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**Supervision of Teachers: Guidelines for Appropriate and Accountable Supervision,
as Derived from Recent Law Cases**

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Introduction. This article will focus on what supervisors² can and should do as they perform their professional duties in the public schools. Their duties arise from the goal of all schools to offer a high level of education to their students, who will become interdependent adult citizens in our democratic society. Central to every school's mission is a staff of professional competent teachers³ who are supervised by the school district's leaders. The enacted laws⁴ of each state require that students attend school. Those same or related laws also require, among other things, that supervisors evaluate their teachers to determine whom they will recommend to be retained by the board of education and in what ways those teachers need to improve their professional skills.

This article will focus on the supervisory evaluation of teachers according to current law, as set forth in state statutes and state agency regulations, as well as local laws, especially those established pursuant to collective bargaining agreements (CBAs) between boards of education and their respective teachers' unions. My approach will be to examine the common law, as manifested in court and arbitration decisions, that applies and interprets the enacted law. Just as we know today what constitutes First Amendment free speech by examining court decisions, here we will look to ten recent case decisions on teacher supervision (eight are from 2001-2005; two are from 1996-2001) to determine what the law is on the evaluation of teachers. Judges and arbitrators offer their respective opinions of what constitutes appropriate and accountable supervisory procedures when they apply the facts of a particular classroom⁵ situation to the relevant statutory, regulatory, and CBA law. We can derive what these adjudicators consider to be appropriate supervision by examining their decisions when teachers challenge their supervisors' evaluations.

For example, in an Ohio case, *Koch v. Greenville City School District*,⁶ in which teacher Kenneth Koch challenged the nonrenewal of his limited teaching contract, the judge commented on the State of Ohio's mandate that supervisors should help teachers to improve. The judge said that in regard to teacher Koch the mandate was "virtually meaningless." That was so because Koch's principal had suggested that Koch improve his ability to ensure student success, but the board of education refused to fund Koch's

attendance at a seminar entitled "Producing Productive Student Behavior." The judge rightly wrote that he would "express no opinion on Koch's effectiveness as a teacher" because that was not within his judicial role.⁷ Then the judge added that the events that transpired in Koch's case "did not assist in achieving the goal of making him [Koch] a better teacher."⁸ That is to say, according to the judge, supervisors and boards of education have an obligation not only to diagnose what teachers need to do in order to improve but also an obligation to facilitate their teachers' efforts to improve their skills pursuant to their supervisors' recommendations. For the judge, appropriate and accountable supervision according to Ohio state law and that district's CBA includes both making recommendations for improvement and supporting efforts that will lead to improvement. Because there was no facilitation of Koch's attempt to improve, the judge consequently ruled in favor of Koch.

The basis of the examination here on the evaluation of teachers will be ten recently decided federal and state cases: *Bernstein*,⁹ *Cowan*,¹⁰ *Evans-Marshall*¹¹ *Fields*,¹² *Hicks*,¹³ *Koch*,¹⁴ *Natay*,¹⁵ *Settlegoode*,¹⁶ *Shanklin*,¹⁷, and *Tri-Valley*.¹⁸ The motivation for these cases stemmed from nonrenewal of a teacher's contract, disciplinary action for insubordination and conduct unbecoming a teacher, and retaliation for whistle blowing. While nine of the ten cases stemmed from contract nonrenewal, the claims of the plaintiff teachers involved a broad range: violations of the free speech and the establishment of religion clauses of the First Amendment; racial discrimination and religious discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991¹⁹; violation of Section 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978²⁰; procedural errors from the CBA, state statutes, and school district policies, Oregon's Whistleblower Act;²¹ and an arbitrary and capricious decision by a board of education. One of the ten cases involved only arbitration. The others all involved a court as the final decision maker.

I make no claim that these ten cases provide a comprehensive view of how supervisors should act. Not all appropriate supervisory behavior needs to have a legal basis. Some guidelines for appropriate supervision stem from an ethical, philosophical, or psychological basis. Perhaps some supervisory behavior can even be founded on just common sense. For example, "Don't write your evaluation reports while angry."²² Nevertheless, what follows constitutes a fair legal set of guidelines based on the ten selected case decisions. Supervisors would do well to accept these guidelines in their endeavors to act appropriately and accountably according to the law.

Guidelines: The Underlying Ideas. Supervision has as its foundation some underlying ideas, concepts, or beliefs that often go unrecognized or unmentioned. Here I shall set forth five such ideas on which teacher evaluation law is based. The law, at the state and local levels, is prescriptive, directing supervisors to act in a certain manner. To understand the legal basis of supervision it is necessary, I believe, to be cognizant of these underlying ideas. Without any specific order of importance these five ideas follow.

1. *The law holds that it is possible to improve a teacher's poor performance.* According to New Jersey Statute 18A:27-3.1, the purpose of teacher evaluation is "to recommend as to employment, identify deficiencies, extend assistance for their correction, and improve professional competence." Similarly, according to Revised Code

3319.111 (B) (3) of the Ohio statutes, for each evaluation of a teacher, that teacher must receive "a written report of the results of the evaluation 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." Such statutory provisions mean that a supervisor may not give up on a teacher until a final decision needs to be made; improvement is always possible.

2. *Teachers and supervisors have professional rights.* Both probationary and tenured teachers have rights to protect them when their actions are disapproved by supervisors and the community. Teachers are not private, unprotected at-will workers. In addition to the constitutional and federal statutory rights that every person has, teachers have state, local, and collective-bargaining-agreement rights (where applicable) to protect them. As Strike and Bull put it, teachers have the right to be evaluated "on the basis of evidence" and "on relevant criteria."²³ Supervisors have the right to collect information relevant to their supervisory and evaluative roles."²⁴ This underlying idea means that federal law supports and promotes evidential evaluation and opposes discrimination constitutionally pursuant to the Equal Protection and Due Process clauses of the Fourteenth Amendment and statutorily in race, color, religion, sex (gender), national origin,²⁵ pregnancy,²⁶ age (over 40),²⁷ and disability.²⁸ State and local anti-discrimination laws, when they exist, can and might prohibit discrimination in sexual preference (sexual orientation).

by 3. *Teachers and supervisors are expected to cooperate with each other in a good faith effort for the success of the school in providing an appropriate education for their students.* Success in school is based on expected mutually beneficial relationships between teachers and their supervisors. School success occurs in an atmosphere of teamwork, not contention, closedness, and resistance.

4. *Teachers and supervisors will abide by the current law on teacher evaluation in performing their professional duties within the structure of the public schools.* That hierarchical school structure provides for supervisors to evaluate their teachers and not vice versa. The law functions as intended when people are honest within their roles.

5. *The supervisors are leaders in the schools and serve as role models and mentors for the teachers.* Supervisors are the links between the teachers and the board of education, which is the representative of the community while governing the school district. As leaders, supervisors naturally serve to influence teachers by their very behavior, verbal and nonverbal, intended and unintended.

The above five underlying ideas are often unwritten but are nevertheless the foundation of the supervisory structure and the legal perspective of the public schools. Without a recognition of them it is not possible to grasp the legal aspects of teacher evaluation.

Guidelines for Appropriate and Accountable Supervision: An examination of the ten selected law cases concerned with the supervision of classroom teachers yields the eight guidelines that follow.

Guideline #1: Supervisors should respect the teachers' rights as they accept their own rights and responsibilities. For example, teachers and supervisors have the constitutional right to free speech whether they are probationary or tenured teachers.

Nevertheless, probationary teachers often remain silent regarding matters of public concern, such as the flag salute and the confirmation of a justice for the Supreme Court, because they fear that they will lose their jobs if they speak out on community, national, or international political issues. A school situation that gives rise to such fear is not desirable in that it denies legal rights. In *Settlegoode* and *Cowan*, both teachers claimed First Amendment protection of their speech on treatment of special education students and religion, respectively. Significantly, the two juries on their cases supported them when they claimed violation of their First Amendment rights.

Two federal statutory examples, in addition to constitutional First and Fourteenth Amendment rights, are: Title VII of the Civil Rights Act of 1964 and 1991 and the Age Discrimination in Employment Act (ADEA) of 1967/1986. The former act protects teachers from discrimination in employment by providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."²⁹ (Note that *Cowan* won but *Natay* and *Shanklin* lost on their Title VII claims.) The latter act protects teachers over the age of 40.³⁰ Teacher evaluation need not be inconsistent with the rights granted by such enacted laws.

Guideline #2: Supervisors should trust and support teachers as professionals. Teachers need and seek support from their supervisors, especially regarding the direction of and strategies for improvement pursuant to recommendations made on evaluation reports. Supporting teachers as professionals means recognizing that teachers are people who can and do make significant decisions in the classroom regarding every student's education, and for this reason states generally have special statutes to protect teachers during and after their mandated evaluations. Ohio's statute on teacher evaluation, Revised Code 3319.111, for example, sets forth the specific procedures that supervisors are required to follow when evaluating their teachers so as to create a fair approach in evaluation. Thus, Ohio supervisors must evaluate a teacher at least twice a school year (once before January 15 and once between February 10 and April 1.) The teacher must their receive evaluations by January 25 and April 10, respectively. The school districts must establish policies dealing with the topics of criteria for job performance and the length of time for observations (not less than 30 minutes). The written supervisory reports must include specific recommendations and the means by which the teacher may obtain assistance for improving. I support such procedures because they promote appropriate and accountable supervision.

Teachers, as professionals, need to be trusted and encouraged to make decisions on their own without hounding. Every teacher, as a certified professional, deserves the time and encouragement to improve. All teachers need their supervisors' support in their efforts to improve, even though the end result of an improvement effort still might turn out to be the nonrenewal of the teacher's employment contract or dismissal of a tenured teacher.

The supervisors involved with *Shanklin* showed patience and abided by the established procedures when guiding *Shanklin*'s professional improvement, as prescribed in her evaluation reports. They prepared two Performance Improvement Plans (PIP) which were "designed to help *Shanklin* cure her four areas of deficiency"³¹ Finally, they warned *Shanklin* that she had 30 days to improve, but they subsequently gave her an additional five months when she requested more time to "resolve her deficiencies."³²

They even changed the composition of her Evaluation Team at her request and then conducted a hearing in regard to the Statement of Charges that was drawn up by the school district against her.³³ All in all, the supervisors and the board of education appear to have supported Shanklin patiently and professionally as they all worked on her unsuccessful professional improvement.

Guideline #3: Supervisors should help their teachers to improve in a reasonable amount of time as they comply with other aspects of the law. The main function of a supervisor is to help improve the education of the students in a given school district. A primary way for a supervisor to effect improvement in a school district is to help the teachers to improve their competencies. As mentioned in *Fields*, the enacted law in Oklahoma requires that the supervisor "make a reasonable effort to assist the teacher in correcting the poor performance...."³⁴ The lack of substantial compliance with the enacted law applicable to teacher evaluation can lead to a loss in court when a teacher challenges supervisory evaluations. A judge can order the reinstatement of a terminated teacher if there was failure to comply with the legally prescribed procedures. In the case of Koch the school district did not comply with the law that required supervisors to facilitate the improvement of Kenneth Koch. Therefore, the judge reinstated Koch for the next year.³⁵

It is a judge who decides what constitutes substantial compliance with the law in recognition that there are sometimes slips by the supervisors. In *Tri-Valley* the arbitrator, in the conclusion section of his decision, put it this way, "Though the letter of the prescribed procedure for evaluation was not strictly adhered to, the record disclosed that the five observations, meetings, and written reports substantiated the finding that the grievant was not qualified...."³⁶ Similarly, in *Hicks* the judge noted that the teacher did not meet her burden of demonstrating that the board of education did not act in good faith. In rejecting reinstatement the judge concluded that the failure to provide complete compliance "did not substantially and directly impair her ability to improve herself."³⁷ The judge in *Cowan* also rejected reinstatement of the teacher but not for lack of substantial compliance. The court's reason reflects the need for a good relationship between teacher and supervisor, as set forth earlier in the third underlying idea. The appellate court said, "We believe that the district court correctly concluded that the teacher-principal relationship between Cowan and Cogdill was so badly damaged that none could be reestablished. Without such a working relationship the school would not be able to function properly."³⁸

The best approach for a supervisor is to strive for complete compliance with deadlines and other items with specific dates or quantitative requirements. This approach will remove a supervisor from the risk of having to rely on a judge or arbitrator to decide in favor of the supervisor instead of the teacher who is challenging a procedurally defective evaluation process.

Because improvement takes time and is sometimes a difficult goal to attain, generally there is no specified amount of time in the enacted law within which a teacher must improve. What is a reasonable amount of time depends on the teacher, the school conditions, and the items identified for improvement. In *Koch* the collective bargaining agreement recognized this point by "requiring the administrator to allow a member *reasonable* time between observations to allow for improvement in the areas of deficiency."³⁹ (emphasis added). In *Tri-Valley* the arbitrator used the synonymous term

"suitable period of time."⁴⁰ In contrast to the flexible, unspecified term *reasonable*, New Jersey Statute 18A:6-11 provides that when a tenured teacher is charged with inefficiency leading to dismissal, the school district must "allow at least 90 days in which to correct and overcome the inefficiency." A teacher may also challenge the amount of time allowed for improvement, and a judge or arbitrator will decide on that issue, too.

Guideline #4: Supervisors should clarify evaluation criteria, gather facts, and be specific in their recommendations and assistance plans for their teachers. The criteria applicable to an evaluation guide the collection of data and the recommendations to improve any weakness identified by the supervisor. Criteria are fundamental in teacher evaluation. It is for this reason, for example, that Ohio statute R.C. 3319.111(B)(3), which is the relevant statute in *Koch, Evans-Marshall*, and *Tri-Valley*, requires that a board of education shall establish a teacher evaluation procedure. The required procedure in Ohio must include "criteria of expected job performance in the areas of responsibility assigned to the teacher being evaluated." Other states and local school districts may not have such an enacted provision to guide supervisors. In any case, it is best for both teacher and supervisor to discuss the evaluation criteria that the supervisor will apply so as to be up-front and fair in teacher evaluation. Such a step will set the context and direction for gathering pertinent data by the supervisor. Teachers, like all workers, need to know clearly on what basis they will be evaluated.

Supervisors would be wise to offer specific suggestions for improvement even where the enacted law for a particular school district does not require specific recommendations. With specificity, the supervisor can manifest meaningful assistance to the teacher via a good faith effort to help the teacher improve. In *Evans-Marshall*, where the specificity of the supervisor's recommendations was challenged, the trial court and the appellate court compared the recommendations offered to Evans-Marshall with those made to another teacher in a prior Ohio Supreme Court case. The two *Evans-Marshall* courts concluded that the recommendations given to Evans-Marshall were similar to the recommendations accepted as being "specific" by the Ohio Supreme Court.⁴¹ Thus, on this claim about compliance Evans-Marshall lost. (She may yet win on her new claim in federal court that the school district violated her First Amendment free speech rights.)

In *Fields* the school district failed to be specific as to the ways the teacher needed to improve. Moreover, the court deemed the assistance given to the teacher to be insufficiently specific to help her improve.⁴² The district used the term "suggest" regarding attendance in summer workshops in contrast to the stronger, specific terms "recommend" and "require." Hence, the court held that Fields did not know clearly that she was expected to attend workshops and that her "continued employment hinged on such attendance."⁴³ On these key points the teacher won in her challenge and gained reinstatement.

Guideline #5: Supervisors should involve their teachers personally and notify them of their responsibilities and their own duties. This guideline leads the supervisor to make explicit what too often is not discussed openly between the supervisor and the teacher. First, supervisors should aim for face-to-face communication with their teachers, which is what "normally occurs,"⁴⁴ so as to establish a direct, open, and trusting relationship with each teacher individually. Communication based primarily on telephone calls, or e-mail, or both, though they go directly to the teacher, still have the effect of distancing the supervisor from the teacher. Such technological avenues should

serve to supplement and support the personal touch of face-to-face contact where both supervisor and teacher can benefit from nonverbal communication, too.

The supervisor should emphasize that the person responsible for the improvement of the teacher is ultimately the teacher. The law requires the supervisor to offer recommendations; sometimes the enacted law requires specific recommendations. In any case, the actual improvement is the responsibility of the teacher. The North Brunswick, New Jersey school district CBA puts it this way explicitly: the supervisors must offer in their evaluation reports "specific suggestions as to measures the teacher might take to improve his/her performance in each of the areas wherein weaknesses have been indicated."⁴⁵

The supervisor can at most facilitate and assist. The CBA in Tri-Valley even requires the supervisor and teacher to "discuss" their "specific plans for improvement."⁴⁶ It is the teacher who must improve and then manifest the improvement while teaching so that the supervisor can observe it, evaluate it, and document it.

Guideline #6: Supervisors should develop and utilize other supervisors. Because of the ever-changing relationship between a supervisor and a teacher and because often there is need for corroboration of data and conclusions drawn from those data, supervisors need support for their evaluations of teachers. This point is especially relevant when a supervisor's evaluation is challenged, as in *Hicks*. To supplement the evaluation of Hicks by her principal, the school district's CEO (in South Dakota a CEO has the authority and functions of a superintendent) also evaluated the teacher.⁴⁷ Similarly, the principal in *Natay* requested the superintendent to evaluate the teacher because of concern that the recommendation not to renew the teacher's employment contract would result in a discrimination lawsuit. The appellate court expressly noted that the superintendent's independent evaluation was a key point in affirming the trial court's decision in favor of the school district.⁴⁸ In both *Hicks* and *Natay* the utilization of multiple evaluators was essential in defending the school district's decision concerning a teacher.

Guideline #7: Supervisors should act within appropriate timelines and with timing in mind. As with virtually all legal matters, time is an important factor in analyzing the facts of a case. First, the enacted laws all set deadlines for the appropriate observing, conferring, and reporting stages of teacher evaluation. Supervisors need to perform their designated tasks according to the deadlines, lest their evaluations be challenged as procedural errors. Such errors when challenged, (for example, by Koch and Evans-Marshall), can nullify the intended effect of the evaluation.

Timing is important to the charge of retaliation. If supervisors keep timing in mind, they might be able to disprove and defend themselves against a claim that one supervisory action arose because of a prior act by the teacher. Two examples are relevant here. Settlegoode claimed and convinced a jury in her case that the later, negative evaluation reports about her were in retaliation for her letters that criticized the way her school district treated disabled students. Apparently the supervisors had changed their evaluations without being aware that the sequence of events was against them. Similarly, the supervisory evaluations of Cowan changed after she wrote her Magic Rock letter to her students.⁴⁹ The changed evaluations became the basis of Cowan's First Amendment Free Speech claim and her Title VII religious discrimination claim. The appellate court stated, "We conclude [the principal's] conduct in response to the community

apprehension regarding New Ageism coupled with her generally unsupportive behavior toward Cowan, provided sufficient evidence for the jury to conclude that [the principal] was motivated by religious concerns."⁵⁰ In sum, time and timing are important factors for supervisors to be cognizant of always. This important element of timing may be a decisive one in the ongoing new suit by Evans-Marshall.

Guideline # 8: Supervisors should document their teachers' progress and their own. It is important for supervisors to keep notes of what the teachers have done, what their own responses have been, and how the teachers have been notified about these actions. Supervisors should sign and date their evaluation reports, provide a copy to the teacher, obtain the teacher's signature to signify receipt of the document from the supervisor, and submit the document to the school district. In short, complete evaluation reports are essential for defense against challenges based on procedural defects and lack of notice.

The principal's documentation in *Bernstein* is an excellent example of needed documentation and testimony. Using a year's evaluation report, Bernstein's principal showed that he had notified Bernstein of the school's concern about his use of sexual classroom language. The principal also produced evidence that he notified the teacher orally and in writing that the teacher "should de-emphasize sexual aspects of literary works and be cautious about classroom discussions that have sexual overtones."⁵¹ From the evidence offered, the appellate court concluded that the overall testimony and documentation "provided the requisite quantum of evidence to support the charges against the tenured teacher."⁵²

Summary. While I do not claim that the selected cases are representative of all supervisory evaluations, I do maintain that they are generally indicative of the legal literature, reflecting the breadth of claims that teachers bring against supervisors and offering the foundation for a wealth of guidelines for appropriate and accountable supervision that can aid supervisors in their legal role as evaluators of teachers. These cases offer supervisors a fresh look at what to expect when their supervisory decisions are challenged before a judge or arbitrator. The underlying ideas offer a way to understand the bases for the law's prescriptions. The guidelines offer specific ways to act appropriately and accountably. Together, the cases, the underlying ideas, and the guidelines can offer a wake-up call to supervisors, because there is not much written and available on classroom supervision from a legal perspective.⁵³ This article's look at teacher evaluation from a legal perspective will help to supplement points from other perspectives appearing in the general education literature on sound supervision.

Endnotes

1. I thank Amy H. Wollock of Rutgers who worked with me on an earlier version of this paper.

2. By the term supervisor I mean any person who is authorized to assist, observe, confer with, lead in professional development, and evaluate a teaching staff member. Thus, the term supervisor includes, but is not limited to, people with the titles of department chair, supervisor, assistant principal, principal, assistant superintendent, and superintendent.

3. By the term teacher I mean any teaching staff member who holds a state certificate. Thus, teacher includes, but is not limited to, people who are classroom teachers, librarians, counselors, principals, and curriculum coordinators.
4. By the term enacted law I mean the combined law this is passed by the citizens, the legislature, the state board of education, the local board of education, the board of education together with the teacher's association, or any other official body authorized to pass a law. This does not include common law, which is decided by a court or arbitrator. Thus, the term enacted law includes, but is not limited to, a constitution, a statute, a state regulation, a local school district policy, and a collective bargaining agreement.
5. By the term classroom I mean the work station of a teacher. Thus, classroom includes, but is not limited to, a teacher's instructional space, a counselor's office, a school library, an athletic coach's field, and a principal's building.
6. Koch v. The Greenville City Sch. Dist. Bd. of Educ., No. 1403, 1996 Ohio App. LEXIS 5433., at 13 (Darke Cty. December 6, 1996).
7. Id.
8. Id.
9. In re Bernstein v. Norwich Sch. Dist., N.Y.S.2d 474 (A.D. 3 Dept. (2001)).
10. Cowan v. Strafford R-VI Sch. Dist., 140 F.3d 1153 (8th Cir. 1998).
11. Evans-Marshall v. Board of Educ. of Tipp City Exempted Village Sch. Dist., No. 03CA2, 2003 Ohio App. LEXIS 4496 (Miami Cty. September 19, 2003), 802 N.E.2d 154 (Ohio 2004) (rejection of the teacher's petition for final review by the Ohio supreme court). Evans-Marshall subsequently brought another suit against the school district, claiming that the school district violated her First Amendment right of free speech. This case is now scheduled for trial. See 2005 FED.Appx. 0432P (6th.Cir.).
12. Fields v. Independent Sch. Dist. No. 1 of Tulsa County, Oklahoma, 84 P.3d 779 (2002).
13. Hicks v. Gayville-Volin Sch. Dist., 668 N.W.2d. 69 (S.D. 2003).
14. Koch v. The Greenville City Sch. Dist. Bd. of Educ., No. 1403, 1996 Ohio App. LEXIS 5433 (Darke Cty. December 6, 1996).
15. Natay v. Murray Sch. Dist., 129 Fed.Appx. 259 (2005).
16. Settlegeode v. Portland Pub. Sch., 362 F.3d 1118 (9th Cir. 2004).

17. Shanklin v. Fitzgerald, 397 F.3d 596 (8th Cir. 2005).
18. Tri-Valley Educ. Ass'n. v. Tri-Valley Local Sch. Dist. Bd. of Educ., 119 Lab.Arb (BNA) 229 (2003) (Skulina, Arb.).
19. 42 U.S.C. ' 2000e-2.
20. 29 U.S.C. ' 794.
21. ORS 659.530.
22. Jeff Horner, Fifteen Tips for Better Documentation of Employee Performance, 146 Ed.Law Rep. [613] (Oct.12, 2000).
23. Kenneth Strike and Barry Bull, Fairness and the Legal Context of Teacher Evaluation, in Handbook of Teacher Evaluation 307 (Jason Millman,ed. 1987).
24. Id. at 307-308.
25. Title VII of the Civil Rights Act of 1991, amending Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e).
26. Pregnancy Discrimination Act of 1978 (42 U.S.C. 200e)
27. Age Discrimination in Employment Act of 1967 (29 U.S.C. 621).
28. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C.794).
29. 42 U.S.C. 2000e-2.
30. 29 U.S.C. 621.
31. Shanklin, at 599.
32. Id. at 600.
33. Id.at 601.
34. Fields, at 785.
35. Koch, at 14.
36. Tri-Valley, at 235.

37. Hicks, at 79. Note the implied criterion for rejecting reinstatement, based on a twist of the term substantial compliance, along with a statement that the teacher is responsible for her improvement. See Guideline #5, *infra*.

38. Cowan, at 1160.

39. Koch, at 3.

40. Tri-Valley, at 233.

41. See *Thomas v. Newark Bd. of Educ.*, 643 N.E.2d 131, 134 ((Ohio 1994).

42. Fields, at 783.

43. *Id.* at 784.

44. Hicks, at 78.

45. North Brunswick Sch. Dist. CBA, 2003-2004 through 2005-2006, at 46.

46. Tri-Valley, at 232.

47. Hicks, at 72.

48. Natay, at 262.

49. The letter is as follows: Dear Second Grader, You have completed second grade Because you have worked so hard you deserve something special and unique, just like you! That something is your very own magic rock. The magic rock you have will always let you know that you can do anything you set your mind to. To make your rock work, close your eyes, rub it, and say to yourself three times, "I am a special and terrific person, with talents of my own!. Before you put your rock away, think of three good things about yourself. After you have put your rock away, you will know that the magic has worked. HAVE FUN IN THIRD GRADE!!!!

50. Cowan, at 1158.

51. Bernstein, at 476.

52. *Id.* at 477. The charges were: "conduct unbecoming a teacher, insubordination, neglect of duty, and incompetence for using inappropriate verbiage during the course of a lesson." *Id.* at 475.

53. Helen M. Hazi, Policy and Legal Considerations in Supervision, *Handbook of Research on School Supervision* 968 (Gerald R. Firth & Edward F. Pajac, eds., 1998).

DEVELOPMENTS IN THE COURTS

No Child Left Behind

Rumsfeld v Forum for Academic and Institutional Rights, No. 04-1152 (U.S. March 6, 2006): In a unanimous 8-0 decision, the United State Supreme Court has upheld the “Solomon Amendment” which requires that institutions of higher education which receive federal funds provide campus access to military recruiters. A coalition of law schools operating under the name Forum for Academic and Institutional Rights (FAIR), all of which ban military recruitment on their campus because of their “discrimination” against hiring homosexuals, had brought suit alleging a violation of their First Amendment free speech rights. FAIR’s argument was that by the Solomon Amendment forcing them to open their campus to military recruiters, the federal government was unconstitutionally compelling them to support the military’s “don’t ask don’t tell” policy as regarding homosexuals.

In a decision authored by the new Chief Justice Roberts, two different justifications were provided as to why the federal government had the power to require universities to allow military recruiters access to their campuses. The first reasoning was the basic contract analysis underlying the whole concept of categorical aid. There was nothing illegal about the federal government requiring, as a condition of acceptance of federal money, that universities allow military recruiting on their campuses. If the universities did not desire to provide such access they had the power to refuse such a “contract” for federal money. Moreover, all the categorical aid “contract” required was access. It did not prohibit the law schools from publicly expressing disapproval or disagreement with the military’s policy on homosexuals.

The second rationale supported the contract rational. The Court stated that Congress could have simply demanded access under its Article I, Section 8 power to “provide for the common Defense,” “raise and support Armies,” and “provide and maintain a Navy.” If the Congress had the power to impose such a requirement, it certainly had the right to include such a requirement under a funding contract, acceptance of such by any given university being totally voluntary. *Editor’s Note: While the Solomon Amendment does not apply to K-12 schools, this decision does give a good indication of the probable position of the Court should the NCLB requirement that high schools give equal access to military recruiters ever be challenged.*

The pilot program offered by the U.S. Department of Education has been fairly popular with states. As of the end of February, 20 states – Alaska, Arkansas, Arizona, Colorado, Delaware, Florida, Hawaii, Indiana, Iowa, North Carolina, Oregon, South Carolina, Tennessee, and Utah for consideration this year and Maryland, Nevada, New Hampshire, Ohio, Pennsylvania, and South Dakota for consideration next year – had applied for 10 possible spots which would allow the state greater flexibility in measuring student progress. Under the pilot program, states could show AYP by tracking individual students’ progress on standardized tests rather than utilizing aggregate test scores.

School Finance

In light of North Carolina Supreme Court decision in *Hoke County Board of Education v North Carolina*, which defined a “sound basic education” to consist of a competent, well-trained teacher, an effective principal, and sufficient resources, the judge overseeing North Carolina’s finance adequacy case has informed state officials that he will close poorly performing schools unless the principals are immediately replaced. Reminiscent of the laments of state and federal judges after southern schools deliberately dragged their heels after the call of desegregation, Judge Howard Manning, Jr. stated that “Superintendents and principals have run out of room and run out of time.” Not surprising, the Charlotte-Mecklenburg school district is once again in the middle of the controversy. *Editor’s Note: Much research coming out of colleges and universities have said that the new dividing line which is replacing race is socio-economic status. Now instead of whites vs non-whites when it comes to inequitable distribution of educational resources and opportunities, it is high SES vs low SES which is the new segregation which must be combated through the revision of state funding of public education. This case seems to bear out the truth of that research.*

Special Education

Fitzgerald v Camdenton R-III School District, No. 04-3102 (8th Cir. March 1, 2006): The 8th Circuit has ruled that the IDEA does not give local school districts the power to require that a child, who is being privately educated and whose parents have waived all rights under the IDEA be evaluated for possible special education services. In *Fitzgerald*, the student in question was a general education student in the Camdenton public schools until, based on his behavior and academic performance, the school decided that he should be evaluated for a possible disability allowing him services under the IDEA. At that time the parents refused to consent to the evaluation and decided to home school him rather than continue sending him to the public schools. The district initiated a due process hearing under the “child find” provision of the IDEA. After both a hearing panel and the U.S. District Court sided with the school district and ordered evaluation, the parents appeal to the circuit court claiming that the law was unconstitutional. The 8th circuit court did not decide on the question of constitutionality, but did rule that the district had overstepped its authority. When a student is being privately evaluated, privately educated and privately served, the public school district no longer has an interest in an evaluation in order to prepare an IEP for that student. The court found that to require such an evaluation would be unreasonable and serve no purpose therefore could not have been the intent of the legislation.

Student Rights

MySpace.com and FaceBook.com are proving themselves to be gigantic head aches for the educational community, both K-12 and higher education. For those not initiated to these web sites, these are two web sites open to high school and/or college students where

such students can post information about themselves, photographs, and interact with each others based on this information and images. Unfortunately this is done with little to no oversight from teachers, parents, or other reasonable adults. Therefore, what a 16 to 20 year old young adult may think is appropriate information to disseminate to the world, may not be so appropriate. To wit:

A middle school student in California faces expulsion for publishing threats on his MySpace.com website. In addition, 20 other students have been suspended for accessing the site, viewing the threat, and perhaps commenting on the “poster’s” desire to “take a shotgun and blast her in the head over a thousand times?” The “her” being referred to was a female classmate referred to by name, an expletive, and an anti-Semitic reference. Local law enforcement is investigating the possibility of prosecution as a hate crime. What is perhaps the most incredulous part of this is that parents of some of the students involved are upset with the school for attempting to discipline students for something the students did on their own time, at home, and on their own computers! *Editor’s Note: Just another instance of where parents fail to parent, schools try to step in before someone gets hurt, and then the parents are upset because they finally are forced to pay attention to their own children!!!!*

Layshock v Hermitage School District, __ F.Supp.2d __, 2006 WL 240655 (W.D. Pa. Jan. 31, 2006) A student posted a less than flattering profile of the school’s principal on MySpace.com. The posting included a photograph imported from the school’s website. As news of the profile spread, students started accessing the site on school computers. Layshock was placed in an alternative program. He filed suit alleging that disciplinary action violated his First Amendment right to free speech and sought a preliminary injunction which would have barred the school officials from instituting the discipline. Layshock was unsuccessful in obtaining the injunction. When looking at the free speech claim, the court was less impressed with Layshock’s argument that he was being punished for non-threatening, non-obscene internet activity done off of school property and on a private computer, and referred instead to the test established in *Tinker v Des Moines*, specifically whether the “speech” caused a material and substantial disruption in the educational environment.” The court decided that there was ample evidence to show that Layshock’s off-campus activity did cause such a disruption. Because of the large volume of students attempting to access the profile, the school was forced to shut down the school’s computer system for five days. In addition, school personnel had to devote an inordinate amount of their time monitoring student computer usage.

In Grand Rapids, Michigan approximately 20 high school students face discipline after their parents discovered photos on blogs and personal web sites such as Xanga, MySpace, and Facebook, showing the students engaging in the illegal consumption of alcohol. School administrators held the position that there was nothing they could do unless the offending students were involved in extra-curricular activities because the offense took place on the students’ own time. *Editor’s Note: A good point, however, was brought up by law enforcement and that is these web sites often contain information such as name, addresses, and phone numbers which make these minors more accessible to online predators.*

Religion and Education

Lee v York County School Division, No. 05-125 (E.D. Va. Feb. 23, 2006): The Virginia federal district court ruled that removal of religious posters from a teacher's classroom without his consent was not a violation of the teacher's First or Fourteenth Amendments rights to freedom of speech or equal protection. Lee, a Spanish teacher, had posters publicizing the National Day of Prayer on the bulletin board in his classroom. While he was out on sick leave, school officials removed the posters citing a potential violation of the Establishment Clause. In deciding in favor of the school district, the court applied the *Pickering-Connick* test by first determining whether the speech in question was of general public concern, therefore protected by the First Amendment. If the court was to find that the speech was so protected, it would then need to apply a balancing test to determine if the free speech rights of the teacher outweighed the school district's interest in maintaining orderly administration of its school building.

Relying on the 4th Circuit's decision in *Boring v Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1996), the court held that curricular speech fails, *per se*, to be a matter of public concern. Since Lee claimed to use the posters as part of his methodology of instruction, they were undoubtedly part of his curriculum and therefore not protected. Furthermore, even if the posters were not considered part of the curriculum they still failed to be public speech having been chosen because of Lee's private interests, were displayed in a non-public forum, therefore free to be regulated by his employer.

Morrison v Board of Education of Boyd County, No. 05-38 (E.D. Ky. Feb. 17, 2005): A school district's mandatory diversity training program instituted as part of a settlement of earlier litigation does not violate the free speech, equal protection, or free exercise of religion of students and/or their parents because such training program stresses the need for tolerance of homosexuality. Students based their lawsuit on the fact that during the training videos are shown in which it is stated that homosexuality is not a matter of choice, and that they are forbidden from expressing to homosexuals that destructive lifestyles, such as homosexuality, are wrong. Such restrictions, the students claim, offend their religious beliefs. In ruling against the students, the court relied on *Tinker v Des Moines*, stating that the only speech prohibited was harassing speech that was disruptive of the educational process. The students were not kept from voicing their opinions, nor were they forced to espouse agreement with any idea contrary to their religious beliefs. The court found the training materials to be viewpoint neutral with no one viewpoint or religion being promoted over another. In many ways this case reinforced earlier federal district court cases dealing with curricular issues which stated that mere exposure to an idea is not a violation of the Free Exercise Clause of the First Amendment and that there is no constitutional mandate which might force a public school district to provide an alternate curriculum to those individuals claiming such violation.

Skoros v City of New York, No. 04-1229 (2d Cir. Feb 3, 2006): New York City's Department of Education's policy allowing the display of the menorah and the star and crescent but does not allow the display of a nativity scene is not a violation of the First Amendment Religion Clause. In an attempt to not favor one religion over another, the

policy restricts holiday displays to “secular” symbols such as Christmas trees, menorahs, and the star and crescent. Suit was filed by the Catholic League questioning the classification of a menorah and the star and crescent as secular symbols. The allegation was that the policy promoted Judaism and Islam over Christianity.

In making a decision, the court employed the *Lemon Test*, finding a secular purpose for the policy, namely an attempt to approach the issue in a neutral manner in order to promote understanding and tolerance for the cultural and religious diversity of the community. Applying the second prong, that being the actual effect of the policy, the court concluded that an objective observer would not interpret the policy as the state’s attempt to favor one religion over another. Finally, the court found not excessive entanglement because the policy limited only government speech, but did not cede any government authority to a sectarian group.

Taetle v Atlanta Independent School System, No. 05-1632 (Ga. Jan. 17, 2006): A school district decision to rent classroom space from a church does not violate the Georgia state constitution’s prohibition on the use of public funds to aid religious institutions. The Atlanta Public Schools entered into a lease agreement with the Buckhead Baptist Church for a kindergarten annex. The school district agreed to pay for renovations and improvements on the church property in return for credits on rent owed. The court found the lease agreement to survive the challenge because it was an arm-lengths transaction for a non-sectarian purpose. The purpose was to establish and operate a kindergarten in a nonsectarian environment. *Editor’s Note: If ever there was boot-strapping, here is the perfect example. You have a Baptist Church with space that needs renovations and improvement. In steps the state saying, “Hey, if in the end you will let us hold kindergarten classes here, we will pay for capital improvements to your church property. Never mind that our state constitution states the “No money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect, cult, or religious denomination or of any sectarian institution.” We will fix up your place and then march impressionable 5 year olds over to your church every day for kindergarten. Why, we don’t understand why y’all would have any problem with that.” Does the Atlanta Public Schools get to share in those capital improvements? If not, is that not direct aid to a religious denomination? Was there absolutely no on the property in fashionable Buckhead which could be renovated and improved for the same cost for a kindergarten? This is the type of corruption of the basic premises on which our nation was built that is just criminal – but it keeps happening and at a quicker and quicker pace, yet no one says a thing. Where is Benjamin Franklin when you need him?*

Employment

Harper v City of Jackson Municipal School District, 2005 WL 3763925 (S.D. Miss. Feb. 16, 2005): Being transferred from a high school to a middle school teaching assignment with not accompanying loss of pay, benefits, or other terms and conditions of employment, does not constitute a “adverse employment action” supporting a Title VII retaliation claim. Harper, a business education teacher at the high school, filed a complaint of sexual harassment against the building principal. During the pendency of the action, Harper was reassigned to the middle school due, according to the school, to a

reduction in force. She was returned to the high school three months later when an opening occurred. Mere transfer, without other evidence, is not sufficient to establish a *prima facie* case of retaliation.

Here is a scary thought for the job security of administrators. Ypsilanti Public Schools in Michigan is considering firing its top three administrators and then hiring them back as independent contractors. The district's figures it can save \$39,000 per administrator because it would no longer be responsible for health insurance or retirement. The former CFO, who has retired and is now back working as an independent contractor says it makes good financial sense for the school district. Not surprisingly, the teachers union opposes such an arrangement for teachers.