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**TEACHER EMPLOYMENT CONTRACTS: POTENTIAL POLICY ISSUES****Overview**

Over the past decade several CEPI Ed Law commentaries were devoted to discussions of legal and policy issues dealing with classroom teacher employment. While such subjects as tenure, dismissal, selection and use of curriculum materials, tort liability, sexual harassment, and First Amendment rights have dominated prior discussions, the impact of local school system budget constraints also has been a focus of attention—especially as school funding levels are directly linked, via technology, to student progress and out-comes on statewide academic testing, drop-out statistics, and graduation rates.

As communities across this country continue to expect and insist that their local school boards do infinite things with a finite (in some cases even shrinking) budget, and as local community demographics rapidly change and student enrollments become more culturally diverse, being creative and flexible regarding personnel (including full-time teachers) is needed. Past solutions for past problems might not work in solving the emerging problems found in today's rapidly changing, data-driven, social and fiscal environments. One area of close scrutiny by local school boards in dealing with today's changing scene, where long term fiscal commitments are risky, involves classroom teacher contracts.

*Emerging Fiscal Issues and Contractual Flexibility.* In today's public school systems, while the recruitment, selection, and hiring of new classroom teachers remains a critical part of the task, assigning and reassigning existing teachers (including those possessing tenure status), and shifting fiscal resources from one school to another (especially from "high performing schools" to "struggling schools"), and from one subject area to another, are of critical importance and have a direct impact on policy. As local school boards work to bolster student academic progress and performance is it necessary to eliminate extra-curricular activities including sports teams, or reduce the emphasis on some academic areas while building up others? As a need to expand mathematics and computer science courses grows, what is the future of art, drama, music,

physical education, culinary arts? Will it be necessary to increase school system budgets to support growing numbers of immigrant and English language learning children<sup>1</sup> entering the schools? How do we continue to adequately fund special education? Should local school boards pay teachers and other employees strictly on a “pay for performance” model? In an effort to save money on such matters as health care and retirement is it necessary to fill vacant positions with temporary and part-time workers and reduce the number of full-time employees (including classroom teachers)? In a local public school system in the area where I live the superintendent has proposed to his board that to improve student academic performance classroom teacher pay be tied to days worked—i.e., paying teachers for their work. (B2, [Richmond Times-Dispatch](#), February 4, 2015)

*Teacher Assignment and Re-Assignment.* As a general rule, absent a collective bargaining agreement or other contractual arrangement to the contrary, classroom teachers (both tenured and non-tenured) can be assigned and/or reassigned to any position or combination of positions for which they are qualified. (Vacca and Boshier, 2012) Historically, while tenured classroom teachers have been and remain less likely to find themselves in such a situation, non-tenured teachers, especially those in their probationary first three years of full-time employment, are often called upon by their principal to fill a variety of tasks in a school’s daily operation, including extra duties, for little to no compensation (*e.g.*, bus duty, student club sponsor, hallway and playground supervision, committee membership, *et al.*). Issues are likely to spring up when assignments and/or reassignments are made during the school (*i.e.*, contract) year, and/or effect salary, and/or work schedule of tenured teachers. In my view radical steps must be taken—maintaining the *status quo* will not work.

*Property Interest Theory.* The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.” In a series of decisions the United States Supreme Court made it clear that both the *due process* and *equal protection* mandates of the Fourteenth Amendment apply to public school personnel. See, *e.g.*, [Board of Regents v. Roth](#) (1972); [Perry v. Sindermann](#) (1972), [Cleveland Board of Education v. Loudermill](#) (1985), and others. In essence these decisions “balanced school board personnel prerogatives with teachers’ constitutional rights.” (Vacca and Boshier, 2012)

The initial burden carried by public school personnel triggering the application of Fourteenth Amendment protections involves the establishment of a *property interest*. More than a “mere expectation,” a property interest is grounded in fact. As the United States Supreme Court opined in [Board of Regents v. Roth](#) (1972), “The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits...To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” For example, to possess bona fide tenure or

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<sup>1</sup> Some of these may be natural-born citizens who speak another language in the home, some may be authorized recent immigrants, others unauthorized immigrants (but still eligible for public education opportunities under Plyler). Though the status of children can be complex, the increased need for English Language Learner instruction has increased.

continuing contract status creates a property interest for the teacher holding this status. At the same time, another teacher working under a signed annual contract covering a specific period of time (duration) possesses a property interest while working under the conditions and duration, but not beyond the duration, of that particular contract. In both examples, while very different in nature, the commonality is that the holder has a “legitimate fact-based expectation” of continued employment. Thus, the termination (i.e., dismissal) of either teacher triggers the potential for a Fourteenth Amendment challenge—especially one grounded in *procedural due process* (notice, cause, and hearing).

Recently I came across a very interesting decision handed down by the United States Court of Appeals for the Second Circuit. In my view the facts of the case and the Court’s rationale offer a possible glimpse into the future.

Mirabilio v. Regional School District 16 (2<sup>nd</sup> Cir. 2014)

*Facts:* Catherine Mirabilio (hereafter referred to as C.M.), was employed as a full-time tenured culinary arts teacher by a local school district (hereafter referred to as “the board”) in Connecticut. In May 2011, the superintendent of schools informed her by letter that, under the recently-adopted school district budget, her position had been reduced to half-time, “commencing with the 2011-2012 school year.” Rather than contesting the board’s decision by requesting an administrative hearing in September 2011, C.M. filed suit in Connecticut Superior Court. In her lawsuit she claimed that the board violated her due process and equal protection rights by failing to provide her with notice and a hearing prior to reducing her work hours. As remedy she sought full reinstatement to her former full-time position, reimbursement of lost salary and benefits, and damages.

*Lower Court Decision:* The board removed the case to a federal district court and subsequently filed a motion to dismiss for failure to sufficiently allege a constitutional or statutory violation or, in the alternative, for lack of subject matter jurisdiction. The board’s motion was granted; the equal protection claim was dismissed with prejudice; and the due process claim was dismissed without prejudice. C.M. amended her complaint (October 2012), reasserted her due process claim, and the board again moved to dismiss on the same grounds as before. The district court granted the board’s motion to dismiss holding that under Connecticut law only a “termination” of a teaching position triggers a right to prior notice and a hearing, and a reduction in hours from full-time to half-time did not constitute such a termination. (D. Conn. 2013) C.M. next took her case to the United States Court of Appeals for the Second Circuit.

*Appellate Court Rationale and Decision:* The Second Circuit Court reviewed *de novo* the district court’s decision. In doing so the Court construed the complaint liberally and accepted the factual allegations in the complaint as true and drawing “all reasonable inferences in the plaintiff’s favor.” However, the Court made it clear that “[a]though all allegations contained in the complaint are assumed to be true, this tenet is ‘inapplicable’ to legal conclusions.”

Citing and directly quoting from Connecticut law the Second Circuit focused on statutory language dealing with the procedural requirements (including filing a written request for a hearing) associated with the “termination of a tenured teacher’s contract.” In the Court’s view the state law

creates “a protectable property interest.” However, said the Court, citing and quoting from Connecticut case law, “‘personnel decisions *short of termination* do not constitute a deprivation of a property interest’ cognizable under the Fourteenth Amendment.” Wargat v. Long (D. Conn. 1984) Moreover, said the Second Circuit Court, “[a]n employee reassigned to a lower paying position is not considered “terminated” for purposes of the statute even if the pay cut is “substantial.”

The appellate court next turned to the Connecticut General Statute 10-151(a) where “full-time employment” is defined as “a teacher’s employment in a position at a salary rate of fifty per cent or more of the salary rate of such teacher in such position if such position were full-time.” Thus, in the Court’s view, since C.M.’s salary was reduced exactly 50 per cent her new position is still deemed “full-time under the statute and she remains a ‘full-time employee’ despite the reduction in time and salary, C.M. was not ‘terminated’ and no due process right was triggered.” She “was therefore not deprived of her right of continued employment, and was not entitled to notice and a hearing before her hours and salary were reduced.”

*Decision:* The judgment of the federal district court is affirmed.

*Dissenting Opinion:* In Circuit Judge Calabresi’s view this case should have been certified to the Connecticut Supreme Court and that it was “judicial activism” that impeded his colleagues from doing so. In his opinion, “[w]hen a federal court, for no good reason, reaches out and answers an undetermined question of state law...rather than certifying the question to the state’s highest court, impedes the state from determining the course of its own law, and subjects the parties to a decision that may be wrong and cannot subsequently be corrected even if later the state has an opportunity to make the law clear.”

In this case, states Judge Calabresi, the teacher is tenured and since she has a property interest in her tenured position, Connecticut law requires that she receive notice before her contract is “terminated.” [Conn. Gen. Stat. 10-151(d)] Thus, the question in this case is whether the teacher’s contract “had indeed been terminated so that notice was due her.” Instead, he states, the case law upon which the majority relied, dealt with “whether administrators,” who do not have tenure in their jobs, were terminated when they were assigned *back to teaching*. As such, “[t]he reasoning in those cases is straightforward; because the administrators did not have a protectable *property interest* in their non-tenured administrative positions...” In Judge Calabresi’s opinion the majority read those cases more broadly “for the proposition that any ‘employee’ who is reassigned to a lower-paying position does not have her previous contract ‘terminated,’ thereby eliding the distinction between teachers and administrators.” Moreover, states Judge Calabresi, the Connecticut Supreme Court itself has not decided a case involving the same question raised in C.M.’s case—*i.e.*, whether the new contract actually constituted a “termination” of her previous contract... “[t]he majority decides that question on its own.”

To Judge Calabresi the majority’s “strongest authority” for its position that under Connecticut law contractual termination does not occur for individuals who, though reduced in position, remained employed by the board, “comes from a passing remark in a footnote in a Connecticut Supreme Court decision dealing, once again, with administrators.” School Adm’rs Ass’n of New Haven v. Dow (1986) “Teachers are different.” Judge Calabresi found fault with the majority’s use of

portions of Connecticut case law dealing with reassignment or transfer and not of cutting of salary and hours, and with the majority's position that under Connecticut law [Conn. Gen. Stat. 10-151(a)(4)] C.M.'s new and old positions "both constitute full-time employment."

Based on his analysis of the facts in this case Judge Calabresi concluded his dissent with the following statements: "Despite the majority's insistence that the distinctions (a) between teachers and administrators, (b) between reassignment and having one's job cut in half, and (c) between what "full-time" means for the wholly distinct purposes of tenure accrual and deciding whether a contract has been terminated, are meaningless, I remain unconvinced." Because the issue in this case "is important to the parties, and all teachers and school boards in Connecticut..." the case should have been certified to the Connecticut Supreme Court for resolution and not a matter decided by the federal courts.

### **Policy Implications**

In today's tight fiscal environment, as local public school boards deal with rapid political, cultural, and social change; work to diligently carry out federal and state legal mandates; and continue to meet the rising expectations of their communities, coming up with creative solutions to budgetary issues has become a daily fact of life. Because of escalating costs (*e.g.*, health care) and limited fiscal (property tax dependent) resources, state-wide student academic requirements, and shifting student enrollments, the one area of school system operation that has and continues to receive the most attention and scrutiny is personnel—the largest single category in the total school system maintenance and operation budget where flexibility, creativity, and change are often trumped by collective bargaining agreements and traditional notions of tenure and seniority.

While recognizing that Mirabilio v Regional School District 16 (2<sup>nd</sup> Cir 2014) is but one court decision from one jurisdiction, my intent in presenting the case is twofold. First, to offer an example of how one local school board tried to limit the working hours and reduce the salary within a new full-time contract issued to a returning tenured teacher, while not being in violation of the state tenure law. Second, to present the factual analysis and rationale of the United States Court of Appeals for the Second Circuit as the Court dealt with issues of "termination" and procedural due process. Especially informative in clarifying the potential legal and policy issues in the case is the dissenting opinion written by Judge Calabresi. Potential policy implications gleaned from the Second Circuit Court's majority and dissenting opinions are as follows:

In matters of teacher employment contracts, local school board policies must make it clear that:

- The intent of the Board is to honor and implement the substantive and procedural mandates of all collective bargaining agreements, where they exist, and state teacher tenure statutes in jurisdictions where they exist and in situations where they are applicable.
- Where the Board decides to terminate the contract of a teacher all procedural requirements specified in state law and Board policy will be followed.
- The Board is vested with discretionary authority to assign and reassign all teachers (full-time and part-time) to schools, teaching positions, combinations of positions, and school-

related extra-curricular activities for which they are qualified and where the needs of the school system require such assignments and re-assignments.

- All contract changes will be communicated to employees as soon as practicable.
- Teachers (full-time and part-time) are expected to: (a) fulfill all work-related duties and tasks associated with their teaching position, (b) work within the official hourly schedule and (c) carry out all contractual obligations at a salary set by the Board—as specified in the employment contract.

**Final Note:** Readers are admonished to: (1) place the subject of this commentary within the context of the state where they live—especially where collective negotiations and union contracts exist; (2) follow the mandates and requirements of both state statutory and case law, and local school board policies; and (3) work closely with school system legal counsel at every step of the contract process.

### **Resources Cited**

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**Note:** The views expressed in this commentary are those of the author.