leadership Licensure Consortium (both incorporated by reference) and specific standards set forth in the teacher evaluation system requirements.

Regulation .05 establishes the Default Model for teacher and principal performance evaluation criteria. A local school system is required to adopt the Default Model if the system and the exclusive employee representative do not reach an agreement on an evaluation system. The Default Model teacher performance evaluation criteria include:

- a student growth component worth 50% of the teacher’s overall evaluation evaluated in specified ways, including the use of State Assessment or High School Assessment data and SLOs for elementary and middle school teachers of State Assessment content areas and non-content areas, and High School Assessments for high school teachers as specified; and
- a professional practice component worth 50% of the teacher’s overall evaluation broken down percentage-wise for specified subcomponents.

The Default Model principal performance evaluation criteria include:

- a professional practice component worth 50% of the principal’s overall evaluation including the outcomes in the Maryland Instructional Leadership Framework and other outcomes based on the Interstate School Leaders and Licensure Consortium (both incorporated by reference herein); and
- a student growth component worth 50% of the evaluation including:
 - for elementary and middle school principals, SLOs, State Assessment data, aggregate school-wide growth scores in State-assessed content areas, and the school-wide index; and
 - for high school principals, SLOs, High School Assessment data, and the school-wide index.

Regulation .06 sets forth a three-year evaluation cycle for tenured teachers. A tenured teacher is required to be evaluated at least once annually as follows: in the first year, evaluation on both student growth and professional practice; in the second year, an effective or highly effective teacher uses the previous year’s professional practice rating and most recent available student growth data; and in year three, same as the second year, if rated highly effective or effective. A teacher may request a new review of professional practice along with student growth in any year. Principals and teachers who are rated ineffective or are nontenured are evaluated annually on both student growth and professional practice.

Regulation .07 establishes requirements for the evaluation report, and Regulation .08 establishes appeal procedures for a teacher or principal whose overall rating is ineffective.

Legal Issue

Regulation .01 presents a potential legal issue of concern to the committee regarding whether the State Board of Education has the authority to require the 22 local education agencies to continue to comply with the Race to the Top application provisions due to the one-year extension of the federal grant to spend unexpended funds. Regulation .04 presents a potential legal issue of concern to the committee regarding whether the State Board of Education has the statutory authority to require (1) department approval of an evaluation system that has been mutually agreed on by the exclusive employee representative and a local education agency and (2) the use of SLOs informed by State assessments with a weight of at least 20% of a teacher’s evaluation.

Authority to Require Compliance with Race to the Top

Regulation .01 requires the “evaluation criteria set forth in the RTTT application and amendments” to apply to the local education agencies that signed on to the Race to the Top application. The department stated that this provision was included in the regulations due to the one-year no cost extensions that were granted by USDE for several State and local education agency projects. However, as the regulation is written, it is unclear if the requirement expires when the no cost extensions expire on September 30, 2015. It could be interpreted to be a permanent requirement, which would bind 22 local education agencies to several commitments made in the RTTT application that have been or may be superseded by the ESEA Flexibility Waiver. The department has stated that it intends to remove this requirement from the regulations before they are final.

Authority to Require Department Approval of Locally Agreed-Upon Evaluation System

Regulation .04B(6) requires an evaluation system established by a local education agency to include “rigor” that is demonstrated, in relevant part, by “the use of student learning objectives based on and informed by the data resulting from the State Assessments” representing “at least 20% of a teacher’s evaluation” and “[o]btaining Department approval of the agreed-on evaluation system.” Section 6-202(c)(3) of the Education Article requires a county board of education to establish teacher and principal performance evaluation criteria in the local school system that are (1) “based on the general standards adopted [by the department]” and (2) “mutually agreed on by the local school system and the exclusive employee representative.” Subsection (c)(4) and (5) specify what must be included in the performance evaluation criteria, including “data on student growth as a significant component of the evaluation and as one of multiple measures” and that no “single criterion shall account for more than 35% of the total performance evaluation criteria.”

The plain language of the statute is silent on departmental *approval, rejection, or review* of an evaluation system agreed-on by a local education agency and the exclusive employee representative. The statute expressly requires the department to adopt regulations setting general standards for performance evaluation criteria of teachers and principals, including default model performance evaluation criteria. The statute also expressly requires the performance evaluation criteria established by the local school system to be “based on the general standards adopted” by the department. In the absence of clear statutory language on these issues, it becomes a matter of legislative intent. *Kushell v. Dep’t of Natural Res.*, 385 Md. 563, 576 (2005).

In light of the plain language of the statute, it is reasonable to conclude that the General Assembly intended for the department to define the term “rigor” as it relates to teacher and principal performance evaluation criteria. Accordingly, the regulation shows that the department interprets the term “rigor” to mean, in part, meeting the general standards established by the department. The logical means of demonstrating rigor is for the department to, at a minimum, review the local school system-established performance evaluation criteria before the local school system implements it. Thus, it may be reasonable for the board to interpret that it possesses the authority to review local performance evaluation criteria. However, it is unclear whether the board may further interpret this authority to include the approval of such criteria following a review.

As written, this standard appears to be binding on local education agency-developed performance evaluation criteria *for the 2014-2015 and 2015-2016 school years only*. However, paragraph (7) following the paragraph cited above, speaks to department approval of an agreed-on evaluation system *after* the 2015-2016 school year based on an analysis of the 2014-2015 and 2015-2016 evaluation data and use of State assessment data “as a direct measure of student growth.” The Assistant Attorney General for the department confirms that this is the department’s intent.

Therefore, the Department of Legislative Services concludes that proposed Regulation .04(b)(6) and (7) related to the use of SLOs *only apply* to the 2014-2015 and 2015-2016 school years. The department would need to promulgate additional regulations in order to require local education agencies to use SLOs based on State assessment data to account for at least 20% of a teacher’s or principal’s evaluation, or some other mandated measure or percentage, in the 2016-2017 school year and thereafter.

Authority to Define Student Learning Objective Requirements

There is also some uncertainty regarding whether the board possesses sufficient authority to establish the SLO requirement. The statutory requirements for the department-established default model performance evaluation criteria are few: “observations, clear standards, rigor, and claims and evidence of observed instruction.” As previously stated, the performance evaluation criteria established by the local school system are required to be “based on the general standards adopted” by the department. These regulations are substantially similar to the existing regulations in content, including department-established minimum requirements in several components. For example, the statute requires the performance evaluation criteria to include “observations” and, from this, the regulation sets additional minimum requirements, including “*at least two* observations during the school year” and “*at least one* observation by an individual other than an immediate supervisor.” Similarly, it can reasonably be concluded that the requirement that the rigor component include a measure of student growth based on State Assessment data with a weight of at least 20% falls within the parameters of the required student growth component, which must be calculated using multiple measures and no single criterion may be worth more than 35% of the total evaluation criteria.

Statutory Authority and Legislative Intent

The State board cites §§ 2-205(b) and (g) and 6-202 of the Education Article as authority for the regulations.

Section 2-205(b) requires the State board to determine the elementary and secondary education policies of the State and to carry out the provisions of the Education Article within its jurisdiction. Subsection (g) requires the State board, through the State Superintendent, to exercise general control and supervision over public schools and educational institutions of the State.

Section 6-202(b) establishes a three-year probationary period of employment for certificated employees in a local school system and requires a county board to annually evaluate a nontenured certificated employee based on established performance evaluation criteria. Subsection (c)(2) requires the State board to adopt regulations that establish general standards for performance evaluations for certificated teachers and principals that include observations, clear standards, rigor, and claims and evidence of observed instruction, and are required to include default model performance evaluation criteria. Subsection (c)(3) requires a county board of education to establish performance evaluation criteria for certificated teachers and principals in the local school system based on the general standards adopted by the State board and that are mutually agreed on by the local school system and exclusive employee representative. The performance evaluation criteria developed by a county board is required to include data on student growth that is a “significant component” of the evaluation and as one of multiple measures and may not be based solely on existing or newly created single examination or assessment, although the examination or assessment may be one of the multiple measures. Furthermore, no single criterion may account for more than 35% of the total performance evaluation criteria. Performance evaluation criteria developed under this section may not require student growth data based on State Assessments to be used to make personnel decisions before the 2016-2017 school year.

Fiscal Analysis

There is minimal fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

These regulations replace the current teacher and principal performance evaluation criteria regulations that implemented provisions of the Education Reform Act of 2010 (Chapter 189), which helped the State land a \$250 million federal Race to the Top grant that is due to expire September 30, 2014. Specifically, one relevant provision of Chapter 189 required the State board to adopt regulations that establish general standards for performance evaluations for certificated teachers and principals that include observations, clear standards, rigor, and claims and evidence of observed instruction, as well as model performance evaluation criteria. *Failure to adopt* these or similar regulations could result in the loss of federal RTTT grant funds or hinder or revoke the State's ability to receive flexibility from the Elementary and Secondary Education Act (ESEA), which could lead to the loss of federal funds. The department recently received an extension of its ESEA Flexibility Waiver until the end of the 2014-2015 school year. In the July 18 extension approval letter, however, USDE stated that Maryland's extension and further flexibility after the 2014-2015 school year is subject to the State's commitment to continue working with USDE on Maryland's requested amendments to its teacher and principal evaluation and support systems.

The regulations also in part implement Chapter 544 of 2014, which prohibited any performance evaluation criteria for teachers and principals from using student growth data based on State assessments to make personnel decisions before the 2016-2017 school year and required the department to adopt default model evaluation criteria.

The department advises that adopting the proposed regulations will have a minimal fiscal impact on the department and local school systems. The Department of Legislative Services generally concurs with this assessment due to the majority of the costs associated with the regulations being accounted for in the fiscal and policy notes for Chapter 189 and Chapter 544. As noted in the relevant fiscal and policy notes, local school systems may incur additional costs for professional development on using student learning objectives in the evaluations. However, many local school systems already have funds that are allocated for professional development that could be used for this purpose, including RTTT grant funds.

Impact on Budget

There is no impact on the State operating or capital budget from adopting these regulations. Any costs associated with the continued development of the teacher and principal performance evaluation systems will come from federal RTTT funds allocated for that purpose or other federal or local funds. The impact is anticipated to be minimal. However, as noted in the fiscal and policy note for Chapter 544 of 2014 and above, *failure to adopt* regulations implementing Chapter 189 could result in the loss of federal RTTT grant funds or hinder or revoke the State's ability to receive flexibility from ESEA, which could lead to the loss of federal funds. The department and four local education agencies (Baltimore City and Baltimore, Dorchester, and Prince George's counties) recently received one-year no cost extensions for \$20.1 million and \$4 million, respectively, in RTTT funds that will not be spent by the September 30, 2014 deadline. Thus, these funds could be at risk of loss if regulations to implement the teacher and principal evaluation systems are not adopted.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

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