School Law for Administrators

Headlines on School Law

States gear up to revise ESSA plans

by Rob Taylor, PhD

There was a rush to submit the first batch of state education plans to the federal Department of Education (ED), under Secretary Betsy DeVos. Most states got their plans in during the 2017-2018 school year and many are now wanting to make changes. According to ED, a state may submit an alteration to its ESSA-required plan only after the governor has been consulted and public comment has been solicited. A revised plan document may then be submitted to ED, with changes marked in red, along with a cover letter explaining proposed changes and a narrative on how feedback was solicited from the public.

One of the areas of intense interest and conflict at the state level is the state "report card," or accountability system, pegging just where districts and schools land comparatively. After ESSA was passed in 2015, most states set about redefining their accountability systems to be in better alignment with the new law, which tended to lean toward greater state and local autonomy and to move away from heavy emphasis on student standardized test scores to evaluate teacher and institutional success.

But the still pretty-much-new state report cards have been controversial from several perspectives, according to a recent series of *EdWeek* articles. For one, ESSA required so many data points and new sets of data from states that parents tended to feel confused. So, ED decided to create a guide to clarify what was required.

Betsy DeVos said, "Parents deserve to know what is happening in their child's school. They should not have to parse through a 500-page legal document to understand how a law or policy affects their children's education."

Examples of the new requisites coming from ESSA are:

- States must calculate how much is being spent per student by district and school;
- Reporting must include post-secondary enrollment;
- There is now required new data on long-term English-language learners and the level of success of foster children and homeless students compared to their more stable peers;
- Reporting must explain the complexities of the state-adopted accountability scheme, including indicators used to evaluate a school's performance and exactly what schools need to do to improve.

In many states by late 2018 rankings of schools according to ESSA requirements were being made public, and that led to some public flaps, particularly if elections were taking place. In Oregon, for example, Democratic Gov. Kate Brown was accused by her Republican opponent, Knute Buehler, of sitting on data derived from the new state report card until after the election because some of the results would make her look bad.

Brown responded that delay in the publication of data actually resulted from efforts to redesign the report card and to determine how opting-out schools impacted the rankings. However, Brown ordered a quicker release of the data. She also ultimately won her election.

STATE REPORT CARDS UNDER THE MICROSCOPE

Districts have been tasked with collecting reams of new data under the recently devised report cards, data for example seeking to illuminate chronic absenteeism, teacher performance, and student readiness for college and career. Such data then typically goes to state officials for analysis and reporting to federal officials under ESSA.

At that point serious intra-state conflicts have been breaking out, according to an *EdWeek* series, with superintendents from many states complaining that state officials have used unsophisticated calculations from the data to rank schools and are still too dependent on student test scores to evaluate school success.

State accountability systems, of course, are not just about public image but also about where state and federal funds for improvement are awarded. It appears inevitable that local school officials and education groups will seriously question just how the new "report cards" are being put together and used.

Take the St. Charles Parish school district in Louisiana, for example. When the district's letter grade dropped from A to B under the state's new report card, superintendent Felicia Gomez-Walker expressed her exasperation with the state's use of letter grades. "It doesn't really tell the whole story of the effectiveness of any school or any district."

State officials are hearing about and seeing accountability system glitches, along with the frustrations of local officials, upon whom they depend. So, officials in Indiana, Wyoming, and New Mexico have announced their intention to significantly review and revise their state report cards in the near future.

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Trump/DeVos Release 2020 Federal Education Budget

The third President Trump Department of Education budget, this one for federal fiscal year 2020, will likely follow the course of the curious 2018 and 2019 education budgets which proposed unpopular cuts to many programs and so were reversed by Congressional lawmakers who actually increased education spending each year. Most analysts predict a similar occurrence this year.

One of the keys to this year's budget proposal is that it seeks to get rid of 29 ongoing programs, for a potential savings of $6.7 billion, and then ploughs $5 billion back into DeVos-favored school "choice" programs.

As to "choice," John Schilling, president of the American Federation for Children (an advocacy organization for vouchers and tax credits once run by Betsy DeVos), waxes ecstatic at the budget inclusion of many "choice" strategies. "These proposals represent the most ambitious agenda yet for expanding educational freedom and opportunity," Schilling exudes. The proposals include what an *EdWeek* article calls "a $5 billion sweetener for school choice," a program to be run by the Department of Treasury that would give tax credits to individuals and organizations that donate to scholarship-granting groups, so that public monies end up being used to support private and religious schools. Another proposal would double funding for a District of Columbia voucher program from $15 million to $30 million. Then there would be a new voucher program of $200 million that teachers could use for professional development.

Rep. Bobby Scott, D-VA, chairman of the House education committee, sees this budget proposal in a very different light from Schilling. It "ignores the needs of America's children" and doesn't invest in "our future," says Scott, who points to the many deep cuts in traditional programs. For example, the Trump budget would cut $2.1 billion in Title II teacher training funds, another $1.2 billion in afterschool funding in the 21st Century Community Learning Centers Program (killing the program), and $1.2 billion ESSA Title IV block grant dollars intended to assist districts improve academic offerings.

James Blew, assistant ED secretary for planning, evaluation, and policy development, waved these programs away. "We find those programs to be either ineffective, duplicative of other activities, or better funded by state and local governments." What kinds of programs are listed under the 29 that the Trump budget would eliminate altogether? Analysts define these programs, generally, as arts education, gifted and talented, literacy, community support, and targeted low-income.

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The Center for Assessment helps states develop effective accountability systems, and associate director Chris Domaleski sees a positive at this difficult moment: state and federal officials working closely on just what makes schools successful. "It's important for accountability systems," he says, "to provide accurate information about how schools are achieving, given that communities make substantial investments in public schools."

However, not everyone has been so optimistic about developing new accountability strategies. In Texas, for example, for the first time, the state assigned letter grades to its schools, resulting in anger by superintendents across the state. Spokesman for the Texas Association of School Boards, Dax Gonzales, had this to say: "Reporters were going to seize on the letter grade and determine what it meant when we really still don't know what it means. There could be just one indicator that's in there that knocked a district down to a C."

Other complaints across the states include technical and design flaws that delayed data releases, inaccurate reporting of test scores, the sometimes excessive cost of the design and redesign process, layoffs having reduced the numbers of technicians responsible for processing data, problems of merging state accountability systems with federal requirements, the cost of new data collection machinery, and disagreements amongst policymakers, practitioners, and parents as to what defines school success.

Despite these kinds of issues, New Mexico, under a new governor, is optimistically proposing large-scale changes to its accountability system. The state intends to get rid of its A to F ratings of schools and devise broader ranking criteria. The top quartile of schools will be labeled as "spotlight" schools, the middle 50% will become "traditional support" schools, and those in the bottom quartile will be "targeted support" or "comprehensive support" schools. The state plans to get rid of PARCC tests and develop a new teacher evaluation strategy as well.

This ambitious set of plans is good news to Dan Gordon, with Education Counsel, who says, "We want states to periodically review their approach. If their approaches are not delivering for kids, I would say they have not just a legal but a moral obligation to rethink and to revise and to improve."

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First Amendment

Mother seeks right to proceed anonymously in First Amendment Establishment Clause case

Citation: M.G. v. Whitley County Consolidated Schools, 2019 WL 1568335 (N.D. Ind. 2019)

A federal district court in Indiana has granted a mother's request to proceed in a First Amendment Establishment Clause lawsuit using only her initials to identify her. Though courts disfavor anonymous lawsuits, in this case, the court concluded that given the sensitive nature of the legal action and that a minor could be identified if his mother was not permitted to proceed, it would allow the mother to proceed using her initials only and not her full name.

S.G. is the mother of a student who attends school in the Whitely County Consolidated Schools. According to S.G., the school district has a habit of allowing members of a religious organization to visit the schools and that religion is frequently discussed during the school day. For example, members of a certain religious group visit the school during school hours and talk to students. Also, other students have often discussed religion at school and encouraged religious activities. In one case, a student gave S.G.'s son a religious book marked with the initials for S.G.'s son's name. When her son gave it back, the other student approached him, again giving him the religious book and this time saying that he was going to Hell.

According to S.G., this type of conduct at school has made her son feel ostracized, left out, and even threatened and he wishes religion was not part of the school day. S.G. filed a First Amendment Establishment Clause lawsuit against the district, but as a first matter sought to proceed using only her initials to avoid the probability that her son would be identified if she proceeded using her full name since they share a last name. Because the district did not respond to this request, the court considered it without further delay.

Courts typically are not in favor of anonymous litigation on the basis that the general public has an interest in knowing what is happening in the judicial system. This interest is frustrated when legal action is conducted in secret and therefore courts allow anonymous litigation only when there is an interest that outweighs this public interest. The Seventh Circuit has found that there must be exceptional circumstances to justify departing from the normal method of judicial proceedings.

One important consideration is whether the plaintiff seeking to proceed anonymously is "particularly vulnerable to the possible harms of disclosure, particularly in light of his age." Here, S.G. has alleged that her son is greatly upset by the constant intrusion of religious persons at school and feels uncomfortable when religious personnel talk to other students at school because he feels left out and ostracized or at times coerced into unwelcome religious practices. There are examples also of him being made to feel extremely bad and even being told he would go to Hell.

In *Doe ex rel. Doe v. Elmbrook School District*, the Seventh circuit affirmed a lower court ruling that allowed parents the right to proceed anonymously in a First Amendment lawsuit over a public school district's decision to hold high school graduation ceremonies in a church. In that decision, the Seventh Circuit wrote that lawsuits that involve religion can "implicate deeply held beliefs and provoke intense emotional responses." The Seventh Circuit also acknowledged that it is significant when the lawsuit involves children because identifying an adult plaintiff often can have the result of identifying the child. Further, the court noted that because an Establishment Clause suit have the "tendency to inflame unreasonably some individuals and is intimately tied to District schools, such a risk to children is particularly compelling."

Here, similarly, the action centered on religion and public schools and alleged that a child has already suffered harm because of the religious conduct occurring at the schools. Further, S.G. argued that using her full name would risk exposing her son's identity, subjecting him to further harm and public criticism. Though the court found S.G.'s case different from *Elmbrook* where there was actual evidence of retaliatory behavior following the filing of the lawsuit in contrast to S.G.'s supposition that there would be further harm, it still found that the case was sufficiently analogous to *Elmbrook*. Because the subject matter can be inflammatory and it involved the public schools where S.G.'s child had already been made to feel uncomfortable, the court concluded that S.G.'s motion to proceed anonymously would be granted.

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Unconstitutional Seizure

Lawsuit against school district, officials, claims violations of Fourth Amendment because of interrogation of student

Citation: *Jain v. Board of Education of Butler School District 53, 2019 WL 1125809 (N.D. Ill. 2019)*

A federal district court in Illinois has granted a board of education and several school district employees judgment without a trial in a case in which the family of a fifth grader sued alleging violations of Section 1983 for unlawful seizure under the Fourth Amendment following an incident in which the student was questioned without his parents present about whether he had cheated in a competition. The court found that the law was not clearly established at the time of the questioning to put administrators on notice about whether the conduct violated the constitution. Therefore, they were entitled to qualified immunity.

A. was a fifth-grade student at Brook Forest Elementary School in the Butler School District 53 in January, 2016. On January 15, 2016, Superintendent Heidi Wennstrom received information from a parent that some parents in the school district had access to the examination questions for a geography contest, the GeoBee. A. participated in the GeoBee, and the first round took place on January 19, 2016. Later that day, Assistant Principal Lisa Owen, who was also A's homeroom teacher, summoned A. to the principal's office to answer some questions. This was the first time A. had been to the principal's office.

A. was seated at a table across from Wennstrom, Owen, and Principal Kelly Voliva. Wennstrom and Voliva initially began asking questions of A., in what he described as a kind manner. They told him he was not going to be in trouble. A. claimed that after a few minutes the questioning got harsher, and they began to accuse A. of things he had not done and were yelling and glaring at him. A. said the officials said such things as, "Don't Lie," and "We know the truth." Wennstrom showed him the questions on her laptop that were asked during the GeoBee that morning and asked him to read them out loud to see if he recognized them. During his questioning, A. told Wennstrom that his mother had access to the questions, but later, during his deposition, he said what he told Wennstrom was not accurate, and he had only said it to "get out of the room faster." He claimed he had said what he believed the administrators wanted him to say. A. claimed that Wennstrom, "put words in my mouth and I was very scared and nervous so it wasn't the actual thing what I said. It wasn't the truth."

Wennstrom and Voliva also asked A. about WordMasters (another student contest) and another test, and how he had studied for them. The meeting last about an hour and a half. A's parents were not present nor were they informed of the meeting or the topics that were being discussed prior to the meeting.

A's mother, S. Jain, filed a lawsuit against the Board of Education of Butler School District 53, Wennstrom, Voliva, and Owen (Defendants). Jain claimed that they interrogated A. about cheating in the GeoBee and WordMasters Challenge, and coerced a false confession from him that he had studied the actual GeoBee questions. After the investigation, Jain alleged that A. was barred from participating in future academic competitions during his time in the school district, and Jain was not allowed to volunteer at any school-related contests. The lawsuit claimed violations of the Fourth Amendment, specifically unlawful seizure, among other claims. The defendants asked the court for judgment without a trial.

The court granted the defendants' request for judgment on the unlawful seizure claim. The court declined to exercise supplemental jurisdiction on the other state law claims.

The defendants argued that they were protected from liability because of qualified immunity. Officials are protected from liability by qualified immunity if they do not violate a clearly established constitutional right of which a reasonable person should have known. The qualified immunity analysis asks: "(1) whether the facts alleged or shown by the plaintiff establish a violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant's alleged misconduct" *(Dockery v. Blackburn).*

Alternatively, to overcome qualified immunity, Jain could attempt to persuade the court that the officials' conduct was so "egregious and unreasonable that, notwithstanding the lack of an analogous decision, no reasonable public officer could have thought she was acting lawfully." Jain contended that "[as] an initial matter" the conduct by the administrators was so egregious and unreasonable that no reasonable official could believe it would not violate the law. However, the court noted that this argument was undeveloped and unpersuasive. Jain simply cited one decision, *Wallace by Wallace v. Batavia School District 101*, which was not analogous to A's situation. Jain cited the decision because it stated, "school officials may be subject to constitutional claims for Fourth Amendment violations when they are unreasonable under the circumstances then existing and apparent."

The court found this argument was not sufficiently similar to the circumstances of A's questioning by administrators. Jain did not provide any other similar case to support the argument that the administrators had violated a clearly established right. Because she failed to satisfy the burden of showing that there was a clearly established law prohibiting their actions that the officials should have known about, the court granted judgement to the defendants on the Fourth Amendment violation claim based on qualified immunity.

The court declined to exercise supplemental judgment on the remaining state law claims, and dismissed those claims without prejudice.

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