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SUBVERTING THE ACADEMIC ABSTENTION DOCTRINE IN TEACHER EVALUATION: HOW SCHOOL REFORM LEGISLATION DEFEATS ITSELF

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I. INTRODUCTION

Legislatures and other policy makers have always attempted to hold educators professionally accountable, but the last two decades of the twentieth century saw increasing calls for reform and accountability. A recurring theme in the reform movements sweeping the country during these decades was concern about the manner in which school personnel, especially classroom teachers, were evaluated.

Since 1983, nearly every journal article or research report published on the topic of school reform or accountability begins by citing *A Nation at Risk: The Imperative for Educational Reform*.[1] That 1983 document from the National Commission on Excellence in Education addressed the need for improvement in teacher evaluation and provided an impetus for state-level policy initiatives requiring improved teacher evaluation.

Various interest groups have commissioned reform-oriented reports that have reiterated teacher evaluation as an account-

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1. National Commission on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*. (U.S. Govt. Printing Off. 1983).

ability tool. For example, the Task Force on Education for Economic Growth,[2] the Twentieth Century Fund,[3] the Carnegie Corporation,[4] the Research and Policy Committee of the Committee for Economic Development,[5] and the National Governors Association[6] have all commissioned such reports that have fueled concern about the evaluation of teaching personnel, using reform and accountability as the backdrop.

Teacher evaluation stands as a heralded means of improving the delivery of education. Legislatures and state school boards often demand that teacher evaluation systems be put in place by local school systems to set the stage for removing poor teachers. Local school boards adopt evaluation instruments and require their administrators to use the instruments to terminate problem teachers. However, as it will be shown, the policy initiative itself—its language, its structure, and the procedures it requires—can be used to block a school administrator from prosecuting a successful termination action against the teacher or to disable the school board from even holding a hearing on a teacher's effectiveness.

The general rule, often called the "academic abstention doctrine," is that a court will abstain from interfering with decisions of school officials and school boards unless the decision represents an abuse of discretion, is irrational, or violates constitutional or statutory rights.[7] The purpose of this article is to demonstrate how the academic abstention doctrine is subverted and how legislation designed to foster improvement in schools subverts itself. The first section of this article chronicles a newly-emerging means of subverting the academic abstention doctrine in teacher termination—the duty arising from case law to remediate problem teachers. This part examines case law where courts have required school administrators to enter into a remediation phase with a problem teacher before moving

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2. Task Force on Educ. for Econ. Growth, *Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools* (Educ. Commn. of the States 1983).

3. Task Force on Fed. Elementary and Secondary Educ. Policy, *Making the Grade* (Twentieth Century Fund 1983).

4. Carnegie Corp., *Education and Economic Progress: Toward a National Education Policy* (The Carnegie Corp. of N. Y. 1983).

5. Research and Policy Committee of the Comm. for Econ. Dev., (Comm. For Econ. Dev. 1985).

6. Task Force on College Quality, *Time for Results: The Governors' 1991 Report on Education.* (Natl. Govs.' Assn. Ctr. For Policy Analysis and Research 1986).

7. *See e.g. Wynne v. Tufts U. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991).

to terminate the teacher. The second section of this article explores policy decisions invested in state statutes on teacher evaluation. This second section further examines statutory law for potential future exceptions to the academic abstention doctrine. Consequently, this article represents an interim report on how policy initiatives for accountability can be thwarted by unanticipated outcomes.

II. CASE LAW ON REMIDIATION

In the early 1990's an increasing number of teacher termination cases were overturned by state courts on the grounds that the cause for dismissal of the teacher was a remediable cause, and that the school administration could not proceed with the dismissal without first attempting to remediate the problem teacher. West Publishing Company apparently noticed this trend, and in 1993 West edited the headnote "Schools 141(4)" in its key number system to create a new headnote "Schools 147.26." For this study, state and federal court cases since 1970 involving adverse employment actions against teachers were collected using both these headnotes.

Courts have recognized the duty to remediate problem teachers by interpretation of tenure statutes, evaluation statutes, state board regulations, or local school district policies. Frequently, language in a statute or policy speaking to improvement has provided sufficient rationale for the court to grant injunctive relief or a writ of mandamus to halt termination proceedings against a problem teacher. For example, Arkansas' Teacher Fair Dismissal Act required that school administrators address concerns in writing and document efforts to assist the problem teacher.[8] An Arkansas appeals court found in this language a duty to remediate before going forward with a teacher termination.[9] Ohio required local school boards to adopt evaluation procedures, including a requirement to evaluate a teacher by February 10th with two 30-minute observations and to provide recommendations for improvement.[10] From this language, the Ohio Supreme Court found that a school board's failure to provide specific recommendations for

8. Ark. Code Ann. § 80-1266.6 (Lexis L. Publg. 1987).

9. *Caldwell v. Sch. Dist. No. 5*, 746 S.W.2d 381 (Ark. App. 1988).

10. Ohio Rev. Code Ann. § 3319.11.1 (Anderson 1999).

improvement and the means to obtain assistance was a procedural defect, sufficient to reverse a nonrenewal decision.[11]

Some states are more straightforward about the duty to remediate. California's tenure statute demands that administrators observe a 45 calendar-day remediation period before teacher termination or suspension.[12] Arizona's statute requires a 90-day opportunity to correct inadequacies,[13] and New Jersey requires a 90-day remediation period after written notice of inefficiency.[14]

The state with the greatest amount of litigation on teacher remediation has been Illinois, where state courts first interpreted the then-existing tenure statute to require school administrators to remediate a problem teacher before proceeding with a termination action against the teacher.[15] Illinois later added an evaluation statute that included specific remediation requirements.[16] Courts in Idaho,[17] California,[18] Arkansas,[19] Arizona,[20] New Jersey,[21] South Carolina,[22] West Virginia,[23] and Minnesota[24] also interpreted their tenure statutes to require a remediation period prior to terminating a problem teacher. Courts in Washington,[25] Missouri,[26] Louisiana,[27] Ohio,[28] Kansas,[29] Nebraska,[30] Utah,[31] and Michigan[32] require remediation

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11. *See Naylor v. Bd. of Educ.*, 630 N.E.2d 725 (Ohio 1994).

12. Cal. Educ. Code § 44938 (West Supp. 2001).

13. Ariz. Rev. Stat. § 15-538 (1991).

14. N.J. Stat. Ann. § 18A:6-11 (1999).

15. 105 Ill. Comp. Stat. §24-12 (1998); *See Paprocki v. Bd. of Educ.*, 334 N.E.2d 841 (Ill. App. 1975).

16. 105 Ill. Comp. Stat. §5/24A-4 (1998).

17. *Gunter v. Bd. of Trustees*, 854 P.2d 253, (Idaho 1993).

18. *Blake v. Commn. on Prof.l Competence,* 260 Cal. Rptr. 690 (Cal. App. 1990).

19. *Scoggins v. Bd. of Educ.*, 853 F.2d 1472, (8th Cir. 1988); *Caldwell,* 746 S.W.2d 381.

20. *Roberts v. Unified Sch. Dist,* 778 P.2d 1294 (Ariz. App. 1989).

21. *Rowley v. Bd. of Educ.*, 500 A.2d 37 (N.J. Super. App. Div. 1985).

22. *Hall v. Bd. of Trustees,* 499 S.E.2d 216 (S.C. App. 1998).

23. *Mullins v. Kiser,* 331 S.E.2d 494 (W.Va. 1985).

24. *Kroll v. Indep. Sch. Dist. No. 593,* 304 N.W.2d 338 (Minn. 1981).

25. *Wojt v. Chimacum Sch. Dist. 49,* 516 P.2d 1099 (Wash. App. 1973).

26. *Hanlon v. Bd. of Educ.,* 695 S.W.2d 930 (Mo. App. 1985).

27. *McKenzie v. Sch. Bd.*, 653 So.2d 215 (La. App. 1995). (La. Stat. Ann. §17:391.5(C) subsequently repealed).

28. *Farmer v. Bd. of Educ.*, 594 N.E.2d 204 (Ohio Com. Pl. 1992).

29. *Marais Des Cygnes Valley Teachers' Assn. v. Bd. of Educ.*, 954 P.2d 1096 (Kan. 1998).

30. *Cox v. Sch. Dist. No. 083,* 560 N.W.2d 138 (Neb. 1997).

or an improvement plan for problem teachers, arising from each state's legislation about the evaluation of teachers. And under a parallel Oklahoma statute, termed an "Admonishment Statute," an Oklahoma appeals court found a duty to remediate problem teachers. In contrast to the findings in all of these listed states, a Colorado appeals court denied that a private right of action existed under that state's evaluation act.[33]

Teachers facing termination have also used language from state regulation or local school board policy to attempt to stop the termination action. Courts in Maryland,[34] West Virginia,[35] and South Dakota[36] interpreted local school board policies on teacher evaluation to require remediation periods for problem teachers. South Dakota's remediation case was unique in that the state's Department of Labor was called in to enforce a school district policy to remediate problem teachers. A New York court decided that evaluation procedures published by the school commissioner's office were discretionary, not mandatory, thus a specialized remediation period was not required for a problem teacher.[37] A Wyoming court, faced with the question of whether evaluation procedures published by a local school board creates a duty to remediate, was the only court to reject the argument.[38]

A threshold question in the court cases about teacher remediation was whether the cause of dismissal was remediable or irremediable. An Illinois court called remediability of the cause of dismissal a jurisdictional question.[39] Quite simply, if the cause of dismissal is remediable, then the dismissal action cannot continue until remediation has been addressed. This is because the local school board does not have jurisdiction to hold the dismissal hearing. If the cause is not remediable, then the dismissal action may continue without a remediation period. In

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31. *Broadbent v. Bd. of Educ.*, 910 P.2d 1274 (Utah App. 1996). (acknowledged the right to remediation for tenured teachers, but rejected the right for probationary teachers).

32. *VanGessel v. Lakewood Pub. Sch.*, 558 N.W.2d 248 (Mich. App. 1996).

33. *Axtell v. Park Sch. Dist. R-3*, 962 P.2d 319 (Colo. App. 1998).

34. *Bd. of Educ. v. Ballard*, 507 A.2d 192 (Md. App. 1986).

35. *Wren v. Bd. of Educ.*, 327 S.E.2d 464 (W. Va. 1985); *See also Holland v. Bd. of Educ.*, 327 S.E.2d 155 (W. Va. 1985).

36. *Iverson v. Bd. of Educ.*, 522 N.W.2d 188 (S.D. 1994).

37. *Kurey v. N. Y. St. Sch. for the Deaf*, 642 N.Y.S.2d 415 (N.Y. App. Div. 1996).

38. *Leonard v. Sch. Dist. No. 2*, 788 P.2d 1119 (Wyo. 1990).

39. *Aulwurm v. Bd. of Educ.*, 367 N.E.2d 1337 (Ill. 1977).

cases of mixed or multiple causes, where one cause is remediable and another cause is not remediable, the school board is generally not required to follow remediation procedures.[40] For example, where a Louisiana teacher was charged with causes of incompetency (a remediable cause), as well as dishonesty and willful neglect of duty (irremediable causes), the school board was permitted to initiate termination proceeding without diverting to a remediation period.[41]

Swader found that among the fifty states, fifty-four separate causes of dismissal exist.[42] It seems clear that incompetency is always considered remediable. Consequently, a school administrator will be required to enter into a remediation period and clearly do something that counts as remediation within her state before taking the case to the school board when the teacher's competency is the issue. (Remember that if the cause is remediable, the school board lacks jurisdiction to hold a hearing.) For the fifty-three other causes of dismissal listed in the statutes across the states, courts will likely have to address each cause to determine if it is remediable or not.

The cases identified in this study demonstrate that certain causes of dismissal are decidedly not remediable. For example, sexual improprieties with students,[43] theft,[44] and other unethical conduct like cheating on standardized tests[45] have been found irremediable. When the teacher is charged with other forms of wrong-doing, whether the cause is remediable is less clear. Inherent in the analysis is the question of whether the wrong-doing exists as an isolated incident or is rather a series of incidents indicating a general course of bad behavior by the teacher. For example, a school nurse's one-time failure to obtain parental consent before giving inoculations to students was considered remediable by an Illinois court.[46] Similarly, excessive use of corporal punishment in a confined time setting

40. *Matter of Peterson*, 472 N.W.2d 687 (Minn. App. 1991).

41. *Spurger v. Sch. Bd.*, 628 So.2d 1317 (La. App. 1993).

42. Swader, *Statutory Causes of Public School Teacher Dismissal: 1986-1996*, (unpublished Ph.D. dissertation 1997) (on file Univ. of Ala. & Univ. of Ala., at Birmingham).

43. *Bd. of Educ. v. Hunt*, 487 N.E.2d 24 (Ill. App. 1985); *Fisher v. Sch. Dist. No. 622*, 357 N.W.2d 152 (Minn. App. 1984); *Forte v. Mills*, 672 N.Y.S.2d 497 (N.Y. App. Div. 1998).

44. *Matter of Shelton*, 408 N.W.2d 594 (Minn. App. 1987).

45. *Scoggins*, 853 F.2d 1472.

46. *Bd. of Educ. v. St. Bd. of Educ.*, 513 N.E.2d 845 (Ill. App. 1987).

was also found to be remediable.[47] In contrast, a California court found a teacher's continued, repeated use of corporal punishment to be not remediable.[48]

Courts have also begun to address what happens in remediation. The emerging right to remediation appears to have three elements, or stages, of remediation. The stages of remediation appear to be: 1) notice, 2) the remediation action, and 3) findings. The first stage, notice, apparently must be given in writing and, at least in Illinois, must come from the board rather than the administrative staff.[49] The notice must be specific and state a valid reason for concern. For example, an Idaho school board lost its case when it merely stated that it thought it could get a better teacher.[50] The second stage, the remediation action itself, seems to have a very low threshold for compliance. In other words, the administrator need not do much that counts for remediation. For example, an Ohio court found this requirement to be met simply by specific recommendations written on an evaluation document and the words "have a discussion with your department chairman."[51] The third stage, findings issued by the board, may be the most prescriptive stage of the three. It requires that the school board issue findings of fact that include evidence of the cause for dismissal and not merely repeat the charges alleged in the warning letter.[52] For example, an Illinois court overturned a teacher dismissal when the school board only offered the same wording as given at the outset of the remediation period instead of showing that it had investigated and exercised its discretion in determining whether the teacher had in fact improved or not.[53]

The experience of one state, Missouri, is instructive in understanding how the remediation requirement was inserted into the process of dealing with problem teachers and how the requirement then developed into a three-step process as outlined in the previous paragraph. Legislation adopted in 1983

47. *Russell v. Sch. Dist. No. 6*, 366 N.W.2d 700 (Minn. App. 1985).

48. *Sch. Dist. v. Commn. on Prof. Competence*, 4 Cal. Rptr. 2d 227 (Cal. App. 1992).

49. *Paprocki*, 334 N.E.2d 841.

50. *Brown v. Sch. Dist. No. 132*, 898 P.2d 43 (Idaho 1995).

51. *Thomas v. Bd. of Educ.*, 643 N.E.2d 131, 134 (Ohio 1994).

52. *Selby v. Bd. of Educ.*, 777 S.W.2d 275 (Mo. App. 1989).

53. *Bd. of Educ. v. Smith*, 664 N.E.2d 113 (Ill. App. 1996).

required the over-500 school districts in Missouri to adopt a comprehensive, performance-based evaluation process for each teacher employed by each school district.[54] The language for this prescription was:

> In addition, the board of education of each school district shall cause a comprehensive, performance based evaluation for each teacher employed by the district. Such evaluations shall be ongoing and of sufficient specificity and frequency to provide for demonstrated standards of competency and academic ability. All evaluations shall be maintained in the teacher's personnel file at the office of the board of education. A copy of each evaluation shall be provided to the teacher and appropriate administrator. The state department of elementary and secondary education shall provide suggested procedures for such an evaluation.[55]

In addition, Missouri law lists the causes for termination of an indefinite contract with a permanent teacher:

(1) Physical or mental condition unfitting him to instruct or associate with children;

(2) immoral conduct;

(3) incompetency, inefficiency or insubordination in line of duty;

(4) willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

(5) excessive or unreasonable absences from performance of duties; or

(6) conviction of a felony or a crime involving moral turpitude.[56]

Language in the tenure statute is the source of the duty to remediate problem teachers in Missouri:

> At least thirty days before service of notice of charges of incompetency, inefficiency, or insubordination in line of duty, the teacher shall be given by the school board or the superintendent of schools warning in writing, stating specifically the causes which, if not removed, may result in charges. Thereafter, both the superintendent, or his designated representa-

54. Mo. Rev. Stat. § 168.128 (2000).

55. *Id.*

56. Mo. Rev. Stat. § 168.114(1) (2000).

> tive, and the teacher shall meet and confer in an effort to resolve the matter.[57]

According to the Missouri courts, a close examination of the language within the statute indicates a three-step process that must be followed. Thirty days before the formal charges, the school board or superintendent must provide notice in writing of the specific charges. Notice becomes the first step of the process. The superintendent or the superintendent's representative must then "meet and confer" with the teacher to attempt to resolve the problem. The "meet and confer" provision is the second step of the process. The resulting formal charges complete the third and final step of the remediation process. By the wording of the statute, one would presume that this three-step process applies to the statutory causes of incompetency, inefficiency, or insubordination in the line of duty but does not apply to other causes (e.g., immoral conduct or excessive or unreasonable absence from performance of duties) listed in the termination statute.[58] A series of Missouri court cases define the contours of the remediation process and describe what must happen in the three stages of remediation.

Three cases provide some guidance on the first stage, the notice stage. In *O'Connell v. School District of Springfield R-12*,[59] the court ruled that the statutory notice requirement was met by the maintenance of a record of negative evaluations, and that the statements contained within the evaluation documents provided sufficient particularity that was necessary to meet the statutory warning requirement. In contrast, a Missouri appeals court reinstated a terminated teacher when it found the school administration lax in identifying objectionable behaviors and targeting those behaviors for remediation.[60] Where a teacher had engaged in a variety of improper actions including inappropriate comments to students, problems with record-keeping, and use of a pay telephone against orders, a warning letter detailing these concerns was found sufficient to meet the notice requirement.[61] From these cases, it is evident

57. Mo. Rev. Stat. § 168.116(2) (2000).
58. Mo. Rev. Stat. § 168.114(1).
59. 830 S.W.2d 410 (Mo. 1992).
60. *Iven v. Sch. Dist.*, 710 S.W.2d 462 (Mo. App. 1986).
61. *Nevels v. Bd. of Educ.*, 822 S.W.2d 898 (Mo. App. 1991).

that the notice must be in writing and must speak with sufficient particularity that the teacher cannot help but understand the nature of the problem.

The second stage of the remediation process in Missouri, the "meet and confer" provision, is a low threshold to meet. The school board is not required to reassign pupils, institute a new professional development plan, or enlist the aid of other professionals—functions usually considered part of a remediation activity—to comply with the statute.[62] Instead, merely conducting the evaluation and having a conference about the evaluation meets the "meet and confer" requirement.[63] In *Nevels v. Board of Educ. of School Dist. of Maplewood-Richmond Heights*, the "meet and confer" requirement was met by meeting to discuss concerns outlined in the notice letter.[64]

The third and final stage of the Missouri remediation process requires the school board to exercise its judgment and issue findings of fact concerning the charges leveled against the teacher. It is inadequate to merely repeat the allegations that were made in the warning letter.[65] The school board must examine the evidence before it and demonstrate that it is exercising its discretion. For example, the Missouri appeals court upheld a tenured teacher's termination where the teacher had been charged with failure to maintain discipline, failure to provide adequate individualized instruction, and failure to provide timely information on student progress.[66] After administrators had met with the teacher and discussed the problems, the board looked again at the teacher's situation. Although the teacher had improved somewhat and the evidence could support a different conclusion, the court accepted this exercise of the board's discretion.

The right to remediation is a right given to teachers growing largely out of prescriptive language in statutes, state regulations, and local board policies about teacher evaluation. This emerging teacher right has become firmly established in many states, and it serves to add a series of new procedural steps that school administrators must take before going forward with the termination of an employment contract for a problem

62. *Newcomb v. Sch. Dist.*, 908 S.W.2d 821 (Mo. App. 1995).

63. *Id.*

64. 822 S.W.2d 898.

65. *Selby*, 777 S.W.2d 275.

66. *Johnson v. Bd. of Educ.*, 868 S.W.2d 191 (Mo. App. 1994).

teacher. The right to remediation represents an opportunity for the court to review an academic decision; the decision that a problem teacher should no longer be teaching students in the school district. Of particular question, then, is what other opportunities to subvert the academic abstention doctrine exist in evaluation statutes adopted by the states. For that purpose, a review of evaluation statutes was accomplished.

III. EVALUATION STATUTES

To assure that all evaluation statutes were located, four methods were used. Computer searches were done using both Lexis and Westlaw. Then, each individual state code was taken down from the shelves of a law library and checked by hand. At this step, the Lexis and Westlaw citations were checked against the published version and the topical index for each state was reviewed for conformance with the computerized citations. Finally, the state department of education in each state was called and the person who provided liaison with legislative committees was asked personally to send copies. Through this method it was ascertained that forty-one states have statutes regarding evaluation of classroom teachers.[67] A forty-second state, Idaho, requires evaluation of teachers by statute, but such prescription is located within the statute providing for teacher contracts rather than in a separate evaluation statute.[68]

The statutes vary widely in the direction given to local school districts about teacher evaluation. Even within states, many statutes provide internally inconsistent, mixed guidance under which school districts are expected to operate. Certainly language in the statutes produce many ambiguities. Noted particularly within the statutes were statements of purpose for the evaluation, statements of use of the evaluation, and statements of use of documents developed in the evaluation process. This formulation, a comparison of statements about purpose of

67. States with evaluation statues include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Some states, such as Alabama, require evaluation, but by state board regulation.

68. Idaho Code § 33-514-515 (2001).

evaluation, use of evaluation, and use of documentation conforms to the analysis of evaluation policies used by Furtwengler.[69]

Fifteen of the forty-one statutes have a stated *purpose* for doing the evaluation. Of these fifteen statutes, most provide formative statements of purpose. Among the purposes listed are professional growth,[70] constructive assistance for teachers,[71] improvement of instruction,[72] improvement of performance,[73] enhancement of curriculum,[74] identification of behaviors that contribute to student progress,[75] and improvement of educational services.[76] Only two state statutes indicate a summative purpose, and in both situations that purpose is to aid in the dismissal of poor teachers.[77]

There are thirteen state statutes in which the *use* of the evaluation can be identified. In contrast to the stated purpose of the evaluation system, the stated use of the evaluation system is invariably for summative purposes. The dominant statutory use of the evaluation system is for dismissal of problem teachers.[78] Other uses delineated by statutes include preparation for hearings,[79] production of evidence,[80] discovery,[81] demotion,[82] immediate discharge,[83] and production of exhibits.[84] Only one statute mentions that the use of the evaluation system is to

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69. Carol B. Furtwengler, C. *State Actions for Personnel Evaluation: An Analysis of Reform Policies, 1983-1992*, Educ. Policy Analysis Archives, (Feb. 15, 1995).

70. Or. Rev. Stat. Ann. § 342.850 (1999); Utah Code Ann.§ 53A-10-101 (Supp. 2001).

Wash. Rev. Code § 28A.405.100 (Supp. 2001).

71. Nev. Rev. Stat. § 391.3125 (2000).

72. Colo. Rev. Stat. § 22-9-106 (Supp. 2001).

73. Alaska Stat. § 14.20.149 (LEXIS L. Publg. 2000); Ariz. Rev. Stat. § 15-537 (Supp. 2001); Ky. Rev. Stat. Ann. § 156.101 (2001); W. Va. Code § 18A-2-12 (2001).

74. Colo. Rev. Stat. § 22-9-106.

75. Utah Code. Ann. § 53A-10-101.

76. 105 Ill. Comp. Stat. 5/24A-1.

77. Okla. Stat. tit. 70 § 6-101.24 (1998); W.Va. Code § 18A-2-12.

78. Colo. Rev. Stat. § 22-9-106; 24 Pa. Consol. Stat. § 11-1123 (2001); 105 Ill. Comp. Stat. 5/24A-5; Nev. Rev. Stat. § 391.3125 (2000); Mass. Gen. Laws ch. 71, § 38 (1996); N.C. Gen. Stat. § 115C-333 (1999).

79. Ariz. Rev. Stat. § 15-537.

80. Ariz. Rev. Stat. § 15-537; La. Stat. Ann. § 17:391.5.

81. *Id.*

82. Mass. Gen. Laws ch. 71,§ 38.

83. Idaho Stat. § 33-514.

84. La. Stat. Ann. § 17:391.5.

be directly tied to a plan of action for improvement.[85]

Of the forty-one state statutes on evaluation of teaching, fifteen statutes require the production of a written document to address improvement of deficiencies or weaknesses effecting teaching and learning that have been identified through the evaluation process.[86] Another eleven states speak to the need for an improvement plan without specifying that the plan be reduced to writing.[87]

Twelve of the fifteen state statutes that require the production of a written improvement plan go on to specify a use for the improvement plan.[88] In most state statutes, the use of the improvement plan generally is stipulated to be for summative uses. This, too is internally inconsistent with the stated purpose of the plan, which is usually formative. Only two states, Indiana and Kentucky, suggest formative uses for the plan. Some of the states give mixed messages on usage of the plans stating that the plans are to be used for both summative and formative uses. For example, West Virginia states that the plans are to be used for improvement, dismissal, and increased professional growth.[89] Similarly, Colorado specifies that the plans be used for improvement, dismissal, correction of deficiencies, and recommendations for future improvement.[90]

Only six states specify something in all three areas: the purpose of the evaluation; the use of the evaluation; and the use of the improvement plan.[91] Often, the three areas are also internally inconsistent and contradict each other. Again, such internal inconsistencies offer opportunities to defeat the general rule of academic abstention. For Alaska, none of the three statements conform with either of the other two. For Arizona, Illinois, and Nevada, two of the three statements are conform-

85. N.C. Gen. Stat. § 115C-333.

86. The fifteen states with such statutory provisions are: Alaska, Arizona, Colorado, Illinois, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oregon, South Carolina, Tennessee, Utah, Washington, and West Virginia.

87. The eleven states with such statutory provisions are: Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Massachusetts, New Jersey, North Carolina, Oklahoma, and Texas.

88. The twelve states with such statutory provisions are: Alaska, Arizona, Colorado, Illinois, Louisiana, Nevada, Ohio, Oregon, Tennessee, Utah, Washington, and West Virginia.

89. W. Va. Code § 18A-2-12; *See also* W. Va. Code § 18-2-23A & § 18A-3A-3 (2001).

90. Colo. Rev. Stat. § 22-9-106.

91. States listing all three areas are Alaska, Arizona, Colorado, Illinois, Nevada, and Oklahoma.

ing. But for Colorado, two of the three statements are non-conforming. Only Oklahoma has conforming statements in all three areas.

It should be stressed that internal inconsistency was noted in many statutes. This was especially true in comparing purpose statements with use statements. In other words, while the purpose statement almost always spoke to formative evaluation, the use statement almost always spoke to summative evaluation. This internal inconsistency may in the future subject school districts operating in those states to charges of irrationality, sufficient to defeat the academic abstention doctrine. As it will be shown, other problems exist in the language in these evaluation statutes. These problems may be sufficient to persuade a judge to abandon academic abstention and interrupt the termination of problem teachers.

Again, the general rule is that a court will abstain from interfering with decisions of school officials and school boards unless the decision represents an abuse of discretion, is irrational, or violates constitutional or statutory rights. This rule, the academic abstention doctrine, provides the court with justification for not involving itself in adverse employment actions unless it is presented with evidence that the employing school board's actions are procedurally suspect, are irrational, or are an abuse of discretion.

For example, faced with notice that the school board will soon hold a hearing about her continued employment, a problem teacher contacts an attorney. The attorney asks the court for injunctive relief and a writ of mandamus to block the board from going forward with the termination action. The teacher will likely receive equitable relief if there is evidence supporting the need to defeat academic abstention.

In teacher termination actions, the academic abstention doctrine would usually allow the court to simply rely on the judgment of the school administrator that a teacher does not meet minimum accountability standards for teachers in the school district. The administrator's judgment is reinforced by the administrator's administrative certificate, which serves as evidence of legal competency to make the judgment. Traditionally, in the absence of any other legislative pronouncements, the administrator's judgment about the teacher's competency is unassailable. But when the legislature speaks to any aspect of teacher termination or teacher evaluation, even in making a

good-faith effort to assist school districts in ridding themselves of problem teachers, the impact is likely to have the opposite effect. The emerging duty to remediate problem teachers is an example of this opposite effect. This opposite effect thwarts administrative judgment and is an opportunity to undermine the general rule of academic abstention. For example, in *Baranek v. Joint Independent School District No. 287*, the school district attempted to terminate a teacher because of a history of berating students.[92] Although the teacher's current conduct of berating students was documented and testimony could be brought forward to show the teacher's history of such conduct, the absence of a prior written record about the teacher berating students made the conduct remediable, and the school district could not terminate the teacher. Or consider *Board of Education v. Johnson*, where the school principal attempted to terminate a teacher whose physical use of discipline caused a student to suffer a broken rib and contusions.[93] Because the student's injuries caused the student to miss only one day of school, the Illinois appeals court determined that the cause of termination was remediable. The teacher remained employed.

The emerging right to remediation for problem teachers, which is also the emerging duty of school administrators to remediate problem teachers, is an example of the identification by courts of a statutory right that interrupts the academic abstention doctrine. What other opportunities to interrupt the academic abstention doctrine exist in current statutory law? Consider the following examples.

Nevada passed a statute in 1995 that requires evaluation of teachers and other school employees. The language of the statute is:

> 1. It is the intent of the legislature that a uniform system be developed for objective evaluation of teachers and other licensed personnel in each school district.
>
> 2. Each board, following consultation with and involvement of elected representatives of the teachers or their designees, shall develop a policy for objective evaluations in narrative form. The policy must set forth a means according to which an employee's overall performance may be determined to be satisfactory or unsatisfactory. The policy may include an evalua-

92. 395 N.W.2d 123 (Minn. App. 1986).

93. 570 N.E.2d 382 (Ill. App. 1991).

> tion by the teacher, pupils, administrators or other teachers or any combination thereof. In a similar manner, counselors, librarians and other licensed personnel must be evaluated on forms developed specifically for their respective specialties. A copy of the policy adopted by the board must be filed with the department. The primary purpose of an evaluation is to provide a format for constructive assistance. *Evaluations, while not the sole criterion, must be used in the dismissal process.*[94]

Of particular interest is the last sentence: "Evaluations, while not the sole criterion, must be used in the dismissal process." The Nevada statute does not specify whether the requirement to use evaluations as part of the dismissal process continues or is suspended for causes of dismissal unrelated to the teacher's performance as a teacher. Nevada lists sixteen causes of dismissal in its tenure statute, including: inefficiency, immorality, unprofessional conduct, insubordination, neglect of duty, physical or mental incapacity, justifiable decrease in the number of positions, conviction of a felony or a crime involving moral turpitude, inadequate performance, evident unfitness for service, failure to comply with reasonable requirements, failure to show normal improvement and evidence of professional training and growth, advocating overthrow of the government, any cause constituting grounds for revocation of a teacher's license, willful neglect, or dishonesty.[95] Suppose that a teacher, accused of wrongdoing, allegedly has stolen $20 from a student or has had sex with a student. Must a current evaluation be accomplished and placed on file before proceeding against this wrongdoer? If it must, then a statutory right has been added to the procedures for terminating problem teachers, and another opportunity is created to undercut the academic abstention doctrine.

Courts may also bypass academic judgment and abandon the academic abstention doctrine when the court confronts irrational policy. Consider therefore the criteria for judging a teacher's effectiveness, offered by the legislatures of several states. Washington requires that criteria for evaluation be developed in the following categories: "the handling of student discipline and attendance problems; and interest in teaching

94. Nev. Rev. Stat. § 391.3125 (emphasis added).

95. Nev. Rev. Stat. § 391.312 (2000).

pupils and knowledge of subject matter."[96] Florida's language demands that teachers show the "ability to establish and maintain a positive collaborative relationship with students' families to increase student achievement."[97] Hawaii expects both efficiency and ability.[98] Kansas asks that "consideration shall be given to the following employee attributes: [e]fficiency, personal qualities, professional deportment, ability, results, and performance . . ."[99] Pennsylvania specifies that the "employe[e] shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction . . ."[100]

Recall that a tenet of teacher evaluation is that evaluation criteria must be valid, observable, job-related behaviors linked to teacher performance.[101] Is the handling of attendance problems job-related for Washington teachers, or is it an administrative responsibility, as it is in most states? Is maintaining positive collaborative relationships with students' families a valid, job-related behavior linked to performance in Florida? What is "efficiency," at least in Hawaii, and how does it relate to job performance? How exactly would a Kansas teacher demonstrate "professional deportment?" And in Pennsylvania, how does personality really fit in to this daily problem of growing schoolchildren? Is a different personality necessary for teaching kindergarten as opposed to high school physics? Which theoretical school of psychology will we follow?

IV. FINAL COMMENTS

This article has demonstrated how prescriptive school reform legislation has made it more difficult to terminate problem schoolteachers by the addition of a duty to remediate prior to beginning termination procedures. This article has also examined evaluation statutes to show the internal inconsistency,

96. Wash. Rev. Code §28A.405.100(1).

97. Fla. Stat. § 231.29(2)(f)(6) (Supp. 2001).

98. Haw. Rev. Stat. § 302A-638 (Supp. 2000).

99. Kan. Stat. Ann. § 72-9004(a) (Supp.2000).

100. 24 Pa. Consol. Stat. § 11-1123.

101. *See* Joseph Beckham, *Ten Judicial Commandments for Legally Sound Teacher Evaluation*, 117 Ed. Law Rep. 435 (June 12, 1997); *See also*, Donovan Peterson, *Legal and Ethical Issues of Teacher Evaluation: A Research Based Approach*, 7 Educ. Research Q. 6-16 (Winter 1983).

ambiguities, and irrationalities within them. Internal inconsistency, ambiguities, and irrationalities are invitations for the courts to abandon their traditional practice of academic abstention. Courts would rather avoid dealing with academic problems if they can. Historically and traditionally, courts would abstain from interfering with academic issues.

Statutory prescriptions requiring the evaluation of teachers represent perhaps conflicting policy goals. One obvious goal is to make certain that school administrators exercise their judgment and discretion by performing teacher evaluations. An opposing, not so obvious, goal is to make certain that teacher evaluations are done in particular ways, thus taking discretion away from school administrators in their exercise of judgment about a teacher's teaching ability. To practice academic abstention, a court must see evidence of academic judgment. As one court[102] put it, an academic ipse dixit just doesn't suffice. It may well be that, as state legislatures continue to involve themselves in describing what is to be evaluated and how it is to be evaluated, they are removing administrative judgment from the process. And this in turn undercuts the academic abstention doctrine, invites the court's involvement in the termination process, and subsequently makes it more difficult to improve schools by removing poor teachers. How ironic it is that legislatures, by introducing more accountability in the teaching profession by way of mandatory evaluation, may be in fact making it more difficult to terminate problem teachers.

102. *Wynne*, 932 F.2d 19; Ipse dixit is defined literally as "he himself said it" – a bare assertion resting on the authority of the individual. BLACK'S LAW DICTIONARY 828 (6th ed. 1990); Also expressed as "because I say so" or "because I'm the mommy."