



# Legal Challenges in Evaluating Teachers Based on Student Achievement

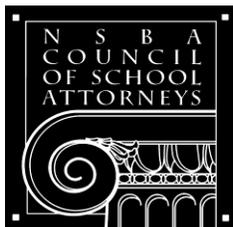
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**Abstract:** This article discusses how school districts are revising teacher and administrator evaluation systems to include student achievement as a criterion, though dismissal and non-renewal statutes do not touch upon student achievement data, and the resulting conflicts and legal challenges to such dismissal and non-renewal decisions.

# LEGAL CHALLENGES IN EVALUATING TEACHERS BASED ON STUDENT ACHIEVEMENT

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## INTRODUCTION

In state after state, school district evaluation systems are being revised to measure teacher and administrator performance, in significant part, based on the academic achievement of their students. This is not an entirely new concept, as court cases from the past 40 years can attest. What is new is the degree of political “buy-in” and public awareness of such evaluation systems, which are increasingly adopted and imposed statewide by legislative action.

As states rush to require teacher evaluations based on student “learning and growth” or “value added” data, the assumption seems to be that teachers and principals who rate poorly on such measurements will automatically become more effective, or will disappear from the ranks of educators. While professional development and mentoring or more intensive supervision may improve an educator’s poor record in fostering student academic achievement, this will not happen in all cases. The question addressed by this article is – What then?

## STATE ACTION IN CHANGING EDUCATOR EVALUATIONS TO FOCUS ON STUDENT LEARNING AND GROWTH

After a decade of focus on school accountability, under the provisions of the No Child Left Behind Act (NCLB), the trend is now to focus on individual teacher accountability for student growth.<sup>2</sup> The recent Race to the Top competition rewarded states that promised to implement systems of accountability that measured and rated teachers and principals on the effect of the educator on student achievement.<sup>3</sup> States such as Oregon, seeking waivers from NCLB penalty provisions, have been required to present plans for adopting such evaluation systems.

More states are moving towards evaluation systems that take student progress or achievement into account during teacher evaluations. As of 2011, almost half of states (24) take into consideration teachers’

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<sup>2</sup> Todd A. DeMitchell, Terri A. DeMitchell, Douglas Gagnon, *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?*, 2012 BYU EDUC. & L.J. 257, 258 (2012).

<sup>3</sup> *Id.*

student achievement information, as measured by value-added or growth data.<sup>4</sup> Half of those states (12) require measures of student achievement to be the most heavily weighted consideration in teacher evaluations.<sup>5</sup> For example, Colorado, Louisiana, and Tennessee all require their teacher evaluation systems to be based 50% or more on the academic growth of students.<sup>6</sup>

This is a notable increase from just two years earlier (2009), when only 15 states took student achievement into consideration, and only four states required student achievement to be the most heavily weighted factor.<sup>7</sup>

Oregon's experience is perhaps typical, although more recent in comparison with many other states. While Oregon has had long-established law, ORS 342.850, adopted in 1979, requiring *local school districts* to establish evaluation standards and procedures, the 2011 Oregon Legislature enacted SB 290, requiring the State Board of Education to "adopt core teaching standards to improve student academic growth and learning by: (a) Assisting school districts in determining the effectiveness of teachers and administrators and in making human resource decisions; and (b) Improving the professional development and the classroom and administrative practices of teachers and administrators."<sup>8</sup>

Along with the adoption of state standards, which largely replicated the Interstate Teacher Assessment and Support Consortium (InTASC) core teaching standards,<sup>9</sup> the Oregon Board of Education adopted a "Framework" for the evaluation process designed to measure those standards. Pushed by the U.S. Department of Education, and as a condition to granting a waiver from NCLB requirements, the State Board's "Framework" requires that each school district's evaluation system must be "based on significant consideration of student learning," including school-wide academic growth, as determined by statewide assessments, and at least two classroom-level student learning goals set and measured annually. Teachers who are responsible for student learning in tested subjects and grades will use state assessments as one measure.<sup>10</sup> No weighting percentage has been adopted, but one may be required by mid-2013 in order for the state to earn continued exemption from NCLB.

The legislature's explicit statement that the new evaluation systems shall "assist" school districts in "making human resource decisions" makes it clear that the resulting evaluations are not to merely "paper"

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<sup>4</sup> NATIONAL COUNCIL ON TEACHER QUALITY (NCTQ), 2011 STATE TEACHER POLICY YEARBOOK 3, available at [http://www.nctq.org/stpy11/reports/stpy11\\_national\\_report.pdf](http://www.nctq.org/stpy11/reports/stpy11_national_report.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Preston C. Green III, Bruce D. Baker, Joseph Oluwole, *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 BYU EDUC. & L.J. 1 (2012).

<sup>7</sup> See NCTQ, *supra* note 4, at 4.

<sup>8</sup> OR. REV. STAT. § 342.856(1) (2013).

<sup>9</sup> OR. ADMIN. R. 581-022-1723 (2012).

<sup>10</sup> See *id.*

the personnel files of educators, but are to have consequences. Logically, the expectation of the public is logically that the new evaluation systems will result in the removal of teachers and principals who cannot demonstrate that students are progressing academically in their classrooms.

## EXISTING EDUCATOR DISMISSAL OR NON-RETENTION STATUTES TYPICALLY DO NOT ADDRESS THE IMPACT OF STUDENT ACHIEVEMENT DATA

A major problem for the education lawyer is that while evaluation statutes may be changing, the statutes that govern the dismissal or nonrenewal of educators have not changed and do not provide for or even address dismissal/non-renewal based on lack of the educator's effectiveness in boosting student achievement. Further, when it comes to layoff decisions, only 11 states require teacher performance to even be considered.<sup>11</sup>

Few states, even ones that do not take teacher performance into consideration during evaluations, give direction as to how to use teacher evaluations. Although 24 states require that teachers be given feedback on their performance evaluations, either written or in person, 16 states have no policy on what should be done with teacher evaluations.<sup>12</sup> Additionally, just 12 states require teacher evaluations to be used to shape professional development offerings.<sup>13</sup>

In Colorado, for instance, state law requires that "The standards [for evaluation] shall include multiple measures of student performance in conjunction with student growth expectations. For the purposes of measuring effectiveness, expectations of student academic growth shall take into consideration diverse factors, including but not limited to special education, student mobility, and classrooms with a student population in which ninety-five percent meet the definition of high-risk student" as that term is defined by state law.<sup>14</sup>

However, nothing in the Colorado statutes spell out when an educator may be dismissed if that teacher or principal does not prove "effective" in producing consistent and comparable student academic growth. Instead, the Colorado statute on dismissal of post-probationary teachers focuses on additional protections of due process for educators. Teachers or principals who are deemed ineffective must receive written notice, the documentation used for making that determination, and identification of the deficiency.<sup>15</sup> Tenured teachers who disagree with this designation have "an opportunity to appeal that rating, in accordance with a fair and transparent process developed, where applicable, through collective

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<sup>11</sup> See NCTQ, *supra* note 4, at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> COLO. REV. STAT. § 22-9-106(1)(e)(II) (2013).

<sup>15</sup> COLO. REV. STAT. § 22-9-106(3.5)(b)(I) (2013).

bargaining.”<sup>16</sup> If a collective bargaining agreement does not exist, then the teacher may request a review “by a mutually agreed-upon third party.”<sup>17</sup> Teachers or principals must then be given a remediation plan to correct their deficiencies, as well as a reasonable amount of time to make the correction.<sup>18</sup>

Another issue that varies greatly by state is how much weight should be given to student progress during teacher evaluations. Although the Colorado statute requires consideration of diverse factors such as special education, student mobility, and classrooms with student populations in which ninety-five percent meet the definition of high-risk student, evaluators are required to base at least 50% of the evaluation on academic growth of the students.<sup>19</sup>

Like Colorado, Louisiana and Tennessee also require teacher evaluation systems to be based 50% or more on the academic growth of the students.<sup>20</sup> Also similar to Colorado, Louisiana and Tennessee also have due process protections for teachers who are found to be ineffective. Unlike Colorado, however, Louisiana spells out how to dismiss a teacher who is ineffective. If a teacher fails to complete the assistance program set forth by the statute,<sup>21</sup> or if the teacher is deemed “ineffective after a formal evaluation conducted immediately upon completion of the program,” then the school board must “timely initiate termination proceedings.”<sup>22</sup> Additionally, Louisiana has a statewide unitary system, whereas some other states (e.g., Arizona, Minnesota, Nevada, New York, and Ohio) allow districts to create their own evaluation systems.<sup>23</sup>

In Oregon, the state law regarding dismissal of teachers and principals has not changed appreciably since the 1970s. Probationary educators (generally in their first three years of employment in a district) can be dismissed or non-renewed “for any cause deemed in good faith sufficient” by the local school board.<sup>24</sup> “Contract teachers” (formerly “permanent” teachers and administrators) may be dismissed for any of nine reasons, which include “inadequate performance,” “inefficiency,” and “failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of

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<sup>16</sup> COLO. REV. STAT. § 22-9-106(3.5)(b)(II) (2013).

<sup>17</sup> *Id.*

<sup>18</sup> COLO. REV. STAT. § 22-9-106(3.5)(a) (2013). For more information, see Green, *supra* note 6.

<sup>19</sup> COLO. REV. STAT. § 22-9-106(1)(e)(II) (2013).

<sup>20</sup> See Green, *supra* note 6, at 1, 2.

<sup>21</sup> The Louisiana statute lists four factors that need to be included in assistance programs for ineffective teachers. LA. REV. STAT. ANN. § 17:3902(C)(2)(b) (2013).

<sup>22</sup> LA. REV. STAT. ANN. § 17:3902(C)(2)(b)(v) (2013). For more information, see Green, *supra* note 6.

<sup>23</sup> Rob Taylor, *Teacher Evaluation: States Mandate Reform*, *Quinlan's EDUC. EMP. L. BULL.*, Vol. 7 Issue 12 (Dec. 2011).

<sup>24</sup> OR. REV. STAT. § 342.835 (2013).

training and growth,” along with other reasons focused on teacher conduct, such as “neglect of duty,” “insubordination,” and “immorality.”<sup>25</sup>

In Oregon, post-probationary teachers and principals who are dismissed may appeal their dismissal to a state-appointed “Fair Dismissal Appeals Board” (FDAB) which is charged with determining whether the reasons given for dismissal are “substantiated.” If so, and if those substantiated reasons establish “inadequate performance” or any of the other eight dismissal reasons, the FDAB is not empowered to overturn the dismissal unless the FDAB determines and states with specificity why the dismissal is “unreasonable, arbitrary or clearly an excessive remedy.”<sup>26</sup>

From the 1970s to the current year, fewer than two dozen FDAB appeals were filed by Oregon post-probationary teachers whose dismissals were based on “inadequate performance” or “inefficiency.” In no cases did the school district employers rely in any way on student achievement results.<sup>27</sup> In many of these cases, the facts cited as substantiating inadequate performance had to do with observations of factors logically associated with poor outcomes for students: poor classroom management, students frequently not engaged, poor instructional planning, and inept teaching methods. But evidence of the end result of such a classroom on student learning and growth was not presented.<sup>28</sup>

## REACTIONS OF COURTS AND OTHER DECISION-MAKERS IN CHALLENGES OF DISMISSALS WHEN LACK OF STUDENT ACHIEVEMENT IS THE REASON, OR ONE OF THE REASONS, GIVEN BY THE DISTRICT

A search for court cases in other states where teachers or principals were dismissed for poor student achievement or inadequate student growth yielded scant results.<sup>29</sup> Of course, educator dismissal cases are often heard by administrative agencies or by labor arbitrators under the provision of a collective

<sup>25</sup> OR. REV. STAT. § 342.865 (2013).

<sup>26</sup> OR. REV. STAT. § 342.905(6) (2013).

<sup>27</sup> In a case involving teacher Beulah Smith (1979), the FDAB ordered Smith reinstated because she was given no help in addressing identified deficiencies, and because the dismissal was based on three incidents where excessive force with students was alleged but not proven as clear-cut violations of district policy. In the FDAB’s decision, the decision-making panel (a teacher, a school board member, and a member of the public) in fact noted that Smith’s class ranked above the national average on standardized tests.

<sup>28</sup> Among those cases, FDAB sustained the dismissal of a 27-year veteran teacher, *Hoover v. Hermiston School District* (1988), and the dismissal of a 33-year veteran teacher, *Ballman v. Warrenton-Hammond School District* (1990). In the only two “inadequate performance” FDAB decisions appealed, the Oregon Court of Appeals upheld FDAB’s reinstatement of teacher Peter Paul in *Paul v. Washington County School District No. 48*, FDAB 72-1 (1972), *aff’d*, *School District No. 48 v. FDAB*, 14 Or. App. 634 (1973), and *AWOPed* the FDAB’s decision sustaining the dismissal of teacher Elaine Ferguson, *Ferguson v. Dayton School District*, 206 Or. App. 520 (2006).

<sup>29</sup> The author made an on-line request from members of the Council of School Attorneys for reports of any such cases they had handled, and received two replies.

bargaining agreement’s “just cause” clause, and thus are not reflected in any of the national reporting services.

Many of the cases located were years old. In most such cases, the dismissing district relied upon standardized test scores, but not upon evidence of growth, or the lack thereof, in the students’ performance during the school year. And in many of the cases, the statutory standard for review allowed reversal of a dismissal only if the district lacked “substantial evidence” of the claimed deficiencies:

- In *Re the Proposed Termination of James E. Johnson’s Teaching Contract with Independent School District No. 209*,<sup>30</sup> the Minnesota Court of Appeals held that the evidence supported the conclusion that the teacher had been “inefficient” as well as “insubordinate.” Johnson, a tenured math teacher of 7th-through 9th-graders, had evaluations that noted concern about excessive student failure rates, a high volume of transfer requests, poor relationships with students and parents, and inappropriate teaching methods. He was given notice in September 1987 that he must improve his teaching performance, and was later suspended without pay the following January. After a 29-day hearing, an independent hearing examiner, who was a retired district court judge, concluded that there was substantial evidence to recommend Johnson’s termination for insubordination and inefficiency in teaching. The school board dismissed Johnson in May 1989. The Minnesota Court of Appeals found that the record contained evidence substantiating the charge of lack of student progress, as well as the other four charges of poor performance. “Although the test scores of highly motivated students improved, the scores of the other students remained the same or worsened. Many students failed his examinations.” Testimony by the replacement teacher indicated that Johnson’s students were behind in the curriculum. Further, evidence of Johnson’s grading practices and failure rates supported the finding of teaching inefficiency.<sup>31</sup>

- In another case based on the high levels of D and F grades given by a teacher, the Supreme Court of Appeals of West Virginia affirmed a county circuit court’s denial of the teacher’s grievance. “Grade distribution” was found to be an acceptable indicator of teacher performance, although it was not explicitly listed as an indicator of the performance standard that the teacher “monitors student progress toward learning outcomes.” Fifty percent of the teacher’s students had received Ds or Fs in science, while the same students had a 17% incident of Ds and Fs in other academic classes.<sup>32</sup>

- The Supreme Court of Minnesota reversed a county district court which had set aside a termination decision, finding that there was substantial evidence in the record to support the termination decision based, in part, on lack of student progress.<sup>33</sup> Other reasons were lack of rapport

<sup>30</sup> 451 N.W.2d 343 (Minn. App. 1990).

<sup>31</sup> The Court did warn that a directive that the teacher’s grade distribution not deviate by more than 2% from distributions in other similar classes was too rigid and could “potentially interfere with a teacher’s legitimate need for classroom flexibility.”

<sup>32</sup> *Larry Brown v. Wood Cnty. Bd. of Educ.*, 184 W. Va. 205 (1990).

<sup>33</sup> *Whaley v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 325 N.W.2d 128 (Minn. 1982).

with students, excessive use of worksheets, and lack of appropriate disciplinary techniques. Evidence of lack of student progress consisted of testimony by staff and faculty members who observed the students in class and measured their progress by the speed at which they moved through the skills tests and worksheets used in the district. The students were found to be progressing more slowly than the other students in the reading program, based on reports from three teachers and a curriculum consultant.

- The Missouri Court of Appeals, Eastern District, Division Three, upheld the decision by the Board of Education terminating a teacher on grounds of incompetence and inefficiency.<sup>34</sup> The Court held that the teacher's failure to maintain classroom discipline, provide adequate and individualized attention to students, or properly evaluate student performance was incompetence, and therefore affirmed the dismissal under a "substantial evidence" test, finding that the dismissal was not arbitrary, capricious, unreasonable, or an abuse of discretion. However, the teacher was charged with failing to provide prompt and accurate information about student performance, not with failing to advance student achievement. In fact, she contended that the students in her classes learned, as evidenced by their standardized test averages. Even assuming this were true, the Court said the evaluations of administrators finding that the teacher still had teaching deficiencies met the substantial evidence test, and the school board's decision was upheld.

- In 2012, the Court of Appeals of North Carolina affirmed the dismissal of an elementary school principal, who was renewed in April 2009, but dismissed a few months later after receiving low ratings on staff surveys and after it became known that students' math and reading test scores declined by more than 15% and 46% respectively at her school. Although there was some evidence that the school was a "struggling school" when the Petitioner assumed her position as principal in 2007, and although the evidence showed that the drop in scores was due in part to a "re-norming" of the reading test, the drop in reading test scores in her school was more than twice the decline in test scores experienced by other schools in the district and the second-year scores were actually lower than during her first year as principal. The evidence regarding test scores was "substantial evidence" for a finding of "inadequate performance."<sup>35</sup>

As evidenced in these cited cases, dismissed teachers and principals typically have not been successful in challenging their dismissals based in notable part on student scores.<sup>36</sup> This may be because the teachers were never dismissed solely for poor student performance. Poor rapport with students, insufficient communications with parents, inappropriate use of class time, and failure to follow the school's adopted curriculum often accompanied lack of student progress in their dismissals.

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<sup>34</sup> *Johnson v. Francis Howell R-3 Bd. of Educ.*, 868 S.W.2d 191 (Mo. App. 1994).

<sup>35</sup> *Butler v. Charlotte-Mecklenburg Bd. of Educ.*, 725 S.E.2d 923, 2012 WL 1995297 (N.C. App. 2012).

<sup>36</sup> Perry A. Zirkel, *Legal Boundaries for Performance Evaluation of Public School Professional Personnel*, 172 EDUC. L. REP. 1, 11 (Feb. 13, 2003).

## POSSIBLE CHALLENGES BASED ON CONSTITUTIONAL THEORIES WHEN STUDENT TEST DATA, EVEN “VALUE ADDED” DATA, IS USED AS THE BASIS FOR DISMISSAL

Rather than contest the adequacy of the evidence of inadequate performance or inefficiency, in a few cases dismissed teachers have challenged the reliance on student test data as a violation of constitutional rights, under the Fourteenth Amendment’s due process (procedural and/or substantive) and equal protection requirements. In two instances, these types of constitutional challenges landed in the federal courts.

In the 1987 case of *St. Louis Teachers Union v. Board of Education of the City of St. Louis*,<sup>37</sup> the U.S. District Court for the Eastern Division of Missouri addressed equal protection, rational basis, due process, and arbitrary and capricious claims after some teachers were dismissed, in part, because of low California Achievement Test (“CAT”) scores of the plaintiffs’ students. Under the district’s evaluation method, a teacher whose students did poorly on the CAT exams would receive a preliminary “unsatisfactory” rating, which resulted in a review of the teacher’s evaluations. If other deficiencies were found, the teacher would receive a final “unsatisfactory” rating.

The court dismissed the plaintiffs’ claims that there had been an equal protection violation since the CAT scores were used to evaluate only English language, communications, and mathematics teachers and not other teachers (e.g., drama, foreign language, music teachers). The court found it was rational for the school district to use the test results to assess only those teachers who taught the subject matter covered in the test.

The court dismissed a second equal protection claim based on the assertion that the only teachers who received “unsatisfactory” ratings were those who had been reviewed based on their students’ CAT scores.<sup>38</sup> The court accepted the school district’s assertion that the CAT scores established a rational basis for reviewing those evaluations to determine whether the teachers in question should receive final “unsatisfactory” ratings.<sup>39</sup>

The court also addressed a procedural due process claim. The court found that there was no violation of the teachers’ protected liberty interests based upon statements about their competency. As for the teachers’ property interest claim, the court found that the teachers did not have a contractual or a statutory expectation of salary advancement.

The court also addressed the claim that the use of CAT scores for evaluation purposes was arbitrary, capricious, and irrational since the CAT had not been designed or validated as an evaluation tool to assess teacher performance. The court refused to dismiss the claim that the use of CAT scores as the sole or

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<sup>37</sup> 652 F. Supp. 425 (E.D. Mo. 1987).

<sup>38</sup> DAVID FARMELO, USING STUDENT TEST RESULTS TO EVALUATE EDUCATIONAL PROFESSIONALS AND INSTITUTIONS: WHAT THE LAW INSTRUCTS (Nat’l Sch. Bds. Ass’n Aug. 2000).

<sup>39</sup> *Id.*

primary basis for an “unsatisfactory” rating constituted a violation of the teachers’ substantive due process rights.<sup>40</sup> Finally, the court questioned, but gave the plaintiffs the opportunity to explain, why there was any violation of the teachers’ constitutional rights based on allegations that a disproportionate number of teachers who received final “unsatisfactory” evaluation ratings were employed in “non-integrated” schools.

Another constitutional challenge to the use of standardized tests in teacher evaluations is *Scheelhaase v. Woodbury Central Community School District*.<sup>41</sup> In *Scheelhaase*, the court declined to undertake a substantive due process review, stating: “Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.”<sup>42</sup> Therefore, even though the plaintiff raised a claim that the use of standardized test scores was arbitrary and capricious, the court declined to agree with her. The court additionally found that the plaintiff did not have a constitutionally protected property interest in her contract of employment, and that she had been afforded all procedures to which she was entitled under her year-by-year appointment.<sup>43</sup>

Although the *St. Louis Teachers Union* case demonstrates that it is unlikely that a teacher can bring a successful liberty interest due process claim, there is the possibility that a teacher could bring a property interest due process claim.<sup>44</sup> The Supreme Court has found that tenured teachers have a property right to continued employment derived from state tenure statutes.<sup>45</sup> Additionally, if plaintiffs can establish a protectable due process right, then they might be able to argue that a teacher evaluation policy that relies 50% or more on standardized tests (e.g., Colorado, Louisiana, and Tennessee) violates substantive or procedural due process.<sup>46</sup>

In addition to due process and equal protection claims, a teacher dismissed based on student test scores might be able to bring a claim under Title VII of the Civil Rights Act. Black students tend to fare worse on standardized tests than white students, and black teachers are more likely to work in schools of low-income black students. As such, this could result in a higher number of black teachers being dismissed because of poor student test scores, especially in states where teacher evaluation systems rely 50% or

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<sup>40</sup> *Id.*

<sup>41</sup> 488 F.2d 237 (8th Cir. 1973).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Green, *supra* note 6, at 17.

<sup>45</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985).

<sup>46</sup> See Green, *supra* note 6, at 17.

more on student standardized test results. Even if the teacher evaluation model being used is not inherently discriminatory, it may still result in a disparate impact, which would be illegal.<sup>47</sup>

## RECOMMENDATIONS FOR USE OF STUDENT ACHIEVEMENT FACTORS IN DECISION-MAKING REGARDING CONTINUED EMPLOYMENT

Under new state educator evaluation laws, supervisors will be expected to gather data regarding a teacher's effectiveness in fostering student academic achievement. The Oregon Board of Education's "Framework" for evaluation, for instance, dictates that to gather "evidence of teachers' contribution to student learning and growth, teachers will establish at least two student learning goals and identify strategies and measures that will be used to determine goal attainment." Teachers must meet with their evaluators to discuss progress for each goal midyear and at the end of the year, when a final assessment is made of the teacher's success in meeting the goals and "implications for future professional growth planning" are determined.

But if the teacher's students are found not to have made adequate progress, what then? Because many state teacher dismissal statutes require at least "substantial evidence" of "inadequate performance" and in order to guard against substantive due process violation claims, these cautions would seem warranted:

- Focusing on "student growth" rather than absolute levels of achievement, avoids many of the claims of mitigating circumstances or arbitrariness. It is easier to argue the impact of an elementary teacher based on gains (or losses) from the prior spring to the current spring – rather than to place responsibility on this year's teacher for below-standard scores of students who may have been below the standard going into that grade.
- Results of student growth analyses will be more credible if results from two or three years are utilized, not just one year.
- Be prepared to present expert testimony as to the reliability and consistency of results of any standardized tests that are the source of evidence of "student learning and growth" because attacking the test is one of most productive ways of undermining a dismissal decision based on those test results. If test scores are relied upon heavily, we can anticipate a "battle of the expert

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<sup>47</sup> See Green, *supra* note 6, at 17. Another issue that may arise for education lawyers is the potential for teachers to become subject to professional negligence suits in the same way that doctors or lawyers are sued for "malpractice." School districts would then have to decide if they would represent teachers in these types of lawsuits. Should the district only represent teachers that it still employs? Should the district represent teachers who are on probation because of poor performance? Will the district face a conflict of interest if it faces a lawsuit from a parent, but then shift the blame for poor student performance to the teacher? Conversely, if a teacher with high "value added" evaluations is sued because one of his/her students is not performing well, can the teacher shift the burden of inadequacy to the district? Implementing a system of evaluations that places greater emphasis on teacher contribution requires districts to address such possibilities, even though educational "malpractice" lawsuits have not been successful for plaintiffs in the past.

witnesses” about the validity, high numbers of “false positives,” and statistical percentages of error in using student test results to gauge teacher effectiveness.

- As illustrated by the case decisions discussed herein, courts and other decision-makers appear to be more supportive of evaluations that are based on more than just student achievement data, or even student growth data. Oregon’s new evaluation statute and “Framework” adopts this viewpoint by requiring “multiple measures” to be used to evaluate educators, including evidence of “Professional Practice” (which includes classroom observations, and an examination of lesson plans and curriculum design), evidence of “Professional Responsibilities” (including teacher self-reports, parent/student surveys, portfolios, and teamwork), and “student learning and growth.”
- Be prepared to compare the growth data for students of one teacher, to the growth data for students of other teachers (e.g., math scores in this classroom remained stagnant, while math scores in other classrooms increased). If all or most teachers in a particular school show minimal student growth in math scores, for instance, the problem may be in the choice of textbooks, the timing of when various math concepts are taught, poor hiring practices for that school, or a number of other reasons, separate and apart from individual teacher skill or effort.
- Restrict the use of student standardized test scores in evaluations to those teachers of subjects that are clearly measured on the test (e.g., math and English). Other measurements of “student learning and growth” will have to be developed for use in evaluating teachers of the fine arts, social studies, vocational courses, and so forth.
- Discuss with the teacher and determine ways to assess and address “mitigating factors,” such as higher class sizes, greater numbers of disabled or English-Language Learner students, racial minorities or students living in poverty in the class loads of teachers being evaluated, in comparison to other teachers. It may be helpful to correct any discrepancies early on by balancing the student class loads, including the numbers of English language learners and disabled students, in the classrooms of that department or school.
- Best practice would be to involve the teaching staff in setting realistic goals for the improvement of student performance, and determining ahead of time what would be the measurement, as Oregon’s new evaluation law requires. Involvement of small groups of teachers at like grade levels and like subject matters in setting expectations would be persuasive.
- Given that many state statutes and collective bargaining provisions require “assistance” before dismissing an inadequately performing teacher, supervisors will have to help identify changes that the teacher can make to increase the level of student achievement. Usually, a period of time must be given to allow the teacher to make the changes.

- As a result, supervisor observations and review of work products will still be needed to identify teacher practices likely contributing to poor student performance. Also, supervisors will still be expected, under many evaluation statutes and collective bargaining agreements, to provide feedback, suggestions, and assistance.
- Where teacher dismissals must meet a “just cause” standard under a collective bargaining agreement, an even higher level of “proof” that a teacher is failing to meet reasonable expectations of student growth will be needed to prevail.

## SUMMARY

Members of the public who expect radical and immediate improvement in student achievement from the new teacher evaluation statutes are likely to be disappointed. However, such evaluation systems, by focusing attention on student achievement and student growth in different classrooms, may be successful in the long run. By identifying those teachers whose classroom methods and relationships are producing high levels of student growth and learning, school leaders may discover models and mentors with proven “track records.” The new evaluation process will also need to identify those unproductive teachers in order to remediate and, if necessary, remove them because their teaching methods and practices fail to produce sufficient student learning and growth.

**Nancy J. Hungerford** is founder of The Hungerford Law Firm in Oregon City, Oregon. The firm represents more than half the school districts and community colleges in Oregon in negotiations/labor law, employee discipline and dismissals, student rights and discipline. Ms. Hungerford is a former educator and human resources director. She received her law degree, *magna cum laude*, from Lewis & Clarke Law School.