



State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
255 Westminster Street
Providence, Rhode Island 02903-3400

Deborah Gist
Commissioner

November 7, 2011

Benjamin M. Scungio, Esq.
Brennan, Recupero, Cascione, Scungio & McAllister, LLP
262 Broadway
Providence, RI 02909

Re: Formal Legal Advisory Opinion Request of Lincoln School Committee

Dear Mr. Scungio:

Please be advised that I am receipt of your letter dated September 29, 2011, requesting a formal legal advisory opinion pursuant to the RIGL §§16-1-5 and 16-60-6¹ and relating to certain requirements of the Basic Education Program. Board of Regents' Regulation G-12-1, *et seq.* Specifically, you have requested on behalf of the Lincoln School Committee that the Commissioner address a set of questions based on the pertinent representations that follow:

Facts presented

1. The Lincoln School District is presently engaged in collective bargaining with its certified teachers union ("LTA").
2. The recently lapsed collective bargaining agreement ("CBA") has provisions for assignment and transfer and recall of certified teachers who have been suspended as a result of reduction in enrollment. . .
3. On April 11, 2011, the Lincoln School Committee formally adopted a professional & support hiring policy. . . The policy was adopted in pursuant to the Committee's statutory duties and responsibilities pursuant to RIGL §16-2-1 *et seq.*, including but not limited to 16-2-9 and 16-2-9.1. . .
4. The LTA and the District have exchanged several proposals concerning the CBA language concerning assignments, layoffs and termination.
5. The District concerned (sic) that any proposals in which seniority is heavily favored and the needs of the District, the abilities of the employee and the needs of a particular position/students are not adequately addressed may create a contractual

¹ RIGL §16-1-5(9) and (10) provides that the Commissioner shall "require the observance of all laws relating to schools and education" and requires that the Commissioner "interpret school law". This authority and responsibility is essentially restated in RIGL §16-60-6.

responsibility which conflicts with its and the Superintendent's management responsibly (sic) as outlined in the BEP and other state law. . .

You state that "it would be helpful to the parties if the Commissioner would exercise her powers of statutory review of educational law to provide guidance as to the specific requirements of the BEP and related law in a formal opinion. " Accordingly, I hereby respond to the following questions as presented in your request, *seriatim*, and issue this response as a formal advisory opinion under the authority vested in the Commissioner of Education by the Rhode Island General Laws.

Questions Presented

- 1) What is the Basic Education Program designed to do in reference to hiring, terminations, recall, assignment and transfer of certified personnel in a school district?

RESPONSE: The Basic Education Program (BEP) regulates the quality of instruction and instructional support systems in part by requiring management to maintain controls over staffing of certified personnel. It does so in two distinct ways: first, through policy-driven imperatives designed to guarantee continuous improvement of teaching and learning; and second, through more explicit and technical requirements of specific systems so as to ensure the attainment of requisite levels of functionality necessary to achieve overarching educational policy goals.

With respect to "hiring, terminations, recall, assignment and transfer of certified personnel in a school district," all such staffing decisions must be directed towards two primary objectives: (1) developing and instituting policies and procedures for a human capital system supportive of the continuous improvement of teaching and learning; and (2) the correlation of all educator service provider qualification determinations to student learning and success.² The BEP plainly states that:

"improving achievement requires recruitment of talented educators driven by strategic human capital management that involves the practices of recruiting, rewarding and retaining talented and demonstrably successful staff."

BEP G-15-2.2.

The BEP clearly restates the significance of centering student learning within the scheme of an effective human capital management system. To underscore this, the BEP expounds on student learning by defining it as "the primary reference point for decision-making, responsive policy development, resource allocation, and personnel assignment and evaluation." BEP G-12-4.1. (Emphasis added).

The requirement that school districts "develop, implement, and monitor a human capital management system that is connected to its educational improvement strategy" means that school districts must establish their own policies and procedures for recruitment, hiring and

² See BEP G-12-1: "The BEP . . . is designed to ensure that high-quality education is available to all public school students, regardless of where they reside or which school they attend.

retention of school staff. Moreover, the fact that the BEP delineates the required policies and procedures in comprehensive terms³ denotes that such policies and procedures for the human capital management system shall be developed and implemented independently of the collective bargaining process. However, there will remain working conditions and terms of professional employment that will remain subject to collective bargaining within the legal parameters of the BEP regulations, as more clearly delineated in local policies and procedures that comport with the BEP.

- 2) To what extent may seniority be accommodated in such a process/system and when making staffing decisions?
- 3) What factors should be used in a Superintendent's calculus when determining an assignment, transfer, and layoff or recall matter? What factors should be predominating in such a process?

RESPONSE: The BEP is generally suggestive of both qualitative and quantitative factors in the implementation of a human capital management system designed for recruiting, hiring and retaining the most effective educators. These factors must substantively "align to district needs" and serve the development of a human capital management system that yields "highly effective and experienced staff." BEP G-15-2.2. In a *Dear Colleague* letter dated October 20, 2009, the Commissioner wrote: "In my view, no system that bases teacher assignments solely on seniority can comply with this regulation." This statement is demonstrative of the breadth of the BEP provisions governing human capital. Although seniority⁴ may correlate to a teacher's degree of "experience," it must be considered as secondary to other performance criteria aligned with the needs of the district and students. There exists no rational link between seniority per se and educational achievement. To make staffing decisions on the mere length of time that a teacher has been in the system does not afford a reliable performance metric, and may in fact contribute to an arbitrary process resulting in forced or arbitrary placement. Accordingly, as an evaluation factor, seniority can only be a component of an overall system of gauging the relative merit of competing, qualified candidates. While it is clear that the BEP does not require recognition of seniority, the BEP also does not dictate a precise degree to which seniority may be taken into account, but it is clear that the interests of students shall be the primary factor in all staffing decisions regarding education service providers.

Any staffing decision relating to the employment status of certified personnel should be weighed in light of the particular needs of students, schools and districts. A decision cannot be made

³ "[S]aid policies and strategies shall align to district needs, focus on screening methods for determining candidate knowledge and skills to match the needs of the LEA, promote early identification of openings, use research-based protocols and incentives to address LEA related factors affecting retention and its impact on mobility trends, and address staffing low performing schools with highly effective and experienced staff." See BEP G-15-2.2(1). On its face, this provision of the BEP is densely worded; yet, each word is expressed with a specifically intended and singular meaning.

⁴ "Seniority," as used herein, refers to years of service within a particular local education agency. Seniority should be distinguished from measures of "experience," which can be more relevant to staffing decisions if they incorporate relevant experience in the same area of certification, grade span, and/or content area. However, neither "seniority" nor "experience" capture relevant past performance levels unless such past performance is made explicit in the relevant guiding document.

without bearing in mind the overarching purpose of the BEP as explicated in the previous response. Decisions must be made pursuant to a district's policies and procedures relating to effective staffing, and those decisions must be *measured* to guarantee a high-quality education"⁵ and "improve[e] achievement for all students."⁶

The BEP states in broad terms the nature of those factors constituting "a Superintendent's calculus when determining an assignment, transfer, and layoff or recall matter." Section G-15-2.2(1) of the BEP, entitled *Policies and Procedures to Recruit, Support, and Retain Highly Effective Staff*, requires that school districts establish their own policies and procedures for undertaking staffing decisions; however, the BEP does not mandate particular methods or strategies in the recruitment of "talented educators." Rather, the BEP requires only that "clearly detailed and widely disseminated policies and procedures for the supervision and evaluation of all staff" be promulgated. This mandate allows districts considerable flexibility in establishing an hiring, evaluation, and assignment system on the following conditions: that the district's human capital management system results in the recruitment, hiring and retention of educational candidates and certified personnel "show consistent positive impact on student learning." See G-15-2.2(4). Also, the standards set forth in the BEP must be "substantive and measurable," and must further be consistent with the legal requirements set forth in the Board of Regents' Educator Evaluation System Standards. BEP G-12-2.1.

- 4) Do professional & support hiring policy (sic) such as Lincoln School District's, (Exhibit B), comport with the BEP?

RESPONSE: The Lincoln School District's Professional and Support Staff Hiring policy provides the administrative framework for the recruitment of certified and support personnel, the application and screening process, and hiring procedures. The policy expressly states and acknowledges that the Lincoln School District is obligated to abide by the Rules and Regulations of the Rhode Island Board of Regents, including the BEP; that all personnel decisions are to be made with "continuous improvement of student learning [being] the primary reference point" (BEP G-12-4.1); that in implementing this policy, that the Lincoln School District shall "maintain control of its ability to recruit, hire, manage, evaluate, and assign its personnel' to ensure the selection and hiring of highly qualified, effective, certified staff that best meets the needs of students." BEP G-15-2.2.

⁵ G-12-1 provides in pertinent part:

The BEP, along with other applicable regulations and standards promulgated and adopted by the Board of Regents, is designed to ensure that high-quality education is available to all public school students, regardless of where they reside or which school they attend. The standards set forth in this title are designed to be measurable in order to determine compliance with the law and, more generally, to determine whether equality of educational opportunity is being provided at the local level. (Emphasis added)

⁶ G-12-2.2 provides in pertinent part:

To accomplish the delivery of a sound, high-quality education to every student, the school, LEA, and state must ensure that policies, programs, and systems are connected and directed toward the common purpose of improving achievement for all students.

The Lincoln School District's Professional and Support Staff Hiring policy (GCD) fully comports with the BEP and relevant statutes including RIGL §§ 16-2-9 and 16-2-11. However, the document identified as "Appendix F – Lincoln School Department Merit System" is less clearly aligned to the aforementioned statutes and regulation. First, Paragraph 1 of Appendix F states that the "Chairperson of the School Committee shall determine which, of the applicants who tied for the highest score, shall receive the position..." This appears to be in derogation of the requirement under RIGL § 16-2-11(a)(7) that states that it is the superintendent's responsibility "[t]o appoint all school department personnel with the consent of the school committee." It is clearly the superintendent who is the appointing authority under Rhode Island law, albeit with the consent of the school committee, not the school committee chair. Moreover, the consent contemplated must be of the body as a whole, not the Chairperson, and such attempted delegation must be considered *ultra vires* and non-compliant with state law.

Second, the point system set forth in Appendix F appears to leave no room for transfer and assignment decisions to include evidence of applicants' prior job performance. Without this element, it is difficult to see how this approach, standing alone, meets the BEP requirement that all hiring decisions be made primarily on the basis of improving student learning. That is not to say that the point system set forth in Appendix F is impermissible; presumably the Lincoln School Committee sees a rational relationship between job qualifications of the applicant and these criteria. However, it appears that the list of factors is incomplete given the lack of measures of past performance or other indicators of efficacy of instructional practice that would suggest that students would benefit from one applicant more than another. In short, Appendix F does not appear to include factors that measure whether applicants for new assignments within the district have been "demonstrably successful." BEP G-15-2.2.

- 5) Are administrative staffing decisions integral to the "essence of the educational mission" and if so, what is the educational underpinning for such determination?

RESPONSE: In its promulgation of the BEP, the Board of Regents has delivered a mission statement to all school districts in order to "ensure that every public school student will have equal access to a high quality, rigorous, and equitable array of educational opportunities from PK-12." The BEP expressly states as follows:

Under the supervision of the governing board, the chief executive shall exercise his or her management authority to accomplish the following responsibilities that are deemed by the Board of Regents to be **essential to the mission** of implementing a statewide system of public education:

* * *

4. Human Capital: The chief executive shall oversee administration of the personnel function consistent with personnel standards, policies, and the table of organization established by the governing board that includes: policies and procedures for recruiting, supporting and retaining highly effective staff; ongoing supports to improve the effectiveness of staff; cohesive professional development; and evaluation of personnel performance.

BEP G-15-1.2. (Emphasis added).

The BEP is a regulatory document with the "full force of law,"⁷ and it comprehensively represents what is essential to the educational mission. Clearly, administrative staffing decisions fall within the regulatory provisions of the BEP.

- 6) Are staffing policies such as Lincoln's professional and support hiring policy and their implementation (which are subject to the standards set forth in the BEP as interpreted by the Commissioner of Education), subject to the collective bargaining process or a non-delegable duty of the Superintendent and School Committee?

RESPONSE: The response to questions number 3 and 4 as jointly rendered above are incorporated and made a part of this response. It is of critical importance to take cognizance of BEP's provisions on human capital. The BEP repeatedly underscores the function of *management* in the recruitment, hiring and retention personnel process. G-15-2.2 of the BEP characterizes the process as the "human capital management system;" it is a management system for "recruiting, developing, rewarding and retaining talented and demonstrably successful staff. The human capital *management* system enables the LEA to address the following functions: *Recruit, Support and retain Highly Effective Staff; Use Information for Planning and Accountability, and Ensure Equity and Adequacy of Fiscal and Human Resources.*" The overarching imperative of the BEP in its entirety, but especially as relating to matters of human capital, is strictly for reasons of educational policy. Every aspect of the BEP, especially those portions dedicated to the human capital management system, is intimately connected to improving education. The central question to be answered before each hiring or retention decision concerns which candidate is the best qualified to meets the needs of students. A school district hiring authority must necessarily exercise its judgment and discretion on a matter that goes to the essence of the educational mission.

The responsibility of a school district by and through its superintendent and school committee to make staffing decisions cannot be abrogated. The powers vested in a school committee over education are substantial. The Supreme Court has held that "the entire care, control, and management of all public school interests" belong to school committees. North Providence School Committee v. Federation of Teachers, 945 A.2d, at 346 (RI 2008). In my view, the decision over who will teach students is directly and causally related to the improvement of the education of students. Ultimate staffing decisions are a management responsibility statutorily limited to the superintendent with the consent of the school committee, and to subject it to the collective bargaining process would be contrary to the statutory provisions granting "the entire care, control, and management of all public school interests" to school committees. RIGL §§16-2-9(a) and 16-2-18. In addition, the authority of school committees is coupled with that of superintendents who have the authority over the "care and supervision of the public schools" and the "appointment of employees of the district." RIGL §16-2-11(a).

⁷ See G-12-1.

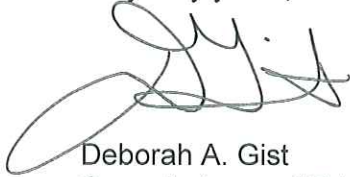
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It is the non-delegable duty of the superintendant and school committee to judge which individual is most qualified to serve the students of the district and improve educational achievement. The BEP expressly reflects this proposition of law in G-15-2.2:

In order to effectively meet these functions, each LEA shall maintain control of its ability to recruit, hire, manage, evaluate, and assign its personnel.

In sum, staffing decisions relating to providers of instructional services are vested in the non-delegable managerial responsibilities of the school district.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Gist', with a large, sweeping flourish extending to the left.

Deborah A. Gist
Commissioner of Education

Attachments