Rex Schultze

From: Justin Knight
Sent: Wednesday, January 18, 2017 8:55 AM
To: Rex Schultze
Subject: Fwd: Federal Law Update - #1 (1/11/17)
Attachments: Form I-9 Instructions (01-21-17).pdf; Form I-9 (01-21-17).pdf

Rex:

This is Update #1.

Justin

Justin Knight
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---------- Forwarded message ----------
From: **Justin Knight** <jknight@perrylawfirm.com>
Date: Wed, Jan 11, 2017 at 10:39 AM
Subject: Federal Law Update - #1 (1/11/17)
To: Greg Perry <gperry@perrylawfirm.com>, Rex Schultze <rschultze@perrylawfirm.com>, "James B. Gessford" <jgessford@perrylawfirm.com>, Josh Schauer <jschauer@perrylawfirm.com>

All:

Thank you for subscribing to our federal law update. The first update relates to the Form I-9. Please note that the federal government has changed the Form I-9 and requires that you stop using the "old" Form and begin using the "new" Form **not later than January 21, 2017**. For your convenience, I have attached the "new" Form that you should begin using immediately with new employee hires. You do not need to use the "new" Form with any existing employees. I have also attached the accompanying instructions. These forms are also available online at the following site: https://www.uscis.gov/i-9

Please let us know if you have any questions.

Sincerely,

Justin Knight

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Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 08/31/2019

▶ **START HERE:** **Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.**

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)*

Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Other Last Names Used *(if any)*

Address *(Street Number and Name)*	Apt. Number	City or Town	State	ZIP Code

Date of Birth *(mm/dd/yyyy)*	U.S. Social Security Number	Employee's E-mail Address	Employee's Telephone Number
	☐☐☐ - ☐☐ - ☐☐☐☐		

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

☐ 1. A citizen of the United States

☐ 2. A noncitizen national of the United States *(See instructions)*

☐ 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____

☐ 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____
Some aliens may write "N/A" in the expiration date field. *(See instructions)*

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____
OR
2. Form I-94 Admission Number: _____
OR
3. Foreign Passport Number: _____
Country of Issuance: _____

QR Code - Section 1
Do Not Write In This Space

Signature of Employee	Today's Date *(mm/dd/yyyy)*

Preparer and/or Translator Certification (check one):

☐ I did not use a preparer or translator. ☐ A preparer(s) and/or translator(s) assisted the employee in completing Section 1.

(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator	Today's Date *(mm/dd/yyyy)*

Last Name *(Family Name)*	First Name *(Given Name)*

Address *(Street Number and Name)*	City or Town	State	ZIP Code

STOP *Employer Completes Next Page* STOP

Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 08/31/2019

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1	Last Name *(Family Name)*	First Name *(Given Name)*	M.I.	Citizenship/Immigration Status

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title		Document Title		Document Title
Issuing Authority		Issuing Authority		Issuing Authority
Document Number		Document Number		Document Number
Expiration Date *(if any)(mm/dd/yyyy)*		Expiration Date *(if any)(mm/dd/yyyy)*		Expiration Date *(if any)(mm/dd/yyyy)*
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any)(mm/dd/yyyy)*				
Document Title				
Issuing Authority				
Document Number				
Expiration Date *(if any)(mm/dd/yyyy)*				

Additional Information

QR Code - Sections 2 & 3
Do Not Write In This Space

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment *(mm/dd/yyyy)*: _____ ***(See instructions for exemptions)***

Signature of Employer or Authorized Representative	Today's Date*(mm/dd/yyyy)*	Title of Employer or Authorized Representative

Last Name of Employer or Authorized Representative	First Name of Employer or Authorized Representative	Employer's Business or Organization Name

Employer's Business or Organization Address (Street Number and Name)	City or Town	State	ZIP Code

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name *(if applicable)*			B. Date of Rehire *(if applicable)*
Last Name *(Family Name)*	First Name *(Given Name)*	Middle Initial	Date *(mm/dd/yyyy)*

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date *(if any)* *(mm/dd/yyyy)*

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date *(mm/dd/yyyy)*	Name of Employer or Authorized Representative

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be UNEXPIRED

Employees may present one selection from List A
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		**1.** Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**1.** A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		**2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		**2.** Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		**3.** School ID card with a photograph		**3.** Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Employment Authorization Document that contains a photograph (Form I-766)		**4.** Voter's registration card		**4.** Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: **a.** Foreign passport; and **b.** Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		**5.** U.S. Military card or draft record		**5.** Native American tribal document
		6. Military dependent's ID card		**6.** U.S. Citizen ID Card (Form I-197)
		7. U.S. Coast Guard Merchant Mariner Card		**7.** Identification Card for Use of Resident Citizen in the United States (Form I-179)
		8. Native American tribal document		**8.** Employment authorization document issued by the Department of Homeland Security
		9. Driver's license issued by a Canadian government authority		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		**For persons under age 18 who are unable to present a document listed above:** **10.** School record or report card **11.** Clinic, doctor, or hospital record **12.** Day-care or nursery school record		

Examples of many of these documents appear in Part 8 of the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.

Instructions for Form I-9, Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 08/31/2019

Anti-Discrimination Notice. It is illegal to discriminate against work-authorized individuals in hiring, firing, recruitment or referral for a fee, or in the employment eligibility verification (Form I-9 and E-Verify) process based on that individual's citizenship status, immigration status or national origin. Employers **CANNOT** specify which document(s) the employee may present to establish employment authorization and identity. The employer must allow the employee to choose the documents to be presented from the Lists of Acceptable Documents, found on the last page of Form I-9. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) at 1-800-255-7688 (employees), 1-800-255-8155 (employers), or 1-800-237-2515 (TTY), or visit www.justice.gov/crt/about/osc.

What is the Purpose of This Form?

Employers must complete Form I-9 to document verification of the identity and employment authorization of each new employee (both citizen and noncitizen) hired after November 6, 1986, to work in the United States. In the Commonwealth of the Northern Mariana Islands (CNMI), employers must complete Form I-9 to document verification of the identity and employment authorization of each new employee (both citizen and noncitizen) hired after November 27, 2011.

General Instructions

Both employers and employees are responsible for completing their respective sections of Form I-9. For the purpose of completing this form, the term "employer" means all employers, including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors, as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, Public Law 97-470 (29 U.S.C. 1802). An "employee" is a person who performs labor or services in the United States for an employer in return for wages or other remuneration. The term "Employee" does not include those who do not receive any form of remuneration (volunteers), independent contractors or those engaged in certain casual domestic employment. Form I-9 has three sections. Employees complete Section 1. Employers complete Section 2 and, when applicable, Section 3. Employers may be fined if the form is not properly completed. See 8 USC § 1324a and 8 CFR § 274a.10. Individuals may be prosecuted for knowingly and willfully entering false information on the form. Employers are responsible for retaining completed forms. **Do not mail completed forms to U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE).**

These instructions will assist you in properly completing Form I-9. The employer must ensure that all pages of the instructions and Lists of Acceptable Documents are available, either in print or electronically, to all employees completing this form. When completing the form on a computer, the English version of the form includes specific instructions for each field and drop-down lists for universally used abbreviations and acceptable documents. To access these instructions, move the cursor over each field or click on the question mark symbol ( ) within the field. Employers and employees can also access this full set of instructions at any time by clicking the Instructions button at the top of each page when completing the form on a computer that is connected to the Internet.

Employers and employees may choose to complete any or all sections of the form on paper or using a computer, or a combination of both. Forms I-9 obtained from the USCIS website are not considered electronic Forms I-9 under DHS regulations and, therefore, cannot be electronically signed. Therefore, regardless of the method you used to enter information into each field, you must print a hard copy of the form, then sign and date the hard copy by hand where required.

Employers can obtain a blank copy of Form I-9 from the USCIS website at https://www.uscis.gov/sites/default/files/files/form/i-9.pdf. This form is in portable document format (.pdf) that is fillable and savable. That means that you may download it, or simply print out a blank copy to enter information by hand. You may also request paper Forms I-9 from USCIS.

Certain features of Form I-9 that allow for data entry on personal computers may make the form appear to be more than two pages. When using a computer, Form I-9 has been designed to print as two pages. Using more than one preparer and/or translator will add an additional page to the form, regardless of your method of completion. You are not required to print, retain or store the page containing the Lists of Acceptable Documents.

The form will also populate certain fields with N/A when certain user choices ensure that particular fields will not be completed. The Print button located at the top of each page that will print any number of pages the user selects. Also, the Start Over button located at the top of each page will clear all the fields on the form.

The Spanish version of Form I-9 does not include the additional instructions and drop-down lists described above. Employers in Puerto Rico may use either the Spanish or English version of the form. Employers outside of Puerto Rico must retain the English version of the form for their records, but may use the Spanish form as a translation tool. Additional guidance to complete the form may be found in the Handbook for Employers: Guidance for Completing Form I-9 (M-274) and on USCIS' Form I-9 website, I-9 Central.

Completing Section 1: Employee Information and Attestation

You, the employee, must complete each field in Section 1 as described below. Newly hired employees must complete and sign Section 1 no later than the first day of employment. Section 1 should never be completed before you have accepted a job offer.

Entering Your Employee Information

Last Name *(Family Name)*: Enter your full legal last name. Your last name is your family name or surname. If you have two last names or a hyphenated last name, include both names in the Last Name field. *Examples of correctly entered last names include De La Cruz, O'Neill, Garcia Lopez, Smith-Johnson, Nguyen.* If you only have one name, enter it in this field, then enter "Unknown" in the First Name field. You may not enter "Unknown" in both the Last Name field and the First Name field.

First Name *(Given Name)*: Enter your full legal first name. Your first name is your given name. *Some examples of correctly entered first names include Jessica, John-Paul, Tae Young, D'Shaun, Mai.* If you only have one name, enter it in the Last Name field, then enter "Unknown" in this field. You may not enter "Unknown" in both the First Name field and the Last Name field.

Middle Initial: Your middle initial is the first letter of your second given name, or the first letter of your middle name, if any. If you have more than one middle name, enter the first letter of your first middle name. If you do not have a middle name, enter N/A in this field.

Other Last Names Used: Provide all other last names used, if any (e.g., maiden name). Enter N/A if you have not used other last names. For example, if you legally changed your last name from Smith to Jones, you should enter the name Smith in this field.

Address (Street Name and Number): Enter the street name and number of the current address of your residence. If you are a border commuter from Canada or Mexico, you may enter your Canada or Mexico address in this field. If your residence does not have a physical address, enter a description of the location of your residence, such as "3 miles southwest of Anytown post office near water tower."

Apartment: Enter the number(s) or letter(s) that identify(ies) your apartment. If you do not live in an apartment, enter N/A.

City or Town: Enter your city, town or village in this field. If your residence is not located in a city, town or village, enter your county, township, reservation, etc., in this field. If you are a border commuter from Canada, enter your city and province in this field. If you are a border commuter from Mexico, enter your city and state in this field.

State: Enter the abbreviation of your state or territory in this field. If you are a border commuter from Canada or Mexico, enter your country abbreviation in this field.

ZIP Code: Enter your 5-digit ZIP code. If you are a border commuter from Canada or Mexico, enter your 5- or 6-digit postal code in this field.

Date of Birth: Enter your date of birth as a 2-digit month, 2-digit day, and 4-digit year (mm/dd/yyyy). For example, enter January 8, 1980 as 01/08/1980.

U.S. Social Security Number: Providing your 9-digit Social Security number is voluntary on Form I-9 unless your employer participates in E-Verify. If your employer participates in E-Verify and:

1. You have been issued a Social Security number, you must provide it in this field; or
2. You have applied for, but have not yet received a Social Security number, leave this field blank until you receive a Social Security number.

Employee's E-mail Address (Optional): Providing your e-mail address is optional on Form I-9, but the field cannot be left blank. To enter your e-mail address, use this format: name@site .domain. One reason Department of Homeland Security (DHS) may e-mail you is if your employer uses E-Verify and DHS learns of a potential mismatch between the information provided and the information in government records. This e-mail would contain information on how to begin to resolve the potential mismatch. You may use either your personal or work e-mail address in this field. Enter N/A if you do not enter your e-mail address.

Employee's Telephone Number (Optional): Providing your telephone number is optional on Form I-9, but the field cannot be left blank. If you enter your area code and telephone number, use this format: 000-000-0000. Enter N/A if you do not enter your telephone number.

Attesting to Your Citizenship or Immigration Status

You must select one box to attest to your citizenship or immigration status.

1. **A citizen of the United States.**

2. **A noncitizen national of the United States:** An individual born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

3. **A lawful permanent resident:** An individual who is not a U.S. citizen and who resides in the United States under legally recognized and lawfully recorded permanent residence as an immigrant. This term includes conditional residents. Asylees and refugees should not select this status, but should instead select "An Alien authorized to work" below.

   If you select "lawful permanent resident," enter your 7- to 9-digit Alien Registration Number (A-Number), including the "A," or USCIS Number in the space provided. When completing this field using a computer, use the dropdown provided to indicate whether you have entered an Alien Number or a USCIS Number. At this time, the USCIS Number is the same as the A-Number without the "A" prefix.

4. **An alien authorized to work:** An individual who is not a citizen or national of the United States, or a lawful permanent resident, but is authorized to work in the United States.

   If you select this box, enter the date that your employment authorization expires, if any, in the space provided. In most cases, your employment authorization expiration date is found on the document(s) evidencing your employment authorization. Refugees, asylees and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau, and other aliens whose employment authorization does not have an expiration date should enter N/A in the Expiration Date field. In some cases, such as if you have Temporary Protected Status, your employment authorization may have been automatically extended; in these cases, you should enter the expiration date of the automatic extension in this space.

   Aliens authorized to work must enter one of the following to complete Section1:

   1. Alien Registration Number (A-Number)/USCIS Number; or
   2. Form I-94 Admission Number; or
   3. Foreign Passport Number and the Country of Issuance

   Your employer may not ask you to present the document from which you supplied this information.

   Alien Registration Number/USCIS Number: Enter your 7- to 9-digit Alien Registration Number (A-Number), including the "A," or your USCIS Number in this field. At this time, the USCIS Number is the same as your A-Number without the "A" prefix. When completing this field using a computer, use the dropdown provided to indicate whether you have entered an Alien Number or a USCIS Number. If you do not provide an A-Number or USCIS Number, enter N/A in this field then enter either a Form I-94 Admission Number, or a Foreign Passport and Country of Issuance in the fields provided.

   Form I-94 Admission Number: Enter your 11-digit I-94 Admission Number in this field. If you do not provide an I-94 Admission Number, enter N/A in this field, then enter either an Alien Registration Number/USCIS Number or a Foreign Passport Number and Country of Issuance in the fields provided.

   Foreign Passport Number: Enter your Foreign Passport Number in this field. If you do not provide a Foreign Passport Number, enter N/A in this field, then enter either an Alien Number/USCIS Number or a I-94 Admission Number in the fields provided.

   Country of Issuance: If you entered your Foreign Passport Number, enter your Foreign Passport's Country of Issuance. If you did not enter your Foreign Passport Number, enter N/A.

Signature of Employee: After completing Section 1, sign your name in this field. If you used a form obtained from the USCIS website, you must print the form to sign your name in this field. By signing this form, you attest under penalty of perjury (28 U.S.C. § 1746) that the information you provided, along with the citizenship or immigration status you selected, and all information and documentation you provide to your employer, is complete, true and correct, and you are aware that you may face severe penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or using false documentation when completing this form. Further, falsely attesting to U.S. citizenship may subject employees to penalties, removal proceedings and may adversely affect an employee's ability to seek future immigration benefits. If you cannot sign your name, you may place a mark in this field to indicate your signature. Employees who use a preparer or translator to help them complete the form must still sign or place a mark in the Signature of Employee field on the printed form.

If you used a preparer, translator, and other individual to assist you in completing Form I-9:

- Both you and your preparer(s) and/or translator(s) must complete the appropriate areas of Section 1, and then sign Section 1. If Section 1 was completed on a form obtained from the USCIS website, the form must be printed to sign these fields. You and your preparer(s) and/or translator(s) also should review the instructions for **Completing the Preparer and/or Translator Certification** below.
- If the employee is a minor (individual under 18) who cannot present an identity document, the employee's parent or legal guardian can complete Section 1 for the employee and enter "minor under age 18" in the signature field. If Section 1 was completed on a form obtained from the USCIS website, the form must be printed to enter this information. The minor's parent or legal guardian should review the instructions for Completing the Preparer and/or Translator Certification below. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) for more guidance on completion of Form I-9 for minors. If the minor's employer participates in E-Verify, the employee must present a list B identity document with a photograph to complete Form I-9
- If the employee is a person with a disability (who is placed in employment by a nonprofit organization, association or as part of a rehabilitation program) who cannot present an identity document, the employee's parent, legal guardian or a representative of the nonprofit organization, association or rehabilitation program can complete Section 1 for the employee and enter "Special Placement" in this field. If Section 1 was completed on a form obtained from the USCIS website, the form must be printed to enter this information. The parent, legal guardian or representative of the nonprofit organization, association or rehabilitation program completing Section 1 for the employee should review the instructions for Completing the Preparer and/or Translator Certification below. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) for more guidance on completion of Form I-9 for certain employees with disabilities.

Today's Date: Enter the date you signed Section 1 in this field. Do not backdate this field. Enter the date as a 2-digit month, 2-digit day and 4-digit year (mm/dd/yyyy). For example, enter January 8, 2014 as 01/08/2014. A preparer or translator who assists the employee in completing Section 1 may enter the date the employee signed or made a mark to sign Section 1 in this field. Parents or legal guardians assisting minors (individuals under age 18) and parents, legal guardians or representatives of a nonprofit organization, association or rehabilitation program assisting certain employees with disabilities must enter the date they completed Section 1 for the employee.

Completing the Preparer and/or Translator Certification

If you did not use a preparer or translator to assist you in completing Section 1, you, the employee, must check the box marked **I did not use a Preparer or Translator**. If you check this box, leave the rest of the fields in this area blank.

If one or more preparers and/or translators assist the employee in completing the form using a computer, the preparer and/or translator must check the box marked **"A preparer(s) and/or translator(s) assisted the employee in completing Section 1"** , then select the number of Certification areas needed from the dropdown provided. Any additional Certification areas generated will result in an additional page. Form I-9 Supplement, Section 1 Preparer and/or Translator Certification can be separately downloaded from the USCIS Form I-9 webpage, which provides additional Certification areas for those completing Form I-9 using a computer who need more Certification areas than the 5 provided or those who are completing Form I-9 on paper. The first preparer and/or translator must complete all the fields in the Certification area on the same page the employee has signed. There is no limit to the number of preparers and/or translators an employee can use, but each additional preparer and/or translator must complete and sign a separate Certification area. Ensure the employee's last name, first name and middle initial are entered at the top of any additional pages. The employer must ensure that any additional pages are retained with the employee's completed Form I-9.

Signature of Preparer or Translator: Any person who helped to prepare or translate Section 1of Form I-9 must sign his or her name in this field. If you used a form obtained from the USCIS website, you must print the form to sign your name in this field. The Preparer and/or Translator Certification must also be completed if "Individual under Age 18" or "Special Placement" is entered in lieu of the employee's signature in Section 1.

Today's Date: The person who signs the Preparer and/or Translator Certification must enter the date he or she signs in this field on the printed form. Do not backdate this field. Enter the date as a 2-digit month, 2-digit day, and 4-digit year (mm/dd/yyyy). For example, enter January 8, 2014 as 01/08/2014.

Last Name *(Family Name):* Enter the full legal last name of the person who helped the employee in preparing or translating Section 1 in this field. The last name is also the family name or surname. If the preparer or translator has two last names or a hyphenated last name, include both names in this field.

First Name (*Given Name*): Enter the full legal first name of the person who helped the employee in preparing or translating Section 1 in this field. The first name is also the given name.

Address (Street Name and Number): Enter the street name and number of the current address of the residence of the person who helped the employee in preparing or translating Section 1 in this field. Addresses for residences in Canada or Mexico may be entered in this field. If the residence does not have a physical address, enter a description of the location of the residence, such as "3 miles southwest of Anytown post office near water tower." If the residence is an apartment, enter the apartment number in this field.

City or Town: Enter the city, town or village of the residence of the person who helped the employee in preparing or translating Section 1 in this field. If the residence is not located in a city, town or village, enter the name of the county, township, reservation, etc., in this field. If the residence is in Canada, enter the city and province in this field. If the residence is in Mexico, enter the city and state in this field.

State: Enter the abbreviation of the state, territory or country of the preparer or translator's residence in this field.

ZIP Code: Enter the 5-digit ZIP code of the residence of the person who helped the employee in preparing or translating Section 1 in this field. If the preparer or translator's residence is in Canada or Mexico, enter the 5- or 6-digit postal code.

Presenting Form I-9 Documents

Within 3 business days of starting work for pay, you must present to your employer documentation that establishes your identity and employment authorization. For example, if you begin employment on Monday, you must present documentation on or before Thursday of that week. However, if you were hired to work for less than 3 business days, you must present documentation no later than the end of the first day of employment.

Choose which unexpired document(s) to present to your employer from the Lists of Acceptable Documents. An employer cannot specify which document(s) you may present from the Lists of Acceptable Documents. You may present either one selection from List A or a combination of one selection from List B and one selection from List C. Some List A documents, which show both identity and employment authorization, are combination documents that must be presented together to be considered a List A document: for example, the foreign passport together with a Form I-94 containing an endorsement of the alien's nonimmigrant status and employment authorization with a specific employer incident to such status. List B documents show identity only and List C documents show employment authorization only. If your employer participates in E-Verify and you present a List B document, the document must contain a photograph. If you present acceptable List A documentation, you should not be asked to present, nor should you provide, List B and List C documentation. If you present acceptable List B and List C documentation, you should not be asked to present, nor should you provide, List A documentation. If you are unable to present a document(s) from these lists, you may be able to present an acceptable receipt. Refer to the Receipts section below.

Your employer must review the document(s) you present to complete Form I-9. If your document(s) reasonably appears to be genuine and to relate to you, your employer must accept the documents. If your document(s) does not reasonably appear to be genuine or to relate to you, your employer must reject it and provide you with an opportunity to present other documents from the Lists of Acceptable Documents. Your employer may choose to make copies of your document(s), but must return the original(s) to you. Your employer must review your documents in your physical presence.

Your employer will complete the other parts of this form, as well as review your entries in Section 1. Your employer may ask you to correct any errors found. Your employer is responsible for ensuring all parts of Form I-9 are properly completed and is subject to penalties under federal law if the form is not completed correctly.

Minors (individuals under age 18) and certain employees with disabilities whose parent, legal guardian or representative completed Section 1 for the employee are only required to present an employment authorization document from List C. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) for more guidance on minors and certain individuals with disabilities.

Receipts

If you do not have unexpired documentation from the Lists of Acceptable Documents, you may be able to present a receipt(s) in lieu of an acceptable document(s). New employees who choose to present a receipt(s) must do so within three business days of their first day of employment. If your employer is reverifying your employment authorization, and you choose to present a receipt for reverification, you must present the receipt by the date your employment authorization expires. Receipts are not acceptable if employment lasts fewer than three business days.

There are three types of acceptable receipts:

1. A receipt showing that you have applied to replace a document that was lost, stolen or damaged. You must present the actual document within 90 days from the date of hire or, in the case of reverification, within 90 days from the date your original employment authorization expires.
2. The arrival portion of Form I-94/I-94A containing a temporary I-551 stamp and a photograph of the individual. You must present the actual Permanent Resident Card (Form I-551) by the expiration date of the temporary I-551 stamp, or, if there is no expiration date, within 1 year from the date of admission.
3. The departure portion of Form I-94/I-94A with a refugee admission stamp. You must present an unexpired Employment Authorization Document (Form I-766) or a combination of a List B document and an unrestricted Social Security Card within 90 days from the date of hire or, in the case of reverification, within 90 days from the date your original employment authorization expires.

Receipts showing that you have applied for an initial grant of employment authorization, or for renewal of your expiring or expired employment authorization, are not acceptable.

Completing Section 2: Employer or Authorized Representative Review and Verification

You, the employer, must ensure that all parts of Form I-9 are properly completed and may be subject to penalties under federal law if the form is not completed correctly. Section 1 must be completed no later than the end of the employee's first day of employment. You may not ask an individual to complete Section 1 before he or she has accepted a job offer. Before completing Section 2, you should review Section 1 to ensure the employee completed it properly. If you find any errors in Section 1, have the employee make corrections, as necessary and initial and date any corrections made.

You or your authorized representative must complete Section 2 by examining evidence of identity and employment authorization within 3 business days of the employee's first day of employment. For example, if an employee begins employment on Monday, you must review the employee's documentation and complete Section 2 on or before Thursday of that week. However, if you hire an individual for less than 3 business days, Section 2 must be completed no later than the end of the first day of employment.

Entering Employee Information from Section 1

This area, titled, "Employee Info from Section 1" contains fields to enter the employee's last name, first name, middle initial exactly as he or she entered them in Section 1. This area also includes a Citizenship/Immigration Status field to enter the number of the citizenship or immigration status checkbox the employee selected in Section 1. These fields help to ensure that the two pages of an employee's Form I-9 remain together. When completing Section 2 using a computer, the number entered in the Citizenship/Immigration Status field provides drop-downs that directly relate to the employee's selected citizenship or immigration status.

Entering Documents the Employee Presents

You, the employer or authorized representative, must physically examine, in the employee's physical presence, the unexpired document(s) the employee presents from the Lists of Acceptable Documents to complete the Document fields in Section 2.

You cannot specify which document(s) an employee may present from these lists. If you discriminate in the Form I-9 process based on an individual's citizenship status, immigration status, or national origin, you may be in violation of the law and subject to sanctions such as civil penalties and be required to pay back pay to discrimination victims. A document is acceptable as long as it reasonably appears to be genuine and to relate to the person presenting it. Employees must present one selection from List A or a combination of one selection from List B and one selection from List C.

List A documents show both identity and employment authorization. Some List A documents are combination documents that must be presented together to be considered a List A document, such as a foreign passport together with a Form I-94 containing an endorsement of the alien's nonimmigrant status.

List B documents show identity only, and List C documents show employment authorization only. If an employee presents a List A document, do not ask or require the employee to present List B and List C documents, and vice versa. If an employer participates in E-Verify and the employee presents a List B document, the List B document must include a photograph.

If an employee presents a receipt for the application to replace a lost, stolen or damaged document, the employee must present the replacement document to you within 90 days of the first day of work for pay, or in the case of reverification, within 90 days of the date the employee's employment authorization expired. Enter the word "Receipt" followed by the title of the receipt in Section 2 under the list that relates to the receipt.

When your employee presents the replacement document, draw a line through the receipt, then enter the information from the new document into Section 2. Other receipts may be valid for longer or shorter periods, such as the arrival portion of Form I-94/ I-94A containing a temporary I-551 stamp and a photograph of the individual, which is valid until the expiration date of the temporary I-551 stamp or, if there is no expiration date, valid for one year from the date of admission.

Ensure that each document is an unexpired, original (no photocopies, except for certified copies of birth certificates) document. Certain employees may present an expired employment authorization document, which may be considered unexpired, if the employee's employment authorization has been extended by regulation or a Federal Register Notice. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) or I-9 Central for more guidance on these special situations.

Refer to the M-274 for guidance on how to handle special situations, such as students (who may present additional documents not specified on the Lists) and H-1B and H-2A nonimmigrants changing employers.

Minors (individuals under age 18) and certain employees with disabilities whose parent, legal guardian or representative completed Section 1 for the employee are only required to present an employment authorization document from List C. Refer to the M-274 for more guidance on minors and certain persons with disabilities. If the minor's employer participates in E-Verify, the minor employee also must present a List B identity document with a photograph to complete Form I-9.

You must return original document(s) to the employee, but may make photocopies of the document(s) reviewed. Photocopying documents is voluntary unless you participate in E-Verify. E-Verify employers are only required to photocopy certain documents. If you are an E-Verify employer who chooses to photocopy documents other than those you are required to photocopy, you should apply this policy consistently with respect to Form I-9 completion for all employees. For more information on the types of documents that an employer must photocopy if the employer uses E-Verify, visit E-Verify's website at www.dhs.gov/e-verify. For non-E-Verify employers, if photocopies are made, they should be made consistently for ALL new hires and reverified employees.

Photocopies must be retained and presented with Form I-9 in case of an inspection by DHS or another federal government agency. You must always complete Section 2 by reviewing original documentation, even if you photocopy an employee's document(s) after reviewing the documentation. Making photocopies of an employee's document(s) cannot take the place of completing Form I-9. You are still responsible for completing and retaining Form I-9.

List A - Identity and Employment Authorization: If the employee presented an acceptable document(s) from List A or an acceptable receipt for a List A document, enter the document(s) information in this column. If the employee presented a List A document that consists of a combination of documents, enter information from each document in that combination in a separate area under List A as described below. All documents must be unexpired. If you enter document information in the List A column, you should not enter document information in the List B or List C columns. If you complete Section 2 using a computer, a selection in List A will fill all the fields in the Lists B and C columns with N/A.

Document Title: If the employee presented a document from List A, enter the title of the List A document or receipt in this field. The abbreviations provided are available in the dropdown when the form is completed on a computer. When completing the form on paper, you may choose to use these abbreviations or any other common abbreviation to enter the document title or issuing authority. If the employee presented a combination of documents, use the second and third Document Title fields as necessary.

Full name of List A Document	Abbreviations
U.S. Passport	U.S. Passport
U.S. Passport Card	U.S. Passport Card
Permanent Resident Card (Form I-551)	Perm. Resident Card (Form I-551)
Alien Registration Receipt Card (Form I-551)	Alien Reg.Receipt Card (Form I-551)
Foreign passport containing a temporary I-551 stamp	1. Foreign Passport 2. Temporary I-551 Stamp
Foreign passport containing a temporary I-551 printed notation on a machine-readable immigrant visa (MRIV)	1. Foreign Passport 2. Machine-readable immigrant visa (MRIV)
Employment Authorization Document (Form I-766)	Employment Auth. Document (Form I-766)
For a nonimmigrant alien authorized to work for a specific employer because of his or her status, a foreign passport with Form I/94/I-94A that contains an endorsement of the alien's nonimmigrant status	1. Foreign Passport, work-authorized non-immigrant 2. Form I-94/I94A 3. "Form I-20" or "Form DS-2019" Note: In limited circumstances, certain J-1 students may be required to present a letter from their Responsible Officer in order to work. Enter the document title, issuing authority, document number and expiration date from this document in the Additional Information field.
Passport from the Federated States of Micronesia (FSM) with Form I-94/I-94A	1. FSM Passport with Form I-94 2. Form I-94/I94A
Passport from the Republic of the Marshall Islands (RMI) with Form I-94/I94A	1. RMI Passport with Form I-94 2. Form I-94/I94A
Receipt: The arrival portion of Form I-94/I-94A containing a temporary I-551 stamp and photograph	Receipt: Form I-94/I-94A w/I-551 stamp, photo
Receipt: The departure portion of Form I-94/I-94A with an unexpired refugee admission stamp	Receipt: Form I-94/I-94A w/refugee stamp
Receipt for an application to replace a lost, stolen or damaged Permanent Resident Card (Form I-551)	Receipt replacement Perm. Res. Card (Form I-551)
Receipt for an application to replace a lost, stolen or damaged Employment Authorization Document (Form I-766)	Receipt replacement EAD (Form I-766)
Receipt for an application to replace a lost, stolen or damaged foreign passport with Form I-94/I-94A that contains an endorsement of the alien's nonimmigrant status	1. Receipt: Replacement Foreign Passport, work-authorized nonimmigrant 2. Receipt: Replacement Form I-94/I-94A 3. Form I-20 or Form DS-2019, if presented
Receipt for an application to replace a lost, stolen or damaged passport from the Federated States of Micronesia with Form I-94/I-94A	1. Receipt: Replacement FSM Passport with Form I-94 2. Receipt: Replacement Form I-94/I-94A
Receipt for an application to replace a lost, stolen or damaged passport from the Republic of the Marshall Islands with Form I-94/I-94A	1. Receipt: Replacement RMI Passport with Form I-94 2. Receipt: Replacement Form I-94/I-94A

Issuing Authority: Enter the issuing authority of the List A document or receipt. The issuing authority is the specific entity that issued the document. If the employee presented a combination of documents, use the second and third Issuing Authority fields as necessary.

Document Number: Enter the document number, if any, of the List A document or receipt presented. If the document does not contain a number, enter N/A in this field. If the employee presented a combination of documents, use the second and third Document Number fields as necessary. If the document presented was a Form I-20 or DS-2019, enter the Student and Exchange Visitor Information System (SEVIS) number in the third Document Number field exactly as it appears on the Form I-20 or the DS-2019.

Expiration Date (if any) (mm/dd/yyyy): Enter the expiration date, if any, of the List A document. The document is not acceptable if it has already expired. If the document does not contain an expiration date, enter N/A in this field. If the document uses text rather than a date to indicate when it expires, enter the text as shown on the document, such as "D/S"(which means, "duration of status"). For a receipt, enter the expiration date of the receipt validity period as described above. If the employee presented a combination of documents, use the second and third Expiration Date fields as necessary. If the document presented was a Form I-20 or DS-2019, enter the program end date here.

List B - Identity: If the employee presented an acceptable document from List B or an acceptable receipt for the application to replace a lost, stolen, or destroyed List B document, enter the document information in this column. If a parent or legal guardian attested to the identity of an employee who is an individual under age 18 or certain employees with disabilities in Section 1, enter either "Individual under age 18" or "Special Placement" in this field. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) for more guidance on individuals under age 18 and certain person with disabilities.

If you enter document information in the List B column, you must also enter document information in the List C column. If an employee presents acceptable List B and List C documents, do not ask the employees to present a List A document. No entries should be made in the List A column. If you complete Section 2 using a computer, a selection in List B will fill all the fields in the List A column with N/A.

Document Title: If the employee presented a document from List B, enter the title of the List B document or receipt in this field. The abbreviations provided are available in the dropdown when the form is completed on a computer. When completing the form on paper, you may choose to use these abbreviations or any other common abbreviations to document the document title or issuing authority.

Full name of List B Document	Abbreviations
Driver's license issued by a State or outlying possession of the United States	Driver's license issued by state/territory
ID card issued by a State or outlying possession of the United States	ID card issued by state/territory
ID card issued by federal, state, or local government agencies or entities	Government ID
School ID card with photograph	School ID
Voter's registration card	Voter registration card
U.S. Military card	U.S. Military card
U.S. Military draft record	U.S. Military draft record
Military dependent's ID card	Military dependent's ID card
U.S. Coast Guard Merchant Mariner Card	USCG Merchant Mariner card
Native American tribal document	Native American tribal document
Driver's license issued by a Canadian government authority	Canadian driver's license
School record (for persons under age 18 who are unable to present a document listed above)	School record (under age 18)
Report card (for persons under age 18 who are unable to present a document listed above)	Report Card (under age 18)
Clinic record (for persons under age 18 who are unable to present a document listed above)	Clinic record (under age 18)
Doctor record (for persons under age 18 who are unable to present a document listed above)	Doctor record (under age 18)
Hospital record (for persons under age 18 who are unable to present a document listed above)	Hospital record (under age 18)
Day-care record (for persons under age 18 who are unable to present a document listed above)	Day-care record (under age 18)
Nursery school record (for persons under age 18 who are unable to present a document listed above)	Nursery school record (under age 18)

Full name of List B Document	Abbreviations
Individual under age 18 endorsement by parent or guardian	Individual under Age 18
Special placement endorsement for persons with disabilities	Special Placement
Receipt for the application to replace a lost, stolen or damaged Driver's License issued by a State or outlying possession of the United States	Receipt: Replacement driver's license
Receipt for the application to replace a lost, stolen or damaged ID card issued by a State or outlying possession of the United States	Receipt: Replacement ID card
Receipt for the application to replace a lost, stolen or damaged ID card issued by federal, state, or local government agencies or entities	Receipt: Replacement Gov't ID
Receipt for the application to replace a lost, stolen or damaged School ID card with photograph	Receipt: Replacement School ID
Receipt for the application to replace a lost, stolen or damaged Voter's registration card	Receipt: Replacement Voter reg. card
Receipt for the application to replace a lost, stolen or damaged U.S. Military card	Receipt: Replacement U.S. Military card
Receipt for the application to replace a lost, stolen or damaged Military dependent's ID card	Receipt: Replacement U.S. Military dep. card
Receipt for the application to replace a lost, stolen or damaged U.S. Military draft record	Receipt: Replacement Military draft record
Receipt for the application to replace a lost, stolen or damaged U.S. Coast Guard Merchant Mariner Card	Receipt: Replacement Merchant Mariner card
Receipt for the application to replace a lost, stolen or damaged Driver's license issued by a Canadian government authority	Receipt: Replacement Canadian DL
Receipt for the application to replace a lost, stolen or damaged Native American tribal document	Receipt: Replacement Native American tribal doc
Receipt for the application to replace a lost, stolen or damaged School record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement School record (under age 18)
Receipt for the application to replace a lost, stolen or damaged Report card (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Report card (under age 18)
Receipt for the application to replace a lost, stolen or damaged Clinic record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Clinic record (under age 18)
Receipt for the application to replace a lost, stolen or damaged Doctor record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Doctor record (under age 18)
Receipt for the application to replace a lost, stolen or damaged Hospital record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Hospital record (under age 18)
Receipt for the application to replace a lost, stolen or damaged Day-care record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Day-care record (under age 18)
Receipt for the application to replace a lost, stolen or damaged Nursery school record (for persons under age 18 who are unable to present a document listed above)	Receipt: Replacement Nursery school record (under age 18)

Issuing Authority: Enter the issuing authority of the List B document or receipt. The issuing authority is the entity that issued the document. If the employee presented a document that is issued by a state agency, include the state as part of the issuing authority.

Document Number: Enter the document number, if any, of the List B document or receipt exactly as it appears on the document. If the document does not contain a number, enter N/A in this field.

Expiration Date (if any) (mm/dd/yyyy): Enter the expiration date, if any, of the List B document. The document is not acceptable if it has already expired. If the document does not contain an expiration date, enter N/A in this field. For a receipt, enter the expiration date of the receipt validity period as described in the Receipt section above.

List C - Employment Authorization: If the employee presented an acceptable document from List C, or an acceptable receipt for the application to replace a lost, stolen, or destroyed List C document, enter the document information in this column. If you enter document information in the List C column, you must also enter document information in the List B column. If an employee presents acceptable List B and List C documents, do not ask the employee to present a list A document. No entries should be made in the List A column.

Document Title: If the employee presented a document from List C, enter the title of the List C document or receipt in this field. The abbreviations provided are available in the dropdown when the form is completed on a computer. When completing the form on paper, you may choose to use these abbreviations or any other common abbreviations to document the document title or issuing authority. If you are completing the form on a computer, and you select an Employment authorization document issued by DHS, the field will populate with List C#8 and provide a space for you to enter a description of the documentation the employee presented. Refer to the M-274 for guidance on entering List C #8 documentation.

Full name of List C Document	Abbreviations
Social Security Account Number card without restrictions	(Unrestricted) Social Security Card
Certification of Birth Abroad (Form FS-545)	Form FS-545
Certification of Report of Birth (Form DS-1350)	Form DS-1350
Original or certified copy of a U.S. birth certificate bearing an official seal	Birth Certificate
Native American tribal document	Native American tribal document
U.S. Citizen ID Card (From I-197)	Form I-197
Identification Card for use of Resident Citizen in the United States (Form I-179)	Form I-179
Employment authorization document issued by DHS (List C #8)	Employment Auth. document (DHS) List C #8
Receipt for the application to replace a lost, stolen or damaged Social Security Account Number Card without restrictions	Receipt: Replacement Unrestricted SS Card
Receipt for the application to replace a lost, stolen or damaged Original or certified copy of a U.S. birth certificate bearing an official seal	Receipt: Replacement Birth Certificate
Receipt for the application to replace a lost, stolen or damaged Native American Tribal Document	Receipt: Replacement Native American Tribal Doc.
Receipt for the application to replace a lost, stolen or damaged Employment Authorization Document issued by DHS	Receipt: Replacement Employment Auth. Doc. (DHS)

Issuing Authority: Enter the issuing authority of the List C document or receipt. The issuing authority is the entity that issued the document.

Document Number: Enter the document number, if any, of the List C document or receipt exactly as it appears on the document. If the document does not contain a number, enter N/A in this field.

Expiration Date (if any) (mm/dd/yyyy): Enter the expiration date, if any, of the List C document. The document is not acceptable if it has already expired, unless USCIS has extended the expiration date on the document. For instance, if a conditional resident presents a Form I-797 extending his or her conditional resident status with the employee's expired Form I-551, enter the future expiration date as indicated on the Form I-797. If the document has no expiration date, enter N/A in this field. For a receipt, enter the expiration date of the receipt validity period as described in the Receipt section above.

Additional Information: Use this space to notate any additional information required for Form I-9 such as:

- Employment authorization extensions for Temporary Protected Status beneficiaries, F-1 OPT STEM students, CAP-GAP, H-1B and H-2A employees continuing employment with the same employer or changing employers, and other nonimmigrant categories that may receive extensions of stay
- Additional document(s) that certain nonimmigrant employees may present
- Discrepancies that E-Verify employers must notate when participating in the IMAGE program
- Employee termination dates and form retention dates
- E-Verify case number, which may also be entered in the margin or attached as a separate sheet per E-Verify requirements and your chosen business process.
- Any other comments or notations necessary for the employer's business process

You may leave this field blank if the employee's circumstances do not require additional notations.

Entering Information in the Employer Certification

Employee's First Day of Employment: Enter the employee's first day of employment as a 2-digit month, 2-digit day and 4-digit year (mm/dd/yyyy).

Signature of Employer or Authorized Representative: Review the form for accuracy and completeness. The person who physically examines the employee's original document(s) and completes Section 2 must sign his or her name in this field. If you used a form obtained from the USCIS website, you must print the form to sign your name in this field. By signing Section 2, you attest under penalty of perjury (28 U.S.C. § 1746) that you have physically examined the documents presented by the employee, the document(s) reasonably appear to be genuine and to relate to the employee named, that to the best of your knowledge the employee is authorized to work in the United States, that the information you entered in Section 2 is complete, true and correct to the best of your knowledge, and that you are aware that you may face severe penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or knowingly accepting false documentation when completing this form.

Today's Date: The person who signs Section 2 must enter the date he or she signed Section 2 in this field. Do not backdate this field. If you used a form obtained from the USCIS website, you must print the form to write the date in this field. Enter the date as a 2-digit month, 2-digit day and 4-digit year (mm/dd/yyyy). For example, enter January 8, 2014 as 01/08/2014.

Title of Employer or Authorized Representative: Enter the title, position or role of the person who physically examines the employee's original document(s), completes and signs Section 2.

Last Name of the Employer or Authorized Representative: Enter the full legal last name of the person who physically examines the employee's original documents, completes and signs Section 2. Last name refers to family name or surname. If the person has two last names or a hyphenated last name, include both names in this field.

First Name of the Employer or Authorized Representative: Enter the full legal first name of the person who physically examines the employee's original documents, completes, and signs Section 2. First name refers to the given name.

Employer's Business or Organization Name: Enter the name of the employer's business or organization in this field.

Employer's Business or Organization Address (Street Name and Number): Enter an actual, physical address of the employer. If your company has multiple locations, use the most appropriate address that identifies the location of the employer. Do not provide a P.O. Box address.

City or Town: Enter the city or town for the employer's business or organization address. If the location is not a city or town, you may enter the name of the village, county, township, reservation, etc. that applies.

State: Enter the two-character abbreviation of the state for the employer's business or organization address.

ZIP Code: Enter the 5-digit ZIP code for the employer's business or organization address.

Completing Section 3: Reverification and Rehires

Section 3 applies to both reverification and rehires. When completing this section, you must also complete the Last Name, First Name and Middle Initial fields in the Employee Info from Section 1 area at the top of Section 2, leaving the Citizenship/ Immigration Status field blank. When completing Section 3 in either a reverification or rehire situation, if the employee's name has changed, record the new name in Block A.

Reverification

Reverification in Section 3 must be completed prior to the earlier of:

- The expiration date, if any, of the employment authorization stated in Section 1, or
- The expiration date, if any, of the List A or List C employment authorization document recorded in Section 2 (with some exceptions listed below).

Some employees may have entered "N/A" in the expiration date field in Section 1 if they are aliens whose employment authorization does not expire, e.g. asylees, refugees, certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau. Reverification does not apply for such employees unless they choose to present evidence of employment authorization in Section 2 that contains an expiration date and requires reverification, such as Form I-766, Employment Authorization Document.

You should not reverify U.S. citizens and noncitizen nationals, or lawful permanent residents (including conditional residents) who presented a Permanent Resident Card (Form I-551). Reverification does not apply to List B documents.

For reverification, an employee must present an unexpired document(s) (or a receipt) from either List A or List C showing he or she is still authorized to work. You CANNOT require the employee to present a particular document from List A or List C. The employee is also not required to show the same type of document that he or she presented previously. See specific instructions on how to complete Section 3 below.

Rehires

If you rehire an employee within three years from the date that the Form I-9 was previously executed, you may either rely on the employee's previously executed Form I-9 or complete a new Form I-9.

If you choose to rely on a previously completed Form I-9, follow these guidelines.

- If the employee remains employment authorized as indicated on the previously executed Form I-9, the employee does not need to provide any additional documentation. Provide in Section 3 the employee's rehire date, any name changes if applicable, and sign and date the form.
- If the previously executed Form I-9 indicates that the employee's employment authorization from Section 1 or employment authorization documentation from Section 2 that is subject to reverification has expired, then reverification of employment authorization is required in Section 3 in addition to providing the rehire date. If the previously executed Form I-9 is not the current version of the form, you must complete Section 3 on the current version of the form.
- If you already used Section 3 of the employee's previously executed Form I-9, but are rehiring the employee within three years of the original execution of Form I-9, you may complete Section 3 on a new Form I-9 and attach it to the previously executed form.

Employees rehired after three years of original execution of the Form I-9 must complete a new Form I-9.

Complete each block in Section 3 as follows:

Block A - New Name: If an employee who is being reverified or rehired has also changed his or her name since originally completing Section 1 of this form, complete this block with the employee's new name. Enter only the part of the name that has changed, for example: if the employee changed only his or her last name, enter the last name in the Last Name field in this Block, then enter N/A in the First Name and Middle Initial fields. If the employee has not changed his or her name, enter N/A in each field of Block A.

Block B - Date of Rehire: Complete this block if you are rehiring an employee within three years of the date Form I-9 was originally executed. Enter the date of rehire in this field. Enter N/A in this field if the employee is not being rehired.

Block C - Complete this block if you are reverifying expiring or expired employment authorization or employment authorization documentation of a current or rehired employee. Enter the information from the List A or List C document(s) (or receipt) that the employee presented to reverify his or her employment authorization. All documents must be unexpired.

Document Title: Enter the title of the List A or C document (or receipt) the employee has presented to show continuing employment authorization in this field.

Document Number: Enter the document number, if any, of the document you entered in the Document Title field exactly as it appears on the document. Enter N/A if the document does not have a number.

Expiration Date (if any) (mm/dd/yyyy): Enter the expiration date, if any, of the document you entered in the Document Title field as a 2-digit month, 2-digit day, and 4-digit year (mm/dd/yyyy). If the document does not contain an expiration date, enter N/A in this field.

Signature of Employer or Authorized Representative: The person who completes Section 3 must sign in this field. If you used a form obtained from the USCIS website, you must print Section 3 of the form to sign your name in this field. By signing Section 3, you attest under penalty of perjury (28 U.S.C. §1746) that you have examined the documents presented by the employee, that the document(s) reasonably appear to be genuine and to relate to the employee named, that to the best of your knowledge the employee is authorized to work in the United States, that the information you entered in Section 3 is complete, true and correct to the best of your knowledge, and that you are aware that you may face severe penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or knowingly accepting false documentation when completing this form.

Today's Date: The person who completes Section 3 must enter the date Section 3 was completed and signed in this field. Do not backdate this field. If you used a form obtained from the USCIS website, you must print Section 3 of the form to enter the date in this field. Enter the date as a 2-digit month, 2-digit day, and 4-digit year (mm/dd/yyyy). For example, enter January 8, 2014 as 01/08/2014.

Name of Employer or Authorized Representative: The person who completed, signed and dated Section 3 must enter his or her name in this field.

What is the Filing Fee?

There is no fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the "USCIS Privacy Act Statement" below.

USCIS Forms and Information

For additional guidance about Form I-9, employers and employees should refer to the *Handbook for Employers: Guidance for Completing Form I-9 (M-274)* or USCIS' Form I-9 website at www.uscis.gov/I-9Central.

You can also obtain information about Form I-9 by e-mailing USCIS at I-9Central@dhs.gov, or by calling 1-888-464-4218 or 1-877-875-6028 (TTY).

You may download and obtain the English and Spanish versions of Form I-9, the *Handbook for Employers*, or the instructions to Form I-9 from the USCIS website at https://www.uscis.gov/i-9. To complete Form I-9 on a computer, you will need the latest version of Adobe Reader, which can be downloaded for free at http://get.adobe.com/reader/. You may order USCIS forms by calling our toll-free number at 1-800-870-3676. You may also obtain forms and information by contacting the USCIS National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TTY).

Information about E-Verify, a fast, free, internet-based system that allows businesses to determine the eligibility of their employees to work in the United States, can be obtained from the USCIS website at http://www.uscis.gov/e-verify, by e-mailing USCIS at E-Verify@dhs.gov or by calling 1-888-464-4218 or 1-877-875-6028 (TTY).

Employees with questions about Form I-9 and/or E-Verify can reach the USCIS employee hotline by calling 1-888-897-7781 or 1-877-875-6028 (TTY).

Photocopying Blank and Completed Forms I-9 and Retaining Completed Forms I-9

Employers may photocopy or print blank Forms I-9 for future use. All pages of the instructions and Lists of Acceptable Documents must be available, either in print or electronically, to all employees completing this form. Employers must retain each employee's completed Form I-9 for as long as the individual works for the employer and for a specified period after employment has ended. Employers are required to retain the pages of the form on which the employee and employer entered data. If copies of documentation presented by the employee are made, those copies must also be retained. Once the individual's employment ends, the employer must retain this form and attachments for either 3 years after the date of hire (i.e., first day of work for pay) or 1 year after the date employment ended, whichever is later. In the case of recruiters or referrers for a fee (only applicable to those that are agricultural associations, agricultural employers, or farm labor contractors), the retention period is 3 years after the date of hire (i.e., first day of work for pay).

Forms I-9 obtained from the USCIS website that are not printed and signed manually (by hand) are not considered complete. In the event of an inspection, retaining incomplete forms may make you subject to fines and penalties associated with incomplete forms.

Employers should ensure that information employees provide on Form I-9 is used only for Form I-9 purposes. Completed Forms I-9 and all accompanying documents should be stored in a safe, secure location.

Form I-9 may be generated, signed, and retained electronically, in compliance with Department of Homeland Security regulations at 8 CFR 274a.2.

USCIS Privacy Act Statement

AUTHORITIES: The authority for collecting this information is the Immigration Reform and Control Act of 1986, Public Law 99-603 (8 USC § 1324a).

PURPOSE: This information is collected by employers to comply with the requirements of the Immigration Reform and Control Act of 1986. This law requires that employers verify the identity and employment authorization of individuals they hire for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

DISCLOSURE: Providing the information collected by this form is voluntary. However an employer should not continue to employ an individual without a completed form. Failure of the employer to prepare and/or ensure proper completion of this form for each employee hired in the United States after November 6, 1986 or in the Commonwealth of the Mariana Islands after November 27, 2011, may subject the employer to civil and/or criminal penalties. In addition, employing individuals knowing that they are unauthorized to work in the United States may subject the employer to civil and/or criminal penalties.

ROUTINE USES: This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The employer must retain this form for the required period and make it available for inspection by authorized officials of the Department of Homeland Security, Department of Labor and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 35 minutes per response, when completing the form manually, and 26 minutes per response when using a computer to aid in completion of the form, including the time for reviewing instructions and completing and retaining the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Avenue NW, Washington, DC 20529-2140; OMB No. 1615-0047. **Do not mail your completed Form I-9 to this address.**

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PERRY LAW FIRM FEDERAL UPDATE - #2
DATE: JANUARY 17, 2017

Secretary of Education Confirmation Hearing

This evening, the United States Senate's Committee on Health, Education, Labor and Pensions Committee (the "Committee") held a hearing on President-Elect Trump's nominee for Secretary of the Department of Education, Ms. Betsy DeVos.

1. School Choice

Ms. DeVos made very clear that she is a strong advocate for school choice. She testified that she believes that school choice (charter schools, vouchers, and so forth) is important for parents and seemed to suggest that her Department of Education may prioritize such options. We will closely monitor any action taken by the Department of Education as it relates to school choice issues.

2. Every Student Succeeds Act ("ESSA")

Next, Ms. DeVos and several members of the Committee made comments in favor of the ESSA (the law that replaced No Child Left Behind). Indeed, Ms. DeVos and the Committee made clear that they believe in the ESSA and have no intention of deviating from the law. Of particular significance, Ms. DeVos commented that she supports the ESSA's deference to "state plans." When asked about state plans and the ESSA-imposed deadlines on state plan implementation, Ms. DeVos committed to upholding the ESSA's deadlines and testified that state plans will be closely monitored by the next Department of Education.

As of this time, the Nebraska Department of Education has not released its state plan. NDE's website[1] states that Nebraska's state plan will be presented to the State Board of Education on March 3, 2017. We will keep you updated on all developments in Nebraska's state plan. Needless to say, based on the testimony during today's Committee hearing, it seems obvious that Nebraska's state plan will be of primary importance for Nebraska school districts.

[1] https://www.education.ne.gov/ESSA/index.html

3. Federal Regulations

The "hot-button" issue during tonight's hearing focused on federal regulations from the Department of Education. Several Committee Republican Senators noted that the number and breadth of federal regulations promulgated under the current Department of Education. These Senators testified that they hope that the next Secretary of Education would begin repealing some of those regulations on an expedited timeline. Some Senators also asked Ms. DeVos to reduce the number of regulations going forward. Ms. DeVos seemed willing to commit to these requests. When asked about how the Department of Education will impose regulations under the ESSA, Ms. DeVos was vague and stated that she would work to enact "pro-accountability" and "pro-responsibility" regulations for school districts.

It should be noted that, despite the overarching request that federal regulations be rescinded and reduced, there was one request by a Republican senator who asked Ms. DeVos to consider imposing a requirement that all schools "screen" students for disabilities at an early age. Ms. DeVos agreed to explore this issue.

With this in mind, keep an eye out for our upcoming updates on any changes in federal regulations, policy and/or guidance.

4. Title IX Guidance

One Senator asked Ms. DeVos about her intentions regarding Title IX and, specifically, a "Dear Colleague Letter" issued by the Department of Education's Office of Civil Rights in 2011. As a reminder, a "Dear Colleague Letter" is a federal agency's interpretation of the law. The 2011 "Dear Colleague Letter" imposed obligations on education institutions relating to sexual assault and sexual harassment. The 2011 "Dear Colleague Letter" has been criticized and debated as to its effectiveness and clarity. During the hearing, Ms. DeVos declined to commit to support and follow the guidance within the 2011 "Dear Colleague Letter." Her testimony and responses implied that the incoming Department of Education will likely depart from some of the Obama Administration's more controversial guidance and take a different approach.

5. Gun Free School Zones Act

Ms. DeVos testified that she would not oppose a repeal of the Gun Free School Zones Act.

6. IDEA

Initially, when Congress enacted the IDEA, Congress committed the federal government to pay 40% of each state's "excess cost" of educating students with disabilities. To date, the federal government has never funded the 40% amount. When asked about this funding shortfall, Ms. DeVos committed to exploring whether the incoming Department of Education will provide the 40% funding amount under the IDEA. Of note, Ms. DeVos also suggested that she will consider revising the special education funding formula.

Interestingly, Ms. DeVos would not commit to the proposition that all schools (including charter schools) that receive federal funds be required to provide IDEA services to special education students. Instead, Ms. DeVos testified that, if she becomes Secretary of Education, she would prefer to leave the decision "to the states" to determine whether private schools (including charter schools) that receive federal funding should be required to provide special education services to students with disabilities. In the event that this were to occur, the state of Nebraska would decide whether private schools in Nebraska could receive federal funds without providing special education services to students with disabilities.

Overall

Although there may not be any "binding" authority from tonight's testimony, we are providing you with an update on the hearing to give you an insight into how the incoming Secretary of Department of Education may view issues differently than the current Secretary of Department of Education. Needless to say, we expect changes over the next several months, let alone the next four years.

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PERRY LAW FIRM FEDERAL UPDATE - #3
DATE: JANUARY 18, 2017

A. Five Takeaways from Today's Hearing on the HHS Nominee

This morning, the United States Senate's Committee on Health, Education, Labor and Pensions (the "Committee") held a hearing on President-Elect Trump's nominee for Secretary of the Department of Health and Human Services, Dr. Tom Price.

1. Repealing and Replacing the Affordable Care Act is a Top Priority, but the Timing is Unclear

Committee Republicans and Dr. Price testified today that they anticipate that Congress will vote "over the next few months" to repeal the Affordable Care Act. However, those same individuals acknowledged that it might take "several years" to implement a replacement. Dr. Price committed to a "reform package" to replace the Affordable Care Act, but he stated that he would not reveal his preferred replacement plan until after he is confirmed.

2. Repealing and Replacing the Affordable Care Act is a Top Priority—Maybe

The procedural maneuvers required to repeal completely the Affordable Care Act is complicated and will likely require 60 votes in the Senate. With only 52 Republicans currently in the Senate, eight Democrats would need to vote in favor of the repeal. One Committee Republican proposed a compromise to Committee Democrats: under a replacement plan, any state could choose to keep aspects of the Affordable Care Act. Depending on whether this idea gains traction outside of the Committee, the future of the Affordable Care Act may not be as bleak as it may seem.

3. Repealing and Replacing the Affordable Care Act is a Top Priority—Later

Committee Democrats and Republicans were united in their concerns that an immediate repeal of the Affordable Care Act would render millions of Americans without coverage. The Committee members and Dr. Price seemed to agree that an immediate and complete repeal of the Affordable Care Act would be unwise, and that the transition from the Affordable Care Act to a replacement plan would need a lengthy transition period. Thus, it will be very important to follow the upcoming debates on an employer's obligations during such a "transition period."

4. Repealing and Replacing the Affordable Care Act is a Top Priority—At Least Partially

Committee Republicans and Democrats also seemed united that certain aspects of the Affordable Care Act should be kept in place, such as the requirement that children be allowed to remain on their parents' insurance plan until age 26, coverage for pre-existing conditions, and so forth. With that being said, there may be certain aspects of the Affordable Care Act that continue into the replacement law. There was some discussion that the replacement plan should include a high-deductible pool for individuals with pre-existing conditions. We do not yet know what parts of the Affordable Care Act will remain in the replacement plan, but, rest assured, the plans offered through the EHA could change dramatically over the next few years.

5. The Multi-Million Dollar Question: What Now?

This morning's lengthy hearing covered a wide range of health-related topics, with a focus on the Affordable Care Act. However, the issue of potential employer penalties under the existing law was not addressed. As such, we strongly advise districts to continue complying with existing law. There is no guarantee that the Affordable Care Act will be repealed or that penalties will be forgiven. With this in mind, districts should continue preparing to file Forms 1094-C and 1095-C in the coming months, unless and until we receive definitive guidance from the IRS that such Forms need not be filed.

B. Introducing LB 630: Nebraska's Charter School Bill

One of the major goals behind the Every Student Succeeds Act ("ESSA") was to improve accountability for charter schools funded by taxpayer dollars. The ESSA deferred to the states on whether to allow charter schools to operate within each state. In the event that a state decides to permit charter schools, the ESSA imposes certain requirements on each state to ensure a charter school's accountability.

Today, Senator Larson introduced LB 630, called the "Adopt the Independent Public Schools Act." Of note, the bill would implement the following:

- Establish "Independent Public School Authorizing and Accountability Commission" to oversee "independent public schools" in Nebraska;
- Ensure that such independent public schools are "open to all students on a space-available basis";
- An independent public school cannot charge an "admission fee or tuition" for students to attend;
- A student may withdraw from an independent public school at any time and enroll (a) in the school district in which the student resides, (b) in an option school district; or (c) in a private school setting;

- An independent public school may be located in all or part of an existing public school building;
- Independent public school employees will be subject to the state school retirement program;
- Each school board shall grant a leave of absence to any teacher employed by the school district requesting such leave in order to teach in an independent public school;
- The school district in which an independent public school is located shall provide transportation to the independent public school for students living in such school district who attend the independent public school, on the same terms and conditions as transportation is provided to students attending schools operated by such school district;
- An independent public school is part of the state's system of public education, except that it is exempt from all statutes, rules, and regulations applicable to schools as defined in section 79-101 unless specifically provided otherwise in the Independent Public Schools Act;
- Independent public school aid shall equal the enrolled students for such independent public school multiplied by the statewide average basic funding per formula student.

You can read the entire text of LB 630, attached at pages 8-43.

In the event that LB 630 (or some other bill authorizing charter schools in Nebraska) passes, the state would be required to revise its ESSA plan to include measures for charter school accountability.

C. Department of Labor's New Guidance on Penalties for Child Labor Law Violations

The Department of Labor's Wage and Hour Division issued guidance to explain and announce its enforcement of increased penalties under the child labor laws, including the Child Labor Enhanced Penalty Program. The Department of Labor can now impose a fine of up to $50,000 for "each [child labor] violation that causes the death or serious injury of any employee under the age of 18 years." Although we certainly hope that no school employee is seriously injured while on the job, this new guidance provides a good opportunity to remind schools of their obligations and potential liability when employing persons under the age of 18, including student-workers:

1. Children under Age 14

Children under 14 years of age may not be employed in non-agricultural occupations covered by the Fair Labor Standards Act ("FLSA"). Permissible employment for such children is limited to work that is exempt from the FLSA (such as delivering newspapers to the consumer and acting). Children may also perform work not covered by the FLSA such as completing minor chores around private homes or casual baby-sitting.

2. Children between Ages 14-15

a. Procedures. Nebraska law requires completion of an employment certificate. The certificate must be filed with the Nebraska Department of Labor. A notice regarding their work hours is required to be posted.

b. Hours. Maximum of 40 hours per week, 8 hours per day. They cannot work before 7 a.m. or after 7 p.m. (if under 14), or after 9 p.m. (if age 14-15; between June 1st and Labor Day).

c. Nature of Work. Nebraska law prohibits work that is dangerous or which may deprave the child's morals. Federal law is more explicit. The federal child labor bulletin gives a list of jobs that children ages 14-15 may not perform (see the attached document, page 50) and which they may perform (see the attached document, pages 51-52).

Specifically, children between the ages of 14-15 may not perform the following work:

Occupations involved with the operating, tending, setting up, adjusting, cleaning, oiling or repairing or of ANY POWER-DRIVEN MACHINERY, including, but not limited to, lawnmowers, golf carts, all-terrain vehicles, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters, and food mixers. Fourteen- and 15-year-olds may operate most office machinery . . .

3. Children between Ages 16-17

a. Procedures. No special rules.

b. Hours. No special rules.

c. Nature of Work. The federal child labor bulletin gives a list of jobs that are considered hazardous, and thus jobs that children ages 16-17 may not perform (see the attached document, page 53-68).

Work involving operation of push lawn mowers, driven mowers, or weed whackers are permissible, as they are not included in the description of hazardous work.

Overall, we hope that school districts will never have student-workers who are seriously injured on the job. With that being said, this newly released guidance on the Department of Labor's increased penalties and new direction on its enforcement of child labor laws should serve as a reminder to public school districts of the legal issues intertwined with employing persons under the age of 18.

D. Department of Education Releases Informal Guidance

The Department of Education has released three documents serving as informal guidance to school districts across the country:

1. "Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools" Guide

According to the Department of Education, this "guide" (attached, beginning at page 72) "defines and provides examples to illustrate the meaning of key terms used in Section 504" and "highlights" a district's requirements under Section 504.

Although we do not believe that anything in this "guide" expands students' or parents' rights under Section 504, we want you to be aware of this document because it seems foreseeable that a disgruntled parent could easily access this "guide" through an online search. Therefore, you might consider having your staff (including 504 coordinator) share this document with your special education staff to ensure that your district's special education staff is familiar with the contents of this "guide."

2. Dear Colleague Letter: Restraint and Seclusion

Beginning at page 125 (attached) is a "Dear Colleague Letter" and "Question and Answer Guide" relating to the Department's view of the use of restraint and seclusion.

The two major points made in these two documents are as follows:

a. The Department views a school's use of restraint or seclusion towards a student as an indication that the student may be in need of special education or related services, and that the school should then determine whether the student qualifies for special education or related services.

b. A school's use of restraint or seclusion towards a student could violate Section 504 and/or the Americans with Disabilities Act, or could result in the denial of a free and appropriate public education ("FAPE"). For example, the use of restraint or seclusion that results in trauma to the student could result in the denial of FAPE. In addition, the Department warns that the repeated seclusion of a student without instruction or services could also lead to the school's failure to comply with the student's Section 504 plan and, thereby, constitute a denial of FAPE.

It should be noted that this guidance has been criticized by some groups. However, at this time, the guidance provides the approach of the federal government and, as such, should be shared with appropriate district staff.

It should also be noted that a district's obligations under this guidance may be more difficult to enforce under LB 595, a bill introduced today by Senator Groene (attached, beginning at page 150). Under LB 595, a teacher, administrator or other student "may use necessary physical force or physical restraint to subdue such student until such student no longer presents a danger to himself or herself, the teacher, the administrator, or the other student."

In the event that LB 595 is enacted into law, and in the further event that the incoming Administration does not rescind the federal guidance on restraint and seclusion, districts will likely need to train staff on appropriate restraint and seclusion methods under federal law.

3. Requirements for Public Charter Schools to Comply with Section 504

Along with the theme of charter schools, the Department issued guidance to set forth the rights of special education students in public charter schools under Section 504 and the IDEA. We will be keeping a very close eye on this issue, given Secretary-Nominee Betsy DeVos's comments yesterday regarding her belief that the states should be able to determine whether charter schools receiving federal money should be required to comply with the federal special education laws. If this becomes the Department of Education's position on this issue, Nebraska public school districts could be substantially affected by this approach.

We would be happy to provide this guidance to any person who wishes to review these documents. However, since the documents are not currently applicable to Nebraska, we did not attach them.

E. EEOC Proposes New Guidance on Harassment in the Workplace

Finally, the EEOC issued a proposed Enforcement Guidance on workplace harassment, including an expanded approach for lesbian, gay, bisexual and transgender (LGBT) employees (attached, beginning at page 153). The lengthy guidance can be crystallized into three major points that the EEOC has proposed to adopt:

1. Using the wrong name or pronoun towards a transgender employee could be categorized by the EEOC as a form of sexual harassment. For example, the EEOC may take the position that an employee was subject to sexual harassment in the following scenario: an employee prefers to be considered female, but the employee's co-workers continue to refer to the employee as "he" or "Mr."

2. The use of "code names" in the workplace could result in the EEOC determining that an

employee was subject to harassment. The EEOC provides the example of the term "boy" to refer to an African-American as a form of "code name" harassment.

3. Going forward, sexual harassment claims relating to unwelcome advances will be subject to a different standard by the EEOC. Prior to this guidance, the EEOC took the position that sexual advances from a supervisor towards a subordinate employee could generally be grouped into one of three categories (1) unwelcomed and hostile (therefore, sexual harassment occurred); (2) unwelcomed but not hostile (therefore, no sexual harassment occurred); or (3) welcomed and not hostile (therefore, no sexual harassment occurred). Going forward, the EEOC intends to disregard the distinction between "unwelcomed" and "hostile" behavior and, instead, conclude that any "hostile" behavior is also, by definition, unwelcomed behavior. The effect of this change mostly relates to legal issues and the burden-shifting requirements in a lawsuit, but districts would be wise to remember to be vigilant of supervisor-employee relationships.

Although we have no way of knowing whether the EEOC under the incoming administration will rescind or revise this proposed guidance, we wanted to let you know that this guidance exists.

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PERRY LAW FIRM FEDERAL UPDATE - #4
DATE: JANUARY 19, 2017

On the final full day of President Obama's term, federal agencies issued their final guidance under his Administration. The following changes are relevant to school districts:

A. Big Changes to FERPA Coming?

Perhaps the most noteworthy regulation issued today was a seemingly small change to a FERPA regulation. As part of this change, the Department of Education announced that the enforcement of FERPA would move from the Family Policy Compliance Office to the Office of the Chief Privacy Officer. This change may seem obscure and immaterial.[1] However, this change may signal a sign of what is to come. In explaining this change, the Department of Education stated this change was made as "part of an *expansion of student privacy operations*." (Emphasis supplied). The Department also noted that this change will allow the Department of Education to "more effectively make use of *new resources dedicated to student privacy*." (Emphasis supplied).

At this point, we have no way of knowing what the Department of Education means by "an expansion of student privacy operations" or the "new resources dedicated to student privacy." The Every Student Succeeds Act ("ESSA") contains several directives to the Department to review and "ensure that students' personally identifiable information is protected."[2] This may be an effort by the Department of Education to begin compliance with and changes under ESSA. Until we see how the Department of Education proceeds with these changes under FEPRA, we strongly encourage districts to review their internal practices to ensure that student privacy is protected in compliance with FERPA.

B. Department of Labor Increases FLSA Fines

For the second time in less than one year, the Department of Labor has increased fines for employers who violate the Fair Labor Standards Act. The penalty has increased from $1,894 per person, per violation to $1,925 per person, per violation. The Department of Labor can impose a penalty for each "repeated" or "willful" violation of that law's minimum-wage or overtime requirements. The Department's definition of "repeated" or "willful" has been more and more employee-friendly in the past few years. We will be interested to see how the incoming Department of Labor defines these terms.

[1] 34 C.F.R. § 99.60.
[2] ESSA Section 8545(b).

Rex Schultze

From: Justin Knight
Sent: Friday, January 20, 2017 7:44 PM
To: James B. Gessford; Rex Schultze; Greg Perry; Josh Schauer
Subject: Federal Law Update #5 (1/20/17)
Attachments: EO - 1.jpg

All:

This evening, President Trump signed an Executive Order, instructing federal agencies to "minimize the unwarranted economic and regulatory burdens" of the Affordable Care Act. A copy of the Executive Order is attached.

To be clear (and contrary to various media reports), this Executive Order does not equate to the ACA being repealed. Instead, federal agencies overseeing implementation, regulation and penalties under the ACA have been directed to act in accordance with the Executive Order. In the next week or so, we anticipate federal agencies issuing guidance as to how they will comply with this Executive Order. Be on the lookout in the near future for any such guidance.

Please do not hesitate to contact us with any questions or concerns.

Sincerely,

Justin Knight

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MINIMIZING THE ECONOMIC BURDEN OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT PENDING REPEAL

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). In the meantime, pending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Sec. 4. To the maximum extent permitted by law, the head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other

applicable statutes in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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PERRY LAW FIRM FEDERAL UPDATE - #6
DATE: JANUARY 23, 2017

A. Department of Education Delays Accountability Regulation

President Trump has delayed the implementation of an Obama-era regulation, previously set to go into effect on January 30, 2017. The regulation addressed the controversial "supplement not supplant" accountability standard under the Every Student Succeeds Act ("ESSA"). The regulation would have required states and districts to include teacher salaries in calculations involving whether Title I funds are being used in addition to, rather than in place of, state and local funds. The former Department of Education's rationale behind the regulation was part of its "school equity" agenda and to require school districts to acknowledge inequalities in compensation of teachers in low-income schools and high-income schools. Critics of the proposed rule argued that the regulation was not authorized under the ESSA and did not fairly or appropriately measure Title I funds within different school districts.

Given the amount of opposition to the regulation, we anticipate that this controversial regulation will eventually be rescinded (rather than merely "frozen") by the Department of Education.

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PERRY LAW FIRM FEDERAL UPDATE - #7
DATE: JANUARY 25, 2017

A. Tracking Federal Regulations

On January 20, 2017, shortly after President Trump's inauguration, President Trump's Chief of Staff issued a memorandum[1] to all federal agencies, generally directing them:

1. Not to move forward with any previously proposed regulation;

2. Delay implementation by at least 60 days of any regulation that was not effective as of noon on January 20, 2017; and

3. Withdraw certain proposed regulations.

The practical effect of this directive is that there are both proposed and final regulations that have now been withdrawn or delayed. On the flip side, there are some regulations that were finalized prior to noon on January 20, 2017 and, therefore, remain in effect (at least for now). Given the uncertainty over so many regulations, we have compiled the attached chart showing the status of relatively recent regulations relevant to Nebraska public school districts.

In reviewing the attached chart, please note that the regulations referenced in the chart are a synopsis of each regulation and not intended as a full explanation of each rule.

In addition, the chart only references recent "major" regulations that we believe are relevant to school districts. Of the hundreds (if not thousands) of existing proposed and final-but-not-yet-effective regulations, we have focused on the key regulations that you may care about the most.

If you have any questions about a particular regulation or a regulation that was not referenced in the attached chart, please let us know.

[1] https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies

Department of Education		
Rule	Description	Status
"Supplement not Supplant" Accountability Regulations, 81 FR 61148 (https://www.regulations.gov/document?D=ED-2016-OESE-0056-0001)	Imposed "accountability" requirements in each state's ESSA plan for Title I schools to include measuring teacher compensation in high-income schools and low-income schools. (See Federal Update #6 for more information).	**WITHDRAWN:** The Department of Education has withdrawn this proposed regulation. The Department of Education is expected to draft new regulations on ESSA's "supplement not supplant" requirement. However, it seems unlikely that the Department will be able to finish drafting a new rule before the beginning of the 2017-2018 school year. As a reminder, states and school districts must fully comply with the ESSA during the 2017-2018 school year.
ESSA Accountability and State Plans Regulations, 81 FR 86076 (https://www.federalregister.gov/documents/2016/11/29/2016-27985/elementary-and-secondary-education-act-of-1965-as-amended-by-the-every-student-succeeds)	The ESSA delegated substantial rulemaking authority to the Department of Education to implement the provisions of the ESSA. One of the requirements under the ESSA is that each state submit to the Department a "plan" for its compliance with the ESSA. These final regulations are lengthy and cover a substantial number of topics, including: ➢ State Accountability Plans: Each state must devise a plan that ensures measures of school quality and/or student success. Each state's plan must include certain standards, such as setting measurable goals for academic progress, choosing the	**DELAYED:** The regulations were set to be effective January 30, 2017. For now, the effective date is delayed by at least 60 days. As you can imagine, such a lengthy set of regulations drew sharp criticism from groups across the political spectrum. Indeed, the Department of Education received 21,015 comments from various groups on the regulations. (To put this in context, most other regulations in this chart received around 200 comments). Thus, with so much debate, these regulations could be modified under the new Administration. However, the problem with modifying these regulations is that states have presumably began formulating their state plans in reliance on these regulations. Given the ESSA's

	measure(s) of academic progress (e.g., graduation rates, standard test scores, etc.), and setting college- and career-ready standards. ➢ States must act towards struggling schools: Beginning in the 2018-2019 school year, states must be ready to identify schools in need of improvement and take "meaningful action" with stakeholders to choose locally designed, evidence-based strategies to improve a struggling school. ➢ Data Reporting: Districts are required to consult with parents in designing "report cards" describing the district's accountability information (such as student assessment outcomes and graduation rates).	implementation deadlines, any change to these regulations would likely result in a delay in the ESSA deadlines. Legal commentators do not believe that the Trump Administration would take any action to delay the implementation of ESSA state plans, given the timing of ESSA deadlines and due to ESSA's bipartisan support. NDE's website states that it will release the draft of its state plan to the State Board of Education on March 3, 2017 and submit its plan to the United States Department of Education in September 2017.

Impact Aid Regulations, 81 FR 64727 (https://www.federalregister.gov/documents/2016/09/20/2016-22407/impact-aid-program)	Generally, the "Impact Aid Program" provides federal funds to help pay for the costs of educating students with federal connections—primarily, children of military families. If a school district meets a certain threshold relating to such federal connections, the district may qualify for federal money from the Impact Aid Program. The ESSA tweaked provisions of the Impact Aid Program. The Department of Education promulgated regulations to "improve, clarify and update" the changes to the Impact Aid Program. In addition to these proposed regulations, in the preamble to the regulations to the proposed regulation, the Department acknowledged that "there are changes [under] ESSA that may require additional regulatory action."	**DELAYED:** The regulations were set to be effective January 31, 2017. For now, the effective date is delayed by at least 60 days. Only a few school districts in Nebraska can qualify for federal funds under the Impact Aid Program, so this regulation likely will not affect most districts across the state. Impact Aid applications for fiscal year 2018 remain due on January 31, 2017.
Assistance to States for the Education of Children With Disabilities, 81 FR 92376 (https://www.federalregister.gov/documents/2016/12/19/2016-30190/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children)	This regulation addresses the former Department of Education's goal of "equity under the IDEA." To this end, the regulation sets forth a new methodology that states are now required to use to determine whether "significant disproportionality based on race and ethnicity is occurring in the State and in its local school districts" with respect to identification of children with disabilities. In the event that, based on the new methodology, a state determines that such a	**IN EFFECT:** This regulation was finalized two days before President Trump took office. Indeed, this regulation was effective as of January 18, 2017. Thus, it remains in effect (at least for now). Given the expected incoming Secretary of Education, regulations under the IDEA may change significantly. It should also be noted that, under the regulation, NDE has considerable discretion in how it defines the term "significant disproportionality." As of this date,

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	disproportionality is occurring, the regulations impose requirements on states to act to remedy such problems. In addition, in the event that the new methodology reveals that disproportionality occurs in a particular school district, then the regulation requires that school district identify, address and remedy the factors causing the disproportionality. Specifically, if a school district is determined to have disproportionately identified children with disabilities based on race or ethnicity, then the state must (1) review the district's policies, procedures, and practices to ensure the district's compliance with the IDEA; (2) reserve the maximum amount (currently 15%) of a portion of funds that would otherwise go to the district to serve children in those groups that were significantly over-identified; and (3) require the school district to publicly report on the revision of its policies, procedures, and practices.	NDE has not published any guidance on this regulation.

Title I-Improving the Academic Achievement of the Disadvantaged-Academic Assessments, 81 FR 88886 (https://www.federalregister.gov/documents/2016/12/08/2016-29128/title-i-improving-the-academic-achievement-of-the-disadvantaged-academic-assessments)	The ESSA made changes to the No Child Left Behind Act in many areas. Perhaps most notably, requirements under Title I expanded under the ESSA. The Department of Education adopted regulations to conform with these new requirements, including the following: ➢ State ESSA plans may allow local school districts to use nationally recognized high school academic assessment in lieu of the statewide high school assessment; ➢ State ESSA plans may allow for a limit of 1.0% of the total number of students who are assessed in a State in each assessed subject, if the state has adopted "alternate academic achievement standards." ➢ A state must administer its English language proficiency (ELP) assessments annually to all English learners in schools served by the State, kindergarten through grade 12. These regulations implement these changes under the ESSA.	**IN EFFECT:** This regulation took effect on January 9, 2017. These regulations are not perceived as controversial as other regulations in this area. Notably, the ESSA gives states discretion in formulating their ESSA plan. Thus, analyzing NDE's state plan will likely affect school districts more than these regulations.

Migrant Education Program Regulations, 81 FR 28943 (https://www.federalregister.gov/documents/2016/05/10/2016-10658/title-i-improving-the-academic-achievement-of-the-disadvantaged-migrant-education-program)	The ESSA requires school districts to ensure and provide for continuous education of migrant children. As such, districts must timely transfer a migrant student's school records (including health records) when a migrant child moves from one district to another district, even if the move occurs in the middle of the school year. Federal funds are allocated to assist with migratory children. To help collect information on migratory children, the Department of Education requires states and school districts to keep records on migratory children. To date, the Department has utilized a certain record-keeping system. Under the new regulations, states and school districts must modify their reporting to ensure that certain data and information is being collected and reported.	**DELAYED:** The regulation was finalized on June 9, 2016. However, affected parties were not required to comply with the new regulations until the Department of Education took steps to coordinate with the Office of Management and Budget ("OMB"). It does not appear that the OMB ever coordinated these steps. Therefore, these regulations, although finalized, are delayed until the new Administration's OMB takes action.
Teacher Preparation Issues Regulations, 81 FR 75494 (https://www.federalregister.gov/documents/2016/10/31/2016-24856/teacher-preparation-issues)	Although the Teacher Preparation Issues regulations do not affect school districts directly, the regulations will affect school districts at least indirectly. Under the Higher Education Act, states and universities/colleges are required to report certain information annually to the Department of Education. Similarly, states	**IN EFFECT:** These regulations were finalized on November 30, 2016, with a technical amendment published on November 17, 2016. As such, these regulations are in effect today. However, this does not guarantee that the rule will not be rescinded under the new Administration. As way of background, these regulations were viewed as a priority under former Obama Education Secretary

	and universities/colleges are required annually to assess their teacher preparation programs. The law, originally enacted in 1965, hoped to help universities/colleges improve their teacher preparedness programs. However, according to the Department of Education, research in recent years has shown that not all teacher preparedness programs have resulted in "well-prepared teachers." In addition, the Department concluded that (1) not all teacher preparedness reporting programs "ensured sufficient quality feedback to various stakeholders;" (2) not all states complied with the reporting requirements; (3) the existing feedback system did not provide sufficient guidance to universities/colleges for improvement; and (4) some universities/colleges were not focusing on improvements in areas of weakness. As a result, the Department promulgated new regulations to change the teacher preparedness reporting requirements. Under the new regulations, states and universities/colleges must use various metrics to assess outcomes of teacher preparedness programs. For instance, states	Arne Duncan, who, in 2009, remarked that "most of the nation's 1,450 schools, colleges, and departments of education are doing a mediocre job of preparing teachers for the realities of the 21st century classroom . . ." (https://www.ed.gov/news/press-releases/us-secretary-education-arne-duncan-says-colleges-education-must-improve-reforms-succeed). As you may expect, Secretary Duncan's comments and the Teacher Preparation Issues Regulations were not without controversy. Specifically, teachers groups across the country opposed the regulations, arguing that student performance (including standard testing) is not a fair measure of evaluating teacher preparation programs. Other groups have argued that the Department of Education does not have the authority to issue these regulations. Still, other groups have opposed the new regulations by pointing to the estimated cost required to implement these new regulations. It is not clear whether the Trump Administration or Congress will take steps to repeal or amend these regulations. For now, these regulations are in effect and may begin affecting and involving school districts in the near future.

	must now collect data and report on "ability of [teacher preparedness] program's graduates to produce gains in student learning," including standardized test scores. States will also now be required to seek feedback from key stakeholders, including prospective teachers, employers and the general public.	
Department of Labor		
Rule	Description	Status
Fair Labor Standards Act Overtime Rule; 81 FR 32391 (https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and)	The regulation would have increased the salary threshold for overtime exempt employees, from $455 per week to $913 per week. Thus, an employee who previously earned at least $455 per week, was paid on a salary basis and performed exempt duties did not need to be paid overtime for work in excess of 40 hours per week. Under the new rule, the salary amount increases to $913 per week—resulting in school districts likely having more employees eligible for overtime pay.	**IN EFFECT, BUT ENJOINED:** As you have probably heard, a federal district court in Texas enjoined the Department of Labor from enforcing this new regulation. The district court's order is on appeal before the Fifth Circuit Court of Appeals and the lower court's injunction remains in effect at this time. Just recently, the federal government asked the Fifth Circuit for more time to brief the issues in the case, signaling the possibility that the Trump Administration could repeal the regulation before the Fifth Circuit makes a ruling. It is possible that the Trump Administration and/or Congress could act quickly to reverse this regulation, however, no action on this regulation is expected until the Senate confirms President Trump's nominee for Secretary of Labor.

Internal Revenue Service		
Rule	Description	Status
Cash-in-Lieu ACA Regulations; 81 FR 44557 (https://www.federalregister.gov/documents/2016/07/08/2016-15940/premium-tax-credit-nprm-vi)	This proposed regulation clarifies when a cash-in-lieu payment must be included in the "cost" of coverage. Notably, the proposed regulation outlines the steps that an employer must take to ensure that a cash-in-lieu amount will not be included.	**IN EFFECT:** The IRS did not take any action to adopt this proposed rule into a final rule, so the regulation is still not "final." However, the rule has not been withdrawn so the proposed rule should still be followed by districts. It is possible that, after the election, the IRS determined that it would wait to see the fate of the Affordable Care Act before finalizing regulations under the ACA.
Department of Agriculture		
Rule	Description	Status
Wellness Rules; 81 FR 50151 (https://www.federalregister.gov/documents/2016/07/29/2016-17230/local-school-wellness-policy-implementation-under-the-healthy-hunger-free-kids-act-of-2010)	The USDA established new requirements for school districts receiving federal funds under the National School Lunch and/or School Breakfast programs. These new requirements include provisions that each school district must have in its wellness policy.	**IN EFFECT:** We have heard some skepticism about whether this rule will remain in effect under the new Administration. However, this rule was finalized and effective on August 29, 2016. As such, the new wellness regulations are not subject to the regulatory delay. Therefore, districts should begin preparing to comply with the new requirements, beginning with each district's administration and Board reviewing required modifications to Board policy.

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PERRY LAW FIRM FEDERAL UPDATE - #8
DATE: JANUARY 30, 2017

A. Immigration Executive Order Affects Nebraska Public School Districts

President Trump's Executive Order on "Enhancing Public Safety in the Interior of the United States" received some media attention for its emphasis on targeting "sanctuary cities" for harboring illegal immigrants. However, the Executive Order is much broader than the media has portrayed. Indeed, the reach of the Executive Order includes Nebraska public school districts.

The text of the Executive Order states that it is the "policy of the executive branch" to "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds . . ." Section 9 of the Executive Order (attached) defines "sanctuary jurisdiction" as "a State, or a political subdivision of a State . . ." Thus, Nebraska public school districts are directly governed by the Executive Order. As a result, this Executive Order, as a matter of law, puts school districts in a very difficult position of balancing the conflicting legal requirements of: (1) the United States Supreme Court holding that public school districts cannot constitutionally deny students a free public education on account of their immigration status;[1] (2) federal law imposing criminal penalties on any person who "conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection" any illegal immigrant;[2] and (3) this Executive Order requiring districts to work with law enforcement to help law enforcement identify illegal immigrants, or else the district could lose federal funds.

Further, the Executive Order specifies that a State and its political subdivisions must comply with 8 U.S.C. § 1373. Generally, under 8 U.S.C. § 1373, a governmental entity (such as a school) cannot interfere with an investigation into an individual's citizenship or immigration status. The statute itself does not contain any penalty for non-compliance. However, the Executive Order now imposes the penalty of potential loss of federal funds for any "jurisdiction" that fails to comply with Federal law, including 8 U.S.C. § 1373.

[1] *Plyler v. Doe*, 457 U.S. 202 (1982).
[2] 8 U.S.C. § 1324(a)(1)(iii).

A number of school districts across the country have started preparing for how they plan to respond to a request from the federal government for information related to a student's citizenship or immigration status (such as a student's country of origin, parent's names, parent's address, date of enrollment, etc.). If the Trump Administration continues with its promise to apply pressure to "sanctuary jurisdictions," schools reluctant to cooperate may not have many viable legal arguments to refuse to comply. For example, under FERPA, there *is* an exception for the Attorney General of the United States to obtain a student's personally identifiable information without prior parental consent.[3] In addition, there does not seem to be any state law that would allow districts to shield student data from a federal inquiry.

As such, districts that have concerns with the Executive Order's potential effect on their students, parents, community members, etc., would be wise to begin planning and preparing for appropriate student and community services. We would also note that we are reviewing the viability of a constitutional challenge to the Executive Order. Any district interested in serving as a plaintiff in such a challenge should contact our office.

B. Regulatory Executive Order Will Also Affect Nebraska Public School Districts

Today, President Trump signed an Executive Order (attached) in accordance with his campaign's "one-in-two-out" regulatory promise. Under today's Executive Order, if a federal agency intends to adopt a new regulation, then the federal agency must identify at least two existing regulations to be repealed. In addition, for the 2017 fiscal year, federal agencies shall have a net outcome of "no greater than zero" for any new regulations. In other words, for the 2017 fiscal year, under the Executive Order, there cannot be more new regulations than the number of repealed regulations.

The practical effect of this Executive Order could be very dramatic for Nebraska public school districts. Specifically, as we have previously mentioned in these Updates, the Every Student Succeeds Act ("ESSA") delegates significant regulatory authority to the Department of Education. As such, under today's Executive Order, the Department of Education may soon face a difficult crossroads in balancing (1) the adoption of mandatory ESSA regulations, with (2) the simultaneous repeal of at least as many regulations. What's more, with new changes possibly coming to FERPA, the Affordable Care Act (in its repeal, replacement or somewhere in between), and other immigration issues, the real-world outcome of today's Executive Order could be more pronounced than merely problems with the ESSA.

[3] 34 C.F.R. § 99.31(a)(3)(ii).

C. Government Lawsuits Begin Transition under Trump Administration

In at least two high profile cases involving challenges to the federal government's policies, the government has signaled that it may be reversing course and declining to follow guidance developed during the Obama Administration. The first case relates to the widely publicized injunction of the Fair Labor Standards Act's increased salary threshold. The Department of Labor appealed the lower court's injunction to the Fifth Circuit Court of Appeals. On appeal, and after the Inauguration, the Department of Labor asked the Fifth Circuit for a 30-day extension to file a reply brief, noting that an extension of time was "necessary to allow incoming leadership personnel adequate time to consider the issues."[4] In the second high-profile case, the Equal Employment Opportunity Commission ("EEOC") filed suit on behalf of a transgender employee who was fired after transitioning from a male to female. The EEOC lost at the district court, but filed an appeal with the Sixth Circuit Court of Appeals. At the end of last week, the EEOC asked the Sixth Circuit for an extension to file its opening brief, stating that the extension was needed due to "Administration-related changes at the Commission."[5]

The government's statements in these pleadings suggest that the new Administration has already begun the process of reversing some of the Obama Administration's more controversial rules and positions.

[4] http://www.natlawreview.com/article/dol-overtime-rule-appeal-faces-uncertainty
[5] https://www.scribd.com/document/337737330/Motion-for-More-Time

Presidential Documents

Executive Order 13768 of January 25, 2017

Enhancing Public Safety in the Interior of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

Section 1. *Purpose.* Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. *Policy.* It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. *Definitions.* The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

Sec. 4. *Enforcement of the Immigration Laws in the Interior of the United States.* In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. *Enforcement Priorities.* In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense, where such charge has not been resolved;

(c) Have committed acts that constitute a chargeable criminal offense;

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. *Civil Fines and Penalties.* As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. *Additional Enforcement and Removal Officers.* The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. *Federal-State Agreements.* It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.

Sec. 9. *Sanctuary Jurisdictions.* It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. *Review of Previous Immigration Actions and Policies.* (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as "Secure Communities" referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. *Department of Justice Prosecutions of Immigration Violators.* The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. *Recalcitrant Countries.* The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. *Office for Victims of Crimes Committed by Removable Aliens.* The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.

Sec. 14. *Privacy Act.* Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. *Reporting.* Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. *Transparency.* To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. *Personnel Actions.* The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

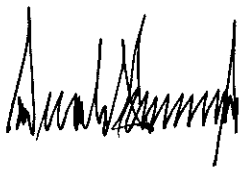
Sec. 18. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 25, 2017.

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PERRY LAW FIRM FEDERAL UPDATE - #9
DATE: FEBRUARY 1, 2017

A. Supreme Court Nominee Judge Gorsuch's Approach to School Law, in His Own Words

Last night, President Trump nominated Judge Neil M. Gorsuch to the United Supreme Court. If confirmed by the Senate, Judge Gorsuch will fill the vacancy left by Justice Scalia's death last year. Since Justice Scalia's death, only eight justices have sat on the Supreme Court. If Judge Gorsuch is confirmed, he could play a key role in breaking ties on the nation's highest court. Thus, Judge Gorsuch could play an instrumental role in the future of education law. As a result, we look at his approach to school law cases, in his own words, as a possible predictor of his approach to legal issues important for school districts.

1. Student Discipline: The Infamous "Fake Burps" Case

In a case that made national news, a seventh-grade New Mexico student was arrested after continuing to fake burp in physical education class. The P.E. teacher, along with the school resource officer, instructed the student to stop fake burping, but the student persisted. Subsequently, the student was arrested under a state statute that prohibits anyone from "interfering in the education process." The 10th Circuit Court of Appeals affirmed that the teacher and school resource officer were justified in having the student arrested and removed from school, but Judge Gorsuch disagreed:

> If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded.[1]

[1] *AM v. Holmes*, 830 F. 3d 1123 (10th Cir. 2016).

2. Teacher's First Amendment Rights Upheld

In 2010, Judge Gorsuch concurred with the three-judge panel that a school district improperly retaliated against a teacher for the teacher's exercise of her First Amendment rights.[2] The case involved two teachers at a Colorado school district that required its teachers to sign a "code of conduct." By signing the code of conduct, the teachers agreed to "refrain from actions or behavior harmful/hurtful to others at this school, including malicious gossip and similar activities." The district superintendent also verbally told the two teachers to (1) not discuss school matters with anyone and (2) not meet together socially at all. Despite the code of conduct, the teachers met and discussed school-related matters. After the superintendent learned of this, she retaliated by giving the teachers poor performance evaluations and imposed increased restrictions on their speech. The teachers eventually left the school and filed suit. On appeal before the 10th Circuit Court of Appeals, the court had little sympathy for the school and quickly concluded that a school could not impose such restrictions on teachers:

> [The school district] stress[es] the apparently undisputed fact that Dr. Marlatt issued her first directive following an incident in which confidential student information was released to the public in violation of the Family Educational Rights and Privacy Act . . . However, this fact would not preclude a jury from reasonably concluding Dr. Marlatt's directives nevertheless prohibited far more speech than the type of speech that provoked them. The record--taken in the light most favorable to Plaintiffs--supports the conclusion Dr. Marlatt's directives were not limited to the improper discussion of such confidential information but were instead broad bans on the discussion of all "school matters" with anyone. . . . Indeed, all of the speech we recognized as involving matters of public concern . . .--the school's code of conduct, Dr. Marlatt's directives on teachers discussing school matters, renewal of the school's charter, and school board elections--appear to fall under her broad prohibition of speech about "school matters." . . . we conclude Dr. Marlatt's broadly worded prohibitions covered more speech than necessary or permissible: Dr. Marlatt's legitimate interests in ensuring the efficient functioning of the school and deterring teachers from disclosing confidential student information did not justify a ban on the discussion of all school matters.

In another case involving a school administrator's claim for First Amendment retaliation,[3] Judge Gorsuch again sided with the school employee. In that case, the plaintiff-superintendent hired an employee to oversee the district's Head Start program. After the Head Start director was hired, the

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[2] *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175 (10th Cir. 2010).

[3] *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (2007).

director realized that a number of families were enrolled in the Head Start program when they were not eligible. After the superintendent learned of this discrepancy, she repeatedly informed the school board. The board dismissed her concerns. After determining that the board would not take any action, the superintendent then disclosed her concerns to the federal government. Shortly thereafter, the superintendent's relationship with the board became rocky. Eventually, the superintendent filed a written complaint to the Attorney General's Office that the board had violated the Open Meetings Act by acting improperly in executive sessions. Eventually, the superintendent was demoted, then fired.

The superintendent filed a suit for unlawful retaliation in response to her report to the Attorney General. On appeal, Judge Gorsuch agreed with the employee:

> Finding that [the superintendent]'s right to be free from retaliatory employment action based on her protected First Amendment activities was potentially violated, we must still ask whether the right [the superintendent] asserts was clearly established in law such that it put [the school board] on notice of the impropriety of their alleged retaliation. . . . This we have little difficulty in doing. . . . It has long been established law in this circuit that when a public employee speaks as a citizen on matters of public concern to outside entities despite the absence of any job-related reason to do so, the employer may not take retaliatory action. . . .

3. Generally District-Employer Friendly Opinions

In several employment cases involving school district employees, Judge Gorsuch held in favor of the district.[4] In at least one of these cases, Judge Gorsuch's opinion acknowledged the unique aspects of a school employment setting. Indeed, in *Almond v. Unified School District*,[5] a Kansas school district faced significant budgetary cutbacks. As a result, the district eliminated three positions. Three employees were employed in these three positions. After deciding to eliminate the three positions, the district approached the three employees and offered each of them a different job within the district. The jobs offered would have, over time, resulted in lower pay. Two employees agreed. Eventually, the two employees, unhappy with their reduction in pay, filed suit, alleging that they were discriminated against on the basis of their gender. Judge Gorsuch, writing for the majority, concluded that a school district transferring an employee to a different position does not, in and of itself, constitute an "adverse employment action."

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[4] *Faragalla v. Douglas County Sch. Dist.*, 411 Fed. Appx. 140 (10th Cir. 2011); *Lawrence v. Sch. Dist. No. 1*, 560 Fed. Appx. 791 (10th Cir. 2014); *Lowe v. Indep. Sch. Dist. No. 1*, 363 Fed. Appx. 548 (10th Cir. 2010).

[5] 665 F.3d 1174 (10th Cir. 2011).

4. School-Friendly Opinions in Special Education Cases

Perhaps the most immediate school law-related outcome of Judge Gorsuch's appointment to the Supreme Court could be his ability to weigh in on the pending special education matters currently before the Supreme Court this term. As way of background, the *Endrew F.*[6] case will establish the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act. Interestingly, the *Endrew F.* case reached the Supreme Court through the 10th Circuit. However, Judge Gorsuch was not on the 10th Circuit's three-judge panel that decided *Endrew F.* Still, Judge Gorsuch has authored and sat on numerous other cases involving disputes over special education matters and has generally ruled in favor of the school districts in these cases.[7]

5. Resistance to Federal Government Regulatory Interpretation

Much of the media coverage to date of Judge Gorsuch has focused on his views on the so-called *Chevron* doctrine. Under the *Chevron* doctrine (named after the Supreme Court case of *Chevron v. N.R.D.C.*), the federal courts will defer to a federal agency's interpretation of its own rules. Under this approach, federal agencies have broad discretion in enacting and enforcing its rules. In the event that Judge Gorsuch is confirmed to the Supreme Court and the Court reverses the *Chevron* doctrine, school law would dramatically change as a result of the decreased weight of federal guidance and regulations.

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[6] U.S.S.C. Docket No. 15-827.

[7] *See, e.g., Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *Muskrat v. Deer Creek Pub. Schs,* 715 F.3d 775 (10th Cir. 2013), *but see Jefferson County Sch. v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012).

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PERRY LAW FIRM FEDERAL UPDATE - #10
DATE: FEBRUARY 2, 2017

A. NDE Updates State Board on ESSA Progress

At this afternoon's State Board of Education meeting, NDE staff updated the Nebraska State Board of Education on NDE's progress in drafting the State's Plan under the Every Student Succeeds Act ("ESSA"). Commissioner Matt Blomstedt advised the State Board that, in light of President Trump's "freeze" on any new federal regulations, there is some uncertainty in the United States Department of Education as to the future implementation of the ESSA. However, NDE reported that it has been advised to continue moving forward with the State's ESSA Plan. As such, NDE will host several "Listening to our Stakeholders" sessions to gather feedback on the State's ESSA Plan. These events will occur as follows:

The Nebraska Department of Education
Invites you to participate in
"Listening to our Stakeholders" Sessions

Date	Location	Time
March 7, 2017	**Harms Advanced Technology Center-WNCC** *2620 College Park, Scottsbluff, NE 69361*	**6:30 pm – 8:00pm**
March 8, 2017	**Mid-Plains Community College** *601 W State Farm Rd, North Platte, NE 69101*	**6:30 pm – 8:00pm**
March 14, 2017	**Norfolk Public Schools Central Adm. Offices** *512 Philip Avenue, Norfolk, NE 68701, Room 302*	**6:30 pm – 8:00pm**
March 16, 2017 **please note time change*	**Southeast Community College, Lincoln Campus** *8800 O Street, Lincoln, NE 68520-1299*	**7:00 pm – 8:30pm**
March 20, 2017	**Grand Island Senior High School** *2124 N Lafayette Ave, Grand Island, NE 68803*	**6:30 pm – 8:00pm**

March 22, 2017	**ESU 5** *900 W Court St, Beatrice, NE 68310*	**6:30 pm – 8:00pm**
March 27, 2017	**UNO Barbara Weitz Community Engagement Center** *6400 South, University Drive Road North, Omaha, NE 68182*	**6:30 pm – 8:00pm**

A copy of the slideshow that was presented at today's meeting is attached.

B. Senator Fischer Will Vote to Confirm Betsy DeVos

Nebraska Senator Deb Fischer announced today that she will vote to confirm Betsy DeVos as the next Secretary of the Department of Education. With Senator Fischer's vote, media outlets report that Ms. DeVos will be confirmed by Tuesday. Of particular relevance to Nebraska schools, Senator Fischer announced her support after receiving the attached letter from Ms. DeVos. Ms. DeVos's letter responds to Senator Fischer's questions about (1) whether Ms. DeVos would try to require states to impose a school choice program (such as vouchers); and (2) whether the Department of Education will continue to enforce the special education laws.

February 2, 2017

The Honorable Deb Fischer
United States Senate
454 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Fischer:

Thank you for the opportunity to share my position on federal education mandates regarding private school vouchers and the importance of protecting the rights of students with disabilities and ensuring that they get the quality education they deserve.

Federal Mandates Regarding Private School Vouchers

As a strong proponent of local control, I believe a decision to provide vouchers, scholarships or other public support for students who choose to attend a nonpublic school should not be mandated by the federal government. Rather, this is a state and school district matter. Therefore, if confirmed, I will not impose a school choice program on any state or school district.

The Every Student Succeeds Act made great strides in returning control over education decisions to states and local communities. Decisions about whether to provide parental choice will vary from state to state and district to district, reflecting local needs and I will be respectful of state and local decisions on this issue.

Individuals with Disabilities Education Act

I believe that all students, including individuals with disabilities, deserve an equal opportunity to lead full, productive and successful lives. I am committed to enforcing all federal laws to protect the hard won rights of students with disabilities.

The Individuals with Disabilities Education Act, commonly called IDEA, includes many essential elements to protect the rights of students with disabilities to gain access to, and succeed in, a high quality education. To that end, if confirmed, I am committed to leading the Department of Education in support of the remarkable parents and educators who make this vision a reality for students with disabilities in states and communities across our great nation. IDEA requires a free and appropriate public education (FAPE) in the least restrictive environment for all students with disabilities.

At the federal level, we need to continue to guide and monitor compliance while providing states with the tools they need to help districts, schools and other stakeholders to be successful. We must also encourage states to work with parents and districts to create more effective Individualized Education Programs (IEPs) that are useful for increasing learning gains for students with disabilities. These students are accomplishing great things in states and districts that recognize their uniqueness. We can shine a light on their successes so that others know what is possible. If confirmed as Secretary, I will make it a priority to highlight what works best for students with disabilities.

Senator Fischer, I look forward to working with you to support Nebraska's teachers, schools and districts as they work to provide a high quality education to every student.

Sincerely,

Betsy DeVos

essaNEBRASKA

Nebraska Department of Education

Stakeholder Engagement

Aligned to AQuESTT

Driven and Informed by Strategic Plan

Key Components Include:

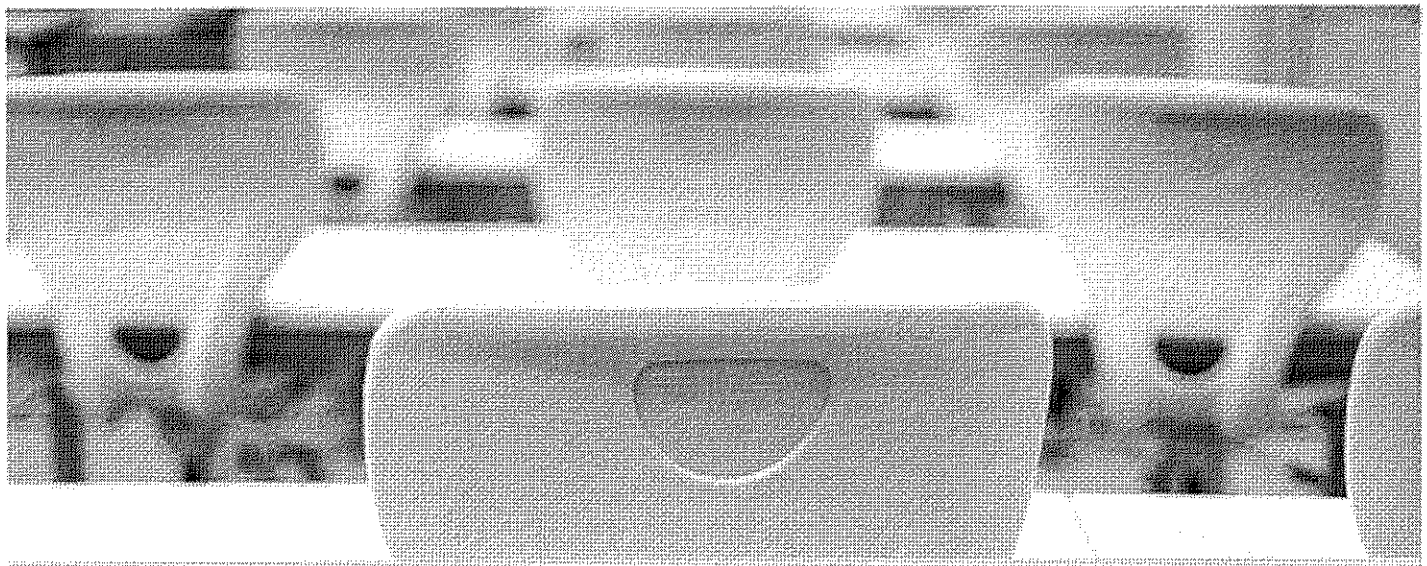
- Long Term Goals
- Academic Assessment
- Accountability, Support, and Improvement for Schools
- Supporting Educators to be Effective
- Supporting All Students

Overview of Work

- Weekly Core Writing Team Meetings
- Weekly Advisory Meetings
- Meetings with Stakeholder Groups and Organizations
- Preliminary Concept Writing- February
- March State Board of Education Meeting
- Stakeholder Engagement Strategies and Efforts

Next Steps

- Key Concept Development in February
- Presentation to SBOE in March
- Stakeholders Listening Sessions in March
- Plan Development & Analysis(March - May)
- Preliminary Peer Review and Expert Consultation (April - May)
- Legal Review (May-Ongoing)



STAKEHOLDER ENGAGEMENT

Timeline of Engagement

- **Phase 1: NDE's strategic Vision**
- June to September 2016
- **Phase 2 – Initial Planning and Development**
- October 2016 through February 2017
- **Phase 3: ESSA Plan Writing and Reviews**
- March 2017 to May 2017
- **Phase 4: Submission and Implementation**
- September 2017

NDE Stakeholder Engagements

Stakeholder Engagements strategies includes, but are not limited to, the following:

- Presentations/Meetings/Conferences
- "Listening to Our Stakeholders" Sessions
- Website
- NDE newsletters
- Email Listserve
- ScreenCast videos
- Online Surveys
- FAQ's and Glossary of Terms

NDE Stakeholder Engagement

National and statewide Engagement and Collaboration Examples: Presented to or participated with:

- Administrators Days - 1/27/16
- CCSSO - Ongoing webinars and consultation and ESSA Consolidated Plan Meetings (NDE) -
  - Initial Meeting in Atlanta (9/12/16 - 9/14/16)
- Wallace Foundation Project: ESSA Leadership Learning Community:
  - (Urban League of Nebraska, OPS, NDE) - 9/26-27 NYC, 10/27/16 Omaha, 2/1 - 2 NYC
- Aspen Education & Society Program retreat
- State Board of Education Presentations
- Community of Practitioners Federal Programs - Ongoing Consultation - 10/18/16 and 1/6/17
- Nebraska Early Childhood Interagency Coordinating Council - 11/18/16
- National Assoc. of State Boards of Education - 1/17/17
- Nebraska State Education Association - 1/28/17
- Nebraska Career Education Stakeholder Feedback – Fall 2016

NDE Stakeholder Engagements

"Listening to Our Stakeholders" Sessions (March 2017)

To help our effort to strengthen family-school-community partnerships, bring inclusive voices to these sessions and empower ALL to speak up for every child in our state, NDE is hosting "Listening to our Stakeholders" Public Sessions!

Examples of groups anticipated to participate among others:

- The Empowerment Network
- My Brother's Keeper-Heartland Collaborative
- Nebraska Civic Engagement Table
- Parent Advisory Groups - Migrant/Homeless
- English Language Learners
- Mentoring Organizations - Big Brothers/Big Sisters of the Midlands/Midlands Mentoring Program/100 Black Men/ Black Men United/ Girls Inc.
- Civil Rights Organizations - ADL / Latino Center of the Midlands / Refugee Resettlement Programs / NE for Civic Engagement
- Urban League of NE
- Disability Rights Nebraska
- Nebraska Tribal organizations and representatives

"Listening to Our Stakeholders" Sessions

March 7, 2017	**Harms Advanced Technology Center-WNCC** *2620 College Park, Scottsbluff, NE 69361*	**6:30 pm – 8:00pm**
March 8, 2017	**Mid-Plains Community College** *601 W State Farm Rd, North Platte, NE 69101*	**6:30 pm – 8:00pm**
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March 20, 2017	**Grand Island Senior High School** *2124 N Lafayette Ave, Grand Island, NE 68803*	**6:30 pm – 8:00pm**
March 22, 2017	**Educational Service Unit #5** *900 W Court St, Beatrice, NE 68310*	**6:30 pm – 8:00pm**
March 27, 2017	**UNO Barbara Weitz Community Engagement Center** *6400 South, University Drive Road North, Omaha, NE 68182*	**6:30 pm – 8:00pm**

Additional Key Dates

- February, Internal Draft of Key Concepts
- March 3, Report of Key Concepts Stakeholder Conversations
- April 3, State Assurances Submission
- April 10-11, AQuESTT Conference
- September 18, Submission Deadline

NOTE: Tentative dates as final rules and regulations may be further delayed by US Department of Education per communication

NDE's Mission

"To lead and support the preparation of all Nebraskans for learning, earning, and living."

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PERRY LAW FIRM FEDERAL UPDATE - #11
DATE: FEBRUARY 4, 2017

A. Federal District Court Enters Injunction, Staying Immigration Order

Last night, a federal district court enjoined the federal government from enforcing parts of President Trump's Executive Order on immigration. Under yesterday's Order (attached), the government cannot prevent certain immigrants from entering the country. Media reports suggest that the White House will appeal this Order. As has been discussed in prior Updates, school districts concerned about the potential consequences of the new Administration's immigration policies should consider planning now, rather than later.

B. National Visa Debate Demonstrates Conflict between Federal Law, NDE Rules

On the topic of immigration and visas, it is worth noting that Nebraska state rules and federal law could conflict with each other. Schools should be aware that Rule 19, relying on the *Plyler* case, states that "Children and children of parents or guardians who are not citizens or legally present in the United States shall not be denied enrollment on that basis."[1] Rule 19 also includes a "Visa Information" guide for student visas (attached). This section of Rule 19 could conflict with federal law. Specifically, under federal law, students with F-1 visas generally may not "attend a public primary/elementary school or a publicly funded adult education program."[2] Thus, although federal law prohibits a student with an F-1 visa from attending a public elementary school, NDE Rule 19 would otherwise instruct that the student should be enrolled. Other legal conflicts may arise with respect to students with expired visas.

C. IRS Warns of W-2 Phishing Scheme Targeting School Districts, including Nebraska Districts

This week, the IRS issued a nationwide release (attached) to warn school districts of an ongoing phishing scam. Under the scam, a scammer creates an email account designed to appear identical to that of a school administrator. The scammer then emails the district's business manager to request an email response with all of the district's W-2's attached. We know of at least one Nebraska school district that has been affected by this scam. Given the seriousness of this scam, it is worth reminding your bookkeepers and business staff to verify any email address and confirm *in person* before

[1] NDE Rule 19.011.
[2] https://travel.state.gov/content/visas/en/study-exchange/student/foreign-students-in-public-schools.html

submitting any confidential personnel information by email. You should also be aware that, if your district has been the victim of a scam like this, Nebraska state law[3] requires that you takes steps to inform the Nebraska Attorney General's Office, as well as those individuals who data may have been compromised.

D. Congress Looking to Rescind ESSA Regulations

On Monday, February 6, 2017, a committee of the United States House of Representatives will meet to begin the process of repealing two major Obama-era Every Student Succeeds Act ("ESSA") regulations. These two regulations focus on (1) state plan accountability and (2) teacher preparation issues. (Both regulations were covered in a prior Update.) Under the Congressional Review Act, Congress has a limited ability to revoke certain federal regulations. It is not clear if the necessary procedures can be cleared in the Senate, but the House appears committed to repealing these regulations. If the Congress does, in fact, repeal both regulations, the implementation of the ESSA would, in all likelihood, be significantly delayed. The Congressional filings for this process (H.J. Res. 57 & 58) are attached.

E. State Board of Education Votes on Charter Schools, Vouchers

At yesterday's meeting, the State Board of Education voted to oppose LB 608 (adopting vouchers/"scholarships" in Nebraska) and LB 630 (establishing charter schools in Nebraska).

The State Board was divided on LB 595, the bill that would allow teachers to use physical force to restrain or remove a disorderly student. Ultimately, due to conflicting opinions, the Board did not take a position. The Education Committee has scheduled a hearing on LB 595 on Tuesday, February 7, 2017.

[3] Neb. Rev. Stat. § 87-803.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-0141JLR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Before the court is Plaintiffs State of Washington and State of Minnesota's (collectively, "the States") emergency motion for a temporary restraining order ("TRO"). (TRO Mot. (Dkt. ## 3, 19 (as amended)).) The court has reviewed the motion, the complaint (Compl. (Dkt. # 1)), the amended complaint (FAC (Dkt. # 18)), all the submissions of the parties related to the motion, the relevant portions of the record, and the applicable law. In addition, the court heard the argument of counsel on February 3,

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2017. (*See* Min. Entry (Dkt. # 51).) Having considered all of the foregoing, the court GRANTS the States' motion as set forth below.

II. PROCEDURAL BACKGROUND

On January 30, 2017, the State of Washington filed a complaint seeking declaratory and injunctive relief against Defendants Donald J. Trump, in his official capacity as President of the United States, the United States Department of Homeland Security ("DHS"), John F. Kelly, in his official capacity as Secretary of DHS, Tom Shannon, in his official capacity as Acting Secretary of State, and the United States of America (collectively, "Federal Defendants"). (*See* Compl.) On February 1, 2017, the State of Washington filed an amended complaint adding the State of Minnesota as a plaintiff. (*See* FAC.) The States seek declaratory relief invalidating portions of the Executive Order of January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Executive Order") (*see* FAC Ex. 7 (attaching a copy of the Executive Order)), and an order enjoining Federal Defendants from enforcing those same portions of the Executive Order. (*See generally* FAC at 18.)

The States are presently before the court seeking a TRO against Federal Defendants. (*See generally* TRO Mot.) The purpose of a TRO is to preserve the status quo before the court holds a hearing on a motion for preliminary injunction. *See Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City*, 415 U.S. 423, 439 (1974); *Am. Honda Fin. Corp. v. Gilbert Imports, LLC*, No. CV-13-5015-EFS, 2013 WL 12120097, at *3 (E.D. Wash. Feb. 22, 2013) ("The purpose

//

of a TRO is to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction . . . .") (internal quotation marks omitted).

Federal Defendants oppose the States' motion. (*See generally* Resp. (Dkt. # 50).)

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

As an initial matter, the court finds that it has jurisdiction over Federal Defendants and the subject matter of this lawsuit. The States' efforts to contact Federal Defendants reasonably and substantially complied with the requirements of Federal Rule of Civil Procedure 65(b). *See* Fed. R. Civ. P. 65(b). Indeed, Federal Defendants have appeared, argued before the court, and defended their position in this action. (*See* Not. of App. (Dkt. ## 20, 21); Min. Entry; *see generally* Resp.;)

The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

As an alternative to this test, a preliminary injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply in

the plaintiff's favor," thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the "serious questions" approach supports the court's entry of a TRO only so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion and must make a clear showing that it is entitled to such relief. *Winter*, 555 U.S. at 22.

The court finds that the States have satisfied these standards and that the court should issue a TRO. The States have satisfied the *Winter* test because they have shown that they are likely to succeed on the merits of the claims that would entitle them to relief; the States are likely to suffer irreparable harm in the absence of preliminary relief; the balance of the equities favor the States; and a TRO is in the public interest. The court also finds that the States have satisfied the "alternative" *Cottrell* test because they have established at least serious questions going to the merits of their claims and that the balance of the equities tips sharply in their favor. As the court noted for the *Winter* test, the States have also established a likelihood of irreparable injury and that a TRO is in the public interest.

Specifically, for purposes of the entry of this TRO, the court finds that the States have met their burden of demonstrating that they face immediate and irreparable injury as a result of the signing and implementation of the Executive Order. The Executive Order adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel. These harms extend to the States by virtue of

their roles as *parens patriae* of the residents living within their borders. In addition, the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of higher learning, as well as injury to the States' operations, tax bases, and public funds. These harms are significant and ongoing. Accordingly, the court concludes that a TRO against Federal Defendants is necessary until such time as the court can hear and decide the States' request for a preliminary injunction.

IV. TEMPORARY RESTRAINING ORDER

It is hereby ORDERED that:

1. Federal Defendants and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert or participation with them are hereby ENJOINED and RESTRAINED from:
   (a) Enforcing Section 3(c) of the Executive Order;
   (b) Enforcing Section 5(a) of the Executive Order;
   (c) Enforcing Section 5(b) of the Executive Order or proceeding with any action that prioritizes the refugee claims of certain religious minorities;
   (d) Enforcing Section 5(c) of the Executive Order;
   (e) Enforcing Section 5(e) of the Executive Order to the extent Section 5(e) purports to prioritize refugee claims of certain religious minorities.
2. This TRO is granted on a nationwide basis and prohibits enforcement of Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order (as described in

the above paragraph) at all United States borders and ports of entry pending further orders from this court. Although Federal Defendants argued that any TRO should be limited to the States at issue (*see* Resp. at 30), the resulting partial implementation of the Executive Order "would undermine the constitutional imperative of 'a *uniform* Rule of Naturalization' and Congress's instruction that 'the immigration laws of the United States should be enforced vigorously and *uniformly*.'" *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (footnotes omitted) (quoting U.S. CONST. art. I, § 8, cl. 4 (emphasis added) and Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added)).[1]

3. No security bond is required under Federal Rule of Civil Procedure 65(c).

4. Finally, the court orders the parties to propose a briefing schedule and noting date with respect to the States' motion for a preliminary injunction no later than Monday, February 6, 2017 at 5:00 p.m. The court will promptly schedule a hearing on the States' motion for a preliminary injunction, if requested and necessary, following receipt of the parties' briefing.

V. CONCLUSION

Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches.

[1]An equally divided Supreme Court affirmed *Texas v. United States*, 809 F.3d 134, in *United States v. Texas*, --- U.S. ----, 136 S. Ct. 2271 (2016) (per curiam).

That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution. The narrow question the court is asked to consider today is whether it is appropriate to enter a TRO against certain actions taken by the Executive in the context of this specific lawsuit. Although the question is narrow, the court is mindful of the considerable impact its order may have on the parties before it, the executive branch of our government, and the country's citizens and residents. The court concludes that the circumstances brought before it today are such that it must intervene to fulfill its constitutional role in our tripart government. Accordingly, the court concludes that entry of the above-described TRO is necessary, and the States' motion (Dkt. ## 2, 19) is therefore GRANTED.

Dated this 3rd day of February, 2017.

JAMES L. ROBART
United States District Judge

VISA INFORMATION

Description of selected visa classifications:

B-1: Temporary visitor for business.

B-2: Temporary visitor for pleasure (a tourist).

F-1: Student.

F-2: Spouse or unmarried child of an F-1 student.

J-1: Exchange visitor ("foreign exchange student").

J-2: Spouse or unmarried child of a J-1 exchange visitor.

M-1: Vocational student or other nonacademic student.

M-2: Spouse or unmarried child of an M-2 vocational or other nonacademic student.

General Information about Student Visas

Note: The following general information and links to U.S. Government websites are provided as a starting point for school district officials and other individuals to obtain more detailed information regarding foreign student visas issued by the U. S. Government. This material is not intended as legal advice for school districts or for foreign students with visas or for their families. Provisions regarding student visas may be subject to change by the U. S. Government at any time, and the Nebraska Department of education does not provide legal advice to school districts or to individuals regarding visa issues. School districts should consult with their own legal counsels if they have questions regarding foreign exchange students or students with other types of visas.

Among the more common student visas that school districts may encounter are J and F visas. A discussion of those visas is provided at the following U. S. State Department website:

www.travel.state.gov/content/visas/en/study-exchange.html

The following U. S. State Department web site currently also provides a chart listing, and providing links to, numerous types of visas:

www.travel.state.gov/content/visas/en.html

Secondary school visitor exchange student J-1 visas are discussed at:

www.j1visa.state.gov/programs

The federal regulations for the Secondary School Student Exchange programs are located at Title 22, Code of Federal Regulations, Part 62, which can be accessed at the website listed above.

The U. S. Department of State also has the following information about the Student and Exchange Visitor Information System (SEVIS) at:

www.j1visa.state.gov/sponsors/current/sevis

The SEVIS website is located at:

https://www.ice.gov/sevis

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Dangerous W-2 Phishing Scam Evolving; Targeting Schools, Restaurants, Hospitals, Tribal Groups and Others

IR-2017-20, Feb. 2, 2017 Español

WASHINGTON — The Internal Revenue Service, state tax agencies and the tax industry issued an urgent alert today to all employers that the Form W-2 email phishing scam has evolved beyond the corporate world and is spreading to other sectors, including school districts, tribal organizations and nonprofits.

In a related development, the W-2 scammers are coupling their efforts to steal employee W-2 information with an older scheme on wire transfers that is victimizing some organizations twice.

"This is one of the most dangerous email phishing scams we've seen in a long time. It can result in the large-scale theft of sensitive data that criminals can use to commit various crimes, including filing fraudulent tax returns. We need everyone's help to turn the tide against this scheme," said IRS Commissioner John Koskinen.

When employers report W-2 thefts immediately to the IRS, the agency can take steps to help protect employees from tax-related identity theft. The IRS, state tax agencies and the tax industry, working together as the Security Summit, have enacted numerous safeguards in 2016 and 2017 to identify fraudulent returns filed through scams like this. As the Summit partners make progress, cybercriminals need more data to mimic real tax returns.

Here's how the scam works: Cybercriminals use various spoofing techniques to disguise an email to make it appear as if it is from an organization executive. The email is sent to an employee in the payroll or human resources departments, requesting a list of all employees and their Forms W-2. This scam is sometimes referred to as business email compromise (BEC) or business email spoofing (BES).

The Security Summit partners urge all employers to be vigilant. The W-2 scam, which first appeared last year, is circulating earlier in the tax season and to a broader cross-section of organizations, including school districts, tribal casinos, chain restaurants, temporary staffing agencies, healthcare and shipping and freight. Those businesses that received the scam email last year also are reportedly receiving it again this year.

Security Summit partners warned of this scam's reappearance last week but have seen an upswing in reports in recent days.

New Twist to W-2 Scam: Companies Also Being Asked to Wire Money

In the latest twist, the cybercriminal follows up with an "executive" email to the payroll or comptroller and asks that a wire transfer also be made to a certain account. Although not tax related, the wire transfer scam is being coupled with the W-2 scam email, and some companies have lost both employees' W-2s and thousands of dollars due to wire transfers.

The IRS, states and tax industry urge all employers to share information with their payroll, finance and human resources employees about this W-2 and wire transfer scam. Employers should consider creating an internal policy, if one is lacking, on the distribution of employee W-2 information and conducting wire transfers.

Steps Employers Can Take If They See the W-2 Scam

Organizations receiving a W-2 scam email should forward it to phishing@irs.gov and place "W2 Scam" in the subject line. Organizations that receive the scams or fall victim to them should file a complaint with the Internet Crime Complaint Center (IC3,) operated by the Federal Bureau of Investigation.

Employees whose Forms W-2 have been stolen should review the recommended actions by the Federal Trade Commission at www.identitytheft.gov or the IRS at www.irs.gov/identitytheft. Employees should file a Form 14039, Identity Theft Affidavit, if the employee's own tax return rejects because of a duplicate Social Security number or if instructed to do so by the IRS.

The W-2 scam is just one of several new variations that have appeared in the past year that focus on the large-scale thefts of sensitive tax information from tax preparers, businesses and payroll companies. Individual taxpayers also can be targets of phishing scams, but cybercriminals seem to have evolved their tactics to focus on mass data thefts.

Be Safe Online

In addition to avoiding email scams during the tax season, taxpayers and tax preparers should be leery of using search engines to find technical help with taxes or tax software. Selecting the wrong "tech support" link could lead to a loss of data or an infected computer. Also, software "tech support" will not call users randomly. This is a scam.

Taxpayers searching for a paid tax professional for tax help can use the IRS Choosing a Tax Professional lookup tool or if taxpayers need free help can review the Free Tax Return Preparation Programs. Taxpayers searching for tax software can use Free File, which offers 12 brand-name products for free, at www.irs.gov/freefile. Taxpayer or tax preparers looking for tech support for their software products should go directly to the provider's web page.

Tax professionals also should beware of ongoing scams related to IRS e-Services. Thieves are trying to use IRS efforts to make e-Services more secure to send emails asking e-Services users to update their accounts. Their objective is to steal e-Services users' credentials to access these important services.

See also:

- Affected employers and companies should also alert the state tax agencies by notifying StateAlert@taxadmin.org.

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Page Last Reviewed or Updated: 02-Feb-2017

115TH CONGRESS
1ST SESSION

H. J. RES. 57

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to accountability and State plans under the Elementary and Secondary Education Act of 1965.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2017

Mr. ROKITA submitted the following joint resolution; which was referred to the Committee on Education and the Workforce

---

JOINT RESOLUTION

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to accountability and State plans under the Elementary and Secondary Education Act of 1965.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Education relating to accountability and State plans under the Elementary and Secondary Education Act of 1965 (published at 81 Fed. Reg. 86076 (No-

vember 29, 2016)), and such rule shall have no force or effect.

○

115TH CONGRESS
1ST SESSION

H. J. RES. 58

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to teacher preparation issues.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2017

Mr. GUTHRIE submitted the following joint resolution; which was referred to the Committee on Education and the Workforce

---

JOINT RESOLUTION

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to teacher preparation issues.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Education relating to teacher preparation issues (published at 81 Fed. Reg. 75494 (October 31, 2016)), and such rule shall have no force or effect.

○

Thomas M. Haase
James B. Gessford
Rex R. Schultze***
Daniel F. Kaplan
Gregory H. Perry
Joseph F. Bachmann*
R.J. Shortridge*
Jeanette Stull
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Arthur E. Perry (1910-1982)
R.R. Perry (1917-1999)
Edwin C. Perry (1931-2012)

PERRY LAW FIRM FEDERAL UPDATE - #12
DATE: FEBRUARY 13, 2017

A. Recent I.C.E. Raids Should Encourage Schools to Plan Ahead

Over the past several days, the United States Immigration and Customs Enforcement ("ICE") conducted raids in at least six states. One of these raids in Charlotte, North Carolina provided one example of how schools and students will likely remain intertwined with any immigration enforcement activity in a community:

> Incidents that have caused alarm include a confirmed arrest witnessed by elementary students and school personnel on the west side of Charlotte on Thursday morning. The incident prompted an email from the principal to her staff.
>
> "As many of you have heard or seen this morning, Immigration is arresting illegal immigrants in this area this morning," Principal Cara Heath wrote to staff at Berryhill School in an email provided to Triad City Beat by Charlotte-Mecklenburg Schools. "I know this is upsetting for the kids as well as all of you. Both staff and students watched as some immigrants were taken in on their routes to school this morning. Some of you may require counseling help today," Heath continued, adding that a psychologist would be on site to assist.[1]

Students observing an immigration raid is one potential issue that may affect the school day, but an immigration raid in a community can affect school districts in other ways.

For one, in the event that you are concerned that immigration officials may try to enter district property, you should be prepared to present to any law enforcement agency the 2011 ICE Memorandum (attached) instructing ICE agents to avoid "sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location . . . or (c) prior approval is obtained."[2] Thus, administrators have a legal document shielding school grounds from immigration raids.

---

[1] "ICE arrest witnessed by students in Charlotte causes alarm across NC," Triad City Beat, February 10, 2017; available at: https://triad-city-beat.com/2017/02/ice-arrest-witnessed-students-charlotte-causes-alarm-across-nc/

[2] U.S. I.C.E. Memorandum, dated October 24, 2011 (attached to this Update) (emphasis supplied).

In addition, in the event that your district has concerns about immigration raids removing the parents of students in your community, we suggest that staff members (such as counselors) who regularly work with students begin to look into various resources, including Nebraska Appleseed's website (https://neappleseed.org/immigrants#immigration_resources).

B. Washington Appears Conflicted on the Future of ESSA Regulations

From the outside, it appears that Washington is divided on the future of ESSA regulations. As a reminder, in a prior Update, we noted that the Obama Administration enacted two ESSA-based regulations governing (1) state plans and (2) teacher preparation issues. We also referenced in a prior update that the U.S. House of Representatives has used the Congressional Review Act ("CRA") to "undo" these regulations. Of note, the House recently passed a resolution under the CRA to repeal both of these regulations. In the event that the state plan regulations are repealed, it is possible that ESSA implementation could be delayed by at least one year. As such, it is not clear whether the Senate will approve the measures to undo both regulations and delay ESSA implementation (ESSA passed the Senate by an 81-17 margin).

The potential ESSA regulatory repeal also puts the U.S. Department of Education in a difficult bind for two reasons. First, three days ago, Education Secretary Betsy DeVos sent a letter to state school officers (attached) stating that "States should continue their work in engaging with stakeholders and developing their plans based on the requirements [under the law]." It is not clear how states would be able to comply with the law if the state plan regulations are repealed. The second difficulty lies in the fact that, under the CRA, if a regulation is repealed by Congress, then the federal agency "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Therefore, if the Senate votes to approve the repeal of the state plan regulation, the Department of Education would likely need to start from scratch, causing even further delay in implementation of ESSA. As of this time, we are told that NDE plans to continue working towards its internal ESSA implementation timeline.

C. IRS Begins Issuing 1095-C Penalty Letters

The IRS has started issuing potential penalty letters to employers that did not file a 1094-C or 1095-C with the IRS last year. The letter states that the employer must select one of the following options and return the completed letter by mail:

> [ ] I was an ALE [Applicable Large Employer – an employer with 50 or more full-time employees] for calendar year 2015 and already filed Form 1094-C and Forms 1095-C with the IRS using the following name _____ and employer identification number (EIN) _____ on date ____.

[ ] I was an ALE for calendar year 2015 and my Form 1094-C and Forms 1095-C are included with this letter. (Do not use this box if you are required to file electronically.)
[ ] I was an ALE for calendar year 2015 and will file my Form 1094-C and Forms 1095-C with the IRS using the following name _____ and EIN _____ by date ___. (If more than 90 days from the date of this letter, explain below under "Other.")
[ ] I was not an ALE for calendar year 2015.
[ ] Other (Indicate below or attach a statement explaining why you have not filed the required returns and any actions you plan to take.)
[...]

Districts in receipt of such a letter should immediately consult with legal counsel.

D. Lawsuits Should Remind Schools of "Robocall" Requirements

School districts across the country have been facing lawsuits over "robocalls" made to unhappy patrons. A "robocall" is a call or text message sent from an "auto-dialer" (a machine that can make calls or texts without a human actually entering phone numbers). As a general rule, under the federal Telephone Consumer Protection Act, an entity cannot use an auto-dialer to contact a person unless that person has given prior express written consent, among other exceptions, to be contacted. There are federal rules on when schools can use auto-dialers. Specifically, under the attached FCC ruling:

> "We confirm that school callers may lawfully make autodialed calls and send automated texts to student family wireless phones **without consent for emergencies** including weather closures, fire, health risks, threats, and unexcused absences. We grant school callers **additional relief for calls and messages that, while not emergencies, nevertheless are closely related to the school's mission**, such as notification of an upcoming teacher conference or general school activity, by clarifying our understanding that such calls are (absent evidence to the contrary) made with the prior express consent of the called party **when a telephone number has been provided to an educational institution by that called party**."

Therefore, school districts must obtain consent to contact a person's phone number through autodialed school calls unless:

1. Calls are for "emergencies"

2. Calls are for reasons that are "closely related to the school's mission" and the school has a form where the "called party" provided his/her cell phone number as a contact number
3. School has prior express written consent from the "called party."

We have developed language to obtain robocall consents. We can provide such language upon request.

In the event that a person requests to be removed from a "call" list, the school should immediately remove that person's number. A district failing to comply with the TCPA can cause hefty fines. For instance, last year, a Florida district paid $12,500 to a woman who requested to be removed from a school's call list, but kept receiving calls.[3]

[3] "Orange schools to pay $12,500 over robocalls," Orlando Sentinel, January 7, 2016, available at: http://www.orlandosentinel.com/features/education/os-orange-robocalls-settlement-20160107-story.html

Rex Schultze

From: Justin Knight
Sent: Wednesday, February 15, 2017 10:01 AM
To: Rex Schultze; James B. Gessford; Greg Perry; Josh Schauer
Subject: Federal Update #13 (02/15/17)

All:

We are writing to let you know of a quickly developing national movement that encourages employees to "strike" from work and students to skip school tomorrow. Indeed, tomorrow (February 16, 2017) has been coined as "A Day Without Immigrants." The movement started in an attempt to show communities the consequences of deporting immigrants. This "strike day" has been publicized over social media over the past 24-48 hours and has spread to Nebraska. In fact, several school personnel have apparently posted information on social media encouraging their co-workers to "strike" (not work) tomorrow and refuse to send their children to school tomorrow. We do not know whether this "strike" day will materialize into a widespread issue for any school district in Nebraska, but we wanted to make you aware of this issue.

Please do not hesitate to contact us with any questions or concerns.

Sincerely,

Justin Knight

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PERRY LAW FIRM FEDERAL UPDATE - #14
DATE: FEBRUARY 15, 2017

A. New Attorney General Shifts Stance on Transgender Rules

On February 9, Jeff Session was sworn in as the new U.S. Attorney General. During his first week as the head of the Department of Justice, one of his first actions appears to be rolling back the federal government's position on the rights of transgender students.

Over the last few years, the Obama Administration's Office of Civil Rights ("OCR") issued guidance under Title IX that required schools to provide certain accommodations to transgender students. Several states filed suit challenging the guidance, contending that the guidance was not permissible. Under the Obama Administration, the Department requested courts to limit any injunction to only the handful of states directly involved in litigating the transgender guidance (rather than a nationwide injunction). In a recent court filing, the Department of Justice signaled to the Fifth Circuit Court of Appeals that it no longer intended to pursue the same level of nationwide protections for transgender students in schools. The Department also noted that it is "currently considering how best to proceed with this appeal."[1] The court was scheduled to hold oral arguments yesterday regarding the scope of an injunction. That hearing has been continued because of the Department's shift in its position on the issue.

The Department's shift comes at a particularly noteworthy time because the United States Supreme Court is scheduled to hear oral arguments in the *G.G. v. Gloucester County School Board* case on March 28, 2017. The issues before the *Gloucester* court are as follows:

> (1) Whether courts should extend deference to the OCR's transgender guidance on the issue of the rights of transgender students under Title IX;
>
> (2) Whether, with or without deference to the OCR guidance, the Department of Education's interpretation of Title IX and federal regulations (providing that schools must "generally treat transgender students consistent with their gender identity") should be given deference.

[1] See attached Motion in *State of Texas v. United States* (filed 02/10/17).

As can be seen, the two narrow issues before the Supreme Court focus exclusively on the federal government's guidance and interpretation of the law. In the event that the Trump Administration's Department of Justice continues to roll back Obama-era rules for transgender students, then the Supreme Court would likely dismiss the *Gloucester* case as moot (meaning, if the federal government withdraws its guidance, then there would be no point in addressing the guidance itself).

B. IRS Announces Change in Individual Tax Returns under Affordable Care Act

Today, the IRS announced that it would not require individual income tax returns to indicate whether the filer(s) had health insurance coverage during the year. The IRS indicated that this change is in response to President Trump's first Executive Order (relating to the Affordable Care Act). Some commentators have questioned whether the IRS's new position is the first indicator that the IRS will not enforce the individual mandate aspect of the ACA. Although this change likely does not directly affect Nebraska public school districts, it does signal a shift within the IRS to modify its enforcement approach under the ACA.

C. President Trump's Parent-Teacher Listening Session Signals Preference for Charter Schools

Yesterday, President Trump and Secretary of Education Betsy DeVos held a "Parent-Teacher Conference Listening Session" with various education professionals across the country. The session caught the attention of public school proponents after President Trump made several remarks in favor of charter schools, including him implying that the expansion of charter schools is "a priority of mine." As can be evidenced by other issues in this Update, the President's remarks come at a key point in the transition under the new Administration, as the new Administration begins withdrawing Obama-era rules and formulating its own policies. The entire transcript of the President's remarks are attached.

D. Senate Leader and President Trump Promise to Sign Repeal of ESSA Regulations

News outlets report that Senate leadership intends to vote to repeal the two ESSA regulations that have been discussed in prior Updates. In addition, President Trump just announced that he will sign any measure that works towards repealing the ESSA regulations. The repeal of the ESSA regulation regarding state plans leaves open the opportunity that the new Administration could design state plan regulations in a way that favors the Administration's preferences in education policy. It is also not clear how the timing of any replacement regulation would fit within President Trump's executive order requiring two regulations be repealed before a new regulation be enacted.

E. National School Boards Association Releases Data Security Guide

The National School Boards Association released a guide on data security and privacy. With their permission, we have attached that guide to this Update as a helpful resource for anyone in your district interested or involved in data security.

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PERRY LAW FIRM FEDERAL UPDATE - #15
DATE: FEBRUARY 17, 2017

FAQ's on ICE: Legal Guidance for School Districts

1. ICE Agents Entering School Property

Q: Can a school district prevent ICE agents from entering school property?

A: **No.** Federal law provides broad investigative authority for federal immigration officials.[1] An ICE agent is authorized by federal law to "interrogate any alien *or person believed to be an alien* as to his right to be or to remain in the United States."[2] An ICE agent also has the authority to "arrest any alien in the United States, if [the agent] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[3] Further, under President Trump's Executive Order (dated January 30, 2017), a political subdivision of a State could lose federal funding if it prohibits or "in any way restrict[s]" a government investigation an individual's citizenship or immigration status.[4] As such, school district cannot and should not prevent ICE agents from performing their duties on school property.

Q: What should a district do if ICE agents request access to school property or unexpectedly appear on school property?

A: **Inform the administration.** School personnel should be advised that, if a school staff member encounters an ICE agent on school property, the staff member should (1) immediately inform the principal (who should then inform the superintendent) and (2) request that the ICE agent in charge speak with the superintendent. Although there is no legal basis to prevent an ICE agent from entering school property, the superintendent should remind the ICE agent that a 2011 ICE Memorandum instructs ICE agents to avoid "sensitive locations," including schools.[5]

[1] 8 U.S.C. § 1357(a).
[2] 8 U.S.C. § 1357(a)(1) (emphasis supplied).
[3] 8 U.S.C. § 1357(a)(2).
[4] Executive Order, "Enhancing Public Safety in the Interior of the United States," signed January 30, 2017.
[5] U.S. I.C.E. Memorandum, dated October 24, 2011.

2. Student Records

Q: ***If an ICE agent requests student records, may the school district provide such information?***

A: **Only if the requested information is directory information.** Under FERPA, "directory information" is not considered personally identifiable information of a student.[6] Directory information is designated by each district in its annual FERPA notice in its student handbooks.[7] Most schools include a student's name, address and date of enrollment as directory information.

Any request for records beyond directory information should not be provided to ICE. Under FERPA, a school district cannot release any personally identifiable information of a student unless (1) the student's parent has consented to the release or (2) federal law contains an exception so as not to require parental consent. FERPA does not include an exception for the disclosure of student records to ICE.

As a result, the district may not provide an ICE agent with student records, other than directory information.

Q: ***If an ICE agent presents a subpoena to obtain student records (of any kind), should the district provide the requested information?***

A: **Yes.** A school district cannot refuse to provide information if the requesting party has a subpoena.[8] However, the district must generally make a reasonable effort to notify the parent of the subpoena before complying with the subpoena in order to allow the parent the opportunity to seek protective action, unless certain exceptions apply.[9]

Q: ***If the school district receives a request for student records (of any kind) from the Department of Justice or U.S. Attorney's Office, should the school district provide the requested information?***

A: **Yes.** FERPA provides an exception for the disclosure of information upon a request by the U.S. Attorney General (the head of the Department of Justice).[10] As such, the district should coordinate with its legal counsel to provide the requested information.

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[6] FERPA defines directory information as including the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A).

[7] 20 U.S.C. § 1232g(a)(5)(B).

[8] 20 U.S.C. § 1232g(b)(2)(B).

[9] 34 C.F.R. § 99.31(a)(9).

[10] 20 U.S.C. § 1232g(b)(1)(C).

Q: ***If the school district receives a request for records about a student's parent(s) or guardian(s), may the school district provide the requested information?***

A: **It depends.** FERPA only applies to a student's education records. In all likelihood, a document with information about a student's parent will fall under the definition of an "education record." Districts should consult with their legal counsel on whether a particular document is an "education record" under FERPA.

If the document is determined to be an education record, then the district should follow the guidance listed above as if the request was made for a student record.

If the document is not an education record under FERPA, then the district must assess whether the records must be disclosed under the Nebraska Public Records law.

Q: ***If an ICE agent requests records relating to school employees (such as Social Security Numbers), should the district provide such information?***

A: **No.** Nebraska law generally prohibits the disclosure of a teacher, administrator or full-time employee's personnel file.[11] In addition, the Nebraska Public Records law allows a public body to refuse to provide "personal information in records regarding personnel of public bodies other than salaries and routine directory information."[12] The term "routine directory information" should be interpreted not to include an employee's Social Security Number due to identity theft concerns. An ICE agent seeking such information must obtain a subpoena.

3. ICE Agents and School Employees

Q: ***If an ICE agent requests to speak with a school employee, should the district grant the request?***

A: **It depends.** As noted above, federal law allows an enforcement officer to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[13] Therefore, if an ICE agent requests to interview a school employee, the district's response will depend on *why* the employee will be interviewed. If the ICE agent believes that the employee may not be in the United States lawfully, then the district should not interfere with the investigation. However, if the ICE agent seeks to interview a school employee to acquire information about other individuals who may not be lawfully present in the United States, then the district should consider requiring that the district's legal counsel be present in the interview, due to concerns with student confidentiality and employee privacy matters.

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[11] Neb. Rev. Stat. § 79-8,109.
[12] Neb. Rev. Stat. § 84-712.05(7).
[13] 8 U.S.C. § 1357(a)(1).

Q: ***If an ICE agent asks a school employee if any students are in the country illegally, should the school employee respond?***

A: **No.** In *Plyler v. Doe*, the United States Supreme Court has held that a school district cannot refuse to educate a student based on the student's immigration status.[14] NDE Rule 19 also prohibits as a pre-condition to enrollment proof that a student is lawfully present in the United States.[15] A federal district court has held that a state statute requiring schools to report the "illegal" status of any parent, guardian, enrollee or pupil conflicted with the *Plyler* decision and was, therefore, unconstitutional.[16] Thus, an employee's reporting of unlawfully present students could violate the holding of *Plyler*, NDE Rule 19 and potentially FERPA.

Q: ***If an ICE agent asks a school employee if any other employees or members of the community are in the country illegally, should the school employee respond?***

A: **This is a district decision.** If the employee is speaking as a school employee, the district can determine what employees should and should not say. The district also has the discretion to decide whether to allow such an interview to occur on school property or during school hours.

4. **ICE Agents and Students**

Q: ***If an ICE agent requests to speak with a student, what should the district do?***

A: **This will depend on board policy and district practice.** An ICE agent has the authority under federal law to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[17] Thus, an ICE agent has the right to interview a student who is suspected to be unlawfully present in the United States. If an ICE agent makes such a request, the district should refer to board policy on law enforcement officials interviewing students, including whether to inform the student's parents of such an interview.

If the ICE agent represents that the investigation is not focused on whether the student is in the country illegally, then the district should follow the same practice as if a local police officer requests to interview students about potential criminal activity.

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[14] *Plyler v. Doe*, 457 U.S. 202 (1982).
[15] NDE Rule 19.003.02E.
[16] *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995).
[17] 8 U.S.C. § 1357(a)(1).

Q: If an ICE agent requests to interview a student at a different location (other than school property), what should the district do?

A: **Inform the student's parent, guardian or responsible relative, unless child abuse is suspected.** Neb. Rev. Stat. § 79-294 governs what school officials must do when a student is removed from school premises.[18] Under the statute, when a school official releases a minor student to a law enforcement official for the purpose of removing the minor from the school premises, the school official must take immediate steps to notify the parent, guardian, or responsible relative of the student of (1) the fact that the student was released to the law enforcement officer; and (2) the location of where the student is being taken. Your board policy should include a form for law enforcement officials to complete to satisfy this requirement.

Notwithstanding the foregoing, if a law enforcement officer removes a student to interview the student about suspected child abuse, then the school official shall provide the law enforcement official with the address and telephone number of the student's parent or guardian. The law enforcement office then has the duty to inform the student's parents of the student's whereabouts. It is unlikely, though possible, that an ICE agent would be involved in a child abuse investigation.

5. Media Inquiries

Q: What should a school employee do if a member of the media requests an interview with an employee or student (about immigration or any other subject)?

A: Each district should develop internal protocols addressing the handling of media inquiries. A teacher interviewed in their capacity as a teacher does not have a right to speak to the media. As such, all media inquiries to school personnel should be referred to the district's superintendent or other designated administrator. Any school personnel that receives permission to give an interview as a school employee should be reminded of student confidentiality laws. Districts should also have protocols in place to ensure that student interviews are only allowed after parental consent has been given.

[18] It should be noted that Neb. Rev. Stat. § 79-294 refers to a "peace officer" as defined in Neb. Rev. Stat. § 49-801. The term "peace officer" in § 49-801 includes "sheriffs, coroners, jailers, marshals, police officers, state highway patrol officers, members of the National Guard on active service by direction of the Governor during periods of emergency, and all other persons with similar authority to make arrests." (emphasis supplied). Therefore, since ICE agents have statutory authorization to make arrests, ICE agents would fit within the definition of a "peace officer" under § 49-801.

Rex Schultze

From: Justin Knight
Sent: Wednesday, February 22, 2017 10:07 AM
To: Rex Schultze; Greg Perry; James B. Gessford; Josh Schauer
Subject: Federal Law Update #16 (2/22/17)
Attachments: Fry v Napoleon.pdf

All:

This morning, the United States Supreme Court released its opinion in *Fry v. Napoleon Community Schools* (attached). The *Fry* case arose from a dispute between a school district and a kindergarten-age special needs students. The student's parents wanted the student to be allowed to bring a trained service animal into the classroom to help the student. The district refused, noting that the student's IEP provided the student with a school aide to provide one-to-one support for the student. Thus, the school reasoned, the service animal would be "superfluous" for the student.

The student's parents filed suit, alleging that the district violated the student's rights under the ADA and Section 504. The parent's ADA/504 argument focused on the denial of accommodating the student's disability by refusing to allow the support animal into the public school building. The parent's argument reasoned that, since a public library or theater could now lawfully prevent a service animal from entering a public building, the district could not prevent the service animal, either. It is important to note that the face of the parent's lawsuit only alleged that the district did not accommodate the student's disability under the ADA/504--the parents did not contend that the student was denied a Free Appropriate Public Education ("FAPE"). The Office of Civil Rights agreed with the parents, noting that the district's decision to refuse to allow the service animal was akin to "requir[ing] a student who uses a wheelchair to be carried" by an aide or "requir[ing] a blind student to be led [around by a] teacher" instead of permitting him to use a guide dog or cane."

The parties continued litigating this issue in federal court. In federal court, the key issue became whether the parents were required to follow the IDEA's administrative procedures before filing suit. The district argued that the parent's arguments under the ADA/504 *overlapped with* the denial of a FAPE. In other words, the district argued that: even though the parents did not explicitly reference a denial of a FAPE, the parent's arguments *related to* the student's denial of a FAPE. (If the denial of a FAPE was involved, then the parents were required to follow the IDEA resolution process.) The parents disagreed, arguing that they had not gone through the IDEA's hearing process because the issue of accommodating the service animal was *separate from and unrelated to t*he FAPE issue and that the IDEA administrative process only applies to the denial of a FAPE.

In today's decision, the Supreme Court sent the case back down to the lower court to determine (1) whether the parents previously pursued any remedy through the IDEA process and (2) whether the claims did, in fact, overlap with an argument that the student was denied a FAPE.

Although the Supreme Court's holding may seem procedural and inconclusive, the court's opinion is noteworthy for two reasons. First, the Supreme Court clearly signaled that it remains committed to the requirement that a parent must follow the IDEA exhaustion procedures if there is even a hint of an allegation that the student has not received a FAPE. Put simply, even an indirect challenge to a student's FAPE requires the IDEA's administrative process to be followed. (This is good for school districts because it likely decreases the number of permissible lawsuits against the districts.) Second, the Supreme Court also made clear that, if a parent does not actually contend that their student was denied a FAPE, then the parent's suit may proceed without an IDEA

administrative proceeding. (This could be more challenging to districts faced with similar accommodation issues).

Districts with service animal issues and/or related matters should consult with their legal counsel for individual assessments under the *Fry* case.

Please do not hesitate to contact us with any questions or concerns.

Sincerely,

Justin Knight

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Rex Schultze

From: Justin Knight
Sent: Wednesday, February 22, 2017 6:38 PM
To: Rex Schultze; Greg Perry; James B. Gessford; Josh Schauer
Subject: Federal Law Update #17 (02/22/17)
Attachments: DeVos Statement.pdf; Dear Colleague - 02.22.17.pdf

All:

Transgender Guidance Update: This evening, the U.S. Departments of Education and Justice jointly announced that they have withdrawn and rescinded guidance issued under the Obama Administration relating to accommodations for transgender students in certain situations, including bathroom use. The new guidance is attached. The Obama-era guidance generally required that districts allow transgender students to use the bathroom of the gender with which they identify.

Under the guidance issued today, the agencies noted that "in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy." Secretary DeVos issued an announcement on the new guidance (attached).

The takeaway of this development for Nebraska school districts is that districts should continue to work with students on a case-by-case basis to evaluate and find beneficial solutions for each transgender student, as well as other appropriate stakeholders. Arguably, the new guidance provides districts with more flexibility in finding a successful accommodation for each transgender student and other individuals in the school building. However, the courts have not yet definitively resolved legal challenges to transgender policies under Title VII. As a result, districts looking to implement changes as a result of this new guidance should consult with legal counsel.

It is also likely that this new development will affect the United States Supreme Court's approach to the pending case of *G.G. v. Gloucester County School Board.* The *Gloucester* case focused on challenging the Obama Administration's guidance. Since that guidance has been rescinded, the Supreme Court may render the issues moot. Oral arguments in the case are set for March 28, 2017, giving the Court about one month to decide how it will proceed.

Correction: In the Update sent this morning (Update #16), there is a typo in the third sentence of the second paragraph ("now" should be "not"). This sentence should read: "The parent's argument reasoned that, since a public library or theater could not lawfully prevent a service animal from entering a public building, the district could not prevent the service animal, either." Sorry for any confusion.

Please do not hesitate to contact us with any questions or concerns.

Sincerely,

Justin Knight

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter
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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and

- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination "on the basis of sex" in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term "sex" in the regulations is ambiguous and deferred to what the court characterized as the "novel" interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
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U.S. Department of Education

U.S. Secretary of Education DeVos Issues Statement on New Title IX Guidance

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U.S. DEPARTMENT OF EDUCATION

FOR IMMEDIATE RELEASE:
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U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance

We have a responsibility to protect every student in America and ensure that they have the freedom to learn and thrive in a safe and trusted environment. This is not merely a federal mandate, but a moral obligation no individual, school, district or state can abdicate. At my direction, the Department's Office for Civil Rights remains committed to investigating all claims of discrimination, bullying and harassment against those who are most vulnerable in our schools.

The guidance issued by the previous administration has given rise to several legal questions. As a result, a federal court in August 2016 issued a nationwide injunction barring the Department from enforcing a portion of its application. Since that time, the Department has not enforced that part of the guidance, thus there is no immediate impact to students by rescinding this guidance.

This is an issue best solved at the state and local level. Schools, communities, and families can find – and in many cases have found – solutions that protect all students.

I have dedicated my career to advocating for and fighting on behalf of students, and as Secretary of Education, I consider protecting all students, including LGBTQ students, not only a key priority for the Department, but for every school in America.

We owe all students a commitment to ensure they have access to a learning environment that is free of discrimination, bullying and harassment.

The new guidance can be found here.

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PERRY LAW FIRM FEDERAL UPDATE - #18
DATE: FEBRUARY 24, 2017

A. U.S. Supreme Court Requests Clarification in Transgender Case

Last night, in light of the federal government withdrawing its transgender guidance (addressed in Update #17), the United States Supreme Court requested that the parties in *G.G. v. Gloucester County School Board* clarify how the federal government's recent action affects the pending case. Indeed, the Clerk of the Supreme Court entered the following on the case's docket:

Feb 23 2017 Request from the Clerk that the parties submit their views on how this case should proceed in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017. The parties' views should be in the form of letters delivered to the Court and served upon counsel by 2:00 p.m. on Wednesday, March 1, 2017

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PERRY LAW FIRM FEDERAL UPDATE - #19
DATE: MARCH 1, 2017

A. ESSA Regulation Repeal Introduced in U.S. Senate

Senator Lamar Alexander, the Chairman of the Senate Committee on Health, Education, Labor and Pensions, introduced Senate Joint Resolution 25 in an effort to repeal the Every Student Succeeds Act ("ESSA") State Plan and Accountability regulations. The Congressional Review Act allows for the repeal of certain regulations if both the President and Congress pass a resolution in favor of repeal. As you may recall, the U.S. House of Representatives already passed a resolution. President Trump has promised to sign off on the repeal effort. If the repeal is approved, the U.S. Department of Education would then be required to draft new regulations.

The practical effect of the repeal will result in a significant delay in the implementation of the ESSA. As way of background, the ESSA (spanning over 1,000 pages) was signed into law on December 10, 2015. Five months later, on May 31, 2016, the Department of Education released its 83-page Proposed Rule on Accountability and State Plans. During the subsequent two-month comment period (from May 31, 2016 to August 1, 2016), the Department received 21,070 comments on the Proposed Rule. Nearly four months after the close of the comment period, the Department published the Final Rule on November 29, 2016. The Final Rule included an additional 90 pages of regulatory guidance. In addition, several aspects of the Proposed Rule were significantly revised after the Department received comments.

As you can see, in the event that these regulations are repealed, the timeline for issuing a new Proposed Rule, receiving comments and finalizing a new Final Rule could span six months to a year, at a minimum. Given that we are already in the month of March, 2017, it is highly unlikely that the ESSA will be fully implemented during the 2017-2018 school year (as the law was intended). Therefore, assuming that the regulations are repealed, then NDE and Nebraska districts will find themselves in another year (or two) of uncertainty.

B. Executive Order Targets Regulations (Again)

Speaking of repealing regulations, President Trump recently signed an Executive Order (attached) instructing each agency to establish a Regulatory Reform Task Force to "evaluate existing regulations . . . and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law." Further, the Task Forces are to identify regulations that "eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits . . ."

The elimination, revision or replacement of federal regulations in certain areas of the law could significantly affect Nebraska public school districts. We will continue to monitor changes in federal regulations.

C. NDE Delays ESSA Implementation Timeline

The Nebraska Department of Education planned to present the first draft of its ESSA State Plan to the State Board of Education during the Board's March 3, 2017, meeting. However, we spoke with NDE staff today who informed us that NDE's internal timeline has been delayed as a result of the federal government revising the ESSA State Plan template. Thus, the Board will not review a draft of the ESSA State Plan on Friday. NDE will wait until the federal government distributes the revised template before adjusting its internal timeline.

Nonetheless, NDE still plans on holding "Stakeholder Listening" sessions across the state this month. A list of the sessions can be found here: https://www.education.ne.gov/ESSA/index.html

D. Parties in Transgender Case Ask Supreme Court to Continue with The Case

On February 22, 2017, the United States' Departments of Education and Justice jointly rescinded the Obama Administration's transgender guidance relating to bathroom accommodations. The following day, the United States Supreme Court asked both parties in the *G.G. v. Gloucester County School Board* case to address how the rescission of the transgender guidance affects the pending case. The Supreme Court gave both parties until 2:00 p.m. today (March 1, 2017) to inform the Court of how they would like to Court to proceed.

Today, both parties filed their written arguments (attached) with the Supreme Court. There had been speculation that the school board would ask the Court to dismiss the case, given that the repeal of the transgender guidance largely resolved the issue for the school district. However, in today's filings, both parties requested that the Supreme Court continue with the case and address other remaining issues. Of note, the student (G.G.) asked the Court to proceed with the case to clarify how Title IX applies to transgender students in schools.

Given that oral arguments in the case are currently scheduled for March 28, 2017, the Court is expected in the next few weeks to decide how to proceed. There is a strong possibility that the Court will drop the case from its docket, given that the primary issues in the case were focused on the (now repealed) transgender guidance. However, the Supreme Court could keep the case. If the Court continues with the case, the Court will, in all likelihood, delay oral arguments and ask the parties and federal government for additional briefing on the remaining issues. As a result, if the Supreme Court keeps the case, it will probably be May or June before an opinion is released.

E. 5th Circuit Allows Federal Government More Time to Consider FLSA Changes

As noted in prior Updates, the Trump Administration has been considering how to address the Obama Administration's changes to the Fair Labor Standards Act's regulations, including the increase in the minimum weekly salary threshold. A federal court in Texas blocked the changes from going into effect. The government then appealed that decision. Recently, the federal government (citing changes in the new Administration) requested, and the 5th Circuit Court of Appeals granted, another delay for the federal government to file a brief in the pending case. The federal government now has until May 1, 2017, to file its brief. If the Trump Administration repeals or modifies the changes to the FLSA regulations, then the case will likely be dismissed since the issue will be resolved.

F. Presidential Address and National School Choice Legislation

Last night, President Trump addressed a joint session of Congress. During his speech, President Trump asked that national "school choice" legislation be introduced in the coming months:

> Education is the civil rights issue of our time. I am calling upon Members of both parties to pass an education bill that funds school choice for disadvantaged youth, including millions of African-American and Latino children. These families should be free to choose the public, private, charter, magnet, religious or home school that is right for them.

It is too early to speculate on what such a bill would look like, how it would interact with other federal laws or how such legislation would affect Nebraska public school districts. Nonetheless, we will continue to monitor for such legislation.

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PERRY LAW FIRM FEDERAL UPDATE - #20
DATE: MARCH 10, 2017

A. How the American Health Care Act Would Affect Nebraska Public Schools

Earlier this week, the Speaker of the House released his plan to "repeal and replace" the Affordable Care Act. A copy of this proposed legislation (called the "American Health Care Act") is attached. Given that the legislative process will probably change the bill (as currently drafted), we do not devote a significant discussion to the content of the bill. However, after reviewing the bill, the following points are worth noting for Nebraska public school districts:

- Employer Penalties. The bill eliminates all "pay or play" penalties that currently exist under the Affordable Care Act. Although the bill does not explicitly repeal the requirement that employers offer coverage to all employees who average 30 hours per week, this clarification would be addressed in an amendment or through regulations. (In any event, since employers would not face any penalties under the bill, there would be no enforcement mechanism to require offers of coverage to employees averaging 30 hour per week). Further, the penalty provision would be retroactive to 2016, so no employer would face any penalties for the 2016 calendar year.

- Medicaid Cutbacks. The bill would result in cuts to various Medicaid programs. Under the bill, Medicaid funds would "shift" to different sources. The bill does not make clear how much Medicaid funds would be reduced or where these funds would be diverted. This clarification will likely occur through amendments or regulatory guidance. Many school districts receive significant money from Medicaid. It is difficult to see how the bill's approach to Medicaid would result in anything but reduced Medicaid funds to school districts.

- End of Reporting. The bill does not specifically eliminate an employer's reporting obligations, such as Forms 1094-C and 1095-C. However, the employer-related provisions of the bill would effectively eliminate the need for any employer reporting requirements.

B. Transgender Supreme Court Case Continues in Lower Court

The United States Supreme Court has decided that it will not address the pending transgender case of *G.G. v. Gloucester County School Board*. After the federal government rescinded the Obama-era transgender guidance, many of the issues in the case no longer applied. After the Supreme Court decided against continuing with the case, the court sent the case back down to the lower courts.

Days after the Supreme Court dismissed the case from its docket, the student asked the U.S. Court of Appeals in the Fourth Circuit to enter an emergency order to allow the transgender student (G.G.) to use the bathroom of his choice until he graduates from high school. That motion is attached. At this point, it seems likely that this case (and other similar cases) will continue to be litigated in the courts until the Supreme Court definitively resolves the issue.

C. Senate Votes to Repeal ESSA Regulations

This week, the U.S. Senate voted to repeal two Obama-era Every Student Succeeds Act ("ESSA") regulations: (1) state plan and accountability rules and (2) teacher preparation rules. President Trump is expected to sign off on the repeal of both regulations, which will result in the complete repeal of both regulations. As outlined in prior Updates, the repeal of these regulations will likely delay the implementation of the new ESSA rules across the country, including Nebraska.

It is worth noting that the ESSA is only authorized through the end of the 2020 fiscal year. As a result, it is possible that the ESSA regulations may not be implemented for a full school year before Congress must decide whether to re-authorize the ESSA.

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PERRY LAW FIRM FEDERAL UPDATE - #21
DATE: MARCH 16, 2017

A. U.S. Department of Education Releases New ESSA State Plan Application

Despite the Congressional repeal of the regulations under the Every Student Succeeds Act ("ESSA") (covered in prior Updates), this week, the United States Department of Education released an abbreviated application (attached) for States to complete to develop their ESSA accountability plans.

This application was released prior to the ESSA's deadline of April 3, 2017 for certain states to submit their ESSA State Plan. (Nebraska chose to delay its submission until September 18, 2017). On the face of the new application, the only major difference is the role of stakeholders. The Obama-era language included the following:

> Each [State] must engage in timely and meaningful consultation with stakeholders in developing its consolidated State plan . . . The stakeholders must include the following individuals and entities and reflect the geographic diversity of the State:
>
> - *The Governor or appropriate officials from the Governor's office;*
> - *Members of the State legislature;*
> - *Members of the State board of education, if applicable;*
> - *LEAs, including LEAs in rural areas;*
> - *Representatives of Indian tribes located in the State;*
> - *Teachers, principals, other school leaders, paraprofessionals, specialized instructional support personnel, and organizations representing such individuals;*
> - *Charter school leaders, if applicable;*
> - *Parents and families;*
> - *Community-based organizations;*
> - *Civil rights organizations, including those representing students with disabilities, English learners, and other historically underserved students;*
> - *Institutions of higher education (IHEs);*
> - *Employers;*
> - *Representatives of private school students;*
> - *Early childhood educators and leaders; and*
> - *The public.*

On the other hand, the revised application contains the following:

> In its consolidated state plan, each [State] may, but is not required to, include supplemental information such as its overall vision for improving outcomes for all students and its efforts to consult with and engage stakeholders when developing its consolidated state plan.

As such, the new accountability template allows, but does not require, stakeholder engagement. Although this change has been viewed as controversial in parts of the country, it is worth noting that the Nebraska Department of Education has been holding "Listening to our Stakeholders" Sessions across the State of Nebraska. As we understand, NDE will continue to hold these sessions, as previously planned.

Overall, since NDE has until September 18, 2017, to submit its ESSA State Plan, this change likely will not affect Nebraska public schools. However, once NDE releases its ESSA State Plan, Nebraska schools should take note of any changes that NDE will undertake to comply with the ESSA.

B. <u>Is Coaching "Teaching" Under the Fair Labor Standards Act?</u>

Under the Fair Labor Standards Act ("FLSA"), employers are generally required to pay employees at least the federal minimum wage (currently $7.25 per hour) and overtime for any hours beyond 40 hours worked in a week. However, the FLSA provides an exception for certain employees, including those with the primary duty of teaching.[1] Indeed, the FLSA does not require that teachers be paid the federal minimum wage or overtime. On the other hand, most classified staff are subject to the FLSA's minimum wage and overtime provisions. One issue that has concerned schools for years has been whether community coaches (community members employed by a district solely for the purpose of coaching) are more like teachers or classified staff members.

In 2009, under President Bush, the Department of Labor's Wage and Hour Division ("WHD") issued an advisory opinion that, in essence, held that "coaching is teaching." Under this approach, a community member who coaches would not need to be paid the federal minimum wage or overtime. However, shortly after President Obama took office, the WHD withdrew this opinion. As a result, schools have been in a state of uncertainty since 2009.

This week, we formally requested that the WHD clarify its position on whether coaching is "teaching" under the FLSA. Based on our informal conversations with the WHD, we are cautiously optimistic that we will receive a response definitively resolving this issue. We will keep you updated on any formal response that we receive.

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[1] 29 C.F.R. 541.303.

C. Health Care Replacement Law Timeline Raises Uncertainty for Schools

Despite criticisms of the recently proposed American Health Care Act ("AHCA"), the Wall Street Journal reports that Congressional leaders still intend to enact a new health care law by the end of April, 2017.[2] Congressional leaders have evidently acknowledged that changes to the AHCA will likely be adopted in the near future.[3]

The replacement health care law could leave school districts in a state of flux during the 2017-2018 school year. Initially, one of the key provisions of the AHCA is the elimination of employer penalties. Many schools currently have negotiated agreements referencing the Affordable Care Act ("ACA") penalty provisions. In addition, schools subject to the ACA penalties have offered certain employees insurance that the district would not otherwise offer. Therefore, schools may be forced to plan—and plan quickly—for insurance offerings during the 2017-2018 school year.

Next, the AHCA eliminates the penalties for individuals not carrying health insurance. Without this penalty in place, it is possible that some district employees could decline to enroll in the district's coverage, especially in cash-in-lieu districts, without any alternate coverage.

Further, the AHCA would change the structure of health insurance marketplaces. In part, the AHCA would allocate the amount of tax credit subsidies differently than the ACA. Under the AHCA, young people would be eligible for more tax credit subsidies to reduce their net premiums. (This change is mostly in response to health insurance companies' criticisms that not enough young people are in the marketplace to offset the risks of insuring older people). If this proves to be true, then it is possible that a greater number of young district employees will decline insurance through the district (to obtain cheaper insurance through the marketplace), especially in cash-in-lieu districts.

If some (or all) of these changes take place, then it is likely that the cost of health insurance will change. However, at this point, based on our understanding, Blue Cross Blue Shield will not change any rates or coverage options during the 2017-2018 school year. With that being said, districts that plan to negotiate beginning in the fall of 2017 should plan to incorporate any such changes.

D. President's Executive Order and Budget Proposal Cuts Education Funding, Programs

President Trump's latest Executive Order (attached) requires that every federal agency submit a plan to "reorganize" each department "in order to improve the efficiency, effectiveness, and accountability of" each federal agency. As part of the plan, every agency must consider, among other things, "whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector." It has been reported that Betsy DeVos, the Secretary of the Department of Education, has

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[2] Peterson, et al, "GOP Plan Hits Snag with Own Senators," The Wall Street Journal, (March 15, 2017).
[3] *Id.*

already started reviewing programs within the Department of Education to determine whether any programs should be eliminated or reduced.

Additionally, this week, the White House released its proposed 2018 budget. The proposed budget would reduce funding to the U.S. Department of Education by $9 billion. Although the specifics of the budget have not yet been released, the following takeaways of the summarized budget may be relevant to Nebraska public schools:

- School Choice: The budget would increase "investments in public and private school choice programs" by $1.4 billion, including an additional $168 million in charter school funding, $250 million for a new private school choice program and $1 billion for additional Title I funding for the purpose of "encouraging districts to adopt a system of student-based budgeting and open enrollment that enables Federal, State, and local funding to follow the student to the public school of his or her choice."

- IDEA: The budget would maintain the current level of funding for IDEA programs (currently at $13 billion per year).

- Grant Programs: The budget eliminates various federal grant programs, including the 21st Century Community Learning Centers program.

- OCR: The budget does not reduce funding for the Office of Civil Rights. Some have wondered whether the OCR would lose funding under the Trump Administration.

The summary of the budget is attached.

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PERRY LAW FIRM FEDERAL UPDATE - #22
DATE: MARCH 22, ,2017

A. United States Supreme Court Releases *Endrew F.* Decision

Does the Individuals with Disabilities Education Act ("IDEA") require that a student receive some educational benefit or that a student receive some educational benefit? This issue was before the United States Supreme Court in the *Endrew F.* case.[1]

The case centered on Endrew, a student from Colorado with autism. When Endrew reached the fourth grade, his parents were dissatisfied with the school's special education services. Endrew's behavior was a consistent problem in school: "Endrew would scream in class, climb over furniture and other students, and occasionally run away from school." By the fourth grade, Endrew's parents believed that his academic and functional progress had stalled and that his IEP was not effectively improving his performance. As a result, when Endrew reached the fifth grade, his parents asked for a "thorough overhaul" of the district's approach to Endrew's behavioral problems. The district declined to change its overall approach, so Endrew's parents enrolled him at a private school that specialized in educating children with autism.

Endrew made good progress at the private school. Around six months after Endrew enrolled in the private school, Endrew's parents met with the public school district to determine if Endrew could be placed back in public school. An agreement could not be reached and Endrew's parents filed for reimbursement of the private school's tuition. To qualify for a tuition reimbursement, the parents were required to show that the public school deprived Endrew of a free and appropriate public education ("FAPE").

The lawsuit made its way through the various federal levels. The courts struggled with the issue of whether the district provided Endrew with a FAPE when his IEP objectives were "sufficient to show a pattern of, at the least, minimal progress." The Tenth Circuit Court of Appeals sided with the school district, noting that a student receives a FAPE if the IEP is calculated to confer "*some* educational benefit."[2] Endrew F's parents disagreed with this standard and asked the United States Supreme Court to determine that the IDEA requires an educational benefit that is "more than *de minimis*."

[1] *ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., v. DOUGLAS COUNTY SCHOOL DISTRICT RE–1*, No. 15-827.

[2] Emphasis in original.

Thus, the Supreme Court had to decide what standard to apply in determining whether a FAPE has been provided.

The Court rejected the "de minimis" test. The Court also rejected the parent's test that a FAPE be "opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities."

Ultimately, the Supreme Court held that a FAPE "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." That the focus is on a "reasonable" test is illustrated by the Court's statement that "the question is whether the IEP is *reasonable*, not whether the court regards it as ideal."

This case could have a significant effect on special education services being provided across the country, including in Nebraska.

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PERRY LAW FIRM FEDERAL UPDATE - #23
DATE: MARCH 28, 2017

A. Health Care Law Faces Uncertain Future

Last week, the United States House of Representatives scheduled several votes on the American Health Care Act ("AHCA"). As a reminder, the AHCA would have repealed and replaced parts of the Affordable Care Act ("ACA"). Ultimately, last Friday, the Speaker of the House cancelled a vote on the AHCA, reasoning that the AHCA did not have a sufficient number of votes to pass. Over the past few days, reports have suggested that Congressional leaders were working to craft a revised bill that would have garnered enough support to pass, but those talks appear unsuccessful. As a result, the ACA remains the law of the land, at least for now. With the ACHA (at least for now) in the rearview mirror, districts may wonder: *what is next?*

At the outset, on his first day in office, President Trump signed an Executive Order instructing federal agencies to ease the burden of the ACA. Thus, even though Congress has not repealed the ACA, it is still possible that federal agencies could effectively nullify the law. For one, the IRS could decline to prosecute penalties against any individuals or employers under the law. In addition, the Department of Health and Human Services could relax certain marketplace restrictions to allow more flexibility to insurers. In short, the federal agencies could still work to restructure the effect and enforcement of the ACA.

Congress's next big task appears to be tackling tax reform. Yet, it seems difficult to draft comprehensive tax reform without addressing at least some health care issues, such as tax credits and deductions. Therefore, it does not appear that changes in health care law is actually as "dead" as some may lead you to believe. (As an aside, if Congress does enact comprehensive tax reform, Nebraska school districts will need to take note to adjust any payroll, employee benefits, and other compensation arrangements.)

Finally, it is no secret that the insurance industry does not like uncertainty in the law. The uncertainty over the health law is amplified by the timing of the recent inaction and potential future action. Specifically, within the next month, most health insurers must decide whether they will offer insurance in the Marketplaces next year. In addition, over the next few months, state regulators begin requiring health insurers to submit proposed rate increases. Without any further guidance, it seems likely that insurance companies will offset this uncertainty with an increase in rates, including an increase in rates for group plans.

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A. New Internet Rules Raise Legal Issues for Schools

President Trump recently signed H.J. Res. 34 into law, a measure under the Congressional Review Act that rescinded several internet privacy rules. In short, the Obama-era rules prohibited internet service providers (the companies that provide access to the internet, such as Time Warner, Windsteram, etc.) from sharing and selling customer information (such as web browsing histories) with other companies. The Trump Administration believes each internet service provider should be allowed to determine what customer information can be shared with third parties, rather than a blanket prohibition.

The rollback of these privacy rules has provided plenty of talking points for different groups. Some groups argue that the elimination of the privacy rules will "level the playing field" for online marketers and advertisers. (Web sites like Google already have the ability to sell customer information to third parties for marketing purposes. Now, internet providers will have the same abilities as these web sites.) Other privacy-oriented groups contend that online privacy should preempt financial gain. Regardless of one's personal feelings on this matter, one overlooked issue in this debate could be the effect on schools.

As a reminder, the Family Educational Rights and Privacy Act ("FERPA") prohibits the disclosure of specified student information. With internet service providers now potentially having access to student information, it is possible that a district could violate FERPA by allowing its internet service provider to share such internet activity with third parties.

It is also worth noting that, under the Children's Online Privacy Protection Act ("COPPA"), operators of websites or online services cannot collect information about children under the age of 13. COPPA incorporates certain responsibilities on schools to facilitate its requirements. Most websites include COPPA disclosures. But it is not clear if internet service providers will follow suit. Thus, it is possible for a district to unknowingly violate COPPA via its internet service provider sharing student information.

At this point, schools should consider reviewing their internet service provider contracts to determine if their contracts includes a provision on sharing information with third parties. If no such provision exists, schools may consider talking with their internet service provider representative to include such a provision to avoid violating any educational privacy laws.