

HB

217

AMENDMENT

BY REPRESENTATIVE FINKELSTEIN

OFFERED IN THE HOUSE
TO: CSHB 217(HES)

Page 4, line 15 before "judicial":
Insert "independent"

States Weigh Plans To Dismantle All or Part of Tenure Laws

States seek to overhaul tenure laws

Senate targets teacher tenure

Action sought by Fuller affects Milwaukee County districts

By RICHARD P. JONES of the Journal Sentinel staff

Madison — The state Senate voted Thursday to repeal teacher tenure in Milwaukee County, one of the reforms sought by Milwaukee School

our contracts spelled out how to fire (bad teachers). "We hope it doesn't hurt people unduly," Howard added.

The bill applies to Milwaukee Public Schools and 17 suburban school districts in the county. It would not affect teachers who already hold tenure in those districts.

After Senate action, Sen. Alberta Darling (R-River Hills) said the tenure law pro-

Critics Target State Teacher-Tenure Laws

Calif. Governor Seeks To Dismantle System

Who Wants tenure repealed? You might be surprised!

by Susan K. Maciak, assistant editor

Teachers against tenure? It may surprise you, but some are. Frustrated by having to put up with peers who are not properly preparing students for the next grade level, some Michig- Patricia Lane, retired

before tenure hearings begin, won't be enough with her

"We want to be able to assure the public that qualifications for classroom instruction are the first consideration for employment and not necessarily seniority."

— Carl Rose, Association of Alaska School Boards

"School districts want to help teachers get the experience, supervision and professional development they need to be successful. Extending tenure acquisition will give districts the time they need to do just that."

— Carl Rose, Association of Alaska School Boards

"Tenure reform, a growing sentiment"

— Education Week, American Education's Newspaper of Record

"I think this has been coming for quite a while."

— Education Commission of the States

"If [teachers] are smart, they'll look at this as an opportunity to elevate the profession. I don't know anyone who's more upset about a bad teacher than a good teacher."

— California Secretary of Child Development and Education

The Trend: Tenure Headlines "STATES SEEK TO OVERHAUL TENURE LAWS"

• Alaska

Bills seek to extend tenure acquisition, allow for layoff when revenues decline, streamline a costly nonretention process.

• California

Governor's proposal would specifically eliminate tenure. Says the Governor, "Good teachers don't need tenure, [and] our children can't afford a teacher who is just punching the clock." He also proposes to abolish California's entire education code and start over.

• Connecticut

In 1993 the Connecticut legislature tried to amend teacher tenure laws that would have added new causes for dismissing a tenured teacher: The failure to demonstrate performance that promotes student achievement or the failure to take part in activities that enhance professional growth. Members of the legislature's Joint Education Committee are now proposing that Connecticut require five years of service for tenure instead of three.

• New Jersey

Governor has introduced a proposal requiring teachers to undergo periodic recertification to keep their licenses.

• New York

Legislature has already streamlined its procedures for disciplining teachers, but a new bill has been drafted that would require teachers to be licensed every three years and undergo a tenure review every five years.

• Ohio

Governor's proposal would require teachers to teach at least four of the past six years in the same district to achieve a "continuing contract" status. Also proposes a state education licensing board that would evaluate, remediate, and, if performance is judged unsatisfactory, release teachers.

• South Dakota

Governor is introducing legislation that would give school boards more flexibility to nonretain ineffective teachers.

• Texas

Senate Education Committee proposal would make it easier to dismiss teachers: They could be fired after two consecutive unsatisfactory reviews. Governor has praised the bill for encouraging innovation and increasing local control of schools.

• Wisconsin

Senate lawmakers recently passed a bill repealing tenure. Governor supports the bill, and has previously introduced similar bills. The Republican-led legislature is expected to pass the bill into law soon. Other bills would repeal de novo type laws that recently cost the state \$200,000 to nonretain two school employees.

STATES THAT HAVE AMENDED TENURE LAWS IN THE PAST FEW YEARS

- COLORADO (Repealed tenure)
- MASSACHUSETTS
- NEW YORK
- FLORIDA
- MICHIGAN
- OKLAHOMA

SOURCE: EDUCATION WEEK, MARCH 1, 1995, WSBA APRIL 18, 1995, EDUCATION COMMISSION OF THE STATES, 1995

CS FOR HOUSE BILL NO. 217(HES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVE IVAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to teacher tenure, teacher layoff and rehire rights, and to
2 review of decisions of school boards concerning teachers."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 14.20.147(b) is amended to read:

5 (b) When a school operated by a federal agency is transferred to or absorbed
6 into a new or existing school district, the teachers shall also be transferred if mutually
7 agreed by the teacher or teachers and the school board of the new or existing district.
8 A teacher transferred from a federal agency school that [, WHICH] does not have an
9 official salary schedule or teacher tenure in the same manner as a public school district
10 in the state [,] shall be placed on a position on the salary schedule of the absorbing
11 district; the salary may not be less than the teacher would have received in the federal
12 agency school. If the teacher taught four [TWO] or more years in the federal agency
13 school and, at the time of transfer, had a valid Alaska teaching certificate, that teacher
14 shall be placed on tenure in the absorbing district.

1 * Sec. 2. AS 14.20.150 is amended to read:

2 Sec. 14.20.150. ACQUISITION OF TENURE RIGHTS. (a) A teacher
3 acquires tenure rights in a district when the teacher

4 (1) possesses a standard teaching certificate;

5 (2) has been employed as a teacher in the same district continuously
6 for four [TWO] full school years and is reemployed for the school year immediately
7 following the four [TWO] full school years; and

8 (3) has been evaluated and recommended for tenure under (c) of
9 this section.

10 (b) The tenure rights acquired under (a) of this section become effective on the
11 first day the teacher performs teaching services in the district during the school year
12 immediately following the four [TWO] full school years.

13 * Sec. 3. AS 14.20.150 is amended by adding a new subsection to read:

14 (c) The superintendent or the superintendent's designee shall annually evaluate
15 the performance of each teacher in the district who has not earned tenure. In addition,
16 for three of the four years before a tenure decision is made, each untenured teacher
17 shall be evaluated by a peer review committee appointed by the superintendent. The
18 superintendent shall appoint three teachers to a peer review committee unless the
19 superintendent determines that, given the number of untenured teachers compared to
20 the number of teachers available to serve on peer review committees, a committee
21 should be composed of two teachers. A peer review committee shall submit its
22 evaluation in writing to the superintendent and to the nontenured teacher. The
23 evaluation by the peer review committee is advisory only. The superintendent shall
24 recommend whether a teacher should be granted tenure.

25 * Sec. 4. AS 14.20.160 is amended to read:

26 Sec. 14.20.160. LOSS OF TENURE RIGHTS. Tenure rights are lost when the
27 teacher's employment in the district is interrupted or terminated. However, a teacher
28 on layoff status does not lose tenure rights during the period of layoff except as
29 provided under AS 14.20.177.

30 * Sec. 5. AS 14.20.175(b) is amended to read:

31 (b) A teacher who has acquired tenure rights is subject to nonretention for the

1 following school year only for the following causes:

2 (1) incompetency, which is defined as the inability or the unintentional
3 or intentional failure to perform the teacher's customary teaching duties in a
4 satisfactory manner;

5 (2) immorality, which is defined as the commission of an act that,
6 under the laws of the state, constitutes a crime involving moral turpitude; or

7 (3) substantial noncompliance with the school laws of the state, the
8 regulations or bylaws of the department, the bylaws of the district, or the written rules
9 of the superintendent [; OR

10 (4) A NECESSARY REDUCTION OF STAFF OCCASIONED BY A
11 DECREASE IN SCHOOL ATTENDANCE].

12 * Sec. 6. AS 14.25 is amended by adding a new section to read:

13 Sec. 14.20.177. LAYOFFS. (a) A school district may place a teacher who has
14 acquired tenure rights on layoff status but only if it is necessary for the district to
15 reduce the number of teachers because of a decrease in school attendance or because
16 of a substantial decrease in school district revenue. ~~§~~

17 (b) For a period of three years after layoff, a teacher is on layoff status and
18 is entitled to a hiring preference in the district or regional educational attendance area
19 where the teacher had been employed. The hiring preference applies only to vacant
20 teaching positions for which the teacher is qualified. If a teacher is offered a teaching
21 position under this subsection and the teacher declines the offer, the teacher is no
22 longer considered to be on layoff status and is no longer entitled to a hiring preference
23 under this section.

24 (c) In making layoff and rehire decisions under this section, a school district
25 may lay off or fail to rehire a secondary school teacher who has more seniority than
26 a primary school teacher in order to give preference to a teacher skilled in teaching at
27 the primary school level. The district may also give preference to a secondary school
28 teacher over a primary school teacher with more seniority in order to preserve
29 secondary school programs.

30 (d) Notwithstanding any provision of AS 23.40, the terms of a collective
31 bargaining agreement entered into between a school district or regional educational

1 attendance area and a bargaining organization representing teachers on or after the
2 effective date of this section may not be inconsistent with the provisions of this
3 section.

4 (e) A teacher on layoff status is not entitled to be reemployed under
5 AS 14.20.145 and does not accrue leave. Time spent on layoff status does not count
6 toward the acquisition of tenure rights. However, layoff status does not constitute a
7 break in service for

- 8 (1) determining eligibility for tenure;
- 9 (2) retaining acquired tenure rights; or
- 10 (3) retaining accrued sick leave.

11 * Sec. 7. AS 14.20.205 is amended to read:

12 Sec. 14.20.205. JUDICIAL REVIEW. If a school board reaches a decision
13 unfavorable to a teacher, the teacher is entitled to mandatory, advisory arbitration
14 conducted by a neutral third party and, if the decision of the school board
15 remains unfavorable to the teacher, to judicial review based on the record [A DE
16 NOVO TRIAL] in the superior court. However, a teacher who has not attained tenure
17 rights is not entitled to arbitration or judicial review under [ACCORDING TO] this
18 section.

19 * Sec. 8. The amendments made by this Act apply to teachers first hired by a school
20 district on or after the effective date of this Act.

Alaska State House of Representatives

House District 99

Session

Alaska State Capital
Juneau, Alaska 99801-1182
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Interim

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Representative Ivan M. Ivan

SECTIONAL ANALYSIS - CSHB 217 (HESS)

The following is a sectional analysis of Committee Substitute for House Bill 217 (HESS):

Section 1: Amends AS 14.20.147(b), Transfer or absorption of attendance area or federal agency school. Changes tenure from two to four years for those teachers who taught in a school operated by a federal agency and has transferred to or is absorbed into a new or existing school district.

Section 2: Amends AS 14.20.150, Acquisition of tenure rights. Changes tenure from two to four years.

Section 3: Adds a new subsection to AS 14.20.150. Three of the four years prior to a tenure decision, requires that a non tenured teacher be evaluated by a peer review committee appointed by the superintendent.

Section 4: Amends AS 14.20.160, Loss of tenure rights. Clarifies that a teacher on layoff status does not lose tenure rights during the layoff period except as provided by AS 14.20.177 (Section 6 of this bill).

Section 5: Amends AS 14.20.175(b), Non retention. Removes subsection (b)(4) which allows non retention of a teacher due to a decrease in school attendance.

Section 6: Amends AS 14.25, Teachers' Retirement by adding a new section. This new section provides for layoff of a tenured teacher when there is a decrease in school attendance or school revenues or to better meet the academic program needs of the district. Procedures under which a district may layoff tenured teachers, the length of time that a teacher retains hire rights after a layoff, the circumstances under which a teacher may lose rehire rights after a layoff and other provisions are provided under this section.

Section 7: Amends AS 14.20.205, Judicial review. Eliminates a de novo trial whenever a school district reaches an unfavorable decision to a teacher. This section adds language which allows judicial review of the decision based on the previously established record. A provision is also added which provides for mandatory, advisory arbitration for a teacher if the school board decision is unfavorable to the teacher.

Section 8: States that the changes made by this bill apply to teachers first hired on or after the effective date of the bill.

Alaska State House of Representatives
House District 30

Session
Alaska State Capital
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Representative Ivan M. Ivan

SPONSOR STATEMENT - CSHB 217 (HESS)

I introduced House Bill 217 to allow our school districts some flexibility when dealing with rising enrollments and increased costs associated with our educational system. Should we, the legislature, decide not to increase educational funding, I believe policy questions such as the one proposed in House Bill 217 need to be addressed.

House Bill 217 would allow school districts to lay off teachers who have acquired tenure rights, but only if the school district finds it necessary to reduce the number of teachers due to declining enrollment, declining revenues or to better meet the academic program needs of the district. The bill also increases tenure from two to four years and removes the costly trial de novo portion of our statutes which allows a school district employee who, if not satisfied with a district led investigation, to go to the court system to begin an entirely new trial. The district's investigation, most often, must be recreated. The bill eliminates the de novo portion when the district investigation has met standards acceptable to the court. The deletion of the trial de novo provides our educators the same protections as provided to other state employees. The bill does allow for mandatory, advisory arbitration if the school board reaches a decision unfavorable to a teacher prior to appealing to Superior Court.

FISCAL NOTE

STATE OF ALASKA

BILL NO. HB 217

1995 LEGISLATIVE SESSION

Revision Date: _____

Department Affected: Education

Title: Employment Rights of Teachers

BRU: Executive Administration

Component: Commissioner's Office

Sponsor: Representative Ivan

Requester: (H) HESS Committee

COMPONENT SERIAL NO. 185

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL	5.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	1.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	6.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

(Thousands of Dollars)

1001 Federal Receipts						
1003 GF Match						
1004 GF	6.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	6.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY95) impact: \$ 0.0

ANALYSIS: (Attach a separate page if necessary.)

House Bill 217 permits school districts to place a tenured teacher on layoff status if it is necessary to reduce the number of teachers because of a decrease in attendance or revenue, or to better meet the academic program needs of the district. The department is required to adopt regulations to establish: procedures for the lay off of tenured teachers; the length of time the teacher retains rehiring rights; and, the circumstances under which a teacher may lose rehiring rights after a layoff. The adoption of these regulations will require travel and advertising costs.

The final section of HB 217 states if a school board reaches a decision unfavorable to a teacher, the teacher is entitled to judicial review based on the record instead of a de novo trial. This provision may result in considerable savings to the local school districts.

Prepared by: Sheila Peterson, Special Assistant
 Position: Commissioner's Office

Phone: 465-2803

Date: March 6, 1995

Approved by Commissioner: *Mike Maher*

Mike Maher

Agency: Education

Date: March 6, 1995

POSITION PAPER

TENURE ACQUISITION

For public school educators

The Association of Alaska School Boards recommends to the Legislature that AS 14.20.150 (a) and (b) be amended to require five years of probation to obtain tenure in the school systems of the State of Alaska.

The quality of teaching is important in the development of strong educational programs for our children. Within a two year time frame, which is in current statute, school districts must evaluate teachers, help improve their skills, and determine whether or not to retain them. Two years is simply insufficient time to comprehensively evaluate teachers and allow for their successful improvement.

With districts under increased pressure to reduce administrative costs, not only will there be fewer administrators to conduct teacher evaluations but with an added workload, administrators will be under greater pressure to evaluate and determine whether or not to retain a teacher, and will have much less time to develop the skills of a potentially good teacher.

Extending tenure acquisition would allow districts time to provide a comprehensive plan for improvement which would help strengthen and develop the employee's teaching skills. With five years, new teachers would have the opportunity to grow in an environment conducive to professional development rather than under the pressure of deadlines of notice of non-retention.

ASSOCIATION OF ALASKA SCHOOL BOARDS

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TENURE ACQUISITION MAJOR ISSUES & KEY POINTS

School districts have shared their concerns about how difficult it is to conduct sound evaluations of their teachers within the current two year period of time in which teachers can be awarded tenure.

INSUFFICIENT TIME FOR EVALUATION

1. FAIRNESS TO TEACHERS

- Two years is too short for meaningful evaluation and improvement.
- Forces the non-retention question of a non-tenured teacher rather than encouraging a district to work with the individual to develop their potential talent.

2. FAIRNESS TO KIDS

- Forces a district to tenure marginal teachers who later may prove unsatisfactory.
- To tenure marginal teachers who can't or won't improve—cheats kids.

3. ADMINISTRATIVE WORKLOAD

- Budget cuts force remaining administrators to take on more responsibilities, and makes less time available for quality teacher evaluations.

FIVE-YEAR TENURE WILL

1. Grant sufficient time to evaluate non-tenured staff by moving from two to five years.
2. Not add increased costs to the districts to implement.
3. Not mandate increased statutory requirements on local school districts.
4. Grant sufficient time for professional improvement.

FIVE YEAR TENURE SERVES THE NEEDS OF SCHOOL DISTRICTS, TEACHERS, AND ULTIMATELY CHILDREN.



1995 CORE RESOLUTION

95-22

ACQUISITION OF TEACHER TENURE

WHEREAS, the quality of teaching is important in the development of strong educational programs in the State; and,

WHEREAS, two years is often insufficient time for a teacher new to a school district to develop professionally and successfully; and

WHEREAS, two years is often not long enough to adequately evaluate the capability of a teacher prior to granting tenure; and

WHEREAS, the two year tenure restricts school boards' abilities to manage for quality education;

NOW THEREFORE BE IT RESOLVED that the Association of Alaska School Boards recommends to the Legislature that AS 14.20.150 (a) and (b) be amended to require five years of probation to obtain tenure in the school systems of the State of Alaska—applicable to teachers hired after the effective date of the act.

ASSOCIATION OF ALASKA SCHOOL BOARDS

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POSITION PAPER

NONRETENTION REVISION

LAYOFF PROVISIONS DUE TO FISCAL CIRCUMSTANCES

The Association of Alaska School Boards supports amending AS 14.20.175 (b) to layoff tenured staff for budgetary and fiscal reasons.

If reductions in the work force are required in Alaska's schools due to fiscal circumstances, layoff provisions must allow the educational program needs of our youth, and not tenure, to be the primary determining factor.

Current law allows nonretention of tenured staff for reasons of: (1) incompetence, (2) immorality, (3) substantial noncompliance, and (4) a decrease in enrollment. Schools may NOT layoff tenured employees due to funding shortfalls (not associated with declining enrollments).

AASB supports legislation for layoff that addresses fiscal circumstances with rehire provisions to accommodate district program needs.

AASB believes program needs of students should drive the staffing patterns of schools. Current law leaves schools in a position of having to make program cuts and fill the remaining positions with teachers who may be less qualified but are guaranteed employment because of tenure. It often places teachers in grade levels or subject areas for which they have insufficient preparation. Legislation should direct the State Board of Education to adopt subject area endorsements to improve the quality of instruction.

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An Educational Perspective Support for Non-retention In the Event of a Reduction in Revenue

Under current law, even if a reduction in revenue to a school district necessitates programmatic cutbacks, including reductions in the number of certificated teaching positions, tenured teachers cannot be non-retained for the following school year unless one of the four categories set forth in A.S. 14.20.175 can be proven. Basically, those categories are incompetency, immorality, substantial non-compliance, and a reduction in force required by a decrease in school attendance.

Apparently, the rationale for protecting tenured teachers—even in the face of funding reductions—appears to be that reductions in the number of certificated teachers can be accomplished by attrition and/or the non-retention of non-tenured teachers.

However, that argument is not logical, reasonable, or appropriate when viewed from an educational perspective. Some examples will prove that point:

1. As a result of decreased funding, a school district is required to reduce some music/art elective high school courses. A third year teacher in the district, hired to teach music and with no prior experience teaching English, is reassigned to teach high school English while an exceptional first year teacher, heavily recruited because of his or her prior teaching experience in English and/or education background in English, must be non-retained.
2. A disproportionate number of the district's non-tenured (first and second year) teachers are special ed. Because the tenured teacher ranks are protected from non-retention because of decreased funding in the absence of decreased enrollment, non-retentions must come from the non-tenured staff. Cutbacks in the number of special ed teachers jeopardizes the district's ability to comply with the Individualized Educational Plan (IEP) requirements of state and federal law.
3. Because more Alaska Natives are graduating from the University of Alaska, a school district has hired most of its Alaska Native teachers over the past two years. Those Alaska Native teachers will be non-retained.
4. A large influx of non-English speaking students has required a district to hire many English-as-a-Second-Language (ESL) teachers over the past two years. Those teachers must now be non-retained.
5. The district has expended substantial money over the past two years recruiting well-qualified chemistry and physics teachers. Those teachers are non-tenured, and must be non-retained.
6. A ten year physical education teacher who has never taught high school math is reassigned to teach high school math.

In all of these examples, staffing decisions are being made on the basis of whether a teacher is tenured or non-tenured. Those decisions are not being made on what is in the best educational interests of students.

When revenues decline, a school board must ultimately make budgetary decisions regarding the allocation of resources. Unfortunately, under A.S. 14.20.175(b), a school board acts with the proverbial one hand tied behind its back. Decisions regarding the allocation of human resources are not based upon who is the best, brightest, most competent, most energetic, most qualified, and most effective teacher, but rather on whether someone has taught for only one or two years in the district as opposed to having taught for three, four or more years.



1995 CORE RESOLUTION

95-23

TENURED STAFF REDUCTION WHEN REVENUES DECLINE

WHEREAS, school districts are faced with budget reductions not associated with declining enrollments; and,

WHEREAS, certificated staff may be non-retained due to incompetency, immorality, non-compliance with school law, and declining enrollments, but not due to declining revenues; and,

WHEREAS, this often places teachers in grade levels or subject areas for which they have insufficient preparation; and,

WHEREAS, districts, in order to deal with declining revenues, need the authority to reduce staff due to a lack of funds; and

WHEREAS, nonretention provisions in current statute address performance criteria, with the exception of declining enrollment;

NOW THEREFORE BE IT RESOLVED that the Association of Alaska School Boards supports amending AS 14.20.175(b) to separate declining enrollments and fiscal or budgetary circumstances from performance criteria when faced with staff reductions;

BE IT FURTHER RESOLVED that the Association of Alaska School Boards will draft legislation for layoff that addresses fiscal circumstances with rehire provisions to accommodate district program needs.



1995 CORE RESOLUTION

95-24

STAFF REDUCTION DUE TO CHANGING PROGRAM NEEDS

WHEREAS, School Boards are specifically charged with the responsibility for determining the program needs of their particular districts; and,

WHEREAS, existing tenure laws do not allow for staff reduction because of changing program needs; and,

WHEREAS, changing program needs often force districts to place teachers in grade levels or subject areas for which they have insufficient preparation; and,

WHEREAS, school boards need to be able to make the decision to change staffing levels based on the district's program needs;

NOW THEREFORE BE IT RESOLVED that the Association of Alaska School Boards promotes necessary legislation to allow districts to change staffing levels based on the district's program needs.



1995 CORE RESOLUTION

95-25

SUBJECT AREA ENDORSEMENT IN THE CERTIFICATION PROCESS

WHEREAS, subject area endorsements gained through the teacher certification process are indicators of a teacher's potential competency; and,

WHEREAS, the Association of Alaska School Boards desires an optimal educational environment for its students by hiring the best qualified teachers that are available to us; and,

WHEREAS, the Association of Alaska School Boards recognizes that endorsements can demonstrate basic knowledge and skills;

WHEREAS, the public wants assurances that the people in the classroom are qualified and competent;

NOW THEREFORE, BE IT RESOLVED that the Association of Alaska School Boards desires the Alaska Department of Education to require subject area endorsements or multiple endorsements of initial applicants for teacher certification.

BE IT FURTHER RESOLVED that such endorsements be required of all applicants for certificate renewal, unless such requirement was met at the time of initial certification.

ASSOCIATION OF ALASKA SCHOOL BOARDS

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POSITION PAPER

DE NOVO TRIALS

JUDICIAL REVIEW OF DECISIONS OF SCHOOL BOARDS
RELATING TO NON-RETENTION OR DISMISSAL OF TEACHERS

Under AS 14.20.205 JUDICIAL REVIEW a school district is obligated to submit to a trial de novo (a new trial) if a decision by the school board is unfavorable to a teacher, and the teacher appeals the decision by the board to non-retain or dismiss them. This is an extraordinary standard that has not been extended to any other group of employees.

When a teacher appeals the findings of a district hearing, the school district must repeat the process again before the court, usually at a much later date, and incur the financial cost once again.

AASB views this requirement to be both duplicative and extremely costly. The history of de novo trials in various school districts has established a pattern of unnecessary legal expenses. In addition, de novo law has a substantial chilling effect on school districts, due to costs, when deciding whether or not to attempt the dismissal of a tenured teacher.

The judicial review of dismissal proceedings should be treated no differently than other State agencies. Review should be "on the record" pursuant to the Administrative Procedures Act. This would provide an opportunity for the superior court to review the established record of the local hearing.

Furthermore, a teacher will still be able to appeal a school board's decision to the superior court.

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DE NOVO TRIALS SAMPLE COSTS

On March 22, 1994 the House HESS Committee took testimony from representatives of five school districts in support of legislation affecting de novo trials. School officials offered testimony on seven recent cases of non-retention—total cost \$721,453.

NORTH SLOPE BOROUGH SCHOOL DISTRICT

Tom Everitt, Director of Personnel

Example 1: A teacher was terminated for striking a child. The board incurred costs of \$126,000 in addition to hearing costs for the "de novo" trial.

Example 2: A tenured teacher was terminated for incompetence. As in the first example, the teacher requested and received a hearing. The legal fees for the district attorney and hearing officer were substantial. The preparation for the trial and settlement negotiations involved another \$29,000 in legal fees. In addition, the district's insurance company paid the ex-teacher \$59,500 as a settlement to avoid the legal expenses of a trial.

Total legal expense to the district: **\$217,500.**

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

Barbara M. Martin, Assistant Superintendent

Example 1: A case is currently being appealed to the Alaska Supreme Court by a terminated employee. Hearing costs in this case were \$44,512 and the trial costs to date are \$38,095, for a total of \$82,607.

Example 2: Another case is scheduled for trial in superior court in January 1995. Hearing costs in this case were \$82,920 and the trial costs to date are \$30,010, for a total of \$112,930.

Total combined costs to the district: **\$195,537.**

ANCHORAGE SCHOOL DISTRICT

Larry Wiget, Director of Government

In a recent case in Anchorage the district spent roughly \$20,000 to prevail before a hearing officer. It was forced to expend an additional \$100,000 to achieve the same result in the Superior court.

Total cost to the district: **\$120,000.**

KENAI PENINSULA BOROUGH SCHOOL DISTRICT

Richard Swarner, Executive Director of Business Management

Kenai has recently gone through a trial de novo for the non-retention of a tenured teacher and the district's legal costs were \$74,000. This is an exorbitant, but normal, price to pay for an employee whose performance is not satisfactory.

Total cost to the district: **\$74,000.**

SITKA SCHOOL DISTRICT

John Holst, Superintendent

In a recent termination case in the Sitka School District the district paid \$39,963. This included the original hearing before the board. At that point an attorney and legal firm was appointed by our insurance carrier and handled the case from that point on. The cost of the de novo trial was \$ 50,386 and the cost associated with the appeal to the Supreme Court was another \$ 42,067. Since this case has been remanded to Superior Court, we do not know at this time what the cost will be to process the next step.

Total cost to the district: **\$114,416.**



**1995 CORE RESOLUTION
95-2
ELIMINATE TRIAL DE NOVO**

WHEREAS, the current system of tenured teacher non-renewal and dismissal in Alaska is inefficient and costly for all parties when compared with similar processes in other states; and

WHEREAS, the current system of tenured teacher non-renewal and dismissal in Alaska requires a school district to complete a trial de novo following a similar hearing process by a hearing officer;

WHEREAS, the school trial de novo doubles the cost to the school district for teacher non-renewal or dismissal; and

WHEREAS, school districts have generally used independent hearing officers who utilize an approved process similar to a courtroom situation; and

WHEREAS, in overturning a Superior Court ruling against trial de novo the Supreme Court of Alaska stated the resolution to the process must be remedied by the Legislature;

NOW THEREFORE BE IT RESOLVED that the Association of Alaska School Boards will promote legislation to adjust the current system of tenured teacher non-renewal and dismissal in order to eliminate the trial de novo when the hearing officer has met standards acceptable to the court.

Sec. 14.20.150

ACQUISITION OF TENURE RIGHTS.

(a) A teacher acquires tenure rights in a district when the teacher

(1) possesses a standard teaching certificate;

(2) has been employed as a teacher in the same district

continuously for two full school years and is reemployed for the school year immediately following the two full school years.

(b) The tenure rights acquired under (a) of this section become effective on the first day the teacher performs teaching services in the district during the school year immediately following the two full school years.

History -

(Sec. 1 ch 92 SLA 1960; am Sec. 17 ch 98 SLA 1966)

Decisions -

Purpose of tenure laws. - Tenure laws are intended to give job security to experienced teachers and to ensure that they will not be discharged for inadequate reasons. *State v. Redman*, 491 P.2d 157 (Alaska 1971).

A system of tenure has as its objective the retention of able personnel after they have undergone an adequate period of probation with the concomitant result that more talented personnel will be attracted to enter the teaching profession. *State v. Redman*, 491 P.2d 157 (Alaska 1971).

The law does not require that teachers shall teach every day, - or every hour of every day. *State v. Redman*, 491 P.2d 157 (Alaska 1971).

The supreme court fails to find any provision of Alaska statutes concerning education which requires, or to perceive of any persuasive policy reasons why, a teacher must work full days throughout the school year in order to attain tenure rights. No legislative intent to exclude a teacher who works less than full days is manifest from a study of the applicable statutes. *State v. Redman*, 491 P.2d 157 (Alaska 1971).

Duties regular and substantial enough to afford intelligent evaluation are sufficient. - When a teacher's duties are regular and substantial enough to afford intelligent evaluation, there is little in the way of persuasive policy considerations for excluding such service from the ambit of Alaska tenure laws. *State v. Redman*, 491 P.2d 157 (Alaska 1971).

"Sequential fractions" regulation, - adopted by the department of education for the purpose of protecting teachers who had taught in a particular school district for various fractions of the school year and entitling teachers who had taught for periods totaling more than the equivalent of two regular school terms to tenure, conflicted with the unambiguous language of this section. *Fairbanks N. Star Borough Sch. Dist. v. NEA-Alaska, Inc.*, 817 P.2d 923 (Alaska 1991).

Use of the word "full" in this section indicates the legislature's intent to preclude a teacher from counting a portion of a year toward the two-year

probationary period required for tenure. Fairbanks N. Star Borough Sch. Dist. v. NEA-Alaska, Inc., 817 P.2d 923 (Alaska 1991).

Cited in Skagway City Sch. Bd. v. Davis, 543 P.2d 218 (Alaska 1975); Crisp v. Kenai Peninsula Borough Sch. Dist., 587 P.2d 1168 (Alaska 1978).
Collateral Refs -

What amounts to waiver of status or rights under teachers' tenure statute. 145 ALR 1078.

Construction and effect of tenure provisions of contract or statute governing employment of faculty member by college or university. 66 ALR3d 1018.

Who is "teacher" for purposes of tenure statute. 94 ALR3d 141.

Sec. 14.20.147

TRANSFER OR ABSORPTION OF ATTENDANCE AREA OR FEDERAL AGENCY SCHOOL

(a) When an attendance area is transferred from a currently operating district to, or absorbed into, a new or existing school district, the teachers for the attendance area also shall be transferred unless otherwise mutually agreed by the teacher or teachers and the chief school administrator of the new district. Accumulated or earned benefits, including but not limited to, seniority, salary level, tenure, leave, and retirement, accompany the teacher who is transferred.

(b) When a school operated by a federal agency is transferred to or absorbed into a new or existing school district the teachers shall also be transferred if mutually agreed by the teacher or teachers and the school board of the new or existing district. A teacher transferred from a federal agency school, which does not have an official salary schedule or teacher tenure in the same manner as a public school district in the state, shall be placed on a position on the salary schedule of the absorbing district; the salary may not be less than the teacher would have received in the federal agency school. If the teacher taught two or more years in the federal agency school and, at the time of transfer, had a valid Alaska teaching certificate, that teacher shall be placed on tenure in the absorbing district.

(c) On the first day of service in the absorbing school district, a teacher transferred from a federal agency school shall be allowed the actual number of days of accumulated sick leave that the teacher has earned while teaching in the state. Consistent with the established district policy the absorbing district may allow credit for any other type of leave. Credit for retirement shall be allowed in accordance with AS 14.25.060.

History -

(Sec. 1 ch 53 SLA 1972; am Sec. 1 ch 150 SLA 1975)

Decisions -

Back pay is not a benefit for the purpose of subsection (a) of this section. - Aleutian Region R.E.A.A. v. Wolansky, 630 P.2d 529 (Alaska 1981).

Quoted in Northwest Arctic Regional Educ. Attendance Area v. Alaska Pub. Serv. Employees, Local 71, 591 P.2d 1292 (Alaska 1979), overruled on other grounds, Alaska Com. Fishing & Agric. Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986).

Stated in Parliment v. Yukon Flats Sch. Dist., 760 P.2d 513 (Alaska 1988).

Sec. 14.20.160

LOSS OF TENURE RIGHTS.

Tenure rights are lost when the teacher's employment in the district is interrupted or terminated.

History -

(Sec. 1 ch 92 SLA 1960; am Sec. 1 ch 104 SLA 1965; am Sec. 20 ch 98 SLA 1966; am Sec. 22 ch 37 SLA 1986)

Sec. 14.20.175

NONRETENTION.

(a) A teacher who has not acquired tenure rights is subject to nonretention for the school year following the expiration of the teacher's contract for any cause that the employer determines to be adequate. However, at the teacher's request, the teacher is entitled to a written statement of the cause for nonretention. The boards of city and borough school districts and regional educational attendance areas shall provide by regulation or bylaw a procedure under which a nonretained teacher may request and receive an informal hearing by the board.

(b) A teacher who has acquired tenure rights is subject to nonretention for the following school year only for the following causes:

(1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform the teacher's customary teaching duties in a satisfactory manner;

(2) immorality, which is defined as the commission of an act that, under the laws of the state, constitutes a crime involving moral turpitude;

(3) substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent; or

(4) a necessary reduction of staff occasioned by a decrease in school attendance.

History -

(Sec. 22 ch 98 SLA 1966; am Sec. 1 ch 11 SLA 1968; am Sec. 13 ch 46 SLA 1970; am Sec. 15 ch 124 SLA 1975)

Decisions -

Section exceeds federal constitutional requirements. - This section, in requiring a statement of cause and an opportunity to be heard, exceeds federal constitutional requirements. *Shatting v. Dillingham City Sch. Dist.*, 617 P.2d 9 (Alaska 1980).

Discretion of school boards. - 4 AAC 19.010, which provides that formal evaluations shall serve as a method for gathering data relevant to subsequent employment status decisions pertaining to the person evaluated, cannot operate to limit the broad discretion that was intentionally given to local school boards by the legislature, and a school board's decision not to renew the contract of a nontenured teacher may be "for any cause which the employer determines to be adequate." *Shatting v. Dillingham City Sch. Dist.*, 617 P.2d 9 (Alaska 1980).

Despite the broad language of subsection (a), the board's discretion is subject to certain limitations; for example, a school board may not deny continued employment to a teacher because of the teacher's exercise of first amendment rights, nor may a school board deny continued employment

to a teacher if to do so would deprive the teacher of other rights that are guaranteed by constitution or statute. *Shatting v. Dillingham City Sch. Dist.*, 617 P.2d 9 (Alaska 1980).

Rights of nonretained, nontenured teachers are limited. - The rights of a nontenured teacher who is simply not retained at the end of his period of employment are relatively limited. A non-

retained, nontenured teacher has no constitutionally protected interest in public employment. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973); *Shatting v. Dillingham City Sch. Dist.*, 617 P.2d 9 (Alaska 1980).

Probationary employees who are otherwise lawfully discharged cannot obtain permanent status through grievance procedures - which do not purport to modify the statutory provisions concerning tenure and termination of employees. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

The grievance procedure may be of value to a nontenured teacher - in attempting to persuade the hiring authority that he should be retained. The process might on occasion bring forth evidence and argument by which the termination of the nontenured teacher might be reconsidered. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

But any such results and action would be a matter within the discretion of the hiring authority, - and thereby a matter of grace rather than legal right. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

Nonretention of tenured teacher for substantial noncompliance with district regulations affirmed. - See *Fisher v. Fairbanks N. Star Borough Sch. Dist.*, 704 P.2d 213 (Alaska 1985).

Submission of alleged breach of collective bargaining agreement to arbitration. - Where procedures concerning the nonretention of teachers are negotiated by a school district and a teachers' union and are included within a collective bargaining agreement, a nontenured teacher who is not retained by the school district can submit an alleged breach of the collective bargaining agreement to arbitration, though the arbitrator's latitude in fashioning an appropriate remedy is restricted by the language of subsection (a). *Jones v. Wrangell Sch. Dist.*, 696 P.2d 677 (Alaska 1985).

Quoted in *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975); *Jerrel v. Kenai Peninsula Borough Sch. Dist.*, 567 P.2d 760 (Alaska 1977).

Collateral Refs -

Right to dismiss public school teacher on ground that services are no longer needed. 100 ALR2d 1141.

Sec 14.20.205

JUDICIAL REVIEW.

If a school board reaches a decision unfavorable to a teacher, the teacher is entitled to a de novo trial in the superior court. However, a teacher who has not attained tenure rights is not entitled to judicial review according to this section.

History -

(Sec. 24 ch 98 SLA 1966; am Sec. 1 ch 148 SLA 1966; am Sec. 4 ch 11 SLA 1968; am Sec. 18 ch 124 SLA 1975)

Decisions -

This section, granting a trial de novo to teachers, does not violate the separation of powers. - *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975).

On its face, this section bears no relation to the general provisions governing judicial appeals, - which is covered by Title 22. *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975).

AS 22.10.020 does not supersede this section. - AS 22.10.020, which provided in Sec. 17(1), ch. 50, SLA 1959, that "All hearings on appeal from any final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, shall grant a trial de novo, in whole or in part," does not supersede this section, which expressly mandates de novo reviews for tenured teachers.

Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

In reenacting AS 22.10.020 in 1970 the legislature has not unequivocally expressed any intent to deny tenured teachers de novo review nor was the reenactment part of a comprehensive revision.

Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

Since this section and AS 22.10.020 are not irreconcilably conflicting, but can be intelligently read as conterminous expressions of a general rule and an exception to it, nothing in the edicts of statutory construction requires us to find that this section has been rendered inoperative by the reenactment of AS 22.10.020. *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975).

A policy factor militating in favor of a full application of this section - is that a tenured teacher against whose favor a decision has been reached is faced with the loss of a very important right: his source of income. In this connection, it is not necessary to indulge in such classificatory labels as "vested right" or "property right," for it is enough that the right be recognized as important for it to act as a guide to decision in the interpretation of this section. *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975).

De novo trial required, not mere appellate review. - The superior court erred in making the teacher choose between a de novo trial and an appellate

review of the record. The statute provides tenured teachers the right to a de novo trial, and makes no mention of other available levels of review. Further, the de novo requirement is not satisfied by a de novo mere review on the evidence presented in the administrative hearing. *Linstad v. Sitka Sch. Dist.*, 863 P.2d 838 (1993).

Bill of particulars requirement. - The bill of particulars provision of AS 14.20.180 operates as a limitation on the scope of the de novo trial guaranteed by this section. Thus, a school district may not deviate from the original bill of particulars and show other grounds during a de novo review. *Linstad v. Sitka Sch. Dist.*, 863 P.2d 838 (1993).

Rights of nonretained, nontenured teachers are limited. - The rights of a nontenured teacher who is simply not retained at the end of his period of employment are relatively limited because such a teacher has no constitutionally protected interest in public employment. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

Probationary employees who are otherwise lawfully discharged cannot obtain permanent status through grievance procedures - which do not purport to modify the statutory provisions concerning tenure and termination of employees. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

The grievance procedure may be of value to a nontenured teacher - in attempting to persuade the hiring authority that he should be retained. The process might on occasion bring forth evidence and argument by which the termination of the nontenured teacher might be reconsidered. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

But any such results and action would be a matter within the discretion of the hiring authority, - and thereby a matter of grace rather than legal right. *Gorder v. Matanuska-Susitna Borough Sch. Dist.*, 513 P.2d 1094 (Alaska 1973).

Right of nontenured teacher to judicial review. - While this section does not extend the tenured teacher's right to a trial de novo to a nontenured teacher, neither does it preclude a more limited form of judicial review of the school board decision; therefore a nontenured teacher has a right to judicial review, on the record, of a school board's nonretention, and although a review on the record is all that is required, in its discretion the superior court may grant a trial de novo. *Shatting v. Dillingham City Sch. Dist.*, 617 P.2d 9 (Alaska 1980).

Courts granted fact-finding role. - While courts normally feel constrained to defer to the fact-finding role which the legislature has given to a particular agency, no such constraint logically should exist where the legislature itself has granted the courts a fact-finding role in their review of administrative action. This section seemingly does just that, for it expressly grants a tenured teacher a "trial de novo" following an unfavorable school

board decision. *Matanuska-Susitna Borough v. Lum*, 538 P.2d 994 (Alaska 1975).

When time for appeal begins to run. - In light of the provision in AS 14.20.180(c) that the final decision of the school board must be "written and contain specific findings of fact and conclusions of law," the time for appeal from the board's determination did not begin to run until the written decision was mailed or delivered to the teacher. *Jerrel v. Kenai Peninsula Borough Sch. Dist.*, 567 P.2d 760 (Alaska 1977).

Applied in *Renfroe v. Green*, 626 P.2d 1068 (Alaska 1980); *Jones v. Wrangell Sch. Dist.*, 696 P.2d 677 (Alaska 1985).

Quoted in *Sjong v. State, Dep't of Revenue*, 622 P.2d 967 (Alaska 1981); *Fedpac Int'l, Inc. v. State*, 646 P.2d 240 (Alaska 1982); *Fisher v. Fairbanks N. Star Borough Sch. Dist.*, 704 P.2d 213 (Alaska 1985).



clearinghouse notes

RIF Occurs, Based On

State	No. Prov.	Allowed, Procedure Unspecified	RIF Occurs, Based On				Teacher Has Right To Hearing Before a RIF	Reinstatement Occurs by Inverse Order of Seniority
			Tenure Status or Seniority	Classroom Needs Only	Tenure Status & Classroom Needs	Seniority and Need		
Am. Samoa	1							
Alabama					1			
Alaska*		1						
Arizona		1			1 ²		1	
California						1	1	
Colorado	1		1					
Connecticut					1 ³			
Florida	1							
Georgia		1						
Idaho	1							
Illinois			1 ⁴			1 ⁴	1 ⁴	
Indiana		1						
Kansas					1 ³			
Kentucky						1	1	
Louisiana		1						
Maryland*				1				
Massachusetts		1						
Maine	1							
Michigan	1							
Minnesota					1		1	
Missouri					1		1	
Montana					1 ³			
Nebraska	1							
Nevada	1							
New Hampshire	1							
New Jersey					1 ³			
New York	1							
North Carolina	1							
Ohio		1			1	1		
Oklahoma	1							
Oregon						1 ⁴		
Pennsylvania	1				1 ³		1 ³	
Rhode Island						1		
South Carolina	1							
South Dakota		1 ²						
Tennessee		1						
Texas						1		
Utah		1						
Virginia	1							
West Virginia						1	1	
Wisconsin			1					
Wyoming		1						

*Involved teacher has right to any remaining job in the district. Only probationary teachers are fully subject to RIF.

²By opinion of the attorney general

³Or as determined in a collective bargaining agreement

⁴Or as determined in a collective bargaining agreement: nontenured teachers are dismissed first as long as tenured teacher is legally qualified to hold a position currently held by a teacher who is not on tenure. Whenever the number of dismissals due to RIF exceeds 5 or 150% of the average number of teachers dismissed in the preceding 3 years, the local board must hold a hearing on the question of the dismissals.

⁵By court decision

⁶Determination of who gets laid off also influenced by competence and merit

⁷State statute requires each district to have a written RIF policy

*Maryland provisions are by state law, not in education code or teacher contract provisions.

Compiled by: ECS Clearinghouse and ECS Law Center

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AN OVERVIEW OF LEGAL ISSUES
IN TEACHER QUALITY

By

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CONTENTS

INTRODUCTION	1
1. ENTRY	2
Certification of Teachers	2
Accreditation of Teacher Education Programs	3
Testing Teachers	3
The Programs	3
Constitutionality of Testing	4
Adequate Notice	4
Test Validity	5
Bias	5
Developing A Testing Program	6
Handicapped Teachers	7
2. PERFORMANCE	9
Tenure Laws	9
Teacher Evaluation	10
Changing Employment Requirements	12
Changes in Tenure	12
Changes in Certification	13
Other Changes	14
Collective Bargaining	15
Scope of Bargainable Issues	15
Union Duty of Fair Representation	16
Equity Considerations	17
The Interrelationship of Tenure and Labor Laws	18
3. DISMISSAL	20
Incompetence	20
Reductions in Force	22
Legal Limits to Academic Freedom	23
Procedural Requirements	24
4. CONCLUSION	26
APPENDIX	
STATE REQUIREMENTS FOR TESTING FOR TEACHER CERTIFICATION.....	27
NOTES	28
SUGGESTED READING	37

INTRODUCTION

As popular support grows for improving education, the states are considering many different ways to attract better teachers into teaching and keep good teachers in the schools. Proposed reforms are being widely discussed, in national reports, state legislatures and many other forums across the nation. Less widely discussed but also important are the legal context for reform and the legal implications for particular types of reform.[1] This paper identifies central legal principles that should shape state action in three areas: the entry of new teachers into the profession, the performance of teachers and the dismissal of teachers.

This overview of legal principles is intended to clarify the options open to policy makers and help them avoid legal pitfalls. As long as the legal issues discussed below are considered in the policy-making process, "the law" need not obstruct education improvement. Teacher quality can be raised and accountability achieved while preserving the rights of individual teachers.

1. ENTRY

The first step to excellence in teaching is to improve the qualifications of those who enter the profession. Every state is considering how to strengthen professional screening requirements. Strategies include raising admission standards for teacher education programs, tightening the process of institutional accreditation, increasing certification requirements, imposing continuing education and testing requirements for recertification, providing financial incentives for teachers in certain subject areas and certain locales, and reforming the education of teachers.

Certification of Teachers

Every state has enacted statutory eligibility requirements for teaching in public schools.[2] Certification requirements are lenient in some states, strict in others. Most states require prospective teachers to have completed postsecondary courses or programs; many require that candidates have a certain grade point average, or complete a period of student teaching, or both. About a third of the states require prospective teachers to pass a competency test.[3] Although many requirements are already in place and although most teacher colleges have raised admission standards and toughened curricula in the past five years,[4] many states are now considering further ways to raise the quality of beginning teachers.[5]

What are the legal parameters of state efforts to tighten entry into the teaching profession? A state legislature is free to expand or restrict statutory requirements for teacher certification, subject only to constitutional mandates. With one exception, every state constitution contains an education clause that requires the maintenance of a public school system; only Mississippi makes this discretionary.[6] The education clause generally assigns responsibility for the system to the state legislature, and providing qualified teachers is generally seen as basic to carrying out this responsibility. There is, however, some legal question about whether a state board of education, rather than a legislature, may promulgate certification requirements. The scope of a state board's authority depends on the state's statutes and constitution.[7] In some states (e.g., California) an independent commission is responsible for teacher certification.[8] If the constitution and statutes are inconsistent, the constitution prevails.

Certifying teachers is a licensing process, which will generally be legitimate as long as the process is reasonably related to the state interest in education quality. Virtually all the screening

strategies listed above appear to be related to the state goal of assuring that teachers are adequately qualified, but states should be prepared to demonstrate the relevance of each strategy.

Accreditation of Teacher Education Programs

States have the legal authority to accredit teacher education programs. Accreditation is a relatively straightforward matter that does not raise many legal considerations. (The main potential issue is the scope of the regulatory authority of state agencies, since state constitutions may restrict the extent to which regulatory power may be delegated.) In general, however, states are free to introduce more rigorous standards for accreditation. For instance, several years ago Florida enacted a requirement for continued approval of teacher education programs within the state, with approval contingent on passage of the state teacher test by at least 80% of program graduates.[9] This year Florida used the sanction of decertification for the first time, decertifying 38 teacher training programs at 18 different Florida institutions because too many program graduates failed the teacher test.[10]

Testing Teachers

Testing teachers has been perhaps the most controversial screening strategy and consequently the most litigated. The following analysis of legal issues posed by this approach is offered as a sort of case study that may be useful for policy makers who wish to analyze other screening approaches as well; most of the principles discussed would govern other strategies for raising the quality of the teaching work force.

Analyzed below is testing for initial certification. Testing teachers who are already certified raises additional constitutional issues of retroactivity that are discussed later in the paper. Also discussed later is testing teachers as a condition for continued employment.

The Programs

Twenty states now require that teachers pass a competency test to be certified. (The appendix lists those states.) Some states use the National Teacher Examination (NTE) developed by the Educational Testing Service; others prepare their own tests. Some states test so-called "basic skills"; others test comprehensive knowledge and professional competence. Most of the 20 states test students at the end of their training, although a few test freshmen entering teacher education programs. Although these

tests cannot measure classroom teaching ability, they do screen for baseline skills. Classroom performance can then be evaluated against other standards.

Constitutionality of Testing

Courts have shown a long-standing reluctance to interfere with academic decision making. The courts are not receptive to challenges to education policy making, and they defer to educators' academic judgments except when specific constitutional rights of individual teachers are jeopardized. Even the U.S. Supreme Court has warned against judicial intrusion into education since "[c]ourts are particularly ill-equipped to evaluate academic performance." [11] The Court explained that, for constitutional purposes, academic decisions differ from disciplinary decisions, which require a hearing because they resemble traditional judicial and administrative fact-finding proceedings.

This judicial context governs litigation over academic decisions in general, and challenges to tightened requirements for teacher certification, such as testing, in particular. A state acts reasonably on behalf of the public interest in taking steps to preserve the integrity of its education process. Teacher testing for certification has been upheld as being rationally based on the state's desire to assure qualified teachers. In the leading case, a federal court in 1977 upheld South Carolina's use of testing for teacher certification, saying that the "state has the right to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary to effective teaching." [12]

There is no doubt that the Supreme Court, too, would find validated testing rationally related to a state's interest in the quality of the teaching system. Although it has never ruled on teacher testing, the Court in 1976 upheld the constitutionality of a police employment test: "It is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing." [13]

Adequate Notice

The right to notice derives from the due process clause of the fourteenth amendment to the Constitution. It has been clarified in student competency testing litigation, although courts have not yet addressed it in the context of testing teachers. [14] Like students, teachers must have fair warning of competency tests, and they must be given the opportunity to prepare for changed certification requirements. Thus, a state wishing to test

teachers for certification is legally required to provide a phase-in period. The testing program and the type of material the test will cover must be announced before certification sanctions take effect. Although exactly how much time must be allowed is unclear, at least one year would be a legal minimum.

Teachers should be given more than one opportunity to pass a competency test. This is another requirement for fairness that also derives from student competency testing litigation. Multiple opportunities should be offered to avoid the appearance of arbitrary action. It is also advisable to build remediation opportunities into the testing system, since courts in student testing cases have implied that testing would otherwise be unconstitutional.[15]

Test Validity

To avoid being arbitrary or capricious, tests must actually measure what they purport to measure and there must be a demonstrable connection between a test and the purpose for which it was designed. Courts tend to refer to these ideas of a match between a test and its purpose as "content validity," although psychometricians will distinguish at least three kinds of content validity.[16] Although content validity has surfaced as an issue in the context of "racially disparate" test results, courts probably would mandate content validity in other circumstances as well, but there is no such precedent thus far. If an employment test is not shown to be related to the job, its classification of passers and failers would lack a rational relationship to any legitimate state goal, and the test would probably be unconstitutional under minimal equal protection requirements, as well as substantive due process.[17]

Bias

Tests may not be racially, culturally or sexually biased. If a test question presupposes knowledge generally unavailable to one racial or cultural group, that question is biased, and test validity may be impaired by extraneous factors. If, for example, a test of a teacher's reading comprehension included questions about golf course etiquette, answers would be biased by the cultural background of the respondent. The validation process must insure that specific items on new test instruments are free of bias.

Most challenges of testing programs have concerned their impact on special populations. When tests have produced discriminatory results, claims have been brought on the basis of the Constitution or of various federal statutes. Under the Constitution, a test may be legal even though it has a disparate impact on one racial group, as long as there was no discriminatory intent. [18] But

claims of discrimination based on statutes may not require proof of intent. Under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices, the rules are complex. A prima facie case of test discrimination exists if statistics show a racially or sexually disparate impact in the pass rate. Unless test administrators can rebut that statistical presumption of discrimination by showing that the disparity results from legitimate job-related selection procedures, the testing program will be illegal.[19]

What is "disparate impact"? The federal Equal Employment Opportunity Commission (EEOC) has adopted guidelines that say a selection rate for any racial group of less than 80% of the rate for the group with the highest rate is evidence of disparate impact. Thus, if a state test produces a racially disparate pass rate, the state education agency must be prepared to show how the test was job-related -- or, to paraphrase a court -- that the test accurately selects applicants who would be better teachers.[20]

The two main challenges to using testing for initial teacher certification provide lessons for other states. Although both cases involved the National Teacher Examination (NTE), the same principles would apply to other tests. In the first case, in North Carolina, the court struck down the testing program because no validation study had been done. Expressly noting that a properly validated testing program would be legal, the court criticized North Carolina for failing to validate its cutoff score. Consequently, the test was an arbitrary denial of equal protection of the law: there had been no "validation with respect to teacher competency . . . that a score of 949 truly means that one does not possess enough knowledge to teach adequately." [21] Such a failure to validate would be illegal under Title VII, when racially disparate pass rates are shown. Another federal court upheld the teacher testing program of South Carolina, despite its racially disparate impact. The court found the test rationally related to the state interest in assuring minimally competent teachers. The court rejected a Title VII challenge to the testing and accepted the state's validation study, which related the test to the content of teacher training courses rather than to job requirements.[22]

Developing A Testing Program

It has subsequently become clear that tests should be validated against job requirements as well as against training programs. Two Justices dissented from the Supreme Court's summary affirmation of South Carolina's testing program. These Justices questioned whether the lower court was "correct in holding that the NTE need not be validated against job performance and the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test." [23] Lower court decisions, in other types of testing cases subsequent to the South

Carolina decision, suggest that validation to training courses rather than to job performance would be legally inadequate.[24]

For policy reasons, as well as for legal reasons, the job performance approach to validation seems preferable, especially since many educators have questioned whether training bears much relationship to actual classroom teaching. States might improve education more directly by measuring the skills needed for effective teaching rather than by testing whether a candidate has received effective training.

Deliberate and comprehensive test development is vital to the legality of a testing program, and the development process should be systematically documented. A federal appeals court has suggested five measures of the content validity in any employment testing program:

- o The test makers must have conducted a suitable job analysis.
- o The test makers must have shown reasonable competence, thoroughness and care in constructing the test itself.
- o The content of the test must relate to the content of the job.
- o The content of the test must be representative of the content of the job.
- o The system for scoring the test must usefully select applicants who can better perform the job.[25]

The participation of professional test developers is essential to assure the psychometric validity of a test, as well as to convince a court of its legality. One court, in a case concerning a test for hiring police officers, has gone so far as to warn employers to use outside experts to help develop tests: "an employer dispenses with expert assistance at his peril." [26] In other words, a court will scrutinize the validity of a staff-developed test more closely than the validity of a test developed with expert assistance.

Although the participation or cooperation of teachers in test development is not yet a legal issue, ultimately teacher participation in testing may raise labor law issues concerning the scope of collective bargaining.[27]

Handicapped Teachers

Testing programs must not discriminate against handicapped teachers. Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination in all federally funded programs or activities against a qualified person on the basis of handicap, requires reasonable modifications in test administration

to insure that handicapped applicants are fairly tested for mastery of test materials. Modifications might include time extensions, for instance, or printing the tests in Braille. Section 504 does not require educators to lower academic standards to accommodate persons who are not "otherwise qualified" and cannot meet valid standards because of their handicaps.[28]

2. PERFORMANCE

Once teachers are employed in the school system, how can excellence be rewarded and incompetence be eliminated? To raise the quality of teachers, states are considering not only incentive plans like merit pay and career ladders but also performance evaluation plans and other changes in tenure systems. A few states are even considering the abolition of tenure. This section discusses legal considerations raised by tenure and by various other strategies to keep better teachers in public schools.

Performance evaluation issues are central to merit pay plans and career ladders as well as to improving traditional tenure systems. Merit pay plans tie teachers' salaries to measures of performance: teachers whose performance is deemed excellent receive higher salaries. Some plans may, however, be more accurately characterized as negative merit pay: all teachers get the same salaries except teachers receiving bad evaluations who get lower salaries. Career ladders restructure teacher employment, giving promotions from rung to rung and salary increases to teachers who assume greater responsibilities. Career ladders introduce the concept of academic rank to teaching in elementary and secondary schools.

Since the purpose of both reforms is to reward excellence by providing financial incentives, criteria for excellence must be established. Legal problems will arise with vague or poorly defined standards for evaluation. Legitimate standards are also just as important to the dismissal of incompetent teachers as they are to the promotion of competent teachers.

Tenure Laws

Teacher performance under tenure systems has recently become the focus of critical scrutiny as well as the source of substantial confusion. Every state has a statutory system that provides for the continued employment of elementary and secondary public school teachers unless they are dismissed for cause. These state systems vary in procedural details and terminology. Some statutes do not use the term "tenure," for example, but speak of "permanent employees." The Arkansas statute, for instance, states that it "is not a teacher tenure law in that it does not confer lifetime appointment, nor prevent discharge of teachers for any cause which is not arbitrary, capricious, or discriminatory." [29] Not surprisingly, then, the statutes vary greatly in how much job protection they provide.

The first tenure law was enacted about 75 years ago in New Jersey. At that time job protection was seen as necessary because of

prevalent nepotism, political favoritism and arbitrary dismissals. Granting teachers "tenure" means that they can be dismissed only for cause, as specified in state statutes.

Granting tenure is a much simpler legal matter than dismissing tenured teachers. Teachers must generally complete a specified period of probationary employment (usually three years). Then, as long as a teacher has not been given notice of nonrenewal, he or she receives tenure. In some states, schools must take certain actions for a teacher to become tenured, following procedures specified by state statute. In general, schools have great latitude in deciding whether to grant tenure, as long as decisions are not discriminatory. Tenure decisions also must not be based on teachers' exercise of academic freedom, which is discussed below in the context of teacher dismissal.

Some tenure statutes do not address performance evaluation at all and others mandate only administrative regulations. But several states mandate evaluation criteria in substantial detail and make evaluation an integral part of the tenure system.[30] When a teacher's performance is judged unsatisfactory, the teacher is given an opportunity to demonstrate improvement.

Performance evaluation is not incompatible with the tenure system, although tenure laws have been weak in this respect and there is a widespread perception that tenured teachers are not subject to sufficiently critical evaluation. Since tenure is a product of legislation, there is no legal obstacle preventing states from strengthening the evaluation component of tenure.[31] Tenured status need not insulate teachers from performance evaluation. Tenure does not require continuing the employment of an incompetent teacher; all tenure laws provide for dismissal of incompetent teachers.

Teacher Evaluation

The legality of most current reform proposals depends on the establishment of objective criteria for evaluating teachers and of an even-handed process for conducting evaluations. Merit pay plans have been tried before, but they have usually been dropped because problems with fairness of administration led to staff dissension and low morale.[32] Often, the time and care required to develop an adequate plan have discouraged schools from trying merit pay.

It would not be legally sound to implement any kind of incentive plan without first developing standards and procedures: "there must be a specified set of skills, knowledge, abilities, and attitudes that teachers are expected to demonstrate at each level on the ladder." [33] Any kind of merit pay or career ladder for teachers would be illegal if advancement decisions were based on an arbitrary or subjective evaluation process. To some extent,

evaluating teachers is inherently difficult, since (as has been traditionally argued) teaching is so subjective a process. Yet research in the past decade has begun to identify the components of effective schools and effective teaching.[34]

As long as the criteria used to classify teachers are rationally related to state objectives, the criteria will be constitutional. The "rational basis" test that governs most education decisions is relatively easy to satisfy. However, the criteria for evaluation must be made explicit for a plan to be legally defensible.

Some tenure statutes already enumerate minimum evaluation criteria. Washington's statute, for instance, lists the following categories:

- o Instructional skill
- o Classroom management, professional preparation and scholarship
- o Effort toward improvement when needed
- o Handling of student discipline and attendant problems
- o Interest in teaching pupils and knowledge of subject matter.[35]

But evaluation criteria need not be spelled out by statute, and specifying criteria in administrative regulations could provide greater flexibility. Above all, evaluation criteria need to be usable; there would be disadvantages to making the criteria too specific or too rigid to work.

A major question about merit pay and career ladder plans is: who does the evaluation? Teachers' unions have generally objected to these kinds of plans because they fear evaluation will be arbitrary and subjective. When a plan allows teachers to evaluate other teachers, fewer problems are likely. Although the involvement of teachers in the evaluation process is largely a policy matter, the extent of that involvement does have labor law implications: state collective bargaining laws address the respective roles of teachers and school boards in determining education policy and working conditions. (Also as a matter of policy, teachers should be involved in developing evaluation laws, since their opposition may kill a plan. When Governor Alexander of Tennessee proposed a master teacher plan, teachers objected that they had not been consulted; the legislature did not accept the governor's plan in 1983.[36])

Conventional evaluation of teaching, as reflected in tenure laws, has emphasized process and teacher input. A merit pay approach places more emphasis on results, on so-called "productivity." The idea behind "productivity evaluation" is to evaluate the results

of teaching, i.e., students' learning.[37] One particularly controversial idea is to use student performance on tests as a quantifiable measure of teacher productivity.[38] One federal appellate court upheld the non renewal of a nontenured teacher's contract on the basis of her students' low performance on tests, finding this neither arbitrary nor capricious.[39]

Despite that one court decision, basing teacher evaluation solely on student performance would be legally unsound, because of the obvious potential for inequities: students have widely different abilities from class to class.[40] It seems unlikely that a system could be devised that would assure the fairness of teacher evaluation based strictly on student test performance.[41]

Changing Employment Requirements

Schools and state legislatures retain the authority to change requirements for teacher tenure and certification. Courts do not look kindly on teachers' claims of breach of contract based on changes in tenure laws. However, the contractual and constitutional rights of employed teachers must not be impaired by reforms that toughen tenure standards or give special attention to certain kinds of teachers (e.g., science teachers).

Courts recognize that educational institutions have "wide latitude and discretion" in determining academic requirements.[42] Latitude to make changes is limited, however, by constitutional requirements, including due process and the contract clause. Ample notice of changed requirements and an opportunity to satisfy new requirements must be provided to satisfy procedural rules of due process.

Changes in Tenure

Teachers have claimed that legislation repealing or modifying tenure unconstitutionally impaired their indefinite statutory contracts. In general, courts disagree: they regard tenure not as a contractual right but as a status granted through legislative policy and thus subject to change. The contract clause of the U.S. Constitution forbids states to impair contracts.[43] But the U.S. Supreme Court explained, more than 40 years ago, that "the presumption is that [a tenure] law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the Legislature shall ordain otherwise." [44]

Whether a particular state's tenure statute gives teachers a vested contract right "will depend largely upon the wording of the particular teachers' tenure statute in question as evincing a legislative intention to create contractual rights." [45] In one early case, the U.S. Supreme Court ruled in 1938 that the wording of the Indiana teacher tenure law did give tenured teachers vested

contract rights that could not be retroactively taken away. The ruling appears limited to Indiana's particular statute in which "the word 'contract' was not used inadvertently or in other than its usual meaning." [46] Even in finding that Indiana's tenure statute did confer an indefinite contract, the Court pointed out the general rule that prevails in the absence of specific contractual language in the legislation: "the principal function of a legislative body is not to make contracts but to make laws which declare policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." [47]

A legislature legally may abolish tenure. [48] Legislative action cannot change constitutional or contractual rights. [49] But it can change statutory rights, and tenure rights are statutorily based. [50] Even in the few states where tenure statutes seem to give contractual rights, as Indiana's statute did in 1938, a legislature may revise the statute prospectively -- waiting until contracts have expired, that is, and exempting employed teachers from revised requirements. Or a legislature may modify tenure by making it renewable, for instance, instead of abolishing it outright. It may opt to "grandfather in" already-tenured teachers (exempt them from stiffer requirements), but is probably not required to do so.

Of course, writing legislation to abolish tenure is easier than creating or strengthening an evaluation process. Even if tenure were abolished, the problem of how to evaluate teachers would remain.

Changes in Certification

States can generally change recertification requirements for teachers as well as tenure requirements. In most states, teaching certificates must be renewed at various intervals, and some of the very few states that still issue lifetime licenses are considering periodic recertification. [51]

Most states appear to be moving toward requiring in service training for recertification. No state currently tests teachers for recertification, but Arkansas has just enacted a requirement that teachers be tested for recertification and other states, e.g., Florida, are considering similar requirements. [52] If a state does want to use testing for recertification, it must make sure that the test used has been validated for that purpose (and not merely for initial certification). For instance, Georgia's use of the National Teacher Examination (NTE) was held unconstitutional because the test was not validated for recertification. A federal court ruled that, without such validation, the test produced an arbitrary classification in violation of the equal protection clause. [53] Moreover, the Educational Testing Service, which designed the NTE, has long expressly stated that using the NTE to terminate teachers is

"inappropriate." [54] Just recently, the testing service publicly announced that it will not permit the use of the NTE as a test for recertification. [55] For all these reasons, the use of test scores to evaluate employed teachers is unlikely to be upheld in the courts, [56] although it is still possible that a state could develop a test that could be adequately validated.

Some school boards have introduced continuing education requirements for tenured teachers, sometimes tying these requirements to pay raises, and many states require continuing education for certificate renewal. As a political matter, teachers have sometimes vigorously opposed such certification requirements. Some litigation has already occurred and more is likely. [57]

However, the Supreme Court has held that teacher continuing education requirements are rationally related to legitimate public objectives. The Court stated that "[t]he School District's concern with the educational qualifications of its teachers cannot under any reasoned analysis be described as impermissible The sanction of contract non-renewal is quite rationally related to the Board's objective of enforcing the continuing education obligation of its teachers." [58] The Supreme Court did not address the issue of how a continuing education requirement actually relates to improved job performance. The Court assumed that that type of requirement was closely enough related to the goal of better qualified teachers. Many experts have questioned whether continuing education requirements improve teacher performance, [59] but this is so far basically a policy objection rather than a legal concern. Continuing education requirements are much easier to justify in court than testing programs, for which the fairly complicated validation procedures discussed above must be completed.

It seems, then, that tenured teachers may be required to meet new requirements to retain their jobs as long as the qualifications are reasonable and have been introduced with sufficient advance notice. Any new recertification requirements should be phased in carefully. Legal problems would arise if at least a year's advance notice were not given, and a longer phase-in period might be necessary. For instance, several years would probably have to be provided if teachers were required to earn continuing education credits. Sufficient advance notice is necessary to protect the due process rights of teachers by giving them an opportunity to meet new requirements.

Other Changes

If a school board institutes special bonuses for new teachers, the board must make sure not to impair the contractual rights of current teachers, and the basis for awarding financial incentives must be rationally related to the public interest in improving

education. If special teachers are hired, questions about tenure and seniority will arise. States may choose to limit teachers' seniority rights to the subjects which they have actually taught[60], although this would discourage teachers from shifting to subjects, like mathematics and science, in which there are teacher shortages. In many of these instances both tenure laws and collective bargaining agreements must be considered.

Collective Bargaining

Labor laws affect how reforms of teachers' working conditions can be implemented. Thirty-three states have authorized collective bargaining in public education, and other states are expected to authorize it by the end of this century.[61] A cluster of significant labor law issues should be considered in any move to improve the teaching force.

Scope of Bargainable Issues

Most collective bargaining laws make wages, hours and "terms and conditions" of employment subject to the collective bargaining process.[62] If a state has collective bargaining, issues considered terms of employment must be agreed to in the negotiating process. On the other hand, most collective bargaining laws place "education policy" outside the scope of collective bargaining. This dichotomy has major significance for teacher reform: a measure categorized as a term of employment must survive the bargaining process, whereas a measure categorized as education policy can be implemented unilaterally.

Public-sector labor relations law varies widely from state to state and, unlike private-sector labor law, is not governed by federal law.[63] While some states define negotiable "terms and conditions" in fair detail, many do not. Some further specify which topics may be negotiated and which must be negotiated. Some provide for "meeting and discussing" only on policy issues that are nonbargainable. A number of states define management rights or prerogatives, although to varying extents.[64]

Many specific issues affecting teachers, however, have been difficult to characterize. Educational goals, the length of the school year, number of classroom hours and individual decisions on tenure have all been held to be nonbargainable issues. Grievance procedures, transfer, reassignments and reduction in force are typically mandatory subjects of bargaining. Class size may be subject to bargaining in some states[65] and most collective bargaining agreements over the past decade have specified criteria and procedures for evaluating teachers. But some observers have pointed out a continuing need for legislative clarification.[66]

Some of the remaining statutory uncertainty is unnecessarily costly, and it is a variable affecting teacher improvement that can be readily corrected.

The governance issue of permissible delegation of authority also affects collective bargaining and efforts to raise teacher quality. Elected school board officials may not give away or delegate their ultimate decision-making authority over terms and conditions of public school employment. Collective bargaining agreements would therefore be illegal if they conflicted with constitutional or statutory provisions concerning the duties of local school boards. Over the past 15 years, many courts have upheld collective bargaining in public education against challenges based on state constitutional prohibitions on delegation of legislative authority to persons other than elected officials.[67] When, for instance, binding arbitration of grievances between schools and teachers has been challenged as violating the state constitution, the courts usually uphold arbitration as long as the arbitrator is not given discretion over matters reserved to management, like education policy.

Union Duty of Fair Representation

Particularly significant to efforts to raise teacher quality is the fact that a union owes a legal duty of fair representation to every employee who is represented in the bargaining unit that the union represents. This duty plays a role in school efforts to get rid of incompetent teachers. State collective bargaining statutes do not spell out this duty, but the courts have concluded that the duty of fair representation is implicit, a quid pro quo for the legislative power conferred on the union to act as exclusive representative of all the employees covered.[68] A union must diligently represent and act to benefit the interests of all individuals in the bargaining unit, including those in the bargaining unit who are not union members.[69]

The union has a duty to evaluate grievances in good faith and make decisions about their merits. When a union does pursue a grievance, "it must not do so in a perfunctory manner." [70] (A union would violate its legal responsibility by, for instance, discriminating against black teachers.) If a union breaches this duty, courts may hold the union liable to the individual employee. Unions may therefore feel they must vigorously represent the interests of a teacher who is disciplined for unsatisfactory performance, even if union members privately agree with school management that the teacher is not doing a good job. The union has no duty to pursue every grievance, no matter how frivolous. Only when a union's conduct is arbitrary, discriminatory or in bad faith does the union incur liability.

The existence of a collective bargaining agreement "does not prohibit the discipline and dismissal of poor teachers." [71] When

management sets forth specific, valid reasons for teacher discipline, the union has no obligation to pursue a grievance. Many school administrators may not realize this and may also not recognize the possibility that a union may not win in grievance proceedings. General misunderstanding about the duty of fair representation does appear, on occasion, to interfere with efforts at improving the caliber of the teacher force. Clarification of that duty might make efforts go more smoothly.

Equity Considerations

Equity issues should always be considered in connection with reforms affecting employed teachers. All of the equity problems raised in connection with screening teachers also pertain to the continuing employment of teachers.

Promotion plans based on teacher test scores typically pose equity issues. In 1976, a South Carolina county school board gave pay raises to teachers who performed well on a test, thereby producing racially disparate results. The decision to tie teacher pay raises to scores on the NTE was upheld by a federal appellate court. In finding no violations of the Constitution or of Title VII of the Civil Rights Act, the Fourth Circuit ruled that the school's practice served its legitimate employment objectives, despite its racially disparate impact. Likewise, the court found the practice was not arbitrary and capricious. The court explained in 1981 that "[p]ay increases for the highest rated teachers enhances [sic] the School Board's capacity to attract highly rated teachers from the outside." [72] Thus, it appears to be legal to use teachers' scores on validated tests as a basis for pay raises, although it would not be legal to use those scores as a basis for firing teachers (unless somehow the scores could be shown to indicate ineffective classroom performance).

Retirement plans may also pose equity problems. States must make sure they do not discriminate against older teachers as they attempt to improve the teaching force. The federal Age Discrimination in Employment Act now prohibits age discrimination against personnel under 70 by state and local public employers. [73] A mandatory retirement age of under 70 is vulnerable under this law, unless the requirement is a bona fide occupational qualification or can be shown to relate to job performance. [74]

Although state tenure statutes treat retirement variously, states that set a mandatory retirement age under 70 should be prepared to show that age relates to effective teaching. Mandatory retirement provisions may also be attacked under state civil rights statutes prohibiting age discrimination. One such state civil rights law, for instance, was deemed to imply the repeal of the requirement for mandatory retirement at 65 contained in the state teacher tenure statute. [75] On the other hand, if challenges to mandatory

teacher retirement policies are based only on the Constitution and not on statutes, the policies will usually be valid. The courts have generally ruled that teacher retirement systems are rationally related to legitimate state objectives and have rejected equal protection and due process challenges.[76] The Hawaii Supreme Court, for instance, recently upheld the constitutionality of the Hawaii tenure law, which requires mandatory retirement at age 65. The court considered the requirement rationally related to "state interests in maintaining student discipline and preserving the quality of instruction through the retirement of school teachers whose physical and mental skills generally decline with age." [77]

The Interrelationship of Tenure and Labor Laws

Tenure laws and collective bargaining laws both developed as means of protecting teachers' rights from arbitrary administrative action. Some people have suggested that tenure laws may become unnecessary as collective bargaining becomes the norm and as courts develop extensive constitutional law provisions for public employees. Collective bargaining agreements probably will incorporate most procedural protections provided by tenure laws, but they are, of course, always subject to renegotiation; tenure laws offer more permanent protection since they are statutes.

Unfortunately, all too often lawmakers have insufficiently considered how these areas of law relate. The result has been inconsistencies and ambiguities, especially since laws in each area were often enacted piecemeal. Legal uncertainties stemming from undefined boundaries can hinder reform, so states need to look at the overall teacher employment system created by existing state law, considering labor law and tenure components together.

For instance, the authorized scope of bargaining and the enumeration of management rights in state labor laws may need to be revised to reflect the role of teachers in selecting master teachers. Statutory responsibilities of school boards may also need to be revised. Another example of overlap: certain rights, such as the right to tenure and to procedural protections in the discharge process, are guaranteed by statute -- yet collective bargaining may result in some of those same rights being given up. Does public policy permit waiver of these statutory rights by contract? Courts may permit some procedural protections to be waived in a labor agreement, but they generally will not permit waiver of tenure rights. Tenure decisions are matters of education policy and therefore not bargainable. Legislative limitations on the collective bargaining process may affect the possibilities for reform. For instance, although the consensus is that teacher salaries are too low to attract or retain talented teachers, [78] legislation in some states limits the salary increases that can be given in collective bargaining.

Thus, tenure reform poses more statutory and political problems than constitutional ones, with the important exception of potential inequities in evaluation and promotion systems. Of course, the procedure by which a reform is implemented could raise constitutional problems if phase-in periods are insufficient. In general, though, the key to the legality of proposals for career ladders, merit pay and other reforms is thorough consideration and integration of all pertinent state statutory law.

To avoid inconsistencies, statutes may need revision. For instance, implementing some form of career ladder would require changes in most tenure laws. Teachers would have different licenses or certificates at each level of the ladder. Statutory time periods for achieving tenure would have to be changed. Some mechanism should be provided for recognizing seniority rights. Collective bargaining agreements would need to be revised to recognize new seniority structures authorized by the legislature.

3. DISMISSAL

[T]he dismissal of teachers and non-renewal of their teaching contracts is sometimes a complex, difficult process, with serious implications. Because of the fact that under the statutory procedures, the dismissal or non-renewal of a teacher requires a long and time-consuming effort, school administrators and Boards of Education are often reluctant to institute such procedures against teachers who ought to be dismissed. As a result, the students suffer from the quality of their education. On the other hand, teachers, at times in the past, have not been fairly treated and have been dismissed or non-renewed without good reason. In determining cases involving the dismissal or non-renewal of a teacher's contract, the courts are obligated to consider the rights of the teacher, the rights of the School Board, and the rights of the school children to receive a quality education in a proper school atmosphere.[79]

Although teacher discharge is undoubtedly a complicated process, it presents some discrete legal problems. This section analyzes issues of incompetence, academic freedom, reduction in force and procedural requirements. Contrary to popular assumptions, neither constitutional principles of academic freedom nor tenure provisions concerning incompetence need interfere with school efforts to improve the teaching force.

Incompetence

The assumption that tenure laws force public schools to put up with incompetent teachers seems widespread. While it is surely true that some teachers are incompetent, tenure laws do not require that result. State tenure laws do not generally pose a legal obstacle to dismissing incompetent teachers, although they may lead to some delay. All tenure laws authorize dismissal for cause, and most specify the conduct that constitutes cause; they do not require schools to continue the employment of incompetent teachers. Tenure laws do make the dismissal process somewhat complex. Most laws specify a procedure for dismissing a tenured teacher, which schools must follow and document.[80] The statutory requirements for dismissal are designed to protect due process rights based on the Constitution, so they must be met exactly.

All too often administrators seem reluctant to initiate dismissal procedures and instead put up with unsatisfactory teachers or transfer them to other schools, while placing the blame on the tenure system. Yet, as long as teachers' procedural rights are respected, courts are unlikely to deny attempts to fire truly

incompetent teachers. As discussed earlier, the judiciary is most unwilling to second-guess educators on academic decisions related to the competence of a teacher. "A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are 'in an area in which school officials must remain free to exercise their judgment'. . . Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts" [81]

Tenure statutes typically define cause for dismissal broadly as including immorality, incompetence, insubordination, physical or mental incapacity, neglect of duty or other sufficient cause. The courts are limited to the statutory provisions: a dismissal will be legal only if it is justifiable on one of these grounds. The meaning of these statutory terms has been extensively disputed in litigation in every state. Most teacher dismissal litigation does not seem to involve classroom performance or competence, but rather morality or involvement in social or political controversies.

Some school administrators have suggested that these terms are too vague to be useful, and that administrators would be less reluctant to dismiss poor teachers if the statutes were made more specific. They argue that educators hesitate to invoke an abstract reason for dismissal like "incompetence," because they are uncertain about its legal meaning, and that elements such as lack of mastery of material or inability to impart knowledge to students should be specified in statutes.

Tenure statutes, like other types of laws, must be written clearly enough to give a person of ordinary intelligence notice of what kinds of conduct are forbidden. However, the courts have generally found that terms like "immorality," "incapacity" or "incompetence" are sufficiently precise to indicate what conduct is proscribed. These relatively broad terms also provide valuable flexibility in dealing with a wide range of unforeseeable circumstances. [82] If the broad terms were replaced with enumerations of specific types of misbehavior, there would probably not be a valid statutory basis for terminating the tenure of a teacher who behaved in some troublesome way not listed in a statute. Especially when some criteria for evaluation are enumerated in a tenure statute, "incompetence" seems to be a sufficiently specific basis for tenure termination. Procedural irregularities aside, schools have generally been successful in dismissing teachers on the basis of incompetence. [83]

Schools generally can refuse to rehire probationary teachers for any reason, which is not the case with tenured teachers. However, when a probationary teacher has a contract, he or she may be

discharged before the term of that contract only for valid cause and schools must preserve the constitutional rights that teachers have as individuals, such as the right to free speech.

Teachers can be dismissed if they do not meet new requirements for competence, as long as a school board has implemented those requirements properly. Competence is broadly defined and tenure rights are generally subject to legislative modification. Consequently, when a legislature enacts tougher standards for competence, teachers must meet those standards or be subject to termination. Of course, adequate procedural safeguards must be observed.

Reductions in Force

Layoffs present particularly difficult equity issues. Because they have the lowest seniority rights under collective bargaining agreements, and because tenure statutes generally also base layoffs on seniority, the teachers last hired would be first fired. However, courts will not enforce collective bargaining provisions that are contrary to public policy, and layoffs based strictly on seniority may have the effect of reinstating prior discrimination. Title VII of the Civil Rights Act of 1964 authorizes courts to disturb seniority rules, even when part of a collective bargaining agreement, to "make whole" employees who have been discriminated against. Some tenure statutes contain specific provisions for dismissals based on reduction in force for financial reasons. Nevertheless, where a school has previously engaged in intentional discrimination, neither collective bargaining provisions nor state tenure laws will be allowed to impede the correction of unconstitutional discrimination.[84]

The circumstances in which seniority rights give way to equity mandates depend on whether discrimination was found under the Constitution or simply under Title VII. Title VII protects bona fide, neutral seniority systems as long as no intentional discrimination is proved. Under Title VII it is not unlawful to base different terms of employment on a seniority system.[85]

School boards must be sensitive to these equity considerations in deciding to reduce the size of the teaching force. They also may not dismiss a teacher because he or she exercises freedom of speech. Further, the unions' duty of fair representation obligates them diligently to pursue grievances on behalf of teachers who are unfairly or improperly discharged.

If these and other legal issues are not considered, a teacher's dismissal may be illegal. But if school administrators understand the legal issues, they may be less reluctant to initiate the process of dismissing an incompetent tenured teacher. Clarification of expectations and conditions for teachers and administrators alike should help avoid some problems. Even

if teacher dismissal can never be wholly litigation-free, the policy-maker's goal should be to minimize needless litigation.

Legal Limits to Academic Freedom

Any move to hold teachers more accountable for their performance must not fail to consider teachers' individual rights to freedom of speech and academic freedom. It would be unconstitutional, for instance, to dismiss a teacher who spoke out in public against a merit pay plan. Likewise, it would violate the first amendment to base promotion or transfer decisions on a teacher's private complaints to a school principal about racial inequities in the school.[86]

The U.S. Supreme Court has held that teachers retain the first amendment rights they hold as citizens, but that a teacher's freedom of expression is not absolute. When teachers express their views outside of the classroom, they have the same rights as others. They are free to speak out on public issues.[87] Inside the classroom, teachers must meet job expectations, which implies reasonable restrictions on the expression of private views.

The first amendment does not protect teachers who fail to teach assigned subjects, or who insist on teaching additional subjects that school officials have found inappropriate for a particular class. Teaching methodology is entitled to some protection, but a teacher may not present a personal view as part of a course. The Supreme Court has acknowledged some sort of undefined right of teachers to teach, but it has not dealt directly with the issue of academic freedom in the classroom.[88]

Although assertions that "academic freedom" has been violated are popular in teacher disputes, schools are perfectly free to discharge unsatisfactory teachers as long as the discharge is based on factors other than the exercise of first amendment rights. The first amendment will not insulate an otherwise unfavorable performance record.[89] Particularly when a teacher has been asked to stop including extraneous material in class, a claim of academic freedom will be treated as a "red herring." For example, courts have upheld the dismissal of teachers who have persisted in using religious material in class.[90] Likewise, a school legally dismissed a teacher who knowingly showed a pornographic film to his students.[91]

The first amendment also does not protect employees who are insubordinate. If a teacher speaks out on issues not of public concern, such as internal office policies, and that action destroys close working relationships, the first amendment would not protect him or her from being dismissed. Although whether a

particular issue is of public concern is not always clear, personnel matters and internal operations will generally not be considered of public concern.[92]

Procedural Requirements

Tenure laws generally provide that the contract of a tenured teacher (or, as some statutes may describe it, a "permanent" teacher) is automatically renewed from year to year unless the school board notifies the teacher otherwise by a certain date in the spring. The contract of a nontenured teacher generally may be not renewed for any reason or no reason, as long as non renewal is not based on constitutionally impermissible criteria and certain procedural formalities are observed. The procedural steps required vary with state law and judicial interpretation. Generally, nontenured teachers do not have a right to a hearing before they are dismissed.

Can a nontenured teacher acquire tenure if a school neglects to notify the teacher properly of nonrenewal? In some states, teachers have acquired tenure in these circumstances. In other states, though, courts have ordered reemployment of nontenured teachers on an annual basis, holding that tenure should not be acquired automatically because of procedural irregularities. For instance, an Illinois court observed that improper dismissals did not entitle teachers to tenure, because schools must have the "opportunity . . . to observe and evaluate the actual performance of a teacher's work for two years." In ordering the reemployment of a teacher for another probationary year, the court noted that this would provide "adequate opportunity to observe and evaluate plaintiff's teaching job for the required two (consecutive) school terms at the end of which she may be rehired with the result of her acquiring tenure or be dismissed as a probationary teacher if the school board complies with all the statutory procedures." [93]

Where a tenure statute requires local adoption of specific criteria for teacher evaluation, dismissal generally will be illegal if a school board has neglected to draw up criteria and then attempts to dismiss a tenured teacher. Likewise, when a statute requires a school to develop a written improvement program for "remediable teaching deficiencies" of an unsatisfactory teacher before dismissal, dismissal will be illegal if that program has not been developed.[94] In Washington, for instance, "Lack of necessary improvement shall be specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause (for discharge)..." [95] In Pennsylvania, teachers must be "rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined . . . by the Department of Public Instruction . . ." before they are dismissed

for incompetence.[96] Courts require technical compliance with the steps of tenure termination, to assure that teachers are not dismissed for arbitrary reasons.

Dismissal also requires consideration of constitutional mandates. Although there is no federal constitutional right to public employment, equity issues arise, of the sort discussed earlier in this paper: a teacher may not be dismissed on the basis of race or sex. A teacher may not be discharged for exercising first amendment rights, as discussed above, and procedures must be fair, to protect teachers' due process rights. Constitutionally based procedural protections and equity rights are relatively recent judicial developments that have appeared long after tenure teacher laws. But they assure that, even if tenure were abolished, teachers would still enjoy fundamental job protections.

The fourteenth amendment guarantees procedural due process when state action jeopardizes the liberty or property interests of an individual. Procedural due process generally mandates the right to a fair hearing before an individual is deprived of a property right, although a hearing after deprivation may suffice in some circumstances. Although procedural due process has not been precisely defined, adequate notice, a fair hearing before an impartial decision maker and the opportunity to present evidence are standard components. The exact protection required will depend on the particular interest jeopardized. Tenured teachers are entitled to procedural due process; nontenured teachers generally are not when they have no legal expectation of continued employment. In some circumstances, however, even probationary teachers are entitled to procedural due process before they are dismissed. A clearly implied contract, short of actual tenure, would constitute a property interest. Or, if a school decides to dismiss a teacher for reasons that would stigmatize the teacher's professional reputation, the teacher's constitutionally protected "liberty" interest is jeopardized and procedural due process applies. As the Supreme Court has explained, "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." [97]

Whether or not a teacher's interest in continued employment constitutes a protected property interest depends on applicable state law. The Supreme Court referred in Roth to "existing rules or understandings," short of a formal tenure system, as sufficient to constitute a protected property interest.[98] Recently, a federal appellate court ruled that a nontenured school athletic director and coach in Illinois did have a protected property interest, which a school unconstitutionally impaired by refusing to rehire him for a second year. The Supreme Court has recently agreed to consider the case and perhaps may clarify what protections are afforded nontenured school employees and whether teachers are entitled to greater protection from arbitrary dismissal than other school employees.[99]

4. CONCLUSION

Legal considerations need not impede teacher quality. But multiple areas of law should be considered as states develop teacher reform strategies. The two most important potential sources of problems for states are equity and due process rights. These two constitutional mandates, the one prohibiting discrimination and the other requiring fairness of procedures, affect teachers' entry into the profession, their employment and their dismissal.

In many cases, supposed legal problems are more perceived than real. Contrary to public assumption, it is not impossible to dismiss incompetent tenured teachers, and courts will uphold validated and properly implemented testing of teachers for state certification.

As states strive to hold teachers more accountable, they must simultaneously preserve teachers' individual constitutional rights. Most aspects of the teaching system that have been established by statute are subject to legislative revision. Ultimately, though, legislation cannot solve every problem: legislatures can only shape the context in which teachers teach, leaving to the teachers themselves the fundamental task of educating children.

AMENDMENT

7

BY REPRESENTATIVE FINKELSTEIN

OFFERED IN THE HOUSE
TO: CSHB 217(HES)

Page 4, line 15 before "judicial":
Insert "independent"

A handwritten signature in black ink, appearing to be 'R. Finkelstein', is written over a long, sweeping diagonal line that extends from the top right towards the center of the page.

AMENDMENT #6

OFFERED IN THE HOUSE

TO: CSHB 217(HES)

BY REPRESENTATIVE IVAN

- 1 Page 3, lines 15 - 16:
2 Delete "because of a substantial decrease in school district revenue"
3 Insert "because the basic need of a school district determined under AS 14.17.021(b)
4 and adjusted under AS 14.17.225(b) decreases by three percent or more from the previous
5 year"

AMENDMENT

#5

OFFERED IN THE HOUSE
TO: CSHB 217(HES)

BY REPRESENTATIVE PORTER

yes

- 1 Page 3, line 16. after ".":
- 2 Insert "This section does not apply to a teacher who has not acquired tenure rights."

- 3 Page 3, lines 25 - 26:
- 4 Delete "lay off or fail to rehire a secondary school teacher who has more seniority
- 5 than a primary school teacher in order to give preference to a teacher skilled at teaching at
- 6 the primary school level"
- 7 Insert "give preference to a primary school teacher who has less seniority than a
- 8 secondary school teacher in order to preserve the primary school program"

- 9 Page 4, lines 5 - 6:
- 10 Delete "Time spent on layoff status does not count toward the acquisition of tenure
- 11 rights."
- 12
- 13 Page 4, line 8:
- 14 Delete all material.

- 15 Renumber remaining paragraphs accordingly.

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE FINKELSTEIN

TO: CSHB 217(HES)

1 Page 3, line 12, through page 4, line 3:

2 Delete all material and insert:

3 **** Sec. 6. AS 14.20 is amended by adding a new section to read:**

4 Sec. 14.20.177. LAYOFFS AND REHIRE. (a) A tenured or nontenured
5 teacher is subject to layoff for the next fiscal year if the school district has

6 (1) an unanticipated financial exigency that interferes with the normal
7 operations of the school district and that cannot be resolved through other reasonable
8 and usual budgetary processes, including normal staff attrition, reduction of
9 unnecessary expenditures, and administrative layoffs; or

10 (2) a decrease in school attendance that makes a reduction in staff
11 necessary.

12 (b) A neutral third party selected by mutual agreement between the school
13 district and the bargaining organization representing teachers must verify the
14 unanticipated financial exigency or the need to reduce staff because of a decrease in
15 school attendance before the school district may lay off teachers.

16 (c) A school district shall notify tenured teachers of a layoff no later than
17 March 15th of the fiscal year preceding the year of layoff. Layoffs shall occur in
18 reverse order of seniority of employment within the district.

19 (d) A school district and the bargaining organization representing teachers
20 shall negotiate a provision concerning the rehire or recall rights of teachers who have
21 been laid off under this section before the district lays off teachers under this section.

22 (e) A teacher who is laid off under this section has recall rights based on
23 seniority for five years after the date of layoff. A school district may not employ a
24 new teacher so long as there are laid off teachers on the recall list."

1. Reletter the following subsection accordingly.

AMENDMENT

#3

OFFERED IN THE HOUSE
TO: CSHB 217(HES)

BY REPRESENTATIVE FINKELSTEIN



1 Page 1, line 12:

2 Delete "four"

3 Insert "three"

4 Page 2, line 6:

5 Delete "four"

6 Insert "three"

7 Page 2, line 7:

8 Delete "four"

9 Insert "three"

10 Page 2, line 12:

11 Delete "four"

12 Insert "three"

13 Page 2, line 16:

14 Delete "three of the four"

15 Insert "two of the three"

#2

A M E N D M E N T

OFFERED IN THE HOUSE
TO: CSHB 217(HES)

BY REPRESENTATIVE FINKELSTEIN

1 Page 1, lines 1 - 2:

2 Delete "to review of decisions of school boards concerning teachers"

3 Insert "teacher arbitration rights"

4 Page 4, lines 11 - 18:

5 Delete all material.

6 Insert new bill sections to read:

7 **** Sec. 7.** AS 14.20.180(b) is amended to read:

8 (b) The tenured teacher may, within 15 days immediately following receipt
9 of the notification, notify the employer in writing that arbitration under
10 AS 09.43.010 - 09.43.180 [A HEARING BEFORE THE SCHOOL BOARD] is
11 requested. The tenured teacher may require in the notification that the arbitration
12 hearing be either public or private [AND THAT THE HEARING BE UNDER OATH
13 OR AFFIRMATION. THE NOTIFICATION MAY ALSO REQUIRE THAT THE
14 RIGHT OF CROSS-EXAMINATION BE PROVIDED AND THAT THE TENURED
15 TEACHER BE REPRESENTED BY COUNSEL AND HAVE THE RIGHT TO
16 SUBPOENA A PERSON WHO HAS MADE ALLEGATIONS THAT ARE USED
17 AS A BASIS FOR THE DECISION OF THE EMPLOYER].

18 *** Sec. 8.** AS 14.20.180(c) is amended to read:

19 (c) Upon receipt of the notification requesting an arbitration [A] hearing, the
20 employer and the employee shall immediately arrange for a hearing [, AND SHALL
21 NOTIFY THE TENURED TEACHER OR ADMINISTRATOR IN WRITING OF
22 THE DATE, TIME, AND PLACE OF THE HEARING. A WRITTEN
23 TRANSCRIPT, TAPE, OR SIMILAR RECORDING OF THE PROCEEDINGS
24 SHALL BE KEPT. TRANSCRIBED COPIES SHALL BE FURNISHED TO THE

1 TENURED TEACHER FOR COST UPON REQUEST OF THE TENURED
2 TEACHER. A FINAL DECISION OF THE SCHOOL BOARD REQUIRES A
3 MAJORITY VOTE OF THE MEMBERSHIP. THE VOTE SHALL BE BY ROLL
4 CALL. THE FINAL DECISION SHALL BE WRITTEN AND CONTAIN SPECIFIC
5 FINDINGS OF FACT AND CONCLUSIONS OF LAW.] A written notification of
6 the arbitration decision shall be furnished to the tenured teacher and the employer
7 within 10 days after [OF] the date of the decision. Either party may apply to the
8 court to confirm, vacate, modify, or correct the arbitration decision in
9 accordance with AS 09.43.110 - 09.43.130.

10 * Sec. 9. AS 14.20.205 is repealed and reenacted to read:

11 Sec. 14.20.205. JUDICIAL REVIEW. Judicial review of a decision or award
12 in arbitration under AS 14.20.180 shall be as provided in AS 09.43.010 - 09.43.180."

13 Renumber the following bill section accordingly.

Ivan

AMENDMENT #1

OFFERED IN THE HOUSE

TO: CSHB 217(HES)

- 1 Page 4, line 19, after "made by":
- 2 Insert "secs. 1 - 3 of"

Passed