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TEACHER EVALUATION 2008: ACCOUNTABILITY FOR RESULTS**Overview**

In 2008 public education will remain under the public accountability microscope. In fact, public education will receive more attention than it did in previous years because of two primary reasons. First, 2008 is a presidential election year and the campaign rhetoric from both parties already has heated up with one of the primary targets being the public schools. Second, in the coming year Congress eventually will reauthorize the *No Child Left Behind Act (2001)*. Under a reauthorized *NCLB* the responsibility for carrying out the statute's mandates will continue to rest not on the federal government but on the shoulders of each state, local public school systems in the states, the individual schools in local public school systems, and most of all on professional staff members in those schools--- especially classroom teachers.

Rewards for Productivity. The current scene in our nation's public school systems is best characterized as a "rewards for productivity" environment. Based on a business world model, this *out-put* oriented environment measures success in terms of student academic progress and proficiency as demonstrated by federal AYP data and statewide standardized student academic testing results.

In community after community, where the rewards for productivity "bottom line" philosophy has taken hold, the general public demands results for a growing financial (*i.e.*, local property tax driven) investment in public schools. Within this data-driven accountability model, parents as end consumers seem convinced that every child's failure to learn is a direct result of a classroom teacher's failure to teach. Very seldom are such variables as socio-economic condition in families, diverse racial and ethnic student populations in school buildings, and growing numbers of non-English speaking students in public school classrooms considered as having an impact on student learning. Thus, in contemporary public school systems greater emphasis is placed on holding instructional leaders (which term in my opinion includes classroom teachers as well as school principals and curriculum supervisors) directly accountable and responsible for student academic progress and proficiency.

Quality Classroom Instruction. The current emphasis on employing and retaining "highly qualified teachers," coupled with the implementation of technology-created links between instruction in the classroom and student academic progress and proficiency, place classroom teachers in a very difficult, disconcerting, and vulnerable

position. Educational accountability, as measured by student academic progress and proficiency, focuses attention on the professional expertise and potential liability of every principal and teacher. Boshier, Kaminski, and Vacca ((2004),

Classroom Teachers and Instruction. Research consistently shows that the key to providing quality instruction for public school students lies not in inanimate buildings and instructional spaces but in the selection, placement, professional development, and retention of quality classroom teachers. Employ and retain quality teachers, provide them with up-to-date equipment, textbooks, and supplies, support and reward them, hold parents accountable for their child's behavior, and students will learn.

While state statutes and state board of education policies and regulations must be followed, and local school boards determine broad curriculum content, teachers, by virtue of their training and experience, have considerable freedom in organizing their classes and in determining methods of instruction. As the United States Supreme Court has clearly stated, "classroom methodologies and techniques are matters best left to teachers...." Owasso I.S.D. v. Falvo (2002) However, courts have consistently held that teachers are not free to digress into topics or cover material not included in the general curriculum, or to express their personal viewpoints in class. Mayer v. Monroe County Community School Corporation (7th Cir. 2006)

Negligent Retention. In today's rewards for productivity-oriented era of academic accountability, local school officials have become increasingly aware of their potential liabilities, as courts have recognized three theories on which plaintiff parents might base a "failure to learn" cause of action. In situations where students have failed to master the required material necessary to pass state mandated tests of academic progress and proficiency, and where parents claim that their child's failure is directly linked to "teacher ineffectiveness," one or a combination of the following three theories might be cited: (1) *negligent hiring* (school officials knowingly hire unqualified teachers), (2) *negligent placement* (school officials knowingly place teachers in classrooms where they are not qualified to teach the subject being taught), and (3) *negligent retention* (school officials knowingly retain [year after year] incompetent classroom teachers. In each of these categories, however, the need to demonstrate that school officials had prior actual knowledge but were *deliberately indifferent* to lack of qualifications is critical to making the case.

Not intended as a restatement of the law on teacher evaluation, the purpose of this commentary is to focus on a sampling of recent court decisions involving the critical nature of teacher evaluation. The case law included in the discussion will focus on the theory of *negligent retention* and the importance of contemporary public school officials documenting (by objective data) teacher work performance and, at the same time, demonstrating that school board policies and procedures have been followed, especially where a violation of employee civil rights is claimed.

Teacher Evaluation

All personnel decisions must be documented with substantive work place-generated, performance-based data. In addition, the following six basic elements are necessary to establish procedural fairness: (1) employees must know, at the outset, the board's expectations for job performance, (2) evaluation criteria must be directly linked to measurement of effectiveness in job performance over a period of time, (3) evaluation criteria must be valid and reliable, (4) employees must be involved in the evaluation process at all stages, (5) evaluation procedures must be equally applied to all employees, and (6) the entire process must be developmental and not solely punitive in nature. Vacca and Boshier (2003)

Court decisions from the decade of the 1990's also emphasize the importance of: (1) administrators and supervisors observing teachers at work in their classrooms, (2) providing immediate post-observation feedback, (3) identifying examples of classroom performance that need improvement, (4) establishing a reasonable timeframe within which the teacher is expected to remedy identified deficiencies, and (5) creating a paper trail of formal notices and warnings when deficiencies are not being remedied. Schofield v. Richmond City School District (S.C. 1994) and Alba v. Ansonia Board of Education (D.Conn. 1998)

Recent Case Law

Brown v. Regional School District (D.Conn. 2004) involved a teacher who claimed that the Board's non-renewal of her contract was in retaliation for her exercise of First Amendment rights of free speech and association. School officials responded that the teacher was not renewed because of poor job performance and her inability to respond to constructive criticism. According to the superintendent of schools his recommendation to non-renew the contract was based on his concern about "the decline in her job performance, her problems with communication, her inability to respond to suggestions and constructive criticism, and a decline in classroom performance."

In Brown, the court held, among other things, that given the employer's "well-documented concerns regarding her work performance" plaintiff teacher could not make a case for discrimination. In the court's view, school officials must be given considerable leeway in determining which teachers they wish to rehire. To rule otherwise, said the court "would put this court in a position of second guessing every school's annual hiring decisions, a task that this court is ill-suited to undertake...."

Shanklin v. Fitzgerald (8th Cir. 2005) involved a teacher who alleged employment discrimination based on race and retaliation under Title 7 and state law. A federal district court granted summary judgment to school officials and the teacher appealed. Subsequently the United States Court of Appeals for the Eighth Circuit affirmed the lower court.

In Shanklin, the appellate court was impressed by evidence that showed the teacher failed to demonstrate that she was meeting her employer's "legitimate job expectations." The record showed that the teacher: (1) repeatedly received unfavorable performance evaluations, and (2) was given additional time to meet job expectations but "failed to cure deficiencies." More specifically, the evidence established that her classes were observed by an assistant principal who reported that he was troubled that she (1) did not use a variety of teaching methods effectively, (2) did not communicate effectively with students, and (3) failed to manage student behavior in a constructive manner. In a subsequent observation it was noted that she used a "profanity" during a confrontation with a student, and used, for instructional purposes, another individual's personal income tax form without the person's consent.

In a summative evaluation the observer stated that this teacher "needs improvement" in four areas. The areas identified were: (1) using a variety of teaching methods, (2) demonstrating an ability to communicate effectively with students, (3) managing student behavior in a constructive manner, and (4) demonstrating positive interpersonal relationships with students. She also was given a Performance Improvement Plan (PIP) specifically designed to help cure the four deficiencies. Evidence showed that she failed to carry out the PIP and that she received two reprimands and was transferred to another position.

Subsequently, a second PIP was implemented. However, because her deficiencies continued she was issued a warning letter and a formal notice of deficiencies specifying several items that must be remedied. The notice

characterized her overall job performance as evidence of “incompetency, inefficiency and insubordination.” The notice also stated that her “conduct reflects a mental condition” making her “unfit to instruct or associate with children.” She was given 30 days (i.e., probationary period) to improve or a recommendation would be made that she be dismissed from employment in the school system. Once again she failed to remedy her deficiencies.

The teacher requested and received more time to improve, and another notice of deficiencies was issued. During the second probationary period she was observed (both announced and unannounced) and evaluated by a three-member team of colleagues. The team also video-taped her classes and critiqued the tapes. Ultimately the team “expressed specific concerns” regarding her performance. Based on the team’s summative evaluations a Statement of Charges was issued. In this document she was described as (1) incompetent and inefficient in failing to maintain satisfactory relationships with students and failing to effectively utilize effective instructional methods, and (2) insubordinate in failing to comply with Board policy. Ultimately she was dismissed from her teaching position in the school system and she went to court.

As stated at the outset, the teacher in this case did not prevail both in federal district court and on appeal to the Eighth Circuit where the lower court’s decision was affirmed. Persuaded of her failure to meet the Board’s job expectations, the “undisputed evidence” presented by school officials foreclosed any finding that the reasons given for her discharge were in anyway a pretext for discrimination. Absent a clear showing of “discriminatory intent,” said the Eighth Circuit, “a school board must be free, consistent with due process, to remove ineffective teachers.”

Bellairs v. Beaverton School District (Or.App. 2006) is a state court decision involving a full-time contract teacher who challenged the decision of a state-level Fair Dismissal Appeals Board (FDAB) upholding a local school board’s termination from employment decision. In this case the FDAB was convinced by the evidence that the dismissed teacher had engaged in neglect of duty and insubordination.

Between 1999 and 2004 the teacher was the subject of numerous complaints from students and colleagues. For example, a student had complained about the teacher’s use of derogatory language, a degrading letter sent by the teacher to this student’s father, and an incident in which the teacher insulted a guidance counselor. Other evidence showed that he failed to enter student grades on time, he berated students and brought them to tears, he used inappropriate language with students, and he engaged in outbursts at faculty meetings. And, even though he received several warnings from superiors, the teacher made it clear that he intended to disregard any communications sent by school administrators.

Subsequently the FDAB concluded that his behavior constituted “discrete instances of insubordination” which, considered with his past pattern and practice of refusing to comply with directions given to him, “demonstrate a continuing pattern of insubordination sufficient to support this statutory ground for dismissal.” The FDAB decision was affirmed by a state court, based on and supported by “substantial evidence of neglect of duty and insubordination.”

The non-renewal of limited contract, non-certificated employees does not need to be documented by job performance data. However, courts consistently have held that it is none the less important for local school boards to establish and carry out evaluation of performance policies and procedures applicable to limited, fixed duration employees. Milliken-Dees v. Salem City School District Board of Education (Ohio App. 2006)

In Sharif v. Buck (W.D.N.Y. 2004), for example, a paraprofessional claimed discrimination on the basis of religion as the underlying reason for his dismissal. He claimed that his termination from employment was not

because of “deficient performance” as alleged by his employer. His lawsuit was not successful because he failed to show that: (1) he was “performing his job satisfactorily,” and (2) his termination occurred in circumstances giving rise to an inference of discrimination.

In reaching its decision, the federal trial court was impressed with the documentation presented by school officials. School officials were able to show that: (1) he (the paraprofessional) had work-related disciplinary problems, (2) his overall job evaluations stated he “needs improvement,” (3) he received a number of verbal and written warnings concerning absenteeism and tardiness, (4) he refused certain assignments and did not follow directions from superiors, (5) he received, on two separate occasions, written reprimands for “neglect of duty, and “insubordination,” and (6) he had been reprimanded, in writing, for coming to work late. The record also showed that the paraprofessional had been advised that “any further conduct of this nature would result in disciplinary action up to and including termination.” A subsequent incident did take place and he was terminated from his job.

Ruling in favor of school officials, the court quoted from the United States Supreme Court’s decision in Bishop v. Wood (1976). “The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily in public agencies.”

Policy Implications

Contemporary public school officials are expected, by their communities, to establish and maintain a learning environment in every school and classroom where competent and effective instruction is provided by qualified personnel. As indicated in early sections of this commentary, a sound and effective *evaluation process* is the key to success.

As the case law reviewed above demonstrates, courts exercise judicial restraint where *documentation* of inadequate work performance and *procedural due process* exist. However, while judges consistently opine that personnel decisions, especially those involving classroom teachers, are best left to local school officials, the policy implications of this attitude are several. In 2008, classroom teacher evaluation must be placed within the total context of employee evaluation where local school board policies make it clear that:

- The intent of employee evaluation is to provide an educational environment in every school and instructional space where teachers can teach and students can learn.
- All employees will be provided with a clear description and explanation of job expectations.
- All school system employees will be subject to a formal evaluation process.
- Employee evaluation will be based on actual observations of work-place performance.
- Student academic progress and proficiency data will be factored into the overall evaluation of all employees directly involved in instruction, especially school principals and classroom teachers (both continuing contract and annual, fixed duration contract).
- Where deficiencies in job performance are found these deficiencies will be immediately communicated to the employee involved, along with the clear expectation that deficiencies be remedied.
- Assistance and support will be offered to and provided for employees in their efforts to remedy work-related deficiencies.
- Where deficiencies in job performance are not remedied within a reasonable period of time, a written warning shall be issued to the employee involved.
- Employees who receive written warnings but fail to remedy work-related deficiencies will be subject to termination from employment.

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