

Vol. 19, No. 3  
Spring 1999

ILLINOIS STATE  
UNIVERSITY



*SCHOOL*  
*LAW*  
*QUARTERLY*<sup>TM</sup>

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Illinois State School Law Quarterly is

published every Fall, Winter, Spring and Summer by the Department of Educational Administration and Foundations and the College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

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## **THE LAW AND SOUND SUPERVISION: TWO SOURCES TO GUIDE TEACHER EVALUATION**

**by Ronald T. Hyman, and Ellen V. Whitford**

All schools have as their goal the provision of a high quality educational program for their students. One necessary requirement for achieving this goal is a staff of competent, preferably excellent, teachers<sup>1</sup> with primary responsibility for guiding students in learning. Supervisors<sup>2</sup> have responsibility to evaluate teachers and monitor the quality of programs and teaching. At its best, supervision benefits students, teachers, administrators, and the instructional program. Sound supervision of teachers can join the talents and resources of teachers and supervisors into a vehicle for long term educational change and improvement.

Beyond the educational benefits of supervision is the reality that the aspect of supervision related to teacher evaluation is a prescribed responsibility, a role often linked to critical decisions of employment, renewal of contracts, merit, salary, and tenure. When performed in a perfunctory manner, as a routine administrative function, supervision loses its potential as a catalyst for school improvement. More importantly, failure to comply with the tenets of sound supervision in evaluation can lead to prolonged, costly legal battles and force employment decisions that may detract from what is best for students and their needed educational programs.

Two main sources exist as re-

sources for supervisors to know how to evaluate and lead their teachers. These two sources are the laws and the concept of sound supervision as it has developed over the years and as it is advocated in the literature devoted to supervision. This article will deal with the location of the laws on supervision, recent developments in the law on supervision, the concept of sound supervision, and some implications for supervisors who desire to perform well, if not excellently. Examples from the law will come from New Jersey, Maryland, and Ohio, but the focus will be on the revised statutes of Ohio.

### Where the Law Is Located

For most school systems the law on supervision, often organized under the heading “teacher evaluation,” appears in five separate but related levels of the law — constitutional, statutory, regulatory, district policy, and contractual. Because the U.S. Constitution does not deal with education and, generally, education is the responsibility of the individual states rather than the federal government, the highest law dealing with the supervision of teachers can be found in each state’s own constitution provided that some pertinent reference is found there. Most likely the constitution will not directly deal with teacher evaluation, but it may give some suggestion or clue about doing so. For example, the law on supervision in New Jersey derives from the section of the state constitution that directs the Legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of

all children in the State between the ages of five and eighteen.”<sup>3</sup> In Maryland, the constitution directs the General Assembly to “...establish throughout the State a thorough and efficient System of Free Public Schools.”<sup>4</sup>

The next level involves the state legislatures. Again for example, in New Jersey the legislature, empowered and directed by the state constitution, has enacted statutes, among others, to establish school districts, mandate certain aspects of the curriculum, and direct boards of education to “observe and evaluate” each nontenured teacher at least three times each school year.<sup>5</sup> While the New Jersey legislature is silent on the supervision of tenured teachers, the Maryland legislature gives to each county superintendent the power and duties for the “professional improvement of teachers” which may include advising “teachers as to their further study and professional improvement”; development of “a program of in-service training for all public school personnel”; and requiring “attendance at an institution of higher education for future certification and professional improvement.” Further, the legislature assigns to the county superintendent and his professional assistants responsibility to “visit the schools; observe their management and instruction; consult with and advise principals and teachers; and try in every way to awaken public interest and improve education conditions in the county.”<sup>6</sup>

At the next level down from the legislature in terms of deference from the courts, state boards of education pass regulations to provide specifics for their respective legislatures’ calls for the supervision of

teachers. In New Jersey, the state board, in recognizing that the legislature has been silent on the supervision of tenured teachers, passed a regulation for the Administrative Code that does deal with the observing and evaluating of tenured teachers. That regulation calls for the annual observation and evaluation of tenured teachers.<sup>7</sup> The state board has also enacted other regulations that flesh out the legislature’s call for the supervision of nontenured teachers.

Maryland regulations define evaluation as “a written appraisal of professional performance for a school year based on written criteria and procedures.”<sup>8</sup> The general standards for evaluation specify that the evaluation be based on written criteria established by a local board of education, “including, but not limited to scholarship, instructional effectiveness, management skills, professional ethics, and interpersonal relationships.”<sup>9</sup> Further, the state board has set minimum requirements for standards of evaluation, frequency of evaluation, procedures for observation, and essential components of the written observation report.<sup>10</sup>

While the stated purposes of the New Jersey legislature’s and state board’s laws that govern supervision all focus on the improvement of the professional skills of the teachers, the specifics are different for tenured and nontenured teachers. Two key differences are the minimum times each teacher must be observed (three for nontenured and one for tenured) and the emphasis on correcting deficiencies found in nontenured teachers while promoting the professional excellence of tenured teachers. By comparison, Maryland’s administrative code does not make a distinction on the basis of

tenure status, but requires a different frequency of observations based upon the possession of a "Standard Professional Certificate" or an "Advanced Professional Certificate."<sup>11</sup> Obviously, supervisors need to be alert to and knowledgeable about the differences if they want to perform their jobs well and avoid complaints resulting from legal omissions and commissions.

Knowing the levels of statewide law and abiding by that law, however, are not enough. As stated in the statewide law of New Jersey and Ohio, for example, every local board of education must adopt a policy of its own to set forth procedures for supervising nontenured and tenured teachers in its district. In their policies, New Jersey school boards for example, may supplement the enacted state laws but not negate them. For example, a school board may raise the minimum number of times that the state requires for observing and evaluating teachers yearly. One northern New Jersey district policy provides for tenured teachers as follows: "Two (2) full period classroom observations, one each semester. Second evaluation to be completed before the Annual Evaluation."<sup>12</sup>

Knowing local school district policy and abiding by that policy are also not enough. Teachers in general are permitted by law to form a union or association and collectively bargain about procedural issues involved in the supervision. The resulting collective bargaining agreement (CBA), therefore, may further modify the state law and the local school board's policy in specific areas. The extent to which the CBA can modify the enacted law depends on each state's own laws. For example, in New Jer-

sey a local board of education is prohibited from bargaining away the managerial rights granted to it by the legislature.<sup>13</sup> In Ohio, as indicated later, a local CBA may supersede and replace state law.<sup>14</sup>

Three examples of a CBA modification concerning classroom observations are the following provisions that accept the state enacted minimum requirement and then add something to it. The first CBA adds, "Observations of a teacher's performance shall be made as often as necessary in order to provide the observer with an accurate and valid appraisal of the teacher's effectiveness."<sup>15</sup> The second CBA adds, "The formal written reports of observation of tenured teaching staff members shall not exceed three (3) per year unless additional observations are requested by the teacher. A fourth observation may take place if the teacher is informed at least one (1) day in advance of the administrator's intent to observe."<sup>16</sup> The third CBA adds that "the administrator shall allow the member reasonable time between observations to allow for improvement in the areas of performance deficiencies."<sup>17</sup> Supervisors need to be alert to such CBA provisions lest they fail to comply with a basic supervisory requirement.

The prudent supervisor will go one step beyond consulting the levels of statewide enacted laws, the local school district policy, and the CBA. Because the available written documents may not be current, the supervisor will consult the school district's attorney through the superintendent. From the attorney the supervisor can learn the most recent law established by decisions of judges, arbitrators, and state officials or agencies, such as the State Superintendent

(Commissioner) of Education, the State Board of Education, and the Public Employment Relations Commission that acts on disputes arising from CBAs.

The decisions made by judges, officials, and agencies deal with and interpret the enacted laws and the CBAs but are not readily accessible in local libraries or school district administrative offices. Nevertheless, these decisions do directly affect how supervisors must perform their jobs in a given district at a given point in time. For this reason supervisors would do well to obtain updates periodically on the enacted law, the contracted law, and the common law made by judges and other authorities.

In summary, there are several layers of enacted law and contracted law pertinent to the evaluation of teachers, beginning with the state constitution and going down to the state statutes, then to the state administrative regulations, then to the local school district policy, and finally to the collective bargaining agreement between the teachers union and the board of education. In addition, case decisions by judges and other authorities affect the daily duties of supervisors. At each layer, laws may vary by state and jurisdiction. As we shall see below when we look closely at teacher evaluation according to Ohio law, it is necessary to be aware of and refer to the diverse locations of the law bearing on the evaluation of teachers in order to decide what are the legal obligations of supervisors and their boards when they evaluate teachers.

#### Recent Developments in Ohio Law

The recent developments in Ohio related to teacher evaluation, as provided in

the amended statutes (Revised Code 3319.11 and Revised Code 3319.111) as well as in the subsequent court cases interpreting them, offer an excellent basis for looking at one state's attempt to broaden and strengthen its approach to supervision of public school teachers.

Prior to the revision of the statutes on teacher evaluation in 1989, Ohio law offered "minimal safeguards...to protect" nontenured teachers.<sup>18</sup> For example, under prior law a board of education (BOE), acting upon the recommendation of its superintendent, could simply give written notice to a teacher by April 30 that it was not renewing a teacher's contract if it decided not to reemploy a teacher for the next school year. The amended statutes now offer nontenured teachers protection in terms of the required due process procedures and the required help toward improvement due them.<sup>19</sup>

To give an overview of the two Ohio statutes a simplified plain-English synopsis of the statutes' essential provisions follows:

1. A board of education, if it decides not to reemploy a teacher working under a limited contract (i.e., a nontenured teacher), must comply with the evaluation procedures stipulated in division A of R.C. 3319.111 [see item #7 below] and must, before April 30, give written notice to the teacher of its intention not to offer reemployment. If the board does not comply with both of the above requirements, the teacher is deemed reemployed (R.C. 3319.11(B)(2)).

2. A teacher who receives a notice of non-reemployment may request in writing a statement describing the circumstances that led to the board of education's negative decision. ( R . C . 3319.11(G)(1))
3. A teacher who receives a timely notice of non-reemployment and a letter describing the circumstances leading to non-reemployment (within 10 days after BOE receipt of teacher's request) may then request in writing a hearing before the board of education.  
(R.C. 3319.11(G)(2) & (3))
4. A teacher's hearing before the board of education will take place in executive session, unless the BOE and the teacher agree to a public hearing. In either case, the hearing must take place before a majority of the full BOE membership and must be concluded within 40 days (R.C. 3319.11(G)(5)); within 10 days following the conclusion of the hearing, the BOE shall notify the teacher of its affirmance to deny reemployment or its intention to vacate the order not to reemploy (R.C. 3319.11(G)(6)).
5. If the BOE affirms its decision to deny reemployment, the teacher may appeal to the county's civil court, the court of common pleas (R.C. 3319.11(G)(7)).
6. The civil court shall deal only with procedural errors and has no jurisdiction to order the BOE to reemploy a teacher except that the court may do so when it determines that the BOE did not comply with the details of the supervision process under division A of R.C. 3319.111 [see item #7 below] or the BOE has not given timely notice of non-reemployment. [That is to say, the court deals with the procedural dimension of teacher evaluation, and the substantive determination of who is to be reemployed is solely a BOE determination.]  
(R.C. 3319.11(G)(7)).
7. Each nontenured teacher shall be evaluated at least twice a year. One evaluation must be completed by January 15 and another between February 10 and April 1 of the school year. (R.C. 3319.111(A)) The teacher shall receive a report of the first evaluation by January 25 and of the second evaluation by April 10.<sup>20</sup>
8. Each BOE must adopt procedures to be applied each time a teacher is evaluated. These procedures must include criteria of job performance (R.C. 3319.111(B) and (B)(1)).

9. For each evaluation the teacher must be observed at least twice for at least 30 minutes each time (R.C. 3319.111 (B)(2)).
10. For each evaluation the teacher must receive a written report with specific recommendations regarding needed improvements in the teacher's performance and regarding the means by which the teacher may obtain assistance in making those improvements (R.C. 3319.111 (B)(3)).

#### The Ohio Courts' Interpretations of the Teacher Evaluation Statutes

Almost immediately following the enactment of R. C. 3319.11 and 3319.111, nontenured teachers whose contracts were not renewed began filing suits to appeal the negative decisions of their respective boards of education. The first wave of cases reached the Ohio Supreme Court during the Fall term of the 1993-94 court session. The Court decided the first four cases on the same day, April 27, 1994, giving the results of the Court's "first opportunity to address legal issues arising under" the two amended statutes that took effect on July 1, 1989.<sup>21</sup>

In establishing a foundation for interpreting the statutes upon which the cases rested, the Ohio Supreme Court pointed to two judicial guidelines (i.e., standards or principles) for the Court based on its prior decisions. First, the Court noted that the statutes under consideration "are remedial statutes that must be liberally construed in favor of teachers."<sup>22</sup> Second, the Court

pointed out that in Ohio when a statute is "susceptible" to opposing interpretations that a court must read that statute "in the manner which effectuates, rather than frustrates, the major purpose of the General Assembly."<sup>23</sup> With the first guideline directly in favor of the teachers and the second indirectly in favor of the teacher in that the statutes set out to provide security for nontenured teachers pursuant to the intentions of the chief lobby for the statutes, the Ohio Education Association,<sup>24</sup> the die was cast from the start. The initial and subsequent decisions have generally been pro-teacher by the Ohio Supreme Court and its lower courts.

A brief summary of key decisions and statements of the courts along with some commentary follows:

The Ohio Supreme Court held that a teacher must receive actual notice of nonrenewal from the BOE in a timely manner and the BOE must show "evidence" of such in order to comply with the Revised Code. Constructive notice or a signed receipt of certified mail by someone else at the school is insufficient.<sup>25</sup>

The Court held that the specifics of the Revised Code (division B of R.C. 3319.111) "define" the required evaluation procedures given in division A of R.C. 3319.111). Therefore, failure of a BOE to comply with division B "constitute[d] a failure to comply with the requirements" of division A and allowed the court to order a BOE to reemploy a teacher pursuant to the Revised Code.<sup>26</sup> The BOE had failed to observe a teacher twice for each of the two required written evaluations.<sup>27</sup>

The Court, in a later case, decided

that when a BOE fails to comply “strictly” with the procedural requirements for teacher evaluation, the BOE may be ordered to re-employ the teacher. A BOE had not observed a teacher twice each semester for at least 30 minutes each time; it observed the teacher only twice the entire year and on one of these two times the observation lasted less than 30 minutes.<sup>28</sup>

The Court emphasized that pursuant to the Revised Code the scope of a court is limited to procedural matters only. A court may not conduct a “substantive review of the merits” of case under the Revised Code statutes on teacher evaluation.<sup>29</sup> Moreover, as a lower, appellate court pointed out explicitly, “the burden is on the board of education to ensure compliance with the evaluation procedures contained in the Revised Code.”<sup>30</sup>

The Court interpreted the provision in the Revised Code that requires a BOE to give a teacher, upon request, a written statement describing “the circumstances that led” to the BOE’s negative decision. The Court ruled that the statute’s requirement means that a BOE must “explain” why it did not renew the teacher’s contract. That is, the BOE must provide a nontenured teacher “a clear and substantive basis for its decision not to reemploy the teacher for the following school year.” The Court ruled that a conclusory statement (e.g., we did not re-employ because we believe “the District would be better served” by not renewing your contract”) or a recital of the procedural steps taken by the BOE does not satisfy the BOE’s statutory obligation.<sup>31</sup>

The Ohio Supreme Court interpreted the provisions in Revised Code that require

a “hearing” by a BOE at a teacher’s request and the issuing of an “order.” The Court decided that such a hearing means a “proceeding that possesses some formality.” The Court did not offer specifics about the nature of the hearing. The Court only concluded that the hearing “necessarily includes the presentation of evidence, confrontation and examination of witnesses, and the review of the arguments of the parties.”<sup>32</sup> The Court explained its interpretation by rephrasing the two guidelines mentioned above. In the words of one observer, the “Court has now mandated what approximates a full evidentiary hearing. Witnesses are to be called, sworn, and subjected to both direct and cross examination.”<sup>33</sup>

The Court pointed out that under a CBA, a teachers union and a board of education may agree to their own procedures for teacher evaluation. However, the Court stated that “unless a collective bargaining agreement specifically provides to the contrary, [the Revised Code] governs the evaluation of a teacher employed under a limited contract.” That is to say, the CBA may exclude the Revised Code’s provisions only when the parties explicitly say this is so.<sup>34</sup>

The Court affirmed the “long-standing rule” that a BOE has the ultimate responsibility for employing teachers. The BOE may affirm or reject a superintendent’s recommendation to it regarding contract renewal. It did not state whether the BOE may initially employ teachers not recommended by the superintendent. It only commented on renewal situations for nontenured teachers.<sup>35</sup>

The Court, in deciding a case dealing with a BOE’s reasons for not reemploy-

ing a teacher, emphasized that the statutes provide for a reemployment order by a court only when a BOE fails to comply with the evaluation procedures. If a BOE fails to comply with the requirement to explain the reasons for not reemploying a teacher, a court may not order reemployment. (Such a failure constitutes a post-evaluation termination procedure, not an evaluation procedure.) With a failure to offer adequate reasons a court may only order “an award of back pay” as a means of enforcing the statute. With such an order the court does not contravene the limits set by the statutes, according to the Court. Rather, such an order supports the overall purpose of the statute — to provide protection for the teacher — while preserving the ultimate authority of the BOE over the employment of teachers.<sup>36</sup>

The Court held that a BOE complies with the statutory requirement to provide specific recommendations regarding improvement if it incorporates by reference the recommendations of an earlier evaluation report into a later report.<sup>37</sup> However, in a most recent decision this year the Court dealt with a situation where a BOE incorporated “by reference prior evaluation reports and appraisals” in its statement describing the circumstances behind its decision not to renew a teacher’s contract. The Court refused to extend the use of the incorporation technique to a statement of reasons, stating that the purpose of reasons is to give “a clear explanation behind the board of education’s decision.” Only in this way, according to the Court, will the teacher be afforded “some measure of protection”<sup>38</sup>

Implicit in the Court’s review of the

requirement of the Revised Code to offer the teacher specific recommendations for improvement is the position that a court has the power to decide whether specific recommendations have been offered at all as well as whether those offered are sufficiently specific. A state appellate court using the standard of “strict compliance” ordered that a teacher be reemployed when a BOE failed to offer a second set of specific recommendations for improvement in its second evaluation report.<sup>39</sup>

Another state appellate court has explicitly dealt with a situation concerning specificity and decided that the evaluations offered by the BOE “were sufficiently ‘specific’ to alert a reasonable person to the need for change.”<sup>40</sup> A third appellate court examined the evaluation reports of a principal and found them not specific regarding recommendations for improvement in the teacher’s performance and not specific regarding “the means by which the [teacher] shall obtain and receive assistance in making such improvement.”<sup>41</sup> The court used the language of the school district’s CBA section on teacher evaluation because it specifically stated that its procedures “supersede and replace the evaluation procedures” of the Revised Code. That court, in addition to finding a lack of specificity regarding recommendations and means for improvement, found that the BOE did not substantially comply with the CBA requirement to allow the teacher “reasonable time between observations...for improvement in the areas of performance deficiencies.”<sup>42</sup> The appellate court then ordered the BOE to reemploy the teacher for noncompliance with the CBA procedures for teacher evaluation based on the Revised Code.<sup>43</sup>

In short, within just a few short years after the passage of the revised teacher evaluation statutes in Ohio the courts, led by the Ohio Supreme Court, dealt heavily and strongly with conflicts between teachers and their respective boards of education. The lower courts followed their leader in implementing a liberal interpretation of the remedial statutes in favor of the teachers.

### Comments on Ohio's Revised Code and the Courts' Interpretations of It

The Revised Code has engendered a surge of court cases by teachers claiming violations of its various sections, concerning such areas as the number of observations made, the specificity of recommendations for improvement, timely notice, and the reasons given for nonreemployment. The Ohio Supreme Court, in particular, has done more than just decide legal conflicts between sets of parties. It has deliberately and explicitly shaped its state's pair of teacher evaluation statutes by using a perspective favorable to teachers. The Court has:

1. expanded the procedural requirements that allow a court to order the reemployment of a nontenured teacher (i.e., it incorporated of division B procedures into division A of R.C. 3319.111).
2. established the necessary and formal features of a hearing, thereby strengthening the position of a non-renewed teacher vis-a-vis the BOE (i.e., it mandated almost a full-evidentiary hearing).
3. called for strict compliance with the simple, specific dictates of the Ohio legislature.
4. placed the burden of compliance on a BOE while reaffirming that the responsibility for teacher employment remains with the BOEs. The Court indicated that a BOE will have the authority to choose its teacher only if it complies strictly with the statutes.
5. required each BOE to give a clear and substantive explanation to a teacher for nonrenewal of a contract (i.e., a BOE may not give a conclusory statement nor a recital of procedural steps taken).
6. required that a nonrenewed teacher receive actual notice and that the BOE show evidence of such.
7. allowed collective bargaining agreements to supersede and replace statutory provisions only if they explicit say so; if not, the BOE must abide by both the Revised Code and the CBA.
8. permitted the award of back pay to a nonrenewed teacher beginning with date of failure by a

BOE to provide an adequate statement of reasons for nonrenewal; the purpose of such an award is to strengthen the protection of teachers and to serve as motivation for the BOE to comply with the Revised Code.

9. allowed incorporation of an early set of specific recommendations into a later set; yet it did not allow the use of the incorporation technique when a BOE offered a statement of reasons for nonrenewal to a teacher (i.e., because no incorporation is allowed and the BOE must specify the reasons teachers will not grope for answers as to why they were not reemployed).
10. permitted courts to examine the recommendations for improvement that supervisors offer to teachers so that a court can determine whether the recommendations are sufficiently specific to effectuate the purpose of teacher evaluation—to assist teachers in getting better.

These interpretations were offered based on the standard that a remedial statute should be liberally construed in favor of the teachers. Nevertheless, not all court decisions have sustained the plaintiff teachers' complaints. Overall, the Court took the position that a strong teacher evaluation law improves education for the benefit of all people, even the teachers whose contracts

might not be renewed. The Court acted wisely regarding the legislature's desirable amendments to the statutes on teacher evaluation.

The Ohio legislature's revised statutes, the Supreme Court's fundamental interpretation of the Revised Code, and the ensuing court decisions correctly reflect the needed direction for the evaluation of nontenured—and even tenured—teachers. Ohio law rightly took a position that teacher evaluation should provide due process procedures and an effort to work toward improvement via specific recommendations by supervisors. In this way Ohio law is now closer to the principles and practices of sound supervision as advocated in the professional literature. (See sections below.) Although the burden of compliance regarding due process procedures and specificity of recommendations is now added to a BOE's responsibility for teacher evaluation, no indication exists that this burden is undue. The law in no way need stymie any BOE if its administrators will adhere to procedural requirements of notice and a hearing. Nor need the law stymie a BOE once supervisors accept the basic notion that specificity is not only legally required but also professionally required. Specificity is ethically called for in order to aim toward the improvement of the teachers.

Within such a context two points about the Revised Code and its interpretations by the courts appear odd. One, there appear to be no state administrative regulations that provide specifics for the Revised Code or indicate how the Code should be implemented. Second, the Revised Code, for all its attempt to help nontenured teach-

ers does not prescribe that a supervisor ever hold a pre-observation or post-observation conference with the teacher or ever discuss the written evaluation reports with the teacher face to face. The Revised Code only requires that the supervisor observe the teacher and write an evaluative report. The court decisions are silent on these two points. That is odd.

It seems that with the emphasis on due process the legislature, the state board of education, and the Court would provide for a timely deadline (perhaps 10 days?) for the filing of all written reports, not just for an evaluation held on Jan. 15 or April 1. (Any evaluation performed between the start of the school year through January 15 or from February 10 through April 1 has more than a ten-day deadline. For example, an evaluation held on October 1 has a 115-day deadline.) Why not treat the written report after an evaluation the same way as the issuing of a written statement of reasons for nonrenewal and as the issuing of a BOE's decision after a hearing? (see items 3, 4, & 7 in the prior section.) It seems that with the emphasis on teacher improvement, the legislature, state board of education, and the Court would not rely only on a written report to convey recommendations to a nontenured teacher. Why not require the supervisor to talk with the teacher just as a teacher would talk with a student?

What is not odd, but unfortunate, is the language used by the Ohio Supreme Court in characterizing the purpose or effect of the revised statutes on teacher evaluation in contrast with the former law. Justice Sweeney, in beginning the first Ohio Supreme Court decision based on the pair

of revised teacher evaluation statutes, described the former law as providing "minimal safeguards ...to protect a nontenured teacher." He then continued by stating what the revised laws now offer. He implied strongly that the revisions do offer safeguards and protection in that the law "now requires that boards of education follow certain prescribed statutory procedures prior to nonrenewal, including formal evaluation, written notice, and, if requested, a hearing."<sup>44</sup>

Justice Wright was explicit in this regard. In the last of the set of four original decisions Justice Wright wrote that "R.C. 3319.11 has afforded limited-contract teachers some measure of protection with respect to the renewal of their contracts, protections which are procedural in nature." The justice then went on to give two examples of protection, the right to a statement of circumstances and the right to appeal a BOE's decision to a civil court.<sup>45</sup>

The justices were, of course, correct about what the revised law provides. What is unfortunate is that they stated it by painting a picture of the board of education and its supervisors as adversaries of the nontenured teachers so much so that the law must protect those teachers from the BOE through procedural safeguards. With an adversarial metaphor in mind, in contrast to a cooperative one that brings every teacher together with the supervisors and the BOE, there is little hope of the law serving as a device to support effective, long range improvement in the schools. The adversarial metaphor is already sadly and deeply rooted in the daily operation of the schools to the point where nontenured teachers too often fear for their

jobs if they speak out against injustice in the schools despite their right to freedom of speech.

The language and tone of the justices do the revised statutes no good. The new laws on teacher evaluation never use the terms safeguards and protection as they correct a situation that never should have existed in the first place. The adversarial picture only prolongs an image that is best done away with in an effort to foster a mutual and cooperative approach to improve and optimize the education of students. The negative metaphor was not necessary, and it is harmful to productive thinking about the supervision of nontenured teachers.

The justices' comments point to an all too frequent situation in some schools. That situation occurs when teacher evaluation results merely or mainly in performance ratings and labels such as satisfactory or unsatisfactory even though the law requires that the supervisor work toward improvement. In such a situation the supervisor and teacher may well become adversaries. Then an open dialogue to identify areas that need improvement or correction is silenced. At that time a nontenured teacher surely does need safeguards and protection.

To understand the sections on teacher evaluation in the Ohio Revised Code, their interpretations by the courts, and other laws on teacher evaluation a look at the underpinning of these laws is helpful. Such a look at the laws of teacher supervision provides a perspective that supervisors would do well to keep in mind as they work with teachers and help them to change.

### The Moral Aspect of the Law on Supervision

In reviewing and studying the laws on supervision, often indexed in books and CBAs under the heading of "teacher evaluation," a supervisor will soon note that a moral underpinning of the laws exists. The laws on teacher evaluation are based on and aim to promote the concepts of fairness and justice. The moral dimension of fairness appears most often associated, implicitly or explicitly, with the term due process to indicate that the laws are reasonable as they provide for timely notice and a timely hearing when a conflict arises between two parties. However, the term due process itself does not appear in the sections of the Ohio Revised Code discussed here even though the Code requires timely notice and a timely hearing.

The concepts of fairness and justice are explicitly what led to the New Jersey Supreme Court decision in Donaldson v. Board of Education of North Wildwood<sup>46</sup> in 1974. In that case Mary Donaldson, a nontenured teacher, sought the right to receive reasons from her board of education for not being reemployed after two years as an elementary school teacher. In agreeing with Donaldson that her board had an obligation to honor her request for a statement of reasons, Justice Jacobs wrote trenchantly and persuasively, saying:

The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and

may or may not ultimately attain tenure. If he is not reengaged and tenure is precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggests that, when he asks, he be told why (emphasis added).<sup>47</sup>

The decision in Donaldson led directly and quickly to the enactment of a statute that provides specific and “fair” timelines for implementing Justice Jacobs’s decision for the state’s supreme court. As a result, a nonrenewed teacher who requests reasons in a timely manner (within 15 days after notice of nonreemployment) is entitled to receive them in writing in a timely manner (within 30 days after receipt of request by board of education).<sup>48</sup>

Also, based on the concepts of fairness and justice supervisors must observe teachers and help them to improve. For example, in New Jersey supervisors of nontenured teachers are directed to “identify any deficiencies, extend assistance for their correction and improve professional competence.”<sup>49</sup> In Ohio the parallel statute goes much further. After two observations of a nontenured teacher, the supervisor must prepare a written report “that includes specific recommendations regarding any improvements needed in the performance of the teacher being evaluated and regarding the means by which the teacher may obtain assistance in making such improvements.”<sup>50</sup> The Ohio Supreme Court, in a decision two years after Justice Sweeney’s and Justice Wright’s comments in 1994, put the point for improvement succinctly, saying, “The purpose of evaluations is to assist teachers in getting better.”<sup>51</sup>

In short, it is simply not fair or just for supervisors to point out the weaknesses of a teacher without working further with that teacher so that he or she may improve. The laws do not promote or require mere change in the teacher’s performance but in New Jersey, Maryland, and Ohio, for example, they call for the value-laden act of improvement for all teachers, even those teachers who may subsequently not be reengaged for the next year. This is so because New Jersey, Maryland, and Ohio, as do all states, aim to promote a good education or a high quality education to benefit society. The improvement of all teachers is, therefore, a necessary component of every school system’s overall effort on behalf of its community.

The moral underpinning of the law not only involves the concepts of fairness and justice but also the concept of equal respect. Equal respect is allied with fairness and justice and may even be considered to be a component of these ideals.<sup>52</sup> The concept of equal respect focuses on the way people treat each other. Equal respect stems from the moral belief that human beings have worth, deserve treatment indicative of their worth, and thrive when dealt with humanely, especially by the supervisors in government and in private employment.

The concept of equal respect is the basis for requiring open observations rather than secret ones without the teacher’s awareness due to the use of one-way mirrors, or electronic devices or hidden cameras. The strength of the belief in the concept of equal respect, which leads to the fear of secret observations, has led many school districts and local teacher unions in New Jersey, for ex-

ample, to include in their CBAs a provision mandating only open observations known to the teachers. For example, one CBA states, "All monitoring or observation of the work performance of a teacher will be conducted openly, with full knowledge of the teacher. Surreptitious use of the public address or audio systems and similar surveillance devices shall not be permitted."<sup>53</sup> Similarly, Maryland's state regulations stipulate that observations must be conducted with the "full knowledge of the certificated individual."<sup>54</sup>

It is the concept of equal respect that is also the basis for conducting a face to face conference between supervisor and teacher so that the two educators can work together on improvement as they create ways to further the providing of an appropriate, worthwhile educational program. It is equal respect that is the basis for the regulation in the New Jersey Administrative Code that mandates the involvement of teachers in the "development of job descriptions and evaluate criteria based on district goals, program objectives, and instructional priorities."<sup>55</sup> It is equal respect, in conjunction with fairness and justice, that underpins the right of an Ohio teacher who has received written reasons for not being reemployed to appear before the board of education in an attempt to convince the board members to change their minds.<sup>56</sup>

In short, the law on teacher evaluation has a moral foundation even when the law does not explicitly identify it or does not explicitly use value-laden terms to accompany its dry behavioral language, specific timelines, and specific numbers for observations to be performed and reports to

be filed. For example, in Maryland, without reference to fairness, the law simply requires that an "unsatisfactory evaluation shall include at least one observation by an individual other than the immediate supervisor."<sup>57</sup> The New Jersey and Ohio statutes do not include such a requirement. Nevertheless, the statutes of Maryland, New Jersey, Ohio, and other states as well all have a moral foundation that seeks to lead supervisors and boards of education to establish a particular type of relationship with their teachers—a fair and just one that includes equal respect between parties.

### The Values of Sound Supervision

It is not only the law on supervision that has had a moral underpinning. The professional literature of supervision also has a moral basis. This literature guides supervisors to conduct themselves in a particular manner so as to create a healthy, meaningful, productive, and humane relationship with their charges. This literature advocates sound supervision, which should apply to all employees, whether those employees are teachers or not.<sup>58</sup> Sound supervision in education goes beyond what the teacher evaluation law requires.

Sound supervision draws on philosophical (especially moral) and psychological theories of human behavior and human needs as well as research data on human development.<sup>59</sup> It offers principles and guidelines for humane action and advocates such concepts as the establishment of a trusting relationship, cooperative activity between supervisor and employee, flexibility of procedures, new metaphors for the role of the

supervisors (e.g., coach, trainer, facilitator, and mentor), continuity of effort, administrative and peer support, public and comprehensible criteria, respect for privacy and confidentiality, openness, reasonable expectations, increased individual choice, and personal responsibility for self and professional growth.

Sound supervision in education has an explicit moral and psychological foundation that gives supervisors strong direction about how to act for and with teachers. It accepts the concepts of fairness, justice, and equal respect as found in the law, including their components of due process and reasonableness, and then goes beyond them with its expanded set of values. It leads supervisors to seek ways to implement them specifically as they work with teachers cooperatively, openly, consistently, honestly, flexibly, fairly, reasonably, respectfully, constructively, and trustingly.

For example, one local school district policy uses several value terms not found in the state laws of New Jersey, Maryland, or Ohio. These terms — cooperative process, joint responsibility, and work together — explicitly serve to guide the supervisor-teacher relationship. That board of education policy states:

Evaluation must be a cooperative process wherein the individual evaluated and the person responsible for making the evaluation feel a joint responsibility to focus upon performance areas worthy of commendation and performance areas needing improvement, to work together to achieve the best results and to assess the results.<sup>60</sup>

Another school district policy, that of Manville, New Jersey, uses other value terms and metaphors to indicate not only the direction for supervision but also the weight given to that direction by the board of education. The Manville policy states:

The board encourages a positive working environment in which the professional growth which results from staff participation in the evaluation process is considered of major importance.

Such language is reminiscent of the language of Justice Pfeifer in the Snyder decision for the Ohio Supreme Court:

Revised Code 3319.111 [entitled Evaluation Procedures] was not designed to create an obstacle course for school boards to traverse before they can fire a teacher. The point of the requirements is positive — school boards and their administrators are forced to find out what is being taught in their classrooms and how it is being taught. The purpose of evaluations is to assist teachers in getting better. The club that exists to force school districts to perform evaluations properly does not mean that evaluations exist only to initiate the removal of bad teachers. They are of value to all. We therefore hold firm to the simple, specific dictates the General Assembly enacted regarding the evaluation of teachers.<sup>61</sup>

The tone of Justice Pfeifer also reflects not the stiff tone of formal legislation but the less formal and more open tone of the literature on sound supervision. It is not

surprising at all that the above passage is the most quoted one from Snyder. The passage, without the specific reference to the legislature and the Revised Code, could easily serve as a prologue to a textbook prepared for a graduate course entitled “Supervision of Instruction.” It offers a revealing insight into the perspective of the Court — that the supervision of teachers must go beyond the formalistic value of legislative fairness and enter the positive realm of evaluations for the improvement of classroom teaching.

The perspective of sound supervision appears significantly in one particular part of the Ohio Revised Code itself, and it is understandable that nonrenewed teachers have used it frequently in their efforts to recover their jobs. The Revised Code without flair or emphasis provides that supervisors offer teachers specific recommendations regarding the improvement of performance as well as specific recommendations regarding the means for obtaining assistance towards improvement. This provision, not found in New Jersey statewide laws, not only reflects the concept of fairness but also a basic principle of human behavioral change. That is to say, the Revised Code accepts a fundamental principle of sound supervision: recommendations to teachers must be specific if they are to be helpful, meaningful, and understood. Also, sound supervisory practice mandates that, in addition to being fair, once weaknesses or deficiencies are identified the supervisor should be specific as to what will lead to teacher improvement and how the teacher may obtain it.

Because this key principle of speci-

ficity is missing in New Jersey statutes and regulations local teacher unions and school districts have negotiated at least part of it into their CBAs. For example, the Elizabeth, New Jersey school district CBA mandates that the supervisor report about strengths, weaknesses, and “specific suggestions as to measures which the teacher might take to improve his/her performance in each of the areas wherein weaknesses have been indicated.”<sup>62</sup> It is a credit to the Ohio General Assembly that it realized that specificity is essential to teachers who need to improve.<sup>63</sup>

The concepts and principles of sound supervision are manifested more frequently in the legal documents at the local level than at the state level, most likely, because these documents reflect the spirit of the educators close to the locus of education. It is not surprising that the local documents are value laden from a broader base of values than state law is. This point helps to explain the inclusion in the CBA of Greenville City (Ohio) School District of the sound supervisory provision that the supervisor allow the teacher “reasonable” time between observations to make improvements.<sup>64</sup> Sound supervision recognizes that human change takes time. Significant change does not occur overnight. Local documents are based on the experience of teachers who are eager to improve not only in order to save their jobs but also to satisfy their need to feel competent and confident as they teach young people.

The combination of the traditional moral foundation of the law (based on fairness, justice, and equal respect) with other values fundamental to sound supervision

(cooperation, openness, personal responsibility, reasonableness, and the others mentioned above) is and ought to be an asset to every school district.

Perhaps that combination, as synthesized from available enacted laws, selected school district policies, local CBAs, professional literature, and the common law, will filter out to all levels of law so as to effect a richer, more effective, and more influential supervisory practice for the improvement of teachers and, thereby, the improvement of the education of students.

#### Some Implications for Supervisors of Teachers

Without commentary, what follows is a simple and straightforward brief list of implications for supervisors as derived from the preceding examination of the law and sound supervision along with examples from New Jersey, Maryland, and Ohio.<sup>65</sup> Supervisors should:

1. Know and understand legal requirements as found in the various layers of enacted law, contracted law, and common law.
2. Comply with legal requirements as found in the various layers of enacted law, contracted law, and common law. Understand and strictly comply with all procedural requirements. For example, if observations must be completed by a specific date, the supervisor should be sure to

meet the deadline with full compliance.

3. Reflect on the values underpinning the law and sound supervision and make a commitment to them to guide their relationship with teachers.
4. Practice and hone supervisory skills, such as observing teachers, conferring (pre- and post-observation) with teachers, and writing evaluation reports and other documents.<sup>66</sup>
5. Provide specific feedback when observing teachers. That is, provide specific descriptive data as the basis for conclusions and recommendations; draw conclusions based on observational data; give specific suggestions for improvement, time for improvement, and ongoing feedback to provide ample opportunity for remediation.
6. Incorporate by reference earlier conference and written report statements into later ones so as to create continuity, stability, and strength of effort.
7. Be specific regarding praise, regarding recommendations for performance improvement, and regarding the means to obtaining assistance towards performance improvement. As one at-

torney has said, “If you do not want the court to substitute its judgment for that of the school board, specifics are very helpful.”

8. Keep up to date on the law and supervision theory as well as practice. Do so by reading; listening to audio-visual material; attending seminars, conferences, and conventions; and consulting with colleagues and experts.
9. Prepare a checklist of compliance requirements and sound supervisory tasks that should be performed. This checklist will help to catch omissions that otherwise might well prove to be troublesome.
10. Carefully write observation reports. Consider the tone of the report as well as the contents. Recognize that there may be multiple readers for any written supervisory documents, formative observation reports, and summative evaluations.
11. Use the opportunity of supervision to encourage optimal professional development.

### **Endnotes**

<sup>1</sup> By the term teacher we mean any teaching staff member who holds a certifi-

cate. Thus, teacher includes, but is not limited to, people who are classroom teachers, librarians, counselors, and curriculum coordinators.

<sup>2</sup> By the term supervisor we mean any person who is authorized to observe, confer with, and evaluate another teaching staff member. Thus, supervisor includes, but is not limited to, people with the title of supervisor, assistant principal, principal, and superintendent.

<sup>3</sup> N.J.Const. art.VIII, §4, para. 1.

<sup>4</sup> Md. Const. art. VIII, §1.

<sup>5</sup> N.J. Stat. Ann 18A:27-3.1.

<sup>6</sup> Md. Educ. Code Ann. §4-205.

<sup>7</sup> N.J. Admin. Code 6:3-4.1.

<sup>8</sup> Code of Md. Regs. 13A.07.04.01B.

<sup>9</sup> Code of Md. Regs. 13A.07.04.02A.

<sup>10</sup> Code of Md. Regs. 13A.07.04.02A and Code of Md. Regs. 13A.07.04.03.

<sup>11</sup> Code of Md. Regs. 13A.04.04.02B.

<sup>12</sup> Hanover Park, New Jersey Regional High School District Policy 5 (1987).

<sup>13</sup> Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed.,393 A.2d 278, 287 (N.J. 1978).

<sup>14</sup> Naylor v. Cardinal Local School Dist. 630 N.E. 2d 725, 728 (Ohio 1994).

<sup>15</sup> Madison, New Jersey Collective Bargaining Agreement, 13.

<sup>16</sup> Wall Township, New Jersey Collective Bargaining Agreement 31.

<sup>17</sup> Greenville, Ohio City School District CBA, as quoted in Koch v. The Greenville City School District Bd. of Ed., No. 1403, 1996 Ohio App. LEXIS 5433 (Second App. Dec.6, 1996) at \*12.

<sup>18</sup> Kiel v. Green Local School Dist. Bd. of Ed., 630 N.E. 2d 716, 717 (Ohio 1994).

<sup>19</sup> Id. See below for comments on the use of the words safeguards and protection in discussing the statutes on teacher evaluation.

<sup>20</sup> In Farmer v. Kelleys Island Bd. of Ed., 630 N.E. 2d 721 (Ohio 1994), the Ohio Supreme Court decided the issue of whether the provisions of division B of R.C. 3319.111 are incorporated into division A of that statute. In a 4-3 decision the Court held that division B, including the observation requirements listed in R.C. 3319.111 (B)(2), is incorporated into division A. Id. at 724. Therefore, see items 8,9, and 10 below to get a complete view of the evaluation requirements as determined by the Court. See also the next section of this article on the courts' other interpretations of both of the teacher evaluation statutes in the Revised Code.

<sup>21</sup> Kiel v. Green Local School Dist., 630 N.E. 2d 716, 717 (Ohio 1994).

<sup>22</sup> Naylor, 630 N.E. 2d at 727.

<sup>23</sup> Id. at 730.

<sup>24</sup> Correspondence from and conversation with two Ohio education attorneys, Richard J. Dickinson and Julie C. Martin. Thanks to them for their assistance and cooperation.

<sup>25</sup> Kiel, 630 N.E. 2d at 719. [Pursuant to R.C. 3319 11(E).]

<sup>26</sup> In dealing with this issue of re-employment regarding nontenured administrators, the Court has pointed out that the statute for them does not provide for an order to reemploy due to a BOE failure to comply with prescribed procedures. See Cassels v. Dayton City School Dist. Bd. of Ed., 631 N.E. 2d 150, 154 (Ohio 1994) and Martines v. Cleveland City School Dist. Bd. of Ed., 639 N.E. 2d 80, 82 (Ohio 1994).

<sup>27</sup> Farmer v. Kelleys Island Bd. of Ed., 630 N.E. 2d 721, 723-724 (Ohio 1994).

<sup>28</sup> Snyder v. Mendon-Union Local School District Bd. of Ed., 661 N.E. 2d 717,720 (Ohio 1996).

<sup>29</sup> Kiel, 630 N.E. 2d at 718.

<sup>30</sup> Smithers v. Rossford Exempted Village School Dist., No. 93WD070, 1994 Ohio App. LEXIS 2458 (Sixth App. June 10, 1994) at \*7.

<sup>31</sup> Naylor, 630 N.E. 2d at 729.

<sup>32</sup> Id. at 730-731. For appellate court decisions on the requirements for evidence to support the court's decision see Smithers v. Rossford Exempted Village School Dist., No. 93WD070, 1994 Ohio App. LEXIS 2458 (Sixth App. June 10, 1994) and Sparer v. Evergreen Local School Dist., No. 94FU000003, 1994 Ohio App. LEXIS 4905 (Sixth App. Nov. 4, 1994).

<sup>33</sup> Richard J. Dickinson, Teacher Renewal, 6 Ohio School Law Journal 35, 36 (July/August 1994).

<sup>34</sup> Naylor, 630 N.E. 2d at 728 and Snyder, 661 N.E. 2d at 720.

<sup>35</sup> Farmer, 630 N.E. 2d at 723.

<sup>36</sup> Gerner v. Salem City School Dist., 630 N.E. 2d 732, 735 (Ohio 1994).

<sup>37</sup> Thomas v. Newark School Dist., 643 N.E. 2d 131, 134 (Ohio 1994).

<sup>38</sup> Geib v. Triway Local Bd. of Ed., 84 Ohio St. 3d 447, 450, \_\_\_ N.E. 2d \_\_\_ (Ohio 1999), referring to Naylor, *supra*, and quoting from Gerner, 630 N.E. 2d at 734.

<sup>39</sup> Semenie v. Board of Ed. of North Fork Local School Dist., No. 93CA6, 1994 Ohio App. LEXIS 4291 (Fifth App. Sept. 6, 1994) and Morrow v. Board of Ed. of the Franklin Local School Dist., No. 93-48, 1994 Ohio App. LEXIS 2429 (Fifth App. June 1, 1994).

<sup>40</sup> Rickel v. Cloverleaf Local School

Dist., 608 N.E. 2d 767, 770 (Ohio App. 9 Dist. 1992).

<sup>41</sup> Koch v. The Greenville City School Dist., No. 1403, 1996 Ohio App. LEXIS 5433 (Second App. Dec. 6, 1996) at \*3, quoting from the school district's collective bargaining agreement which the court noted is "virtually identical" to the Revised Code's parallel provision.

<sup>42</sup> Id. at \*12.

<sup>43</sup> For a detailed analysis of a BOE successful effort to provide specificity in regard to recommendations for improvement of performance and means of obtaining assistance see McComb v. Gahanna-Jefferson City School Dist., No. 98AP-331 (Court of Appeals of Ohio, Tenth Appellate Dist. Dec. 8, 1998).

<sup>44</sup> Kiel, 630 N.E. 2d at 717.

<sup>45</sup> Gerner, 630 N.E. 2d at 734-735.

<sup>46</sup> 320 A. 2d 857 (1974).

<sup>47</sup> Id. at 861.

<sup>48</sup> N.J. Stat. Ann. 18A:27-3.2. This statute became effective July 1, 1975, one year after the Donaldson decision.

<sup>49</sup> N.J. Stat. Ann. 18A:27-3.2.

<sup>50</sup> R. C. 3319.111 (B)(3).

<sup>51</sup> Snyder, 661 N.E.2d at 721.

<sup>52</sup> See the incisive article by Kenneth Strike and Barry Bull, "Fairness and the Legal Context of Teacher Evaluation," in Handbook of Teacher Evaluation, 303 (Jason Millman ed., 1981) and Chapter 5 on teacher evaluation in K.A. Strike, E.J. Haller, & F. Soltis, The Ethics of School Administration (1998).

<sup>53</sup> Woodbridge, New Jersey Collective Bargaining Agreement 30.

<sup>54</sup> Code of Md. Regs. 13A.07.04.03.

<sup>55</sup> N.J. Admin. Code 6:3-4.3 (c) (2).

<sup>56</sup> R.C. 3319.11(G)(3) to (6).

<sup>57</sup> Code of Md. Regs. 13A.07.04.02.

<sup>58</sup> See for example Carl Glickman, Stephen Gordon, & Jovita Ross-Gordon, Supervision of Instruction; A Developmental Approach (1998) and Stephen Robbins & David De Cenzo, Supervision Today (1998).

<sup>59</sup> See Gerald R. Firth & Edward F. Pajak, eds., Handbook of Research on School Supervision, (1998).

<sup>60</sup> Hanover Park, New Jersey Regional High School District, Revision adopted June 6, 1987.

<sup>61</sup> Snyder, 661 N.E. 2d at 721.

<sup>62</sup> Elizabeth, New Jersey Collective Bargaining Agreement at 16.

<sup>63</sup> A few other states also include

the principle of specificity in their statutes or regulations, including Arizona and Massachusetts. Others may require it by common law. Most, however, do not require specificity explicitly. Thanks to Julie Underwood, General Counsel, and Naomi Gittins, Staff Attorney, of the National School Boards Association for making available the data from an informal survey of their council of associated attorneys.

<sup>64</sup> Koch, 1996 Ohio App. LEXIS 5433 at \*12. Koch won on this point by showing that his supervisor failed to provide a reasonable amount of time.

<sup>65</sup> For a list of implications based on a separate and broader review of teacher evaluation see Joseph Beckham, Ten Judicial "Commandments" for Legally Sound Teacher Evaluation, 117 Ed. Law Rep. [435] (June 12, 1997).

<sup>66</sup> See the strategies and tactics advocated in Ronald T. Hyman, School Administrator's Faculty Supervision Handbook (1986), School Administrator's Staff Development Activities Manual (1986), and School Administrator's Handbook of Teacher Supervision and Evaluation Methods, (1975).

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## **ILLINOIS TENURE: INTENT, STANDARDS, AND REALITY**

**by Paul C. Burton, J.D., M.S.Ed.**

### **I. Introduction**

Teachers in Illinois enjoy substantial statutory protection of their employment status. This protection is afforded by the state's tenure law. Illinois teacher's on tenure, "continued contractual service,"<sup>1</sup> may only be dismissed for "cause."<sup>2</sup> "Cause" is some substantial shortcoming which renders continuance in employment detrimental to discipline and effectiveness of service; something which the law and sound public opinion recognize as a good reason for the teacher to no longer occupy his position."<sup>3</sup> The statutory language exists "[I]n order to encourage experienced and able teachers to remain within the educational system and to insure that rehiring decisions will be based on merit and not upon political, partisan or capricious reasons."<sup>4</sup> The statutory language includes some general specification of what "cause" includes, providing tenured teacher dismissals for "incompetency, cruelty, negligence, immorality or other sufficient cause."<sup>5</sup> The school board purportedly retains the first instance right to determine what constitutes "cause" using the best interest of the school as a standard.<sup>6</sup> This first instance right is restrained by case law requirement that the cause "must bear some relationship to a teacher's ability to perform her job."<sup>7</sup> This restriction is arguably at odds with the broader ideal stating that tenure provisions are "not intended to preclude dismissal where a teacher's conduct is det-

rimonial to the operation of the school."<sup>8</sup>

Tenured teacher dismissals within this system fall into one of two categories. In the first category, "cause" for dismissal of a teacher is failure of that teacher to correct some specific identified shortcoming(s), some "simple deficiencies in teaching or differences in methods of punishment."<sup>9</sup> The conduct involved in such cases is considered to be "remediable."<sup>10</sup> In the second category, "cause" for dismissal of a teacher is that which the current system allows to take effect immediately. In these cases, cause is considered "irremediable."

This paper will argue that the outcome of the current system of Illinois tenure teacher dismissal is the discouragement of all but those tenured teacher dismissals which are based upon the most outrageous conduct. In advancing this argument, several elements of tenure and dismissal will be explored. One section will demonstrate that no "simple deficiency" or "common sense" reason is likely to support a dismissal under the current system. It will be argued that Illinois tenure law, and the accompanying dismissal system, is a morass of conflicting standards, statutes, interpreting cases, values, authority, and judicial activism. Another part will demonstrate that one effect of the Illinois tenure system is the complete subordination of any protection afforded to Illinois' public school children to that of the state's teachers. The paper will conclude that for these reasons, the Illinois tenured teacher system and its accompanying dismissal structure should be eliminated, and that in its place a system should be erected which effectively balances all the legitimate interests involved in the public

school enterprise. Included in that balance would be the currently missing legitimate interests of the primary subjects of public school instruction, the children. Included would also be specific protection for the administrator evaluators charged with the responsibility of conducting effective and valid teacher evaluations.<sup>11</sup> Such a system would include specific reasons for teacher dismissal, reinforce local board of education authority, and establish standards for review render proper deference to school boards and licensed administrators as opposed to hearing officers. A new Illinois teacher dismissal system should include specific reasons not acceptable for dismissal,<sup>12</sup> and thus address the past abuses of teacher employment which gave rise to tenure, and which would be most likely to occur again in the absence of statutory scrutiny.

## **II. Background**

### **A. Achieving Tenure in Illinois: Downstate**

Illinois law<sup>13</sup> grants downstate<sup>14</sup> tenure, “continual contractual service,” to any teacher after their second year (for a teacher employed prior to January, 1998) of full-time teaching in the same district. For teachers first employed on or after January 1, 1998, the probationary period is four consecutive years. Part-time teachers, teachers not serving the two consecutive school term probationary period, and teachers changing school districts,<sup>15</sup> do not gain tenure status. During the probationary period, teachers generally serve “at will,”<sup>16</sup> subject to the notice provisions of the statute.<sup>17</sup> The statute concludes its section on tenure with a

statement of authority, the ramifications of which are as far-reaching as they are antipodal.<sup>19</sup> “This section and succeeding sections do not modify any existing power of the board except with respect to the procedure of the discharge of a teacher ...”<sup>20</sup>

### **B. Achieving Tenure in Illinois: Chicago**

Achieving tenure in Chicago Public Schools is governed by separate statute from that of non-Chicago public schools in Illinois.<sup>21</sup> Chicago teachers are subject to separate certification requirements. Three years of probationary teaching are required<sup>22</sup> in Chicago instead of two<sup>23</sup> as in downstate districts. Like their “downstate” colleagues, Chicago teachers achieving statutory protection under the color of tenure may only be removed for “cause.” As with downstate teachers, conduct giving rise to dismissal of Chicago teachers which is considered “remedial requires the giving of written warning.”<sup>24</sup>

### **C. Illinois Teacher Performance Rating**

Once an Illinois teacher is placed on continued contractual service, the restriction to dismissal only for “cause” becomes effective. Primary among all possible causes for dismissal is incompetent performance. Competent performance is determined by performance rating. Illinois tenured teachers are required by law to be evaluated at minimum every two school years.<sup>25</sup> Evaluation is conducted by qualified<sup>26</sup> administrators employing an Illinois State Board of Education (ISBE) “commented” upon<sup>27</sup> but locally developed evaluation plan. The

evaluation plan must include a description of duties and responsibilities<sup>28</sup> and standards of conformity.<sup>29</sup> A written rating of each teacher's performance is also required.<sup>30</sup> Rating options available must include at least three categories: excellent, satisfactory and unsatisfactory.<sup>31</sup> Specification of each teacher's strengths and weaknesses must also be made. The standard by which "unsatisfactory" is judged is thus delineated by Illinois statute as the prerogative of the school board under both the authority to set policy<sup>32</sup> and the requirement to conform to evaluation standards. However, because the evaluation instrument is a proper subject of collective bargaining,<sup>33</sup> a substantial question exists as to whether it is possible to set a meaningful standard. Even so, the collective bargaining process cannot alter the requirements of the statute, thus excluding required elements of the evaluation plan from being subject to the bargaining process.<sup>34</sup>

Since 1) "Unsatisfactory" is a rating required by statute to be available on all teacher evaluation instruments,<sup>35</sup> 2) tenured teachers must be evaluated at least every two school years,<sup>36</sup> and 3) teachers rated unsatisfactory must within 30 days of the rating be provided with a remediation plan unless deemed irremediable, it can be argued that the effect of tenure operating to remove incentive for teachers to perform in a satisfactory manner is mitigated by the degree to which the required evaluations are conducted in an effective and valid manner. Whatever criticism the Illinois tenured teacher dismissal system may warrant, it cannot be argued that the performance disincentive effect of tenure is totally without remedy. Whether that remedy results in any

real checks against incompetence is admittedly moot. Unsatisfactory performances can be evaluated as such, and can lead to dismissal, albeit through a cumbersome and ponderous process fraught with pitfalls. The actual extent to which unsatisfactory performances are ferreted out, evaluated as such, and lead to dismissal is an issue of its own and generally lies outside the scope of this article.<sup>37</sup> Even the most cursory scrutiny, however, draws instant attention and wonder to the dearth of dismissal cases in general. A review of all cases of dismissal from 1975-1989 involved only 159 cases.<sup>38</sup> A review of all "remediation"<sup>39</sup> cases from 1990 to 1997 revealed only an additional 56 cases. Can anyone seriously argue that a state with over 800 school districts and literally tens of thousands of teachers has, over a 21 year period, only 215<sup>40</sup> cases of remediable incompetence which warrant dismissal attention? When it is realized that the 215 cases represent all categories of dismissal scrutiny, not just those for incompetence, the number represents the systems fundamental lack of credibility.

#### D. Illinois Teacher Dismissal Cases

The most revealing illustration of the systems tenured teacher dismissal system's credibility vacuum is the effective restriction of "unsatisfactory" performance to "remediable" conduct which effectively prevents immediate dismissal. Recalling that non-tenured teachers may be dismissed as probationary employees, a policy generally consistent with Illinois' employment at will doctrine,<sup>41</sup> teachers having achieved tenure may not be similarly dismissed. Thus

“cause” becomes the only effective legal remedy for separating an unsatisfactory tenured teacher from students. With evaluation instruments subject to collective bargaining,<sup>42</sup> and significant factors such as the National Education Association (NEA) operating against effective teacher evaluation, the numbers indicate that many, if not most, warranted tenured teacher dismissals are circumvented.<sup>43</sup> By default, dismissal for irremedial reasons, such as those for misconduct, becomes the only method for immediate dismissal.

### **III. Irremediable Conduct in Illinois**

#### **A. Definition**

No specific definition of irremediation occurs within the statutes governing tenured teacher dismissal.<sup>44</sup> Statutory language specifies that tenured teachers may be dismissed for reasons which are irremediable. “Nothing in this Section shall be construed as preventing immediate dismissal of a teacher for deficiencies which are deemed irremediable or for actions which are injurious to or endanger the health or person of students in the classroom or school.”<sup>45</sup>

The distinctions between remediable and irremediable reasons for dismissal have been broadly specified in the statutes and refined by case law.<sup>46</sup> The “...deficiencies which are deemed irremediable” and “actions which are injurious to or endanger the health or person of students in the classroom or school”<sup>47</sup> are narrowly interpreted for immediate dismissal purposes. The result is practical immunity from immediate discharge for cause.

The local school board supposedly has the authority to determine initially whether charges are remediable<sup>48</sup> or irremediable.<sup>49</sup> Remediation is a question of fact, and is reversible only if the reasons given are against the manifest weight of the evidence or the board acted in an arbitrary or capricious manner.<sup>50</sup> Any action seeking immediate dismissal of a tenured teacher requires action by a majority of the entire board. Excluding dismissal under the reduction-in-force doctrine, any dismissal “or removal”<sup>51</sup> action by the board requires that it “first approve a motion containing specific charges.”<sup>52</sup> In reality, it never happens this way.

#### **B. Circumvention of Local Board of Education Authority**

The sole authority of the board to determine remediability as a matter of first impression in any given teacher’s case, subject only to reversal if the reasons given are contrary to the manifest weight of the evidence, is directly at odds with the burden of proving irremediability by a preponderance of the evidence to the presiding hearing officer.<sup>53</sup> The board cannot be the deferred to decision making authority in the right hand, and simultaneously have to prove irremediability to a hearing officer with the left. The left hand always prevails in this anomaly. Proving irremediability is the burden to which hearing officers and courts have invariably subjected local boards of education, and the right hand of deference to the board’s decision unless arbitrary or capricious has been totally lost. By subjecting all dismissal decisions of school boards

to automatic review by a hearing officer, the Illinois tenure teacher dismissal system operates to render the board's sole discretion to hire and fire a legal fiction. The system has turned the law on its head, and empowered a small group of arbitrators with veto power over Illinois' school boards.

In a similar but separate problem, state hearing officers do not weigh evidence in reviewing a dismissal decision of a school board against the performance standard required by statute to be specified by the local school district in their evaluation plan.<sup>54</sup> The effect is the total circumvention of board authority to set meaningful standards and to hold teacher employees accountable to those standards, in spite of statutory authority establishing that power. This omission occurs in spite of the argument made that adoption of statewide standards is undesirable because a single standard is not responsive to variations in district wealth and makeup.<sup>55</sup> The tension created is hardly that characterized as "a viable system that balances the interests of the school boards and teachers in reasonable and generally predictable ways."<sup>56</sup> Nothing could be further from the truth. By specifying that the board has enumerated powers to hire and fire and set standards which, in reality, they do not have, the state creates a scapegoat of each school district by charging them with educational responsibility on one hand, and eliminating their control over the factor<sup>57</sup> most likely to result in achievement on the other. No one can seriously accept the tenured teacher dismissal system in Illinois as "viable" when the interests of the primary player in the system, the child, is totally subordinated to a fictional "balance" in which tenured teach-

ers enjoy virtual immunity from accountability. To believe otherwise is to deny the realities of the system.<sup>58</sup>

Insight into how the current tenure teacher dismissal system operates against effective Illinois public schools is revealed by examining its current operation. The legal fiction of local control and standards notwithstanding, determining remediability of conduct based on the developed case law is a task which requires an understanding of how teacher misconduct is categorized. The context for discussion of categories of teacher misconduct is properly one of, "Why are school districts made responsible for any potential rehabilitating action in the case of employees?" These employees were tainted by the Universities and Colleges, and certified by the state. So why is the school district that relies upon their training made responsible for their misconduct? It can be reasonably argued that school districts are made responsible for rehabilitation, i.e. remediation, as punishment for being gullible enough to believe that university training and state certification had any nexus with potential competent classroom performance and acceptable conduct. The message is clear. The deck is stacked against school districts, and their only hope to having an effective teaching force in the present system is to exercise extreme care in hiring teachers in the first instance, and to be absolutely diligent in supervision and evaluation of probationary teachers subsequent to hiring. In that light we turn to examine how the system as it currently operates determines irremediability.

"The meaning given to remediability differs depending on the type of inappropri-

ate behavior alleged.”<sup>59</sup> Since case law and independent analysis<sup>60</sup> have clarified how most dismissal cases are classified, examination of those categories provides significant illumination to the remediable/irremediable issue.

#### **IV. Categories of Misconduct**

Questionable teacher behavior, that which gives rise to dismissal or remediation action, has been comprehensively categorized by only one commentator. His review of dismissal actions resulted in the following categorization of conduct giving rise to the question of termination: insubordination, physical abuse of students, personal misconduct, and incompetence.<sup>61</sup> Sexual misconduct is considered as a special subcategory of personal misconduct.<sup>62</sup> These categories encompass all of the dismissal actions occurring between 1975 and 1989, thus encompassing everything over a 14 year period which “law and sound public opinion recognize as a good reason for the teacher to no longer occupy his position,”<sup>63</sup> and all actions over that 14 year period to “dismiss a teacher for incompetency, cruelty, negligence, immorality, or other sufficient cause...”<sup>64</sup> Given that the statute goes on to state that “to dismiss any teacher who fails to complete a 1 year remediation plan with a ‘satisfactory’ or better rating...,”<sup>65</sup> a clear implication is given that the “incompetency, cruelty, negligence, immorality, and other sufficient cause” are sufficient violations of the parameters of acceptable tenured conduct to subject the teacher in question to immediate dismissal. An examination of the cases in these categories reveals that implication has not reached fruition.

#### **A. Categories of Teacher Misconduct: Definitions<sup>66</sup>**

1. Insubordination<sup>67</sup> - the failure of a teacher to perform an action that the board of education or an administrator legitimately demand.
2. Physical Abuse of Students<sup>68</sup> - nonsexually motivated physical contact between a teacher and a student which is sufficiently inappropriate to warrant dismissal.
3. Personal Misconduct<sup>69</sup> - behavior outside of classroom teaching that is so inappropriate that it undermines the teacher’s ability to continue teaching effectively.
4. Incompetency<sup>70</sup> - a pattern of deficient conduct<sup>71</sup> which is sufficient to support by a preponderance of the evidence<sup>72</sup> that the teacher in question does not perform to the minimum level required by the specific standards articulated by the district.

#### **B. The Test for Irremediability**

“The test for determining whether a cause for dismissal is irremediable is whether damage has been done to students, faculty, or school, and whether the conduct resulting in that damage could have been corrected had the teacher’s superiors warned her.”<sup>73</sup> The first element of the test is the primary focus in teacher misconduct cases.

Although the remediability standard has been stated consistently, the interpretation of the test has not always been clear. Some recent appellate court decisions involve allegedly immoral conduct of teachers for sexually abusing students have questioned the applicability of the second prong of the test.<sup>74</sup> The focus of inquiry has shifted from whether the alleged misconduct could have been corrected by a warning to whether the effects of the alleged misconduct could have been corrected.<sup>75</sup>

### C. Categories: Applying the Remediable<sup>76</sup> Test

1. Insubordination - remediability is generally not an issue when a teacher fails to perform an action that the board of education or an administrator legitimately demand, because there is a “pattern” requirement for dismissal which practically renders insubordination remediable. Absent mitigating factors which involve other conduct inherently inviting irremediable analysis, insubordination will generally not be irremediable.
2. Physical Abuse of Students - remediability of nonsexually motivated physical contact between a teacher and a student requires an analysis of 1) the existing context provided by the district’s required disciplinary code, with special emphasis on the corporal punishment policy, 2) the seriousness of the contact, and 3) application of the two-pronged test for irremediability.<sup>77</sup> Where the first prong of the test reveals harm, then the second prong of the test, the severity of the harm, and the written district policy on corporal punishment, must be analyzed to determine irremediability.
3. Personal Misconduct - remediability of inappropriate teacher conduct is normally a question requiring analysis of the nexus between the inappropriate behavior and the teacher ability to continue to teach effectively.<sup>78</sup> Three questions are relevant. First, are the allegations sufficiently supported by the evidence? Second, is the misconduct in question serious enough to warrant dismissal? Third, is the conduct remediable using the Gilliland test? An analysis of the remediability issue in cases of sexual misconduct reveals an emphasis on severity of the misconduct. A sliding scale of severity runs from inappropriate friendliness (remediable)<sup>79</sup> to deviant sexual intercourse (irremediable).<sup>80</sup> Severity analysis renders decisions which fall somewhere between former remediable and irremediable decisions difficult.

4. Incompetency - irremediability of incompetency would likely be exclusively that derived from permanent disease, trauma, or other mitigating factors precluding remediation. Cases of irremediability of incompetency as a board decision of first impression are theoretically possible, but practically remote. Retirement under disability provisions of the state teacher retirement system would be more likely under irremediable incompetency derived from disease or trauma. Incompetency would otherwise likely be inherently remediable.

Any remediable conduct can become irremediable if the causes “continue for a long enough period of time and where the teacher refuses or fails to remedy them, they may be considered ‘irremediable’ and ground for discharge.”<sup>81</sup>

## **VI. Tenure as Protection**

### **A. Tenure History**

There is no question that school board dismissals of teachers prior to the enactment of tenure laws included many excesses.<sup>82</sup> However, the history of abuse in employment practices on the part of school boards has never been sufficient to either allay the widespread public dissatisfaction with the protections afforded to teachers by tenure,<sup>83</sup> or to justify extraordinary protection of teachers as an employment class just because they are unionized. There are two

primary reasons which exacerbate the public's continuing opposition to teacher tenure protections. First, private employees have no equivalent employment protection to statutory tenure. Second, teachers occupy a particularly sensitive public position which should be subject to strict scrutiny and accountability. The current great grandchild of the original 1909 tenure act is now a system of employment protection which prevents both the excesses and the legitimate need to ensure our public schools are free of incompetents and child abusers.<sup>84</sup> While the law in Illinois recognizes a broad spectrum of unacceptable conduct against spouses<sup>85</sup> and senior citizens,<sup>86</sup> the same level of protection for Illinois' children is barred by the tenure law.

### **B. Teacher Protection as Primary**

Illinois' children deserve the same level of protection from abuse afforded by other statutes.<sup>87</sup> Illinois' current “contractual continued service” statute operates to circumvent that level of protection for the states' school children. The general public often blames teachers' unions for the over-protection afforded teachers by tenure. However, because tenure laws<sup>88</sup> pre-date the current pervasive influence of teacher unions, the public's assignment of blame is not historically accurate. The purported purposes that tenure laws originally addressed are historically documented.<sup>89</sup> Simply stated, tenure counters school board abuses of teacher employment. The tenured teacher dismissal system was ostensibly designed to strike a balance between the inherent insular effect of Illinois' tenure law, and the

historical abuses of teacher employment by school boards. In reality, tenure has become one of the “legal privileges and favorable public polic[ies]”<sup>90</sup> which “the NEA is critically dependent” upon.<sup>91</sup> The political power of the NEA today works through tenure laws to protect teachers generally from being removed from service even when her performance is unsatisfactory.<sup>92</sup> Although the current system in Illinois purports to provide a mechanism for removal which operates without sacrificing the legitimate protection afforded quality teachers by tenure, the mechanism is largely a fiction. The Illinois tenure teacher dismissal system does not effectively discriminate between quality teachers and those whose performance and or conduct is marginal. The outcome of the tenure teacher system is the protection of both ineffective and aberrant teacher conduct. Effective teacher scrutiny and evaluation can mitigate these tendencies in a few instances, but has not done so to any significant extent.<sup>93</sup> The only acceptable solution to any conflict between the school boards and the teachers’ unions should be decided in favor of the children in classrooms. For that reason alone the entire Illinois tenured teacher system should be scrapped and replaced with a bill of rights for school children. To ensure vigorous enforcement, school board authority to hire, fire, and set standards must be reestablished.

## **VII. Conclusion**

Under the current system, the irremediable conduct doctrine is far too restrictive, subject to conflicting standards and shifting burdens, and insupportable as pub-

lic policy. The correct test of irremedial harm should be whether the effect of the misconduct or incompetence in question was such that those affected were interfered with to the extent that their ability to concentrate upon the purpose for their being in the public school was significantly impaired. Significance in this case would be any repetitive unwarranted distraction, thus eliminating single distractive incidents from dismissal action and properly placing them within a warning framework. The proper value protected under this definition would be the children and the purpose for which they are required to attend school. The proper standard of care in any teacher dismissal would be abuse of discretion, with the burden of proof being placed upon the person claiming the abuse. This would reinstate the legitimate power of the school board to hire and fire teachers, properly place their duty to protect the best interests of the school and its children before any consideration of “continued contractual service,” and require that local standards of performance would not be subordinated or shifted by allowing a hearing officer to either substitute her standards for those of the district, or to shift the burden to the district to prove by a preponderance of the evidence that they had sufficient “cause.” These changes would go a long way toward reversing the virtual prophylactic effect continued contractual service provides by insulating from accountability those teachers who are lazy, incompetent, or both. The protection of teachers from employment abuse for political reasons, including protection from the plethora of unwarranted and silly board dismissal decisions which have long since been

corrected, would still be subject to abuse of discretion scrutiny. Creating a completely separate definition of defenses based upon these past abuses could be incorporated into local standards set out in evaluation instruments, job descriptions and collective bargaining agreements. The protection of children and their right to avail themselves of an education unfettered by aberrant teacher conduct must be the primary focus of dismissal law. The fact that the children have no union to protect their primary position in the spectrum of a “balanced” playing field should not be dispositive.

### **Endnotes**

<sup>1</sup> 105 ILCS 5/24-11 (West 1996). Contractual Continued Service applies only teachers covered in 105 ILCS 5/24-11 (West 1996) and not to school district employees covered by 105 ILCS 5/10-23.5 (West 1996)

<sup>2</sup> 105 ILCS 5/24-12 (West 1996).

<sup>3</sup> Japsen v. Bd. of Educ. of Community Unit High Sch. No. 307, 153 N.E.2d 417, 419 (1958) quoting Murphy v. Houston, 250 Ill. App. 385 (1928). See also Fadler v. Ill. State. Bd. of Educ., 506 N.E. 2d 640, 643 (1987).

<sup>4</sup> Hegener v. Bd. of Educ. of City of Chicago and Ill. State. Bd. of Educ., 567 N.E.2d 566, 581 (1991).

<sup>5</sup> 105 ILCS 5/10-22.4 (West 1996).

<sup>6</sup> See Chicago Bd. of Educ. v. Payne, 430 N.E.2d at 314.

<sup>7</sup> *Id.* at 747.

<sup>8</sup> Aulwurm v. Bd. of Educ., 357 N.E.2d 1215 (1976), *rev'd on other grounds*, 367 N.E.2d 1337 (1977). See also Julius Menacker, *A Dilemma In Teacher Dismissal Hearings: Determining What Is Right When Both Parties are Wrong*, 93 ED. LAW REP. 459 (1994) for an illustration of a hearing officer subordinating the best interest of the school standard

<sup>9</sup> McCullough v. Ill. State Bd. of Educ., 562 N.E.2d 1238.

<sup>10</sup> See 105 ILCS 5/24-12 (West 1996) and 105 ILCS 5/10-22.4 (West 1996).

<sup>11</sup> The current system cannot be “balanced” and “viable” if 1) the administrators conducting evaluations are thereby subject to the same discharge abuses which give rise to favorable tenure arguments by teachers, 2) the best interest of the child standard in Illinois Marriage and Dissolution law is non-existent in Illinois Education Law, and 3) the best interest of the school standard is not given practical legal effect.

<sup>12</sup> The “not acceptable” reasons would incorporate identified abuses of employment which gave rise to tenure and other protective laws: pregnancy, marriage, human rights interests contained in other statutes such as sexual orientation, and civil rights protections regarding race, religion, age, and gender.

<sup>13</sup> 105 ILCS 5/24-11 (West 1996).

<sup>14</sup> Designated as applying only to “school districts having of less than 500,000 inhabitants.” The effective meaning is that Chicago schools have separate controlling statutes.

<sup>15</sup> A teacher enjoying statutory tenure who changes jobs by taking a teaching position in another school district forfeits tenure and starts over again as a first year probationary teacher.

<sup>16</sup> See *Miller v. School Dist. No. 167*, 500 F.2d 711 (1st Dist. 1974).

<sup>17</sup> “At least 60 days before the end of the school term.”

<sup>18</sup> The wording of this section is astonishing. One can hardly imagine any greater modification of board of education authority than restricting their ability to terminate teachers, yet the statement seems couched in terms which convey a false sense of insignificance.

<sup>19</sup> 105 ILCS 5/24A-5(j) (West 1996).

<sup>20</sup> See 105 ILCS 5/34-84 (West 1996) and 105 ILCS 5/34-85 (West 1996).

<sup>21</sup> 105 ILCS 5/34-84.

<sup>22</sup> With a third year optional for previously inexperienced teachers.

<sup>23</sup> 105 ILCS 5/34-85 (West 1995).

<sup>24</sup> 105 ILCS 5/24A-5 (West 1996). Non-tenured teachers are evaluated at least

yearly, and may be dismissed under the employment-at-will doctrine unless serving a third year of discretionary probation.

<sup>25</sup> 105 ILCS 5/24A-3 (West 1996) and 105 ILCS 5/24A-5 (West 1996).

<sup>26</sup> *Id.* The evaluation plan is subject to compliance requirements of the statute, including all ISBE rules.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 105 ILCS 5/24-12 (West 1996).

<sup>32</sup> 105 ILCS 5/24A-5 (West 1996).

<sup>33</sup> See *Bd. of Educ. of LeRoy Sch. Dist. No.2 v. Ill. Educ. Labor Rel. Bd.*, 145 Ill. Dec. 239, 199 Ill. App. 3d 347 (4th Dist. 1990).

<sup>34</sup> 105 ILCS 5/24A-5(c) (West 1996).

<sup>35</sup> *Id.*

<sup>36</sup> Although frequency of occurrence and other dismissal disincentive issues do lie outside the purview of this paper, comprehensive investigation and analysis is warranted. Current numbers are discussed briefly in a previous section.

<sup>37</sup> See Paul W. Thurston, *Dismissal*

*of Tenured Teachers in Illinois: Evolution of a Viable System*, U. ILL. L. REV. 1, (1990).

<sup>38</sup> These are characterized as “24A” cases by the Illinois State Board of Education (ISBE) Legal Department. Cases were reviewed at the Springfield Office of ISBE, 100 North State Street, Fourth Floor West, Legal Library. The great majority were Chicago Public Schools cases.

<sup>39</sup> The total number of cases for all categories of dismissal scrutiny is slightly greater than 215, but an exact number cannot be specified absent a comparison and verification of case reports housed in both Chicago and Springfield.

<sup>40</sup> See “at will” employment, *Pleasure Driveway and Park Dist. v. Jones*, 367 N.E.2d 111 (1977).

<sup>41</sup> 105 ILCS 5/24A-5 (West 1996).

<sup>42</sup> It is true that some pressure on marginal teachers brought about by unsatisfactory evaluation ratings and subsequent remediation plans (or the threat of them) results in resignations or negotiated terminations, and that these numbers are not reflected in hearing officer and appellate court decisions. It is reasonable to speculate that the number of such cases, though not actually known, is no larger or more significant in scope than those cases which are adjudicated, and therefore are also indicative of the chilling effect of the tenured teacher dismissal system on meaningful accountability.

<sup>43</sup> See 105 ILCS 5/10-22.4 (West 1996) and 105 ILCS 5/24-12 (West 1996).

<sup>44</sup> 105 ILCS 5/24-12 (West 1996).

<sup>45</sup> See Thurston, *supra* note 38.

<sup>46</sup> 105 ILCS 5/24A-5 (West 1996).

<sup>47</sup> *Welch v. Bd. of Educ. of Bement Comm. Unit Sch. Dist. No.5*, 358 N.E.2d 1364 (1977).

<sup>48</sup> *Gilliland v. Bd of Ed.*, 365 N.E.2d at 326 (1977). See also *Morris v. Ill. State Bd. of Educ.*, 198 Ill. App.3d 51, 144 Ill. Dec. 366 (3rd Dist. 1990).

<sup>49</sup> *Bd. of Educ. of Sparta Comm. Unit Sch. Dist. No. 140 v. Ill. State Bd. of Educ.*, 577 N.E.2d 900 (1991).

<sup>50</sup> 105 ILCS 5/24-12 (West 1996).

<sup>51</sup> *Id.*

<sup>52</sup> *Bd. of Educ. of Chicago v. State Bd. of Educ.*, 497 N.E.2d 984.

<sup>53</sup> 105 ILCS 5/24A-5 (West 1996), Content of evaluation plans: “The plan shall include a description of each teacher’s duties and responsibilities and of the standards to which that teacher is expected to conform.”

<sup>54</sup> See Thurston, *supra* note 38, at 72.

<sup>55</sup> *Id.* at 87.

<sup>56</sup> The most important factor is

teacher employment.

<sup>57</sup> As previously observed, to conclude that the current system is in any way balanced requires ignoring existing significant interests.

<sup>58</sup> Thurston, *supra* note 38.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Fadler v. Ill. State Bd. of Educ., 506 N.E.2d 643.

<sup>63</sup> 105 ILCS 5/10-22.4 (West 1996).

<sup>64</sup> *Id.*

<sup>65</sup> See Thurston, *supra* note 38.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Id.* at 38.

<sup>69</sup> This is a working definition I derived from the case law. Thurston offers no specific definition in his article, but does note that two states as of his writing had working definitions included in their statutes.

<sup>70</sup> Bd. of Educ. v. Engles, 75 Ill. App. 3d 334, 31 Ill. Dec. 153 (3rd Dist. 1979).

<sup>71</sup> Specifically, credible witnesses

and sufficient overall evidence.

<sup>72</sup> Gilliland v. Bd. of Educ., 67 Ill.2d at 153, 8 Ill. Dec. at 88 (1977). See also Morris v. Ill. State Bd. of Educ., 198 Ill. App. 3d 51, 144 Ill. Dec. 366 (3rd Dist. 1990).

<sup>73</sup> See Fadler v. Ill. State Bd. of Educ., 153 Ill. App.3d 1024, 106 Ill. Dec. 840 (5th Dist. 1987); Bd. of Educ. v. State Bd. of Educ., 138 Ill. App.3d 947, 93 Ill. Dec. 580 (1st Dist. 1985).

<sup>74</sup> Thurston, *supra* at 38, 9.

<sup>75</sup> See Thurston's analysis for a comprehensive overview of the existing case law through 1989. Case law from 1990 to present has not contributed any substantial changes to the question of remediability in any category. Cited cases remain good law.

<sup>76</sup> Nonsexual contact does not initiate a shift in the conduct analysis.

<sup>77</sup> See Massie v. East St. Louis School Dist. 189, 561 N.E.2d 246.

<sup>78</sup> See Hegener v. Bd. of Educ. of Chicago and the Ill. State Bd. of Educ., 567 N.E.2d 566.

<sup>79</sup> See the *Moffat* and *Hall* hearing cited in Thurston, *supra* note 38.

<sup>80</sup> Szabo v Board of Educ., 454 N.E.2d 841.

<sup>81</sup> It is not the purpose of this paper to document or explore such excesses. Suf-

fice it to observe that prior to tenure teachers were dismissed under the “employment at will” doctrine, i.e. for any reason, or no reason at all. The concept is still the law in Illinois. Tenure is an exception to that law. There are other exceptions.

<sup>82</sup> See Peter Brimelow and Leslie Spencer, *The National Extortion Association?*, FORBES, June 7, 1993, at 72. See also Thomas Tosh with Robin M. Bennefield, Dana Hawkins & Penny Loeb, *Why Teachers Don't Teach*, U.S. NEWS & WORLD REPORT, Feb. 26, 1996 at 63.

<sup>83</sup> I use the term “child abuser” here to describe those teachers whose conduct would fall under an existing statutory definition of child abuse, and those whose conduct should fall under the far more difficult common law definition encompassed in the concept of “public opinion.”

<sup>84</sup> See the Illinois Domestic Violence Act, 750 ILCS 60/101 et. seq.

<sup>85</sup> See the Illinois Nursing Home Rights Act, 210 ILCS 45/2-101 et. seq.

<sup>86</sup> See the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 et. seq. See also Illinois Marriage and Dissolution Act, Child and Minors, 750 ILCS 5/601 et. seq.

<sup>87</sup> 105 ILCS 5/24-11 (West 1996).

<sup>88</sup> “[Tenure] was enacted primarily for the protection of teachers ...” Donahoo v. Bd. of Educ. of Sch. Dist. No. 303, 61

N.E.2d 787 (1953).

<sup>89</sup> *Id.* at 79.

<sup>90</sup> *Id.*

<sup>91</sup> There are many reasons for this, not the least of which is often a lack of relevant classroom teaching experience by administrators in a direct position to effect evaluations which could lead to warranted dismissal. When an evaluator lacks the experience and experience-based expertise necessary to render an evaluation a substantively credible and complete event, the results become a useless exercise of process. Even under experienced evaluators, use of the system as a process formality may subject a teacher to abuse. See Menacker, *A Dilemma In Teacher Dismissal Hearings: Determining What Is Right When Both Parties are Wrong*, 93 ED. LAW REP. 459 (1994).

<sup>92</sup> Since the statutory system mandates deference to the opinion of the hearing officer in teacher dismissal cases, and even the most rigorously fair and reasonable conclusion is subject to her biases, it is difficult to understand why the collective wisdom of 7 school board members (3 in a few small districts whose geographic boundaries lie completely within a single township and where the district opts for a 3 member board) accountable to the public is less trustworthy than that of a single arbitrator. Hearing officers are not required to have any classroom teaching, school administrative, or university training in school-related child growth and developmental psychology. The

effect of such biases and deficiencies works against valid dismissal decisions, and casts the system in a suspect light. This in turn works to insulate marginal teacher performance and conduct. Administrators charged with the responsibility of insuring teaching quality are discouraged from expending the tremendous amount of effort necessary to effect a warranted dismissal. This phenomenon is further exacerbated by the psychological pressure brought to bear by the teachers unions upon any administrator who initiates action which may lead to a tenured teacher dismissal.

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