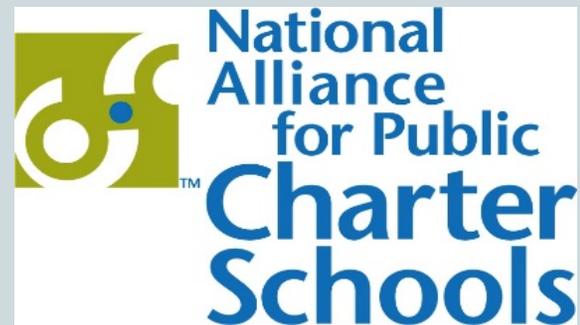


# Update on National Legal and Policy Landscape and the Potential Impact in Colorado



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# Session Objectives



## What May Matter Most to Colorado Charter Schools and Supporters?

- Federal Statutory and Regulatory Developments
  - Every Student Succeeds Act (ESSA)
  - Charter School Program, USED
  - Office of Civil Rights, USED
  - Office of Equal Educational Opportunity, US Dept of Justice
  - Internal Revenue Service
  - NLRB and US Department of Labor
- National Litigation Update
  - Washington State Supreme Court – What Happened, Where Next?
  - Pending State-Level Litigation – National Trends
- You Tell Me: What's On Your Mind?

# Federal Statutory Development - ESSA



- Every Student Succeeds Act – What Happens Now?
  - Big Picture
    - ✦ Title I
    - ✦ Assessments/Accountability
    - ✦ Teacher Certification
    - ✦ Serving and monitoring English Learners and special education students
  - Several Key CSP Provisions
    - ✦ More funding
    - ✦ Grants last up to 5 years, not 3
    - ✦ Entities other than SEA's may apply (governors, charter support organizations, state charter school boards)
    - ✦ State entities must provide more assurances than before (when apply for monies)
    - ✦ Enrollment/Lottery practices – weighted lotteries and feeder patterns
  - Implementation Timeline
    - ✦ Rulemaking underway
    - ✦ NAPCS is collecting feedback from the field
    - ✦ NAPCS recently requested immediate implementation of certain features
  - Current Grantees vs. Future Grantees

# Federal Regulatory Development - CSP



- **Weighted Lotteries - Colorado Leads Country**
  - Revised Non-Regulatory CSP Guidance Permitting Weighted Lotteries – January 2014
  - Colorado Department of Education Gets Approval
    - ✦ Sub-grantees can use weighted lotteries provided CDE approves
    - ✦ Criteria for approval established by CDE
  - Mechanics Can Be Tricky
    - ✦ League has assisted operators
  - Nationally: Significant Interest by Operators and Advocates
    - ✦ Several states have amended state statutes to expressly permit weighted lotteries for educationally disadvantaged or at-risk students
    - ✦ But...things may (should?) change...

# Federal Regulatory Development - CSP



- **Weighted Lotteries – post-ESSA**
  - Unclear how USED will approach its oversight
  - New statutory language permits CSP grantees to use weighted lotteries for educationally disadvantaged students to provide a slightly better chance of admission, *unless prohibited by state law*
  - Technically, this language does not anticipate/set up an oversight process by SEA's or USED; simply relies on state law
  - NAPCS Federal Team is monitoring these developments closely and is working with stakeholders to collect feedback for USED
    - ✦ Expect some guidance to be issued (revising the 2014 Non-Regulatory Guidance) but unclear when
  - In the meantime, existing grantees should adhere to the process/criteria already in place

# Federal Regulatory Developments - OCR



## Recent OCR Guidances – **THERE ARE A LOT!**

- Jan. 2014 – non-discriminatory student discipline
- April 2014 – sexual violence, sexual harassment, Title IX
- May 2014 – voluntary use of race/ethnicity to achieve diversity
- May 2014 – enroll all students regardless of immigration status
- May 2014 – applicability of federal civil rights laws to charter schools
- Oct. 2014 – equitable resources made available to all students
- Oct. 2014 – bullying of students receiving services under IDEA/Section 504
- Nov. 2014 – communication with hearing-, vision-, speech-disabled students
- Dec. 2014 – single-sex classrooms and extracurricular activities
- Jan. 2015 – meaningful participation for ELLs & communication with LEP parents
- March 2015 – protecting children from measles w/o discriminating by disability
- April 2015 – Title IX coordinator requirement

***Nearly 30 more to come in the next 2 years***

# Federal Regulatory Developments - OCR



- Hot button issues?
  - Enforcement still focuses primarily on:
    - ✦ Ensuring outreach and recruitment efforts are inclusionary
    - ✦ Serving students with disabilities
    - ✦ Serving English Learners
    - ✦ Ensuring non-discriminatory administration of disciplinary procedures
  - Increasing attention paid to:
    - ✦ Bullying/harassment: what is bullying, what is harassment, and how to respond
    - ✦ Social media behavior and other off-campus behavior: how evaluate whether school must take action
    - ✦ Transgender students & faculty: protecting their civil rights

# Federal Regulatory Developments - OCR



- **VERY active enforcement effort by OCR**
  - 10,000 complaints filed in each of the last two fiscal years
  - 200 new staff attorneys to be hired for 12 regional offices and 1 national office
  - Notable charter school specific complaints:
    - ✦ ACLU filed OCR complaint against State of Delaware alleging state charter statute violates federal civil rights laws (December 2014)
    - ✦ Centro de Comunidad y Justicia filed OCR complaint against State of Idaho, all charter schools and all board members also alleging state charter statute violates federal civil rights laws (May 2015)

# Federal Regulatory Developments - USDoJ



- **Education Technology Accessibility**
  - Expected Rulemaking
  - NAPCS Webinar, December 2015
- **Applicable Laws**
  - IDEA, ADA, Section 504 and Section 508 of the Rehabilitation Act
- **What Problems Can Arise**
  - Images do not have embedded coding that allows screen reader software to describe the images
  - PDF documents that cannot be read by screen readers
  - Audio that does not have closed captioning
  - Chat rooms not accessible to people with disabilities
  - Programs that can only be manipulated with a mouse and not a keyboard
  - Electronic forms not compatible with assistive technology
  - Third-party content is not accessible

# Federal Regulatory Developments - USDoJ



- What does my school need to do to ensure non-discrimination?
- Goal: Students with disabilities must receive communication as effective as communication with others through provision of auxiliary aids and services
  - Develop nondiscrimination policy
  - Consider needs of students and parents/guardians
  - Consider technology is available 24 hours/day
  - Review school's recruitment/application process and walk through a student's typical day
  - Review curriculum
  - Ensure procurement contracts require accessibility
  - Put together accessibility team with Section 504 Coordinator

# Federal Regulatory Developments - IRS



- IRS – January 2015 Guidance on Charter School Eligibility to Participate in State Pension Plans
  - Most significant change: amending dissolution documents
    - ✦ Which documents must be amended?
    - ✦ What must the amendment include?
  - Most uncertainty: non-charter-holding management organizations that act as the employer for school-level employees
  - Most urgent: permitting schools authorized by non-governmental authorizers to participate in state pension plans

# Federal Regulatory Developments - IRS



- IRS – Pension Participation Guidance, cont'd
  - Most technical:
    - ✦ Health and safety standards
    - ✦ Social Security/FICA contributions
    - ✦ Exiting pension plans upon charter school closure

# Federal Regulatory Developments - IRS



- Pension Participation – Big Picture
  - Pension participation costs are rising (skyrocketing!) in many places and charter school operators are looking for exit strategies
  - Many state pension systems argue “once in, never out”
  - Charter operators seeking to exit may face fees and penalties that could render exiting cost-prohibitive
  - Many school leaders around the country believe recruiting top talent may require offering access to state pension plans
  - **Legal/Policy inquiry: can the same charter entity offer both state pension plan benefits and a 403(b)?**

# Federal Regulatory Developments - IRS



- Recent Developments – as in, in the last week!
  - Two new proposed regulations on different parts of the Internal Revenue Code (neither related to the pension issue, and neither specific to charter school...but with potential impact)
  - CMO's seeking 501(c)(3) tax-exempt status
    - ✦ Services provided: educational organization or supporting organization?
    - ✦ Governance: who controls who?
  - Governmental bonds
    - ✦ Revisiting definition of “political subdivision” in this specific context
    - ✦ Charters may have more difficulty accessing these bonds, but most charters access tax-exempt bond issuances (not governmental)

# Federal Regulatory Developments - Labor



- NLRB – National Labor Relations Board
  - Regional boards are asserting jurisdiction around the country (because they conclude charter schools are not “political subdivisions” under federal labor law)
  - Policy implications
    - ✦ Treating charter operators like private employers
    - ✦ **Legal/Policy Inquiry:** NLRB rules are tightening; are charter schools really better off under NLRA? What are some unintended consequences of NLRA jurisdiction – for instance, on free speech of employees?
  - Big picture
    - ✦ Direct conflict with IRS determination that charters are eligible to participate in state pension plans
    - ✦ Some legal tension is permissible
    - ✦ Feeds critics who argue charter schools “want it both ways”

# Federal Regulatory Developments - Labor



- **Department of Labor – Overtime Regulations Rulemaking**
  - Proposes to raise “salary basis test” from \$455/week to \$970/week
  - Teacher exemption remains intact
  - Greatest potential impact on administrative and operational staff (e.g., non-instructional staff), many of whom would satisfy the “duties test” associated with Department of Labor’s white collar exemption
  - Approximately 104,000 public comments filed in September 2015 (including one from NAPCS)

# Federal Regulatory Developments - Renting/ Purchasing Religious Facilities



- Nationally, witnessing more active scrutiny of charter operators who rent or purchase facilities from religious institutions
- Recommendations
  - Understand relevant federal and state law
  - Draft lease and purchase agreements to account for and properly allocate the risk associated with renting/purchasing facilities from religious institutions
  - NAPCS publication “Separation of Church and School: Guidance for Public Charter Schools Using Religious Facilities” (released August 2015, webinar February 2016)

# National Litigation Update – Washington State



- **Washington State Supreme Court invalidated state charter school law**
  - Overturned state charter school statute, holding charter schools are not “common schools” under state constitution and relevant case law because they are governed by non-elected boards
  - Turned WA into a “local control” state (like Colorado)
  - Unique decision, relies heavily on state law
  - BUT, here’s the wrinkle – and potential cause for national concern:
    - ✦ In footnote 10, WA State Supreme Court expanded the possible scope and reach of the decision by suggesting the “general and uniform” clause in the state constitution requires uniformity of governance – e.g., any school not operated by the local school district would violate the state constitution
    - ✦ Upon reconsideration, the Court removed footnote 10, but the risk of similar challenges in other states remains

# National Litigation Update – Washington State



- Washington State: what's next in WA and what might this decision mean for the CO charter school community?
  - Washington State
    - ✦ The fight goes on – advocates are pursuing every path forward; new charter school legislation making its way through statehouse
    - ✦ Charters have remained open, just reconstituted as a different type of “autonomous” public school overseen by a small rural district (short-term fix)
  - Colorado
    - ✦ Charter statute already survived “local control” challenge
    - ✦ BUT, WA decision could be used to call into question authority of CSI

# National Litigation Update – Washington State



- Washington State: what might this mean for the national charter school community?
  - National Impact:
    - ✦ First state charter statute to be overturned in its entirety
    - ✦ FL and GA faced constitutional losses – but only invalidated state charter commission (and GA passed constitutional amendment thereafter)
    - ✦ After WA decision, some states will be more vulnerable to new attacks based on state-specific constitutional language, case law, past record of court activism and size/strength/performance of existing charter school community
      - NAPCS is conducting national research to evaluate risk and develop responses

# National Litigation Update – States at a Glance



## Funding Lawsuits

Arizona

California

Louisiana

Maryland (Baltimore)

New York

Texas

Washington DC

## Other Lawsuits

Florida & Illinois

- Challenge authority of non-district authorizers to approve charters on appeal

Massachusetts

- cap on number of charter schools

Minnesota

- charters exempt from district's voluntary desegregation plan?

Ohio

- property bought by management company

Pennsylvania

- authorizer imposed caps on number of students

Texas

- Public v. private status (whistleblower statute and authority to sue state)

# National Litigation Update – NAPCS Litigation Investment Fund



- Ideas for a potential lawsuit?
  - NAPCS has created a national litigation investment fund
  - If you have ideas for a potential lawsuit, reach out!
  - NAPCS will ask you to submit a proposal (and will provide a rubric to establish a framework for your proposal)
  - The proposal will be reviewed by NAPCS's National Litigation Council
  - If green-lighted, NAPCS will work with you to develop and file your lawsuit!

# More Questions? Reach Out...



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