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POSITION STATEMENT

IMPLEMENTATION OF ACT 833 OF THE 2014 LOUISIANA LEGISLATURE

Following numerous inquiries and requests from our clients, and after careful consideration, Hammonds, Sills, Adkins and Guice (HSAS) issues the following position statement regarding implementation of Act 833 of the 2014 Louisiana Legislature, pending promulgation of implementing regulations by the Louisiana Board of Elementary and Secondary Education (BESE) and issuance of supplemental guidance by the Louisiana Department of Education (LDE).

EFFECTIVE DATE

The Louisiana Constitution provides that, unless an act of the Louisiana Legislature specifically states otherwise, an act shall take effect on August 1 of the calendar year in which the regular session is held.¹ Act 833 was passed during the 2014 regular legislative session, and an effective date was not specified within the Act. Therefore, Louisiana constitutional provisions obligate school districts to implementation of Act 833 as of August 1, 2014.

IMPLEMENTATION CONSIDERATIONS

There are a number of factors, however, that make implementation of Act 833 problematic as of that date. In particular, Act 833 calls for BESE to create, by Rule, an approved procedure for its implementation. BESE's obligation to take appropriate steps to establish the required procedure (regulations) did not commence until the effective date of the Act, August 1, 2014, making implementation in accordance with such approved BESE Rule impossible until the regulations are formally promulgated.

¹ La. Const. Art. 3, §19.

It is our understanding that BESE approved some proposed Rule changes on August 13, 2014 which, in accordance with Title 28, Part 1, § 1303, will be advertised as a Notice of Intent (NOI) in the Louisiana Register, with final adoption as a Rule at the expiration of the required 90-day advertisement period, if no public comments are received relevant to NOI. If comments are received by BESE, the comments must be considered by BESE prior to final adoption as a Rule. The entire process takes a minimum of five (5) months to complete. This means that the statutorily-required BESE-approved Rule for implementation of Act 833 will not be available to IEP Teams until **AFTER** the 30-day time limitation set forth in the Act for determination of the minimum performance criteria for graduation or promotion and related considerations for eligible students with disabilities.

The absence of final BESE regulations implementing Act 833 also impairs the IEP Team's ability to provide parents or legal guardians with statutorily-required information related to how IEP Team-determined requirements may impact future educational and career options for affected students.

CAUTIONARY PRACTICES

Act 833 provides that a student's IEP Team "shall have the option of determining an alternative pathway to graduation for the student".² This provision makes the determination of an alternative pathway by the IEP Team **discretionary**. However, when an IEP Team determines that state-established benchmarks on the required state assessments are **not** a condition for promotion or graduation for a particular student, the Act requires that BESE-regulations guide the alternative pathway process.

HSAG urges an abundance of caution for those IEP Teams that choose to proceed in determining student performance requirements for promotion or graduation in the absence of final BESE regulations. While we understand that some of our clients are under a great deal of pressure from parents, advocacy groups, and others regarding immediate implementation of Act 833, we remain mindful that the ultimate authority for granting or denying a Louisiana diploma is BESE. It is our considered opinion that the potential for BESE denial of a diploma based on "unauthorized" IEP Team-determined performance standards outweighs any delay in implementation of the Act at this time.

We are also mindful of the July 2, 2014 letter to State Superintendent John White from Michael K. Yudin, Acting Assistant Secretary of the U.S. Office of Special Education and Rehabilitative Services (OSERS), and Deborah S. Delisle, Assistant Secretary of the U.S. Office of Elementary and Secondary Education, relative to Act 833.³ Specifically, the LDE was urged in that letter to take steps to ensure that Act 833 is implemented in a manner consistent with the Elementary and Secondary Education Act (ESEA), Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act—or risk violations of applicable federal laws and continued approval of Louisiana's current ESEA funding flexibility.

² La. R.S. 17:183.2(B)(1)(a).

³ *Letter to White* (OSERS July 2, 2014).

CONCLUSION

It is the position of HSAG that all students, including students with disabilities, should be allowed the opportunity to pursue a Louisiana high school diploma. It is our position, however, that IEP Teams must proceed with utmost caution if they exercise their option under Act 833 to determine an alternative pathway to graduation for a student with disabilities prior to promulgation of applicable BESE regulations. At the very least, we believe that parents or guardians should be advised in writing that promotion/graduation decisions made by the IEP Team prior to final adoption of Act 833 regulations could be in jeopardy and, in fact, rejected by BESE as inconsistent with statutorily-required BESE criteria (inclusive of the USDOE's warning regarding adherence to ESEA, Section 504, and Title II requirements). We would strongly urge IEP Teams to advise parents of the potential impact of such promotion/graduation decisions via prior written notice consistent with the content requirements of such notice under 34 C.F.R. § 300.503 and LDE Bulletin 1706, § 504.

If you have any questions regarding this position statement, or, if this office can be of assistance to you, please do not hesitate to contact us.