

COMMENTS

Submitted By

NYSSBA and NYSCOSS

Regarding the

DRAFT

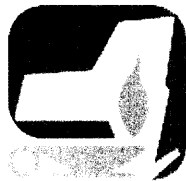
“QUESTIONS AND ANSWERS

RELATED TO COLLECTIVE BARGAINING AGREEMENTS

AND

THE NEW TEACHER AND PRINCIPAL EVALUATION LAW

PURSUANT TO CHAPTER 103 OF THE LAWS OF 2010”



**New York State
School Boards Association**

New York State School Boards
Association, Inc.
24 Century Hill Drive, Suite 200
Latham, New York 12110
(518) 783-0200



New York State Council of
School Superintendents
7 Elk Street, Third Floor
Albany, New York 12207
(518) 449-1063

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QUESTIONS AND ANSWERS RELATED TO COLLECTIVE BARGAINING
AGREEMENTS AND THE NEW COMPREHENSIVE TEACHER AND PRINCIPAL
EVALUATION LAW (EDUCATION LAW §3012-c AS ADDED BY CHAPTER 103 OF THE
LAWS OF 2010)

EFFECTIVE DATE OF NEW LAW

Q. What is the effective date of Education Law §3012-c?

A. Education Law §3012-c, which establishes a new statewide comprehensive evaluation system for all teachers and building principals based on multiple measures of effectiveness, takes effect July 1, 2010. However, the law provides for a phase-in of the new comprehensive evaluation system, including prescribed student achievement measures, beginning with the 2011-2012 school year.

Comment:

This answer is technically correct when it states that the statute is effective on July 1, 2010. However, it would be more helpful if it included the phase-in stages and clearly stated that the new statutory requirements for teacher and principal evaluations will be effective beginning:

- *July 1, 2011 for school district teachers of common branch subjects or English language arts or mathematics in grades 4-8 and principals of schools in which such teachers are employed; and*
- *July 1, 2011 for all school district and board of cooperative educational services (BOCES) classroom teachers and principals (§3012-c(2)(b),(c)).*

Recommended new second heading and question:

IMPACT OF NEW LAW ON COLLECTIVE BARGAINING

Q. *How does the new law affect collective bargaining between school districts and BOCES and their teacher and principal bargaining units?*

A. *Education Law §3012-c makes certain specified aspects of the new comprehensive evaluation system for teachers and principals subject to the collective bargaining process in accordance with the requirements of Article 14 of the Civil Service Law. Those specified areas include:*

- *Procedures for ensuring that evaluations constitute a significant factor in the making of employment decisions including but not limited to, promotion, retention, tenure determination, termination, and supplemental compensation (§3012-c(1)).*
- *Procedures related to teacher and principal development, including but not limited to, coaching, induction support and differentiated professional development (§3012-c(1)).*
- *Elements, other than student growth measures, that comprise the composite effectiveness scores, consistent with the standards prescribed in the regulations of the commissioner of education (§3012-c(2)(a)), including:*
 - *Locally selected measures of student achievement that are determined to be rigorous and comparable across classrooms in accordance with the regulations of the commissioner (§3012-c(2)(e)(ii), (f)(ii), (g)(ii)).*
 - *Sixty percent of the evaluations, ratings and effectiveness scores, excluding student growth measures and selected rigorous measures of student achievement that are comparable across classrooms, consistent with the standards prescribed in the regulations of the commissioner (§3012-c(2)(h)).*
- *Improvement plans for teachers and principals rated as developing or ineffective pursuant to an evaluation conducted under the new law, consistent with the regulations of the commissioner (§3012-c(4)).*
- *Procedures by which teachers and principals may appeal:*
 - *The substance of the evaluation,*
 - *Adherence to the standards and methodologies required for such evaluations under the new law,*
 - *Adherence to the regulations of the commissioner and compliance with any applicable locally negotiated procedures, and/or*
 - *Issuance and/or implementation by school districts and BOCES of the terms of a teacher or principal improvement plan, as required under the new law (§3012-c(5)).*

RELATIONSHIP OF THE NEW LAW TO EXISTING AGREEMENTS

Q. What is the relationship of the new law to evaluation provisions contained in existing collective bargaining agreements? What are the immediate obligations of school districts and BOCES?

A. Education Law §3012-c requires that all collective bargaining agreements for teachers and building principals entered into after July 1, 2010 be consistent with its provisions. It further provides that any conflicting provisions of collective bargaining agreements in effect on July 1, 2010 are not abrogated and remain in effect until there is a successor agreement. In such case, upon entry into a successor agreement, the provisions of the statute shall apply and must be incorporated into the successor agreement.

Comments:

1. *We strongly object to the statement that “the provisions of the statute...must be incorporated into the successor agreement.” Education Law §3012-c simply does not contain this requirement. It says only that collective bargaining agreements entered into on or after July 1, 2010 must be consistent with the requirements of the new law. That does not mean that the agreement must incorporate the statute either directly or by reference.*
2. *Incorporation of the provisions of the statute into a collective bargaining agreement also raises the prospect that compliance with the terms of the new law would be “grievable” under the agreement which:*
 - a. *Gives rise to yet another form of litigation concerning compliance with the requirements of the statute, and*
 - b. *Surrenders all of the provisions of the law to the jurisdiction of a labor arbitrator, in most instances, in binding arbitration.*
3. *The statement that “the provisions of the statute...must be incorporated into the successor agreement” also is contrary to well-established precedent from the Public Employment Relations Board, the agency responsible for enforcing and initially interpreting the requirements of Article 14 of the Civil Service Law, that proposals to restate a statute or to incorporate it into a collective bargaining agreement are non-mandatory subjects of bargaining (see, e.g., Chateaugay CSD, 12 PERB ¶3015 (1979)). Proposals to include in a collective bargaining agreement provisions that require compliance with state law are equally non-mandatory subjects of bargaining (see, e.g., New Rochelle, 8 PERB ¶ 3071 (1975)).*
4. *Whereas incorporation of the provisions of a statute into a collective bargaining agreement is a non-mandatory subject or bargaining, the actual incorporation of statutory provisions into an agreement either directly or by reference would automatically convert all of the terms and provisions of the statute into mandatory subjects of collective bargaining. This means that they cannot be modified without mutual agreement between the parties to the collective bargaining agreement (City of Cohoes, 31 PERB 3020 (1998); Greenburgh No. 11 Federation of Teachers, 32 PERB 3024 (1999)). As a result, compliance with future amendments to **any** of the provisions of Education Law Section 3012-c would require subsequent negotiations, even if those amendments concern provisions otherwise not subject to collective bargaining.*

5. *This question and its answer fails to recognize that it is permissible for a school district and a BOCES and their respective teachers' or principals' union to enter into agreements outside the collective bargaining agreement itself.*

Further, where a school district and a union entered into a memorandum of agreement that was ratified by both parties prior to July 1, 2010, the mutually ratified memorandum of agreement would constitute an agreement deemed to be in effect on July 1, 2010.

Recommended new question and answer

Q. What if my district or BOCES is in the process of negotiating a collective bargaining agreement that was scheduled to have an effective date of July 1, 2010 or before but negotiations stalled with respect to issues related to the new law?

A. The parties may conclude negotiations without addressing the new Education Law §3012-c consistent with basic principles of collective bargaining under Article 14 of the Taylor Law that allow such an outcome when a particular subject was not within the cognizance of the parties when they prepared, exchanged, and valued various proposals as they progressed in their negotiations. Rather than delay settlement and throw their collective bargaining agreement off cycle into impasse, the parties may leave as open subjects for further negotiation the issues that are new as a result of Education Law §3012-c and receive assistance from the Public Employment Relations Board with respect to any impasses that may arise due to such separate or single issue negotiations (County of Genessee, 18 PERB 3016 (1985) citing City of Newburgh, 63 N.Y.2d 793 (1984), affirming 15 PERB 3116 (1982)).

Q. What if my district's or BOCES' collective bargaining agreement is effective for three more years? Does the law permit us to modify the evaluation provisions of our contract sooner?

A. Yes. The law specifically permits districts, BOCES and their local collective bargaining agents to re-negotiate the evaluation provisions in their collective bargaining agreements at any time. The Department strongly encourages parties with ongoing contracts to consider re-negotiating any inconsistent provisions in their agreements as soon as possible to hasten statewide implementation of the new evaluation system.

Comment:

None.

INCORPORATING THE PROVISIONS OF THE NEW LAW INTO AGREEMENTS

Q. If a school district or BOCES' collective bargaining agreement expires after July 1, 2010, how should the provisions of the new law be incorporated, particularly when implementing regulations have not yet been developed?

A. As noted above, any new collective bargaining agreements must be consistent with the provisions of the new law. While the specific language of each agreement may vary, it is recommended that at a minimum the collective bargaining agreement incorporate by reference Education Law §3012-c and expressly provide that nothing in the collective bargaining agreement shall be inconsistent with the requirements contained in the statute and the Commissioner's implementing regulations, including the provisions relating to student achievement measures.

Comments:

1. *Again, we strongly oppose including the recommendation that provisions of the statute be incorporated into collective bargaining agreements, even if only by reference. Education Law §3012-c says only that collective bargaining agreements entered into on or after July 1, 2010 must be consistent with the requirements of the new law. It does not require or suggest that collective bargaining agreements incorporate the provisions of the statute by reference. Moreover, such a suggestion is ill-advised because, as discussed above, statutory provisions incorporated into a collective bargaining agreement either directly or by reference automatically are converted into mandatory subjects of bargaining that cannot be modified except by mutual agreement. This will ultimately negatively affect any movement toward reform which Education Law §3012-c is purportedly based upon.*
2. *The pending implementing regulations may have a profound impact upon the meaning of language that may have to be negotiated into a collective bargaining agreement. The mutuality of agreement required to modify statutory provisions converted into mandatory subjects of bargaining places at risk the ability of school districts and BOCES to comply with regulatory requirements that subsequently modify the statutory language previously incorporated into an agreement.*
3. *Again, the recommendation that an agreement incorporate the statute, even if only by reference, also raises the prospect that compliance with the terms of the new law would be "grievable" under the agreement which:*
 - a. *Gives rise to yet another form of litigation concerning compliance with the requirements of the statute, and*
 - b. *Surrenders all of the provisions of the law to the jurisdiction of a labor arbitrator, in most instances, in binding arbitration.*

Q. Do new contracts need to reference all the provisions of the new law, i.e., percentages relating to teacher and principal effectiveness and student growth?

A. It is strongly recommended that any new collective bargaining agreement incorporate, among other things, the percentages of student achievement measures related to the teacher and/or principal effectiveness score. Over time, as implementing regulations are developed, districts and BOCES may be able to incorporate even more specific references into their collective bargaining agreements.

Comment:

It is ill-advised to recommend that a collective bargaining agreement incorporate either directly or by reference any of the statutory provisions, for the all the same reasons previously discussed above with respect to other questions and answers making a similar recommendation.

Q. After July 1, 2010, is it mandatory that new district and BOCES' collective bargaining agreements include provisions linking teacher and principal evaluations and ratings to compensation?

A. Yes. Pursuant to Education Law section 3012-c all collective bargaining agreements applicable to classroom teachers and building principals entered into after July 1, 2010 shall be consistent with the new law. The law requires that the new evaluations be a significant factor for employment decisions, including, but not limited to promotion, retention, tenure determination, termination and supplemental compensation.

What this means is that any new agreements entered into after this date must incorporate, among other things, locally developed procedures pursuant to Article 14 of the Civil Service Law that will allow for the new teacher and principal evaluations to be a significant factor in employment decisions, including, but not limited to, supplemental compensation, in accordance with the phase in schedule required by the law.

Comments:

- 1. The question itself misleadingly suggests that Education Law §3012-c applies to all types of compensation. However, the statute only requires that evaluations be a significant factor in decisions concerning supplemental compensation (§3012-c(1)). The question and answer should be revised accordingly.*
- 2. The answer fails to recognize that school districts and BOCES are not required to provide supplemental compensation. Thus, the answer should make clear that Education Law §3012-c does not require that school districts and BOCES agree to provide supplemental compensation. The requirement that evaluations be a significant factor in decisions regarding supplemental compensation applies only in those instances where a district or BOCES actually provides that type of compensation.*

Q. What happens if my district's or BOCES' collective bargaining agreement expires after July 1, 2010, but contract negotiations are stalled and a new agreement cannot be reached?

A. Education Law §3012-c provides that any inconsistent provisions in an agreement in effect on July 1, 2010 continue until entry into a successor agreement. While contract provisions may not be abrogated during this period, districts and BOCES must continue to abide by the applicable provisions of the APPR regulation (see below).

Comment:

None.

INTERPLAY BETWEEN NEW LAW (Education Law §3012-c) AND EXISTING APPR REGULATION (8 NYCRR §100.2[o])

Q. How does the new law relate to §100.2(o) of the Commissioner's regulations governing the Annual Professional Performance Review (APPR) of teachers? Are school districts and BOCES required to comply with §100.2(o) of the Commissioner's regulations governing the APPR of teachers for the 2010-2011 school year?

A. The new statewide evaluation system builds on, not eliminates, the existing APPR. Specifically, Education Law §3012-c(3) provides:

Nothing in this section shall be construed to excuse school districts or boards of cooperative educational services from complying with the standards set forth in the regulations of the commissioner for conducting annual professional performance reviews of classroom teachers or principals, including but not limited to required quality rating categories, in conducting evaluations prior to July first, two thousand eleven, or, for classroom teachers or principals subject to paragraph (c) of subdivision two of this section, prior to July 1, two thousand twelve.

Therefore, school districts and BOCES must comply with the requirements in §100.2(o) of the Commissioner's regulations for all classroom teachers prior to July 1, 2011 and thereafter as the provisions of the new law phase in. In other words, even during the first year of the new comprehensive statewide system (i.e. 2011-2012), school districts and BOCES must comply with the applicable provisions of §100.2(o) for all classroom teachers, even for those whom the new statutory system has not yet phased in.

Recent amendments to §100.2(o) apply to all classroom teacher evaluations conducted on or after July 1, 2011. Among other things, the revised APPR regulations require that annual evaluations incorporate student growth measures and use four prescribed rating categories (highly effective, effective, developing and ineffective). As noted above, these provisions will be effective for all teachers beginning July 1, 2011 as the new law phases in. Companion regulations for principals are currently under consideration.