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Legally Sound Criteria, Processes and Procedures for the Evaluation of Public School Professional Employees

JOSEPH BECKHAM*

I. Introduction

Employee evaluation designed to provide a documentary record which justifies an adverse employment decision is termed summative evaluation.¹ In the public school setting, the adverse employment decision may include non-renewal, dismissal for incompetency or neglect of duty, demotion, denial of promotion or reprimand.² A record of performance evaluations might also be used in the assessment and selection process, a process characterized by a review of an individual's credentials and performance, in order to select a candidate for a vacant position or to determine the employee to be laid-off in a reduction in force.³

A review of case law focused on challenges to the policies or practices utilized by school districts to justify adverse employment decisions yields three basic admonitions critical to the development and implementation of evaluation processes in public schools. First, criteria for evaluation must be reasonably related to job requirements. Second, the evaluation process should yield substantial, relevant and credible evidence to justify an employment decision uncompromised by considerations that are unrelated to the applicable assessment and selection criteria. Third, procedures which guide the evaluation process should be clearly articulated and properly followed.

Applicable law relating to the development and implementation of any school district evaluation system must reference local contractual

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¹ Summative evaluation is distinguished from formative evaluation, in that the former involves performance appraisal for the purpose of judging effectiveness as criteria for employment decisions, while the latter consists of performance appraisal for the improvement or development of personnel.

² See J. BECKHAM, *LEGAL ASPECTS OF TEACHER EVALUATION*, (1982); and K. FRELS and T. COOPER, *EVALUATION AND DOCUMENTATION OF PERFORMANCE*, (1984).

³ See J. BECKHAM, *LEGAL ASPECTS OF EMPLOYEE ASSESSMENT AND SELECTION IN PUBLIC SCHOOLS*, (1985).

agreements, board policies and state statute or constitutional provision. However, evolving case law in this area can be usefully reviewed in order to extrapolate a set of uniform guidelines which can be generalized across jurisdictions. Judicial opinion regarding job-related criteria, consistent and uniform processes and procedural safeguards in employee evaluation are synthesized in the analysis that follows.

II. Criteria

Failure to adopt evaluative criteria leaves the school board vulnerable to a charge of arbitrary and capricious conduct and may create a judicial suspicion that evaluation is only a subterfuge to deny the employee's rights. For example, a principal in the state of Washington, employed 18 years in the school district, was regularly given satisfactory evaluations and informed he would be recommended for renewal, but was not so recommended upon the superintendent's abrupt notification of a list of fifteen performance deficiencies. The decision not to renew was judicially reversed due to the board's failure to adopt evaluative criteria and procedures for evaluation pursuant to state statute. Quoting from the opinion:

In the absence of established evaluative criteria, the principal serves at the whim and pleasure of the superintendent. The principal has no guidelines against which to measure his or her performance and may thereby be deprived of a legitimate opportunity for improvement. Without knowledge of the criteria to be employed in a discharge or nonrenewal hearing, the principal is further handicapped in his or her ability to dispute the propriety of the termination decision.⁴

Adoption of job-related evaluative criteria should be a high priority in development of policy to guide the evaluation process. Criteria must conform to state statutory mandates, state and local board regulation and negotiated agreement. Where appropriate, state certification requirements, professional training, years of previous experience and other objective indices should be expressly stated in the adopted criteria. However, job-relatedness should be the principle consideration in adopting criteria and the employer must be prepared to articulate the relationship between a particular criterion and job-performance which will avoid a challenge of vagueness, ambiguity, or irrelevance.

Criteria utilized in employee evaluation may include both objective and subjective factors. What is critical is not whether subjective judgments are made and ultimately relied upon, but whether the criteria on which the judgments are predicated were validly related to the requirements of the position, observable, and properly applied. While

⁴ Hyde v. Wellpinit School Dist., 26 Wash. App. 282, 611 P.2d 1388 (1980).

employment decisions based upon subjective criteria are likely to be closely scrutinized by courts because of the potential for masking unlawful bias, evidence that the selected criteria are job-related through content or empirical validation will permit an inference of reasonableness.⁵

A. Teacher Conduct

While educators continue to debate the characteristics associated with effective teaching, courts have consistently recognized the teacher's ability to maintain appropriate discipline, work cooperatively with professional colleagues and provide proper instruction or supervision as valid considerations in evaluating the teacher's performance.⁶ Classroom observations, anecdotal records and reports of student, parental or co-worker complaints have been utilized to support unsatisfactory evaluations based upon these considerations. While the cumulative weight of evidence justifying an adverse employment decision may be subject to a court's determination of how substantial the evidence of incompetency or neglect of duty may be, it is clear that courts will ask that proposed criteria be shown to have some reasonable relationship to job requirements in order to receive consideration.

Teacher conduct in school and classroom has been considered relevant to the appraisal of professional performance. Evidence that a teacher was a disruptive rather than contributive influence in the school, refused to follow reasonable directives and was unwilling to observe rules and regulations has been upheld as a justification for unsatisfactory evaluations leading to nonrenewal.⁷ While "failure to work with the administration" was not sufficient to justify nonrenewal in a Kansas school district,⁸ difficulty in working with co-workers and parents is often presumed by courts to implicate ineffective classroom performance and school morale and is a judicially recognized factor which would justify an unsatisfactory performance evaluation having adverse consequences for the employee.⁹ Similarly, inadequate lesson plans, abusive and arbitrary treatment of pupils, ineffective use of instructional materials,

⁵ See *Sklenar v. Central Bd. of Educ.*, 497 F. Supp. 1154 (E.D. Mich. 1980) and *Love v. Alamance County Bd. of Educ.*, 581 F. Supp. 1079 (M.D. N.C. 1984).

⁶ *Harrison-Washington Community School Corp. v. Bales*, 450 N.E.2d 559 (Ind. App.2d 1983) (dismissal based on evaluations substantiating lack of ability to maintain discipline, follow administrative direction and properly teach students to prepare them for promotion.)

⁷ *Sharnhorst v. Independent School Dist.*, 686 F.2d 637 (8th Cir. 1982).

⁸ *Haddock v. Board of Educ.*, 233 Kan. 66, 661 P.2d 368 (1983).

⁹ See *Grant v. Board of Educ. of School Dirs. of Centennial*, 53 Pa. Commw. 363, 417 A.2d 1292 (1984) and *Yielding v. Crockett Indep. School Dist.*, 707 F.2d 196 (5th Cir. 1983).

harassment of students, and related classroom improprieties have been judicially accepted indicia of unsatisfactory performance.¹⁰

B. Student Progress

Lack of student progress has been held to be a ground for discharge of a continuing contract teacher under state statute and judicial interpretation. In the leading appellate decision, a Minnesota school board's termination of a tenured teacher was sustained by that state's supreme court on the basis that substantial evidence of unfitness to teach was supported in the administrative hearing record. The teacher had served for nineteen consecutive years in the school district, but had received previous notices of teaching deficiencies, including lack of rapport with students, poor communication with parents, failure to follow adopted school board lesson plans and irrational grading practices. In reviewing the entire record, the court found that substantial evidence supported four major teaching deficiencies: (1) excessive use of worksheets, (2) lack of rapport, (3) lack of appropriate student discipline, and (4) lack of student progress. Lack of student progress is an express statutory ground for discharge under Minnesota law.¹¹

Several courts have considered lack of student progress a reasonable basis for unsatisfactory performance evaluation which, when coupled with other indicia of poor teaching performance, was a significant and appropriate basis for teacher nonrenewals.¹² While several states statutorily prescribe student progress toward instructional goals as a criterion for teacher performance appraisal, assessment of this phenomenon is complicated by differences among students and other variables that make documentation of the teacher's influence on pupil performance difficult. However, the utilization of regular student achievement testing, mandated in many states, may lead to longitudinal data relative to student progress that would permit teacher performance appraisal solely on this criterion.

¹⁰ See *Donnes v. State*, 672 P.2d 617 (Mont. 1983) (abusive and arbitrary with students); *Carson City School Dist. v. Burnsen*, 96 Nev. 314, 608 P.2d 507 (1980) (poor lesson planning and ineffective use of materials); and *Fay v. Board of Dirs. of North-Linn*, 298 N.W.2d 345 (Iowa App. 1980) (harassment of students and lack of rapport with students.)

¹¹ *Whaley v. Anoka-Hennepin Indep. School Dist.*, 325 N.W.2d 128 (Minn. 1982).

¹² See *Pereny v. Commission on Professional Competency*, 149 Cal. App.3d 1167, 197 Cal. Rptr. 390 (1983) (failure to achieve performance objectives in teaching Spanish); *Lamar School Dist. No. 39 v. Kinder*, 278 Ark. 1, 642 S.W.2d 885 (1982) (inability to field competitive athletic teams); *Fay v. Board of Dirs. of North-Linn*, 298 N.W.2d 345 (Iowa App. 1980) (low test scores by students in teacher's class.)

C. Teacher Testing

While there is little empirical evidence to support the view that nationally standardized tests can predict success in teaching, some school districts and state education agencies have emphasized the teacher's knowledge of subject matter as a factor in determining competence. These agencies have relied upon minimum score requirements on standardized tests as a basis for teacher evaluation, certification, and renewal. The use of standardized tests as a basis for promotion and hiring decisions has been subject to federal court review in cases involving racially disparate impact. In an analogous situation, the United States Supreme Court ruled against the use of an intelligence test in promotion to supervisory positions at an electric utility after a showing that the use of the test had a discriminatory impact on a racial minority and could not be shown to meet the business necessity test of Title VII.¹³ In the view of other federal courts, the use of nationally normed objective tests has been held to be unrelated to teacher certification standards and inappropriate where designed to identify effective administrators or teachers.¹⁴

However, use of the National Teacher's Examination (hereinafter "NTE") to determine teacher certification and pay raise standards appears permissible where the objective of the minimum score requirement is designed to provide an incentive to master subject matter related to the study of education and qualify a teacher as meeting a minimum level of knowledge within a subject matter area related to job requirements. While use of an intelligence test as an employee evaluation device would probably be judicially prohibited upon a showing that it was unrelated to job requirements, the use of the NTE may be permissible if the school district is willing to meet the requirements outlined in *United States v. South Carolina*¹⁵ to establish the validity of the test, the reasonableness of the cut-off score and the business necessity for the use of the assessment instrument.

The employer's burden, once a *prima facie* case of disparate impact is established, is illustrated in a case involving a school district's determination to award pay raises to teachers who had received high grades on the NTE. The board policy had a disproportionate impact on black teachers,

¹³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Supreme Court ruled the test must bear a reasonable relationship to job performance to be permissible.

¹⁴ *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276 (5th Cir. 1972) (use of Graduate Record Examination as employment qualification) and *Georgia Ass'n. of Educators v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976) (use of National Teacher's Examination for granting six-year certification.)

¹⁵ 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

denying pay raises to two percent of white teachers and 38.67% of black teachers within the district. The Fourth Circuit Court of Appeals held that the use of the NTE for the purpose of granting pay raises was justified in order to improve the ability of the school district to attract the best qualified teachers and to encourage district teachers to supplement their study and improve their knowledge of those teaching skills which the NTE validly evaluated.¹⁶ Apparently, the use of the NTE scores was not a denial of rights under the disparate impact standards of Title VII since the policy had a legitimate objective in attracting highly rated teachers to the district and creating an incentive to improve the teacher's knowledge of education.

However, black teachers in the Mobile, Alabama public schools were initially successful in securing a preliminary injunction against use of the NTE as a score requirement for renewal of contract. A test norm determined by the local Alabama school board was utilized as the basis for renewals, even though all black teachers within the class adversely affected by the policy had been evaluated and recommended for renewal by their respective principals. In granting the preliminary injunction, the district court recognized the teachers' probable success on the merits of their claim. In particular, the court noted that the district had set arbitrary cut-off standards for the score requirement and failed to follow the admonitions of the testing service in using test results. The testing service acknowledged that the test was a surrogate measure of teacher competence, and the district court viewed this information as a significant limitation of the test when used as a measure of whether employed teachers should be retained.¹⁷

[T]he NTE guidelines, issued by the Testing Service, reflect an acute sensitivity to the fact that its examinations are easily subject to misuse, in particular against black teachers. . . . Nevertheless, the Mobile County School Board implemented use of the NTE cut-off score as a selection procedure without a prior investigation into the probable consequences. . . . [T]here is an increased likelihood that the school board is using the test in a manner adversely affecting black teachers in the school system.¹⁸

¹⁶ *Newman v. Crews*, 651 F.2d 222 (45th Cir. 1981). See also *Moore v. Tangipahoa Parish School Dist.*, 594 F.2d 489 (5th Cir. 1979) (use of NTE permissible in determining teachers to be reemployed, despite disproportionate impact on black teachers, absent other evidence of racially motivated bias.)

¹⁷ *York v. Alabama State Bd. of Educ.*, 581 F. Supp. 779 (M.D. Ala. 1983).

¹⁸ *Id.* at 786. But see *York v. Board of School Com'rs. of Mobile County*, 460 So. 2d 857 (Ala. 1984) (no denial of statutory due process occurred as a result of the board's decision to consider those teachers who failed to present an acceptable NTE score to the school superintendent as a class for nonrenewal determination.)

III. Process

The process of evaluation must reflect fundamental fairness and reasonableness in its application to professional employees and yield a documentary record substantial enough as to cumulative evidentiary weight to justify the adverse employment decision on which unsatisfactory performance is predicated. While evidence need not always be characterized as objective, it must be relevant, credible and substantial. As the Iowa Supreme Court has noted, "A school district is not married to mediocrity, but may dismiss personnel who are neither performing high quality work nor improving in performance."¹⁹ Nevertheless, unsubstantiated claims of inadequate performance, conflicting appraisals of performance or lack of uniform standards in the evaluation process may contribute to the view that the school system lacks sufficient basis for any adverse employment decision.

Judicial opinions note several factors that contribute to a presumption of fair and reasonable evaluation processes. A tenured Illinois teacher was dismissed following parental complaints and classroom observations that consistently confirmed her inability to maintain classroom order or adequately prepare for subject matter discussion. The teacher was informed by the school board of her specific deficiencies in teaching performance and provided with opportunities to improve during the ensuing school year. In the second year she was periodically observed by the principal and three other faculty members, all of whom evaluated the teacher's understanding of subject matter and control over students as unsatisfactory. Sixty-four days of remediation were permitted, but no correction of deficiencies was noted by observers. In affirming dismissal, the state appellate court emphasized that the evaluation record provided clear and convincing evidence that the teacher's deficiencies were of long standing and represented fundamental teaching inadequacies.²⁰

In a Pennsylvania case, a tenured teacher received an initial unsatisfactory performance rating following the introduction of a new multi-level program for teaching French. The school principal and the assistant principal (who held an M.A. in French) rated her work unsatisfactory as did the superintendent and two other administrators who observed her classroom. The following year, further observations established that the teacher failed to maintain proper pace to insure completion of the language program, developed inadequate lesson plans and made unorganized presentations characterized by unvarying teaching methods. Following a hearing, the school board dismissed the teacher, and the

¹⁹ *Briggs v. Board of Dirs.*, 282 N.W.2d 740, at 743 (Iowa 1979).

²⁰ *Community Unit School Dist. v. Maclin*, 106 Ill. App.3d, 435 N.E.2d 845 (1982).

Pennsylvania Secretary of Education affirmed the board's decision. The Pennsylvania appellate court affirmed the board's decision and quoted the Secretary of Education's conclusion that the school district's evaluation process was exemplary.²¹

The evaluations occurred at two levels. At the first level is the principal; if he rates a professional employee unsatisfactory, the matter is referred to the second level, the superintendent, for further evaluation. While a teacher might object to being rated so often in a short period of time by different persons, such a procedure is clearly in the employee's best interest since it brings into the evaluation different viewpoints, thereby lessening the influence personal bias and prejudice with respect to teaching methods can have.²²

An Oklahoma school district went further than statutory evaluation requirements in its attempt to insure fairness under state law. The evaluation process included periodic evaluation and assistance to improve performance. In the case of one tenured teacher, evaluations were conducted at nine week intervals in an effort to assess aspects of performance associated with lack of discipline in classes and failure to work with co-workers. These evaluations were relied upon in a dismissal for willful neglect of duty. On review, the Supreme Court of Oklahoma held the evaluations, taken together with an anecdotal record, provided substantial evidence of deficiencies related to lack of proper supervision and effective classroom control, failure to follow school rules and regulations, and disruption of the school environment through lack of cooperation with colleagues.²³

In a case from Louisiana, a tenured teacher disputed school board reliance on a two-year history of unsatisfactory performance evaluations as a basis for termination on grounds of incompetency and neglect of duty. The court's review of the record established that school personnel had met the statutory evaluation requirements, including provision of over twelve classroom observations conducted by different observers over a year-long period, post observation conferences in which deficiencies were detailed and suggestions for improvement were offered, and provision for timely and special remedial assistance through a free workshop offered by the school district. The independent evaluations by several observers confirmed the teacher's lack of ability to manage classroom discipline and prepare and present effective lessons. Further, there was general uniformity among the observers that the teacher had shown no significant improvement in performance in the course of a

²¹ *Rosso v. Board of School Dirs.*, 33 Pa. Commw. 175, 380 A.2d 1328 (1977).

²² *Id.* at 1329.

²³ *Childers v. Independent School Dist.*, 645 P.2d 992 (Okla. 1981).

year's time. The court held that the unsatisfactory evaluations of teaching performance bore a reasonable relationship to discharge for incompetency and ruled in favor of the school district.²⁴

A South Dakota teacher whose contract was not renewed on the basis of incompetency challenged the evaluation of her teaching performance on the ground that the evaluations were insufficient to meet the requisite standard of substantial evidence. The teacher was formally evaluated by her principal in each of the three years she taught in the school system. In each year she was criticized for her method of instructional organization and for failing to maintain classroom order by allowing students to randomly leave their seats without permission and place their feet on the desks. Following each evaluation, suggestions to improve her performance were given. The teacher's third year evaluation rated her unsatisfactory in regard to these criticisms, and she admitted that she did not take the suggested corrective measures, insisting that her methods of teaching were better. The Supreme Court of South Dakota found that the evaluations were sufficient to support a charge of incompetence and affirmed the school board's action in refusing to renew the teacher's contract.²⁵

A tenured New York teacher was suspended and later terminated following a hearing in which evaluations disclosed that he prepared unsatisfactory lesson plans, failed to adequately evaluate the performance of his students, and employed deficient instruction techniques. These evaluations included observations by the school's English coordinator and principal. The evaluators had made seven independent observations of the teacher's classroom performance over a period of three years. As a result of identified deficiencies, particularly the teacher's inability to prepare adequate and legible lesson plans, he was directed to submit plans to both the coordinator and the principal prior to implementation and maintain separate folders of student work. In addition, he was advised that failure to improve performance would result in loss of employment.

In noting that later evaluations indicated no improvement in the specific areas cited as deficient during the three years in which evaluations were conducted, a New York appeals court concluded that the numerous evaluations by two separate administrators constituted a sufficient evidentiary basis for the adverse employment decision. In the court's view, directives were issued with the intention of helping the teacher to improve his deficient performance and evaluation documents were provided to the teacher so as to keep him apprised of his deficien-

²⁴ Jones v. Jefferson Parish School Dist., 533 F. Supp. 816 (E.D. La. 1982).

²⁵ Busker v. Board of Educ. of Elk Point, 295 N.W.2d 1 (S.D. 1980).

cies and inform him that he had not succeeded in showing improvement in the areas specifically identified.²⁶

Several conclusions may be extrapolated from judicial opinions which have sustained the use of evaluation in employment decision-making. Court reliance upon classroom observation reports completed by supervisors and persons knowledgeable in the teacher's subject matter field illustrates the considerable weight given to the evidentiary value of these records.²⁷ Multiple reports by different evaluators have been recognized by courts as reducing bias and substantiating unsatisfactory performance when reports are corroborative. Specification of deficiencies, consistent with recognized, job-related evaluative criteria, together with reasonable opportunities for remediation and periodic reevaluation supports the fundamental fairness of the evaluation process. Post observation conferences in which deficiencies are detailed and suggestions for remediation are offered strengthens the view that the evaluation process is fair. Other forms of documentation, such as anecdotal records and formal reports of complaints or reprimands contribute to the overall evidentiary weight to be accorded unsatisfactory performance evaluations.²⁸ Follow-up evaluations which indicate the employee has made no progress within a reasonable time period for remediation or which establish that the employee either disregarded remediation or regarded remediation lightly would confirm the appropriateness of the adverse employment decision.²⁹

A. *Evidentiary Sufficiency*

The failure to effectuate evaluation processes which yield relevant, credible and substantial evidence to support employment decisions may lead to a system which fails to justify employment decisions and ultimately utilizes announced evaluation processes as a subterfuge for

²⁶ Clarke v. Board of Educ. of Vestal Central, 105 App. Div.2d 893, 482 N.Y.S. 2d 80 (1984).

²⁷ See Thompson v. School Dist. of Omaha, 623 F.2d 46 (8th Cir. 1980) (evaluations by math instructor and co-worker confirmed unsatisfactory performance evaluation by principal.)

²⁸ See Patterson v. Masem, 594 F. Supp. 386 (E.D. Ark. 1984) (school district established basis for denying black applicant supervisory position on basis of negative performance evaluations coupled with corroborating testimony of co-workers and specific incident memorandum) and Davidson v. Winston-Salem-Forsyth County Bd. of Educ., 62 N.C. App. 489, 303 S.E.2d 202 (1983) (principal's evaluations coupled with record of parental complaints of poor teaching justified dismissal.)

²⁹ See Thompson v. Board of Educ., 668 P.2d 954 (Colo. App. 1983) (failure to follow principal's reasonable suggestions for improved teaching performance appropriately a ground for dismissal for insubordination); Siglin v. Kayenta Unified School Dist., 134 Ariz. 233, 655 P.2d 353 (1982) (insubordination dismissal upheld for refusal to attend daily lesson plan reviews); and Board of Dirs. of Sioux City Community School Dist. v. Mroz, 295 N.W.2d 447 (Iowa, 1980) (termination for incompetency after failure to cooperate in efforts to improve performance.)

unlawful employment practices. This system may be manipulated such that employment decisions are predicated upon superficial or unrelated aspects of job performance or job requirements. Under these circumstances, a court might conclude the employer fashioned a house of straw unable to withstand the fresh breeze of judicial scrutiny.³⁰

The evaluation process may be legally challenged when charges of unsatisfactory performance lack the evidentiary sufficiency to sustain the adverse employment decision. The Supreme Court of Iowa reversed a school board dismissal of a coach for failure to maintain a competitive wrestling program and lack of rapport with student athletes. Two evaluations, one of which rated the wrestling coach's performance as unsatisfactory in only two of forty-nine categories and a second which rated the coach as unsatisfactory in nine of the forty-nine categories, served as part of the evidentiary record justifying dismissal. The court took note that the second evaluation was completed immediately after the evaluator met with disgruntled parents concerned with the wrestling program. No parent or student testified at the dismissal hearing to confirm complaints concerning the program, nor was the coach given an opportunity to remedy alleged deficiencies. A review of the record, including the testimony of students and parents who supported the coach, led the court to conclude that the charges lacked documentation sufficient to sustain the board's determination that dismissal was warranted.³¹

Conflicting evidence of performance may often support a determination that there is insufficient evidence to justify an adverse employment decision. In a West Virginia case, conflicting evaluations of teacher performance, with negative evaluations coming subsequent to criticism of the principal's habit of unannounced monitoring over the school public address system, did not support a teacher's nonrenewal.³² Similarly, citizen complaints alleging incompetency and neglect of duty were insufficient to justify a West Virginia principal's dismissal where the complaints were not contrasted with an evaluator's satisfactory performance evaluations.³³

B. Violation of First Amendment Rights

A school district might well be required to carry the burden of proof to justify an evaluation process which is found to have violated the applicant's constitutionally protected rights under the first amendment. When

³⁰ See *Hollingsworth v. Board of Educ.*, 208 Neb. 350, 303 N.W.2d 506 (1984).

³¹ See *Munger v. Jesup Community School Dist.*, 325 N.W.2d 377 (Iowa 1982).

³² *Wilt v. Flanigan*, 294 S.E.2d 189 (W. Va. 1982).

³³ *Mason County Bd. of Educ. v. State Superintendent of Schools*, 274 S.E.2d 435 (W. Va. 1980).

activity protected under the amendment is judicially recognized as substantial or motivating factor in the school board's adverse employment decision, a first amendment violation is established and the school district must prove that the applicant would have been denied employment notwithstanding consideration of the protected activity.

Evidence that an adverse employment decision was based on an employee's exercise of first amendment rights may often be contained within the evaluation instrument or report utilized to support the employment decision. Statements which indicate the applicant is not to be hired because of his or her public remarks concerning board policy may so implicate constitutional rights as to justify judicial scrutiny.³⁴ A negative evaluation predicated primarily upon the employee's activity as a union representative would be suspect.³⁵ Evidence that the adverse consequences of an employment decision were based upon a negative evaluation of the employee's partisan political activities related to school board affairs might so implicate constitutional rights to free speech and association as to compel court intervention.³⁶ Similarly, an employee's criticism of local school board decisions would not be an appropriate basis for a negative evaluation provided the criticism focused upon a matter of public or community concern.³⁷

In deciding whether an employee's free speech rights have been violated, the employee must first carry the burden to establish that the "speech" related to matters of public concern.³⁸ This initial level of analysis requires the court to consider the content of the speech and the context in which the speech arose in order to weigh the degree of public interest in the employee's speech against the need for effective harmony and discipline required by the public employer.³⁹ Under this analysis, an employee's speech or expression could be the basis for a negative evaluation as long as that expression relates substantially to the employee's personal interests rather than to matters of community concern relevant to a political, social or public policy issue.⁴⁰

In a first amendment case involving an allegation that a teacher was

³⁴ See *Winston v. Board of Educ. of South Plainfield*, 64 N.J. 582, 319 A.2d 226 (1974).

³⁵ See *Hinkle v. Christensen*, 733 F.2d 74 (8th Cir. 1984); *Columbus Educ. Ass'n v. Columbus City School Dist.*, 623 F.2d 1155 (6th Cir. 1980); and *Hickman v. Valley Local School Dist.*, 619 F.2d 606 (6th Cir. 1980). *But see* *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983) (teacher's union activity and subsequent change in schedule did not have sufficient "chilling effect" on free speech.)

³⁶ See *Smith v. Harris*, 560 F. Supp. 677 (D.R.I. 1983).

³⁷ See *Anderson v. Central Point School Dist.*, 746 F.2d 505 (9th Cir. 1984) and *McGee v. South Pemiscot School Dist.*, 712 F.2d 339 (8th Cir. 1983).

³⁸ *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

³⁹ *Connick v. Myers*, 461 U.S. 138 (1983).

⁴⁰ See *Gregory v. Durham County Bd. of Educ.*, 591 F. Supp. 145 (M.D. N.C. 1984).

not rehired because of her exercise of free speech in processing a grievance, the Eleventh Circuit Court of Appeals relied upon the above analysis to affirm a district court's determination denying the teacher's claim. The Alabama teacher grieved a superintendent's decision eliminating her position and awarding a newly created position to another non-tenured employee. Although offered a part-time position, she refused, alleging at the grievance hearing that her refusal was motivated by a concern for the welfare of students. The circuit court concluded that a federal court is not the proper forum for review of a personal decision related to circumstances in which an employee speaks not to a matter of public concern, but instead addresses an employment issue on the basis of a personal interest. In considering the employee's grievance, the court found nothing in the content, form or context of the circumstances which was related to a public concern that would enjoy free speech protection.⁴¹

In contrast, an Illinois teacher penalized by his superintendent for expressing concern over the operation of a negotiated grievance procedure to the local board was successful in sustaining a verdict in the employee's favor. The court considered the teacher's comments to the local board to be protected under the provisions of the first amendment and characterized the comments as reflecting more than the teacher's personal interest. Other teachers in the school district had expressed concern about the grievance procedure and the board had encouraged teachers to make known any relevant facts about the process. The superintendent could not effectively contend that the teacher was violating a board regulation requiring that any communication from a teacher to a board member must be made through the superintendent, as such a policy was unconstitutional on its face and in its application to the teacher involved.⁴²

Although an employee may show that an unsatisfactory evaluation was predicated in part upon his exercise of free speech on a matter of public concern, the school district may ultimately defend its overall evaluation practices by demonstrating that it would have reached the adverse employment decision absent consideration of the protected free speech.⁴³ In one federal district court decision, an evaluator's recommendations not to renew a probationary teacher introduced a material issue of fact as to whether the teacher had been denied renewal for conduct protected

⁴¹ *Renfroe v. Kirkpatrick*, 722 F.2d 714 (11th Cir. 1984). See also *Ferra v. Mills*, 596 F. Supp. 1069 (S.D. Fla. 1984) (teacher's criticisms of scheduling and hiring practices were personal grievances only tangentially related to public concerns.)

⁴² *Knapp v. Whitaker*, 577 F. Supp. 1265 (C.D. Ill. 1984).

⁴³ *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977).

under the first amendment. The court considered the whole evaluation record, including evidence the teacher was not renewed for inflexibility and lack of fairness in dealing with students, and concluded that the school board established that the decision not to renew would have been the same despite any exercise of free speech.⁴⁴

C. Discrimination

Discrimination on the basis of race, religion, national origin, sex, age or handicap is prohibited under federal law and the provisions of many state laws.⁴⁵ Since the litigation of employment discrimination claims is highly fact intensive, documentation of evaluation processes should be designed to provide a strong evidentiary basis for rebutting a claim of discrimination. Nothing can prevent charges of discrimination from arising, but summary disposition of the charges will be more likely where the evaluation process includes documentary records which support a strong anti-discrimination posture.

In instances in which "disparate treatment" is alleged, the ultimate factual inquiry is whether the employer or its agents intentionally discriminated against the individual.⁴⁶ While such a proof rests with the person bringing the claim, a three-step analysis of the alleged discrimination has been adopted which allows a claimant to meet a limited initial burden of proof in establishing a *prima facie* case. After this showing, the court will require the employer to articulate a legitimate non-discriminatory reason for the hiring practice.⁴⁷ If the employer meets this burden of proof, the applicant must go forward with a showing that the articulated reason is a pretext masking the employer's actual discriminatory intent.⁴⁸

As previously noted, school district evaluation processes based upon subjective criteria are often closely scrutinized by courts because of the potential for masking unlawful discrimination. While the use of these criteria may not necessarily give rise to a *per se* finding of discriminatory

⁴⁴ *Derrickson v. Board of Educ. of City of St. Louis*, 537 F. Supp. 347 (E.D. Mo. 1982), *aff'd.*, 703 F.2d 309 (8th Cir. 1983). See also *Patterson v. Masem*, 594 F. Supp. 386 (E.D. Ark. 1984) (supervisor's judgment, management and interpersonal skills resulted in negative evaluations rather than her exercise of free speech) and *Foreman v. Vermilion Parish School Bd.*, 353 So. 2d 471 (La. App. 1977) (negative evaluations indicating unsatisfactory attitude, lack of cooperation and limited adaptability established as primary basis for adverse employment decision.)

⁴⁵ See 42 U.S.C. § 2000(e) (1976) (Title VII of the 1964 Civil Rights Act); 20 U.S.C. § 1681 (1976) (Title IX of the Education Amendments of 1972); and 29 U.S.C. § 794 (1976) (Section 504 of the Rehabilitation Act of 1973).

⁴⁶ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁴⁷ *Id.*

⁴⁸ *United States Postal Service v. Aikens*, 460 U.S. 711 (1983).

intent,⁴⁹ it is highly probable that the school district will be compelled to detail its evaluation system and establish that criteria were job-related and evaluation processes were uniformly applied. Further, the school district must articulate the rationale for employment decisions based upon evaluation processes in a manner which will lend credence to the view that no discriminatory animus influenced the process.⁵⁰

A school district's failure to apply uniform evaluation procedures and submit evidence of reasonable comparisons between employees may implicate a disparate treatment claim. In one instance, evidence of an abrupt change in teacher evaluation ratings coupled with statistical evidence of a disparity in the number of black employees in the district was held sufficient to justify a determination that a school district discriminated against a black physical education teacher. Most comments evaluating the teacher were favorable until just before the determination on tenure and there were only two black teachers out of 281 employed in the district. The New York Court of Appeals enjoined further discriminatory practice in the district, reinstated the teacher to a probationary position and required the district to afford the employee a fair and nondiscriminatory tenure evaluation.⁵¹

In another case which involved the lack of uniform evaluation processes, a certified elementary school teacher established that she was a victim of sex discrimination when she was denied a position as elementary principal. In selecting the male candidate for the position, the school board emphasized attributes such as "tact," "ability to deal with others," and "character" as factors weighed in favor of the male, but failed to demonstrate that they had asked whether the female applicant had comparable qualities. This failure to compare the qualities of the applicants, coupled with a history of selecting male applicants for principal and superintendent positions over a twenty-five year period, was sufficient to establish that there was substantial evidence of sex discrimination.⁵²

Black teachers successfully contested non-reappointment decisions by demonstrating that the evaluation process on which nonrenewals were based was not uniformly applied to all teaching personnel in the district. In the year prior to voluntary desegregation of the district, black teachers were twice singled out for evaluation and eight of the total number of twenty-three black teachers were numerically ranked. When the plan for

⁴⁹ See *Love v. Alamance County Bd. of Educ.*, 581 F. Supp. 1079 (M.D. N.C. 1984).

⁵⁰ See *Parker v. Board of School Comm'rs. of Indianapolis*, 729 F.2d 524 (7th Cir. 1984).

⁵¹ *Guilderland Central School Dist. v. New York State Human Rights Appeal Bd.*, 93 App. Div.2d 908, 461 N.Y.S. 2d 599 (1983).

⁵² *Strand v. Petersburg Public Schools*, 659 P.2d 1218 (Alaska, 1983).

desegregation was implemented, seventeen black teachers were not renewed, although all white teachers in the district were offered new contracts. When seventeen new teachers were hired, all seventeen were white. The Fifth Circuit Court of Appeals concluded the nonrenewals were intentional acts of racial discrimination and noted that the separate evaluation and ranking of black teachers was highly probative although circumstantial evidence of unconstitutional discrimination.⁵³

Evaluations which reflect an emphasis on sexual or racial stereotyping also implicate disparate treatment claims. An evaluation process which expressly presumes that males are better suited to administrative or managerial roles would constitute sex discrimination under Title VII.⁵⁴ Evidence of an evaluator's attitudinal disposition prejudicial to a protected class of individuals would most certainly call into question the evaluation process.⁵⁵ Testimony indicating a preference for white applicants for a position as a school district employee would suggest discriminatory animus in the assessment and selection process.⁵⁶

Uniform and non-discriminatory evaluation processes may often be relied upon to rebut a claim of employment discrimination. In one case, use of a four-step evaluation procedure incorporating teacher self-evaluation, observations and evaluation by the school principal followed by a conference emphasizing methods to improve performance and a second evaluation by one black and one white teacher when low ratings had been received was challenged by a nonrenewed black teacher. The appellate court affirmed the trial court's view that the evaluation process was neither facially discriminatory nor unreasonably burdensome to black teachers in the school district and was an appropriate basis on which to predicate nonrenewal.⁵⁷

A teacher dismissed for incompetency challenged her termination and established a *prima facie* case of racial discrimination by showing that she was deemed an adequate teacher at an all-black school for eight years prior to court-ordered desegregation, then suddenly received unfavorable evaluations after transfer to a predominately white school. The Eighth Circuit Court of Appeals affirmed the district court's decision denying

⁵³ Harkless v. Sweeney Indep. School Dist., 554 F.2d 1353 (5th Cir. 1977).

⁵⁴ See Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982).

⁵⁵ See Padway v. Palches, 665 F.2d 965 (9th Cir. 1982) (superintendent's "attitudinal disposition," suggesting difficulty in working with women administrators might well lead a jury to conclude that a negative evaluation and discharge of a female principal was sex discrimination.)

⁵⁶ Stafford v. Muscogee County Bd. of Educ., 688 F.2d 1838 (11th Cir. 1982) (selection of white applicant for a principal's position, predicated on testimony that the school already had a black administrator, raised genuine issue of fact relative to discrimination on the basis of race, justifying remand.)

⁵⁷ Pickens v. Okolona Municipal Separate School Dist., 527 F.2d 358 (5th Cir. 1976).

reinstatement, agreeing that the school district met its burden of proof by a clear and convincing showing that the dismissal was not racially motivated. The testimony of parents and three school officials, who had observed the teacher's performance a total of twelve times, indicated lack of classroom control, poor organization and lack of preparation. Evidence that her students wandered in the halls without permission, that the teacher failed to answer questions adequately and that she improperly scored classroom mathematics assignments further supported the district's claim that her dismissal was not racially motivated. Furthermore, her former school principal admitted that the teacher's previous satisfactory evaluations were at variance with her actual performance due to his concern that a poor evaluation would engender racial tension in the black community.⁵⁸

A blind teacher who sought placement on his school district's list of administrative candidates was required to complete an evaluation protocol consisting of a written exam and an interview. Despite the assistance of a reader, the teacher placed in the lowest quartile on the examination, and, following an interview, the school district's administrative committee refused placement. A federal district court found the evaluation process proper and concluded that the teacher's blindness was not the determining factor in the administrative committee's determination to deny placement on the list of administrative candidates. No violation of the Rehabilitation Act was established since the teacher's low ranking on the district's placement examination established that he was not an "otherwise qualified" handicapped applicant. While questions in the interview made reference to the limitations imposed on the teacher by his handicap, the court concluded it was reasonable for the committee to inquire how the applicant would handle job responsibilities given his disability.⁵⁹

Although initially successful in establishing a *prima facie* claim of sex discrimination, a part-time teacher lost her *pro se* appeal from a decision dismissing her claim with prejudice. In response to plaintiff's initial proof of discrimination, the school district presented what the trial court described as "overwhelming" evidence that the denial of a position to the teacher was free of unlawful discrimination. The evaluative record showed that the teacher had been a disruptive rather than contributive factor in the school system and the trial court found that the teacher was denied renewal because of her unwillingness to observe rules and regulations, failure to work harmoniously with other staff and refusal to sub-

⁵⁸ Thompson v. School Dist. of Omaha, 623 F.2d 46 (8th Cir. 1980).

⁵⁹ Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979).

mit documentation essential to her employment. Finding no error, the Eighth Circuit Court of Appeals affirmed.⁶⁰

IV. Procedures

The adoption and implementation of procedures to guide the evaluation process and elaborate job-related criteria upon which evaluation will be based can serve to establish fundamental elements of due process of law. Formalizing procedures in the evaluation of employees through written policies consistent with state law, negotiated agreement and district best practice standards will reduce ambiguity and clarify the roles of those involved in the process. Among the formalized procedures associated with evaluation, courts have recognized the importance of maintaining a documentary record of evaluations, provision of adequate notice and reasonable opportunities to improve remediable deficiencies.

Provisions of appropriate due process are uniquely a function of the particular state's laws harmonized with the guarantees of the fourteenth amendment. Evaluation procedures utilized within a school district can emphasize the elements of due process that would insure compliance with delineated standards. In one case, a court's examination of evaluation procedures led to a judicial determination that the employee had been accorded all the necessary elements of due process protection before the adverse employment decision. Among the evaluation procedures provided, the court emphasized specification of evaluative criteria in advance of evaluation, availability of evaluation reports, opportunity to review and respond to evaluations, reasonable time to correct deficiencies prior to a second evaluation, and notice and an opportunity to contest employment decisions on which evaluations would be based.⁶¹

A. Notice

While the degree of procedural protections available to the public school employee positively correlate with the particular state's recognition of a property right in employment or a liberty interest in preserving other employment opportunities,⁶² states have been relatively uniform in requiring notice of the criteria to be utilized in evaluating employee per-

⁶⁰ *Scharnhorst v. Independent School Dist.*, No. 710, 686 F.2d 637 (8th Cir. 1982). *See also* *Danzl v. North St. Paul—Maplewood—Oakdale Indep. School Dist.*, 706 F.2d 813 (8th Cir. 1983) (negative references on female applicant justified selection of male applicant.)

⁶¹ *Needleman v. Bohlen*, 602 F.2d 1 (1st Cir. 1979).

⁶² *Compare Shatting v. Dillingham City School Dist.*, 617 P.2d 9 (Alaska 1980) (nonrenewal may be based upon any reason considered adequate by the board) *with* *Mason Cty. Bd. of Educ. v. State Superintendent*, 274 S.E.2d 435 (W. Va. 1980) (board failure to base dismissal upon evaluations after the employee is afforded an improvement period to correct conduct is arbitrary.)

formance and district conformance with procedures for informing the employee of any deficiencies. Particularly in those instances in which state law mandates an evaluation of the professional employee, courts have required evidence that the school system substantially complied with the statutory or regulatory provisions on evaluation. A probationary teacher in West Virginia won reinstatement when she established that she was neither openly evaluated, nor given a meaningful opportunity to learn what deficiencies were identified in order that she might correct them.⁶³ Failure to provide a tenured teacher with a preliminary notice of alleged inadequacies in teaching performance resulted in her reinstatement under Arizona law.⁶⁴ In a similar case from Montana, a probationary teacher was reinstated to annual contract status when the court found the stated reason for nonrenewal was insufficient to advise the teacher of his deficiencies.⁶⁵

Clearly, a school board's failure to follow employee evaluation procedures can be characterized as a lack of compliance with appropriate due process. West Virginia State Board of Education regulations prohibit a local board from discharging, demoting or transferring an employee for reasons of incompetency where the incompetence has not been brought to the attention of the employee through performance evaluations. The state supreme court affirmed reinstatement of a director of federal programs after finding that the local board failed to establish compliance with the state's evaluation policies.⁶⁶ Said the court,

While the evidence would support a finding that the superintendent and Trimboli discussed the need to prepare certain reports at an earlier time during the school year, it does not support a finding that the superintendent ever put Trimboli *on notice* that he was being evaluated, that his performance was unsatisfactory, and that unless he performed his job differently he would be subject to adverse personnel action. In these circumstances we are unable to find that Trimboli was evaluated and given an opportunity to improve his job performance prior to transfer in compliance with the requirements of Rule 5300(6)(a). (emphasis added)⁶⁷

Irregularities in complying with evaluation procedures will not always work to the advantage of the employee. Although a South Dakota school board failed to meet its own policy standards for evaluation of a proba-

⁶³ Lipan v. Board of Educ. of Hancock, 295 S.E.2d 44 (W. Va. 1982). *See also* Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982) (teacher reinstated when remediable deficiencies were not called to her attention through evaluation.)

⁶⁴ Orth v. Phoenix Union High School System, 126 Ariz. 151, 613 P.2d 311 (1980).

⁶⁵ Bridger Educ. Ass'n. v. Board of Trustees of Carbon County School Dist., 678 P.2d 659 (Mont. 1984).

⁶⁶ Trimboli v. Board of Educ. of Wayne Cty., 280 S.E.2d 686 (W. Va. 1981).

⁶⁷ *Id.* at 689.

tionary teacher, the Supreme Court of South Dakota sustained a nonrenewal decision based on the school board's substantial compliance with notice of deficiencies that provided the teacher with sufficient time to improve her teaching performance. Though the board had not conducted all statutorily mandated evaluations, those evaluations which had been conducted established deficiencies requiring remediation and the court concluded the failure to complete all evaluations did not impair the teacher's ability to make improvements.⁶⁸

In a case from Pennsylvania, a tenured teacher terminated for incompetency following unsatisfactory mid-year evaluations and year-end ratings challenged her dismissal on the ground that the school district's use of classroom observations and anecdotal records did not comport with state regulatory requirements for numerical evaluation ratings. The appellate state court noted that nothing in the statute setting forth criteria for teacher evaluation required numerical scores in rating teachers. In affirming the dismissal, the court held that the use of classroom evaluations and anecdotal records was valid despite the district's failure to use the numerical system advocated by the state department of education.⁶⁹

B. Opportunity to Remediate

Provision for an opportunity to remedy deficiencies may either be mandated by statute law, board regulation or collective agreement. In some instances, courts will infer an opportunity to remediate based upon a provision of notice of deficiencies. Where an opportunity to remediate is recognized, it should be related to specified deficiencies and reasonable as to time for the correction of deficiencies.

The failure of a school board to provide for a reasonable opportunity to correct deficiencies could be evinced by the absence of a plan for remediation, a plan so vague and ambiguous as to fail to define activities which might lead to remediation, or a plan which defines activities unrelated to the correction of alleged deficiencies. In reviewing one plan of improvement, a federal district court concluded that the employee was denied due process because areas of concern were ambiguous as to any definition of proscribed conduct, granting the employer unbridled discretion to terminate the employee should it be determined that the plan was violated.⁷⁰

In determining what constitutes a reasonable time for remediation, courts frequently defer to state law, but apply fundamental standards of

⁶⁸ *Schaub v. Chamberlain Bd. of Educ.*, 339 N.W.2d 307 (S.D. 1983).

⁶⁹ *Hamburg v. North Penn School Dist.*, 86 Pa. Commw. 371, 484 A.2d 867 (1984).

⁷⁰ *Cantrell v. Vickers*, 495 F. Supp. 195 (N.D. Miss. 1980).

reasonableness in circumstances in which practices appear arbitrary or capricious. In one instance, eight weeks from notice of deficiency to notice of termination was not a reasonable remediation period for a teacher with seventeen years of experience to remedy practices labelled deficient for the first time.⁷¹ In another case, failure to provide a reasonable time for remediation was evidenced by board reliance upon evaluations conducted during and not after the specified period of remediation had elapsed.⁷²

In those instances in which opportunities for remediation are denied because the deficiencies are alleged to be irremediable, the burden of proof to establish the irremediable nature of the deficiency is placed upon the school board.⁷³ Deficiencies which are most often sustained as irremediable involve actions which might otherwise be classified as immoral or insubordinate conduct. Those "deficiencies" which are not remediable within a reasonable period of time have included sexual misconduct with students, commission of a crime, and repeated instances of improper disciplining of students. Further, repeated notice of deficiencies, coupled with evidence that no improvement resulted, would justify acknowledging the deficiency as irremediable.⁷⁴

Following reported incidents of touching and stroking females in his fourth grade class, a teacher was admonished and placed on a year's probation. In that year parental complaints were investigated by the school principal. The teacher's inappropriate physical contact with female students was found to have occurred regularly. Following discharge, the teacher sought appellate review on the grounds that he had not been afforded a program to correct remediable deficiencies. In reviewing the statute requiring evaluation, notice and an opportunity to remediate, the state court of appeals found the teacher's conduct to be inapplicable to the remediation statute. Only deficiencies in conduct which have an educational aspect or legitimate professional purpose, such as classroom management, subject matter knowledge, or handling of student discipline would be deemed remedial.⁷⁵

In contrast to the previous case, termination of an assistant principal was reversed in a New Mexico case when the state board of education adopted the view that evidence of an adulterous affair and allegations of

⁷¹ *Ganyo v. Independent School Dist. No. 832*, 311 N.W.2d 497 (Minn. 1981).

⁷² *Board of Educ. v. Illinois State Bd. of Educ.*, 82 Ill. App. 3d 820, 403 N.E.2d 277 (1980).

⁷³ *Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ.*, 112 Ill. App. 3d 696, 445 N.E.2d 832 (1983); *Szabo v. Board of Educ.*, 117 Ill. App. 3d 869, 454 N.E.2d 39 (1983); and *Morris v. Board of Educ. of Chicago*, 96 Ill. App. 3d 405, 421 N.E.2d 387 (1981).

⁷⁴ See *Community Unit School Dist. No. 60 v. Maclin*, 106 F.2d 156 (3rd Cir. 1982).

⁷⁵ *Potter v. Kalamazoo Public School Dist.*, 31 Wash. App. 838, 644 P.2d 1229 (1982).

sexual harassment constituted "unsatisfactory work performance" which required an opportunity for the principal to be informed and correct the deficiencies involved. The state court of appeals affirmed, recognizing the broad discretionary authority vested in the state board to adopt policies on the evaluation of employees.⁷⁶

V. Conclusion

While the level of judicial scrutiny applicable to a school board's adverse employment decisions will vary, courts remain reluctant to interfere with the summative evaluation process of a school district. This process, where based upon criteria reasonably related to job requirements and ostensibly free of impermissible discrimination or the denial of a constitutional right to free speech or association, is presumed to be beyond the expertise of judges.⁷⁷ To conclude otherwise would compel judicial intervention and review of a host of factors used by educators to make summative evaluation decisions, a role courts have neither the competency nor the resources to undertake.⁷⁸

Despite a judicial reluctance to interfere in school district evaluation practices, the evaluation of public school personnel may result in administrative decisions which adversely affect the employee's interest or entitlement. If responsible administrators do not have reasoned, ascertainable standards for making these decisions, or if they fail to apply those standards in a particular employment decision, the consequences may implicate legally protectable rights and result in legal challenge. Judicial review of the employment decision-making processes which rely on summative evaluation can be anticipated when school board decisions appear arbitrary or capricious, lack substantial supporting evidence or deny the individual's constitutionally or statutorily protected rights.

Legally sound summative evaluation processes provide a record of events, incidents, appraisals, discussions, interviews and admonitions which can be relied upon to support the evidentiary sufficiency and credibility of an employment decision involving professional personnel. When efforts to improve performance have failed and an adverse employment decision is compelled, that decision must be predicated upon board adopted criteria reasonably related to job requirements and upon the evaluator's careful adherence to the procedural requirements established by law, contract or board policy.

To withstand judicial scrutiny amid the formidable array of legal con-

⁷⁶ Board of Educ. of Almagordo v. Jennings, 98 N.M. 602, 651 P.2d 1037 (1982).

⁷⁷ Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979).

⁷⁸ Kramedas v. Board of Educ., 523 F. Supp. 1263 (D. Del. 1981).

straints on the evaluation of professional employees, three steps are indicated. First, the school system must determine, in advance, the knowledge, skills and competencies it requires of its professional personnel. Second, the system must implement evaluation mechanisms for identifying deficiencies related to the knowledge, skills, and competencies it has specified. Third, the professional employee must be adequately informed of the criterion referenced standards he or she must meet and provided with a reasonable opportunity to correct deficiencies once identified.

Development and implementation of summative evaluation standards and practices will not eliminate legal disputes, but should yield a documentary record which substantiates the fairness and reasonableness of the process, establishes the proper predicate for an adverse employment decision, and elaborates the procedural integrity of the process. Evaluative criteria must be developed which are sufficiently specific and reasonably job-related to enable the employee to guide his or her conduct and provide a definite standard by which the employee's conduct can be evaluated. Systematic and uniform application of those criteria must characterize the process that will ultimately be relied upon to support employment decisions. Finally, evaluations must be procedurally correct, whether that procedure is express or implicit in the provisions of due process of law.

