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IMPROVING NEW YORK STATE PUBLIC SCHOOLS: WILL PROPOSALS TO LICENSE TEACHERS ELIMINATE INCOMPETENCE?

INTRODUCTION

A sense of dissatisfaction with public education has brought widespread demand for increased competency and accountability of teachers and school boards.¹ These demands, combined with declining enrollments,² budget defeats, and inflation force school boards to reevaluate their programs and services, reduce spending, and lay off personnel.³ During this period of change it is important that school boards have administrative flexibility to deal with these problems. Teachers, however, are the ones who bear the ultimate responsibility for solving these problems,⁴ implementing change, and "do[ing] better for less."⁵ Therefore, the problems of our public schools will not be resolved as long as outdated education laws limit the discretion of school boards and protect the in-

1. For a discussion of the public's changing attitude toward its schools, see *Give Us Better Schools*, U.S. NEWS & WORLD REP., Sept. 10, 1979 at 31:

Shocked by the deterioration of U.S. schools millions of Americans are demanding rapid improvement in every aspect of education as a new term opens.

The taxpaying public, its nerves rubbed raw by the steep decline in educational standards during the last decade is suddenly belligerent—no longer willing to support lax school performance.

The message is clear. Americans want the 46 million students enrolling this fall to get better value in return for the record 80 billion dollars in public school funds budgeted for 1979-80.

Parents are demanding a wide range of changes from tests of teacher competency to better textbooks.

Id. at 31. See generally Gallup, *The 11th Annual Gallup Poll of the Public's Attitude Toward the Public Schools*, 61 PHI DELTA KAPPAN 33 (1979); Plumleigh, *Schools for the 80's: 27.5 Miles/Gallon*, 61 PHI DELTA KAPPAN 24 (1979); TEACHER EDUCATION CONFERENCE BOARD, *TEACHING AS A PROFESSION* 3 (1980).

2. The education commissioner's regulations apportion state aid to school districts partly on the basis of enrollment and attendance. 8 NY CRR 175 (1979).

3. See, e.g., Divoky, *Burden of the 70's: The Management of Decline*, 61 PHI DELTA KAPPAN 87 (1979). Between 1971 and 1976, average school enrollment dropped 2-3% while operating costs increased by an average 56%. Because many costs are stable, it is estimated to take approximately ten years before declining enrollments result in any savings. *Id.*

4. See Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1018-20 (1969); see also Divoky, *supra* note 3, at 88-90.

5. Plumleigh, *supra* note 1, at 24.

competent or unneeded teacher. The goal is to design a system to attract, develop, and retain competent teachers⁶ that allows school boards the administrative flexibility⁷ necessary to meet current problems. Recognizing this, the New York State Board of Regents has proposed substantial reform of the statutory and regulatory law affecting teachers, including a legislative proposal to make teaching a licensed profession.⁸

This Comment will examine the proposed reforms in contrast to the complexities and failures of the existing statutory system,⁹ as shown through recent case law. Examination of this case law will demonstrate how the New York Court of Appeals is reinterpreting these statutes to allow school boards increased administrative flexibility. This judicial reinterpretation is symptomatic not only of an unwieldy system, but also of changes in the values and assumptions underlying tenure and education.¹⁰ The proposed reforms will then be examined to determine whether they resolve current problems. Suggestions to improve the proposals will be offered. To effectively contrast the existing and reform provisions, this Comment will consider separately entrance to the profession, maintenance of professional standards, dismissal for cause, and

6. Attracting and retaining competent teachers was the original goal of tenure legislation. See, e.g., Housman, *Tenure Once More*, 68 EDUC. REV. 118 (1924); Note, *Dismissal or Removal of Public School Teachers Under Teachers' Tenure Laws*, 21 NOTRE DAME LAW. 25 (1945).

7. See Divoky, *supra* note 3 at 87, Plumleigh, *supra* note 1, at 25 (describing the need to adjust to "declining enrollments, taxpayer revolts, negative opinion polls and problems with integration and inflation: as a stressful opportunity"); see generally Shane, *An Educational Forecast for the 1980's*, 45 EDUC. DIG. 2, at 4-5 (1979); Wollett, *supra* note 4.

8. STATE EDUCATION DEPARTMENT, UNIVERSITY OF THE STATE OF NEW YORK, TEACHING AS A PROFESSION IMPLEMENTATION PLAN (July 25, 1980) (unpublished proposal) [hereinafter cited as IMPLEMENTATION PLAN]; STATE EDUCATION DEPARTMENT, UNIVERSITY OF THE STATE OF NEW YORK, IMPLEMENTATION PLAN FOR THE REGENTS TENTATIVE PROPOSAL ON TEACHING AS A PROFESSION (May 17, 1980) (unpublished proposal) [hereinafter cited as IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL]; STATE EDUCATION DEPARTMENT, UNIVERSITY OF THE STATE OF NEW YORK, TEACHING AS A PROFESSION AND TEACHER COMPETENCE (March, 1980) (unpublished proposal) [hereinafter cited as COMMISSIONER'S PROPOSALS].

9. See N.Y. EDUC. LAW §§ 2509, 2510, 2573, 2585, 3001, 3004, 3008, 3012, 3019-a, 3020, 3020-a (McKinney 1970 & Supp. 1979); 8(A) NY CRR 80-83. New York's education law is divided according to the size and organization of school districts. However, for the purposes of this Comment the applicable provisions are substantially the same for each school district type. A special thanks to staff without whose help and support the Comment would never have been finished.

10. See *Amos v. Board of Educ.*, 43 N.Y.2d 706, 372 N.E.2d 41, 401 N.Y.S.2d 207 (1977); see generally Wollett, *supra* note 4.

dismissal for administrative reasons.

Analysis of these areas demonstrates that the present system regulating training, hiring, and continued employment of New York State public school teachers is inappropriate for contemporary educational problems. Its structure fails to effectively attract, develop, or retain competent teachers, and restricts school boards in dealing with incompetent teachers and increased educational demands. While the proposed structure helps assure the competence of newly admitted professionals, it does not give local school boards significantly greater ability to eliminate incompetent tenured teachers or to restructure their systems to meet new fiscal and educational goals.¹¹

I. CONTROLLING ENTRY LEVEL COMPETENCE

The initial point at which state policy controls and encourages teacher competence is regulation of who is allowed to teach and the training they must complete.¹² All educational activity in New York State, including the training of public school teachers¹³ and the regulation of schools, is supervised by the Department of Education. Department policies are determined by the Board of Regents¹⁴ and implemented under the direction of the Commissioner of Education.¹⁵

The present policy regulating who is qualified to teach is incorporated in the Commissioner's Regulations on Teacher Certificates.¹⁶ The certification process begins with graduation from an

11. See text accompanying notes 100, 109, 134 *infra*.

12. The Department of Education has been working with colleges and universities to develop competency-based teacher education programs. COMMISSIONER'S PROPOSALS, *supra* note 8, at 5. In addition, the Commissioner recommends that a state-wide conference be convened to consider means to recruit more able candidates and improve the preparation they receive. IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, *supra* note 8, at BR 4.5. See generally Riggs & Lewis, *The Influence of Mandated Minimum Competency Testing on Teacher Education Curricula*, 60 PHI DELTA KAPPAN 751 (1979).

13. Throughout this Comment, references to "teachers" includes those involved in the administration of the public schools and pupil personnel services, i.e. curriculum development. The proposed changes are applicable only to the public school system and its teachers. IMPLEMENTATION PLAN, *supra* note 8, at 2.

14. The Board of Regents is a fifteen member panel elected by the Legislature to oversee educational policy. They are not necessarily educators. See N.Y. EDUC. LAW § 202 (McKinney Supp. 1979).

15. N.Y. EDUC. LAW § 301 (McKinney Supp. 1979).

16. 8(A) NY CRR 80.1-.36.

approved teacher education program. This makes a potential teacher eligible for provisional certification, issued when the teacher secures employment.¹⁷ After obtaining a provisional certificate, the new teacher has five years to become permanently certified by satisfying the requirements of a Masters Degree in Education and two years teaching experience.¹⁸

Teachers must be eligible for certification before a school board may hire them.¹⁹ They are first appointed as probationary teachers, and for three years the school board exercises absolute discretion over their continued employment.²⁰ Six months before the probationary period ends, the local Superintendent of Schools evaluates the teacher's competency and recommends to the school board whether tenure should be granted;²¹ the school board makes the final tenure decision. If the superintendent or the school board fails to act at this time, tenure is automatically granted.²² A grant of tenure insures teachers that they will hold their positions during good behavior, and cannot be removed without good cause and procedural due process.²³

Under the proposed system the concept of tenure is retained but the requirements to become eligible to teach and obtain tenure are more stringent.²⁴ Upon completion of required undergraduate work, a prospective teacher takes a licensing examination.²⁵ Having passed the examination, he is granted a certificate of qualification, which allows him to seek an internship appointment with a local school district.²⁶ After securing an internship he must qualify for a permanent license. The proposed requirements for a permanent li-

17. 8(A) NY CRR 80.2 (b).

18. 8(A) NY CRR 30.15(b)-16(b). The term certification is used throughout much of the text without reference to either provisional or permanent certification. Where there is no reference to the type of certification, it is not an issue.

19. N.Y. EDUC. LAW § 3001 (McKinney Supp. 1979).

20. N.Y. EDUC. LAW § 2509 (McKinney Supp. 1979); *In re Ross*, 1 EDUC. DEP'T REP. 47 (1958).

21. N.Y. EDUC. LAW § 2509 (McKinney Supp. 1979).

22. *Board of Educ. of Oneida v. Nyquist*, 45 N.Y.2d 975, 385 N.E.2d 628, 412 N.Y.S.2d 891 (1978) *rev'd* 59 A.D.2d 76, 397 N.Y.S.2d 201 (3d Dep't 1977); *Matthews v. Nyquist*, 67 A.D.2d 790, 412 N.Y.S.2d 501 (3d Dep't 1979).

23. *See, e.g., Boyd v. Collins*, 11 N.Y.2d 228, 182 N.E.2d 610, 228 N.Y.S.2d 228 (1962).

24. *See IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, supra note 8, at BR 4.6; COMMISSIONER'S PROPOSALS, supra note 8, at 55.*

25. *IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, supra note 8, at BR 4.5.*

26. *COMMISSIONER'S PROPOSALS, supra note 8, at 32.*

cense are successful completion of a one year internship and completion of a graduate program coordinated with that internship.²⁷ The internship involves close supervision of the first year teacher. This supervision is designed to provide the intern with advice on his classroom techniques, preparations, and materials.²⁸ The final decision on granting a permanent license is made at the state level when the teacher has completed all requirements.²⁹

Tenure decisions under the proposals are made separately from licensing decisions.³⁰ During a teacher's first three years the school board evaluates his abilities and makes its determination regarding tenure.³¹ Unless the regulations restrict local school boards from granting tenure until all the requirements for permanent licensing are met, problems of dismissing a tenured teacher who fails to become fully qualified will develop.³²

Problems resulting from separate evaluations of competency at the state and local level reflect the need for establishing state-wide standards. A licensing examination is an effective means to set state-wide minimum standards of teacher competency.³³ There are, however, substantial problems in developing an examination to accurately test the variety of skills and traits necessary for a good teacher to possess. Written tests can judge subject matter, knowledge, and familiarity with basic teaching techniques, but they cannot test whether a person can competently evaluate a situation or adequately apply the appropriate skills. The Commissioner recommends either using the National Teachers Examination (NTE) or developing a state test.³⁴ Florida, Georgia, and California have found a NTE to be unsatisfactory and have begun

27. *Id.* at 33.

28. *Id.* at 34. It is suggested that this supervision be handled by a mentor-teacher. The mentor-teacher is relieved from part of his usual classroom teaching responsibilities and the state reimburses the local district for the mentor's time spent in internship supervision. *Id.*

29. *Id.* at 38. The licenses, like certification, would be granted in specialized areas such as Nursery-Grade 6 which qualifies a teacher for the elementary grades, and secondary academic subjects, which indicate qualification to teach a particular subject, such as English, to grades 9-12. *Id.* at 26.

30. See IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, *supra* note 8, at BR 4.6; COMMISSIONER'S PROPOSALS, *supra* note 8, at 55.

31. See *id.*

32. See text accompanying notes 94-97 *infra*.

33. See TEACHER EDUCATION CONFERENCE BOARD, *supra* note 1, at 6 COMMISSIONER'S PROPOSALS, *supra* note 8, at 33.

34. See COMMISSIONER'S PROPOSALS, *supra* note 8, at 46.

developing their own examinations.³⁵ The cost of developing a New York State examination would add \$200,000 to the program's first year costs.³⁶ The most significant cost factor, however, is not licensing, but the administration of the internship program, which would require an additional 25.2 million dollars from an already strained state budget.³⁷ The program could be implemented without state funding, but this would only shift the burden to already financially strained local school districts.

Cost and state aid, of course, have a significant effect on the state's control. The licensing and internship programs must be carefully developed and administered to guide local school boards without imposing ineffective procedures or unnecessary bureaucratic red tape. Although the plan attempts to do this, regulations must be carefully drafted so administration is oriented towards helping local school boards meet their managerial responsibilities, rather than towards state control. The requirements of a licensing examination and internship, if properly developed, administered, and funded,³⁸ will establish statewide minimum competency standards without significantly reducing local management or control. The extension of state involvement from merely supervising a potential teacher's academic work to requiring proof of achievement through an examination and supervision during the first year will insure more competent teachers entering the profession.

II. MAINTAINING TEACHER COMPETENCE

In addition to entry requirements designed to insure teacher competence, the proposals seek to facilitate teacher competence through state mandated review of all teachers³⁹ and state funded

35. See STATE EDUCATION DEPARTMENT, UNIVERSITY OF THE STATE OF NEW YORK, TEACHING AS A PROFESSION (July, 1979) (unpublished preliminary proposal) Att. 3.1 [hereinafter cited as TEACHING AS A PROFESSION].

36. COMMISSIONER'S PROPOSALS, *supra* note 8, at 69.

37. *Id.* at 70.

38. It is unrealistic to expect the program to reach its goals of insuring more competent teachers unless the entire project, including funding, is implemented. The establishment of more stringent entrance requirements alone will not deal with the entire scope of the problem. See COMMISSIONER'S PROPOSALS, *supra* note 8, at 7. "The Recommendations in this report must be seen in their totality. It is not suggested that the sole act of recognizing teaching as a profession or of establishing different arrangements for licensure will in and of itself strengthen practice." *Id.*

39. See IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, *supra* note 8, at BR 4.7; See also COMMISSIONER'S PROPOSALS, *supra* note 8, at 51.

inservice training.⁴⁰ Mandated local review will allow each district to develop a plan to review all teachers that includes observation, evaluation, and follow-up through inservice training or prescribed dismissal procedures.⁴¹ Inservice training will give teachers the opportunity to correct problems and develop new professional skills and knowledge.⁴²

Currently, identification and correction of teaching problems is limited. Most school districts continue to observe classroom work and review course plans, teaching materials, and pupil achievement, but little effort is made to correct problems identified during such review with inservice training. Often the review itself is informal, even when its substance and procedure are negotiated as part of the contract between the school board and the teachers' bargaining unit.⁴³ This review is often highly subjective and the criteria applied are more representative of local needs than broad professional considerations.⁴⁴ This is because questions of professional growth and on-going review were not addressed when the system of certification and tenure was originally developed. Certification and tenure were designed to promote the growth and development of the educational system⁴⁵ by setting minimum standards of teacher qualification,⁴⁶ removing the hiring process from the political spoils system,⁴⁷ and increasing teacher job security.⁴⁸ The ef-

40. Inservice training involves programs run by school districts for their teachers in order to update their teaching skills and familiarize them with new methods and curriculum. See IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, *supra* note 8, at BR 4.8-4.9. State aid for inservice education would come through a percentage increase of each district Pupil with Special Educational Needs (PSEN) aid. *Id.* at 4.13.

41. IMPLEMENTATION PLAN FOR TENTATIVE PROPOSAL, *supra* note 8, at BR 4.13.

42. The nature of teaching often isolates professionals and limits the interaction that helps communicate new techniques or resolve problems. See Kane, *The Mindless Box: The Case Against the American Classroom*, 60 PHI DELTA KAPPAN 502 (1979).

43. COMMISSIONER'S PROPOSALS, *supra* note 8, at 51.

44. See generally *id.* at 51; Jacobsen, Sperry & Jensen, *The Dismissal and Non-Employment of Teachers*, 1 J. LAW & EDUC. 435 (1972).

45. There was general agreement at the time tenure legislation was passed that its purpose was to promote the growth and development of the educational system rather than to create special privilege for teachers. See, e.g., 21 NOTRE DAME LAW. *supra* note 6; Hodgson, *Teachers: The Interpretation of Tenure Statutes*, *The Tenth Yearbook of School Law* 31 (1942). See generally *Phelps v. Board of Educ.*, 300 U.S. 319 (1937).

46. Because the hiring process was political, little consideration was given to the potential teacher's training or ability and there was a continual turnover among teachers. Comment, 37 MICH. L. REV. 430 (1939) (citing surveys conducted by the National Education Association in 1924).

47. Prior to the enactment of tenure legislation, public school teachers were often dis-

fect was to reduce the discretion of school boards and stabilize the work force.⁴⁹

An employment system designed to promote the quality of education by stabilizing the work force does not necessarily develop professional motivation, or managerial flexibility to cope with new demands on the educational system.⁵⁰ Traditionally, new concepts and methods of teaching are introduced by new teachers.⁵¹ Development of new teaching techniques is restricted by a stable work force. Such development becomes more necessary as the public increasingly expects schools to handle a wide range of social problems, such as integration, while teaching "a broad range of humanistic [and] skill-oriented goals."⁵²

Increasing the responsiveness of education to such goals not only requires greater expertise from teachers but also administrative development of new programs.⁵³ Addressing these goals, which reflect the country's social values, during the present period of changing social values is particularly difficult, and requires management that can effectively adopt its programs and personnel.⁵⁴ The proposed review and inservice training can allow for this adaptation. Under the proposed program, each teacher is required to assess his individual and his students' needs and develop objectives to cope with these needs. These objectives are incorporated into an overall district wide plan, or an individual plan is developed to help that teacher meet his needs.⁵⁵ These proposed inservice programs, while funded through the state, are developed at the local school district level to meet the particular needs of teach-

missed so that a teaching position could be used as political patronage. Thus, unqualified or minimally qualified people could be hired and those who were qualified to teach were driven to seek more secure employment. *See id.* at 430; Housman, *supra* note 6. *See generally* 3 MD. L. REV. 97 (1934).

48. *See, e.g.*, 21 NOTRE DAME LAW., *supra* note 6.

49. *Id.*

50. *See* Wollett, *supra* note 4, at 1019-21.

51. *See* Divoky, *supra* note 3, at 88.

52. Evans & Harmon, *Opinions of Wisconsin Citizens About Education Goals*, 61 PHI DELTA KAPPAN 131 (1979). *See, e.g.*, Graham, *Enhancing Public Discussion of Education*, 45 EDUC. DIG. 53 (1979); Berry, *The Multicultural Principle*, 60 PHI DELTA KAPPAN 745 (1979); *Give Us Better Schools*, *supra* note 1, at 32.

53. *See* Graham, *supra* note 52, at 54.

54. *See id.*; Dyer, *A New Partnership of School and Community*, 44 EDUC. DIG. 51 (1979); Berry, *supra* note 52.

55. *See* IMPLEMENTATION PLAN FOR TENTATIVE PROPOSALS, *supra* note 8, at BR 4.13.

ers, schools, and the community.⁵⁶ These needs must be revealed through an effective review system. Under the proposals, the Department of Education helps the district develop a plan for reviewing its teachers. It also assists them in formulating reliable evaluation criteria and by training observers in the application and weighing of criteria.⁵⁷

State involvement in both the review system and inservice training is desirable because an effective review and inservice program oriented to local needs requires expertise to develop.⁵⁸ Florida has a unique program of state run teacher training centers and peer review that allows teachers and administrators to receive additional training. Participants share this training with their colleagues in an effort to develop new programs and skills to meet current problems and demands.⁵⁹ State supervision should be directed to developing such an on-going review program by providing the expertise necessary to determine local needs and to correlate these needs with new developments in education. If state guidelines become too heavily oriented toward designating acceptable areas for inservice programs or requiring evaluative paperwork, the advantages of local control will be lost.

Provisions for inservice education and review are critical for upgrading teacher competence because the work force will remain stable due to declining enrollments and increased union negotiation for job security and just cause-due process dismissal clauses.⁶⁰ As with the funding of the internship program, however, it is essential that state support does not become state control. Review and inservice programs must be developed at the local level and implemented with the cooperation of local teacher organizations to insure their acceptance and utility.

56. *See id.*; see also COMMISSIONER'S PROPOSALS, *supra* note 8, at 49.

57. *See generally id.*

58. *See Luehe, Let's Individualize Staff Development*, 8 THRUST 17 (1979).

59. TEACHING AS A PROFESSION, *supra* note 34, at Att. V.4.

60. In Florida, tenure laws are being "sunsetting": that is, they will cease to exist unless action is taken by the state legislature to extend or replace them. The teachers' unions in Florida are already negotiating just cause-due process clauses in anticipation of tenure legislation expiring. *See Freiwald, Tenure: Another Sacred Cow About to Bite the Dust?*, 61 PHI DELTA KAPPAN 50 (1979).

III. DISMISSALS FOR CAUSE

Despite the requirements of certification and tenure, review of a teacher's performance may reveal incompetence or misconduct indicating that dismissal is appropriate. There are currently two formal procedural routes available to take action against a tenured teacher's status. First, at the state level, the Teacher Education Certification and Practice Board (TECPB) can review a teacher's character and make determinations regarding certification revocation.⁶¹ The TECPB reviews teacher conduct when notified by local school officials, or other concerned citizens, that a teacher was convicted of a crime or involved in a matter of questionable moral conduct.⁶² Investigations are conducted to determine whether substantial cause for review exists,⁶³ but privacy restrictions on police records and informal agreements with school officials resulting in resignation rather than charges being brought⁶⁴ hamper the investigatory process. If the investigation does reveal adequate grounds, the TECPB determines whether to bring the charges and notifies the teacher of the charges and of his right to a hearing.⁶⁵ The teacher has thirty days to request a hearing; if he does not do so, his certification is revoked. Requested hearings are before a three member panel or a hearing officer. The teacher has a right to counsel and an opportunity to present evidence to counter the charges.⁶⁶ If the TECPB panel revokes the teacher's certification, he may appeal to the Commissioner of Education, and then the courts.⁶⁷ Charges may also be brought to the TECPB after a local dismissal proceeding based on charges of immoral conduct. However, these charges are only heard by the TECPB if there is third party corroboration. As a result of the complexities of the review procedure and the TECPB's standards, revocation of a teaching certificate is likely to occur only if there is an actual criminal conviction or overwhelming evidence of unsuitability.⁶⁸

61. The TECPB was established by the Board of Regents through an exercise of its legislative powers. See N.Y. EDUC. LAW § 207 (McKinney Supp. 1979); 8 NY CRR 3.14.

62. 8 NY CRR 83.1.

63. 8 NY CRR 83.2.

64. See TEACHING AS A PROFESSION, *supra* note 35, at VI.3.

65. 8 NY CRR 83.3.

66. 8 NY CRR 83.4.

67. 8 NY CRR 83.5.

68. See COMMISSIONER'S PROPOSALS, *supra* note 8, at 44; TEACHING AS A PROFESSION, *supra* note 35 at VI.3.

The second formal procedure for taking action against a tenured teacher's status is for local authorities to bring charges to dismiss a tenured teacher for just cause. Because the standards applied in bringing these charges are essentially local, the conduct may not be judged against the same high proof standards as the TECPB would use.⁶⁹ The sanctions applied, however, are also local. Teachers charged and found guilty under this procedure lose their position in that district, but retain their certification.⁷⁰ Therefore, a teacher found incompetent to teach in one district may be hired by another. Charges against the teacher are brought by supervisors or concerned citizens to the school board, which determines whether there is probable cause for discipline or dismissal.⁷¹ The teacher is advised of the details of the charges and of his right to a hearing. If he desires a hearing he must notify the board within ten days or waive this right.⁷² If a hearing is requested, the Commissioner of Education schedules one within twenty working days.⁷³ Hearings are held before a three person panel;⁷⁴ technical legal rules are not applied.⁷⁵ Each party has the right to representation by counsel, and to testify, present evidence, and cross-examine witnesses.⁷⁶ Prior to the hearing both parties may request that witnesses be subpoenaed, but there is no pre-hearing discovery procedure.⁷⁷ The panel makes its findings and recommendations based strictly on the evidence and testimony presented at the hearing.⁷⁸ Decisions and penalties, if any, are sent to the Commissioner of Education who forwards them to the school board and the teacher.⁷⁹ The school board has thirty days to implement the panel's recommendations or to appeal to the Commissioner of Ed-

69. TEACHING AS A PROFESSION, *supra* note 35, at VI.3.

70. *Id.*

71. N.Y. EDUC. LAW § 3020-a(1) (McKinney Supp. 1979).

72. N.Y. EDUC. LAW § 3020-a(2) (McKinney Supp. 1979).

73. N.Y. EDUC. LAW § 3020-a(3)(a) (McKinney Supp. 1979).

74. N.Y. EDUC. LAW § 3020-a(3)(b) (McKinney Supp. 1979). The Commissioner of Education maintains a list of potential hearing panel members. The school board and teacher each choose one member of the panel who then choose a third member.

75. N.Y. EDUC. LAW § 3020-a(3)(c) (McKinney Supp. 1979).

76. N.Y. EDUC. LAW § 3020-a(3)(b) (McKinney Supp. 1979).

77. *Id.*

78. *Id.* A transcript is kept of the hearing proceedings and is available to either party. See *Bott v. Board of Educ.*, 51 A.D.2d 81, 379 N.Y.S.2d 265 (3d Dep't 1976), *modified on other grounds*, 41 N.Y.2d 265, 360 N.E.2d 952, 392 N.Y.S.2d 274 (1977).

79. N.Y. EDUC. LAW § 3020-a(4) (McKinney Supp. 1979).

ucation or the courts; the teacher has the same appeal opportunities.⁸⁰

Dismissal procedures are currently so complex that school boards often overlook incompetence in preference to becoming involved in this procedure.⁸¹ From the school board's perspective, the problems of dismissing a tenured teacher are further complicated by case law that fails to establish clear standards and which makes it difficult to predict what charges are substantial enough or what procedures are adequate.⁸² The New York Court of Appeals has recently begun, through its review of dismissal cases, to interpret the Education Law⁸³ to allow school boards more flexibility in establishing appropriate local standards and procedures to deal with incompetent teachers, while providing job security and fair procedure for the competent teacher.

The charges a school district can bring against a tenured teacher are so broadly written⁸⁴ that it is difficult for a school board to know what conduct is proscribed and what proof will justify dismissal.⁸⁵ Therefore, most cases brought concern teachers involved in numerous and blatant incidents of misconduct so that multiple charges of insubordination, incompetence, and conduct unbecoming a teacher may be brought. Review of a dismissal in such cases centers on adequacy of evidentiary support and whether the penalty of dismissal is so disproportionate to the offense that it shocks the court's sense of fairness.⁸⁶ The courts, particularly the lower courts where a school board's actions are likely to be reviewed, have failed to establish clear standards to help school

80. N.Y. EDUC. LAW § 3020-a(5) (McKinney Supp. 1979).

81. See, e.g., Jacobsen, *supra* note 44; see also Finlayson, *Incompetence and Teacher Dismissal*, 61 PHI DELTA KAPPAN 69 (1979), which examines dismissal statistics from Pennsylvania and concludes that very few cases are brought, at least partly because "in the political and legal arena where much of a teacher dismissal case is played out, educators generally find themselves ill-prepared, uncomfortable, and sometimes even intimidated." *Id.* at 69.

82. See Munnely, *Dismissal for Professional Incompetence*, 45 EDUC. DIG. 10. See also Nolte, *How to Tell Which Teachers to Keep*, 28 AM. SCH. BD. J. 30 (1976).

83. See N.Y. EDUC. LAW § 3020-a (McKinney Supp. 1979).

84. Teachers may be removed for "neglect of duty, incapacity to teach, immoral conduct, or other reasons which, when appealed to the commissioner of education shall be held by him sufficient cause for such dismissal." N.Y. EDUC. LAW § 3020 (McKinney Supp. 1979). See generally Nolte, *supra* note 82; Jacobsen, *supra* note 44.

85. See *Harris v. Mechanicville Cent. School Dist.*, 45 N.Y.2d 967, 389 N.E.2d 141, 415 N.Y.S.2d 828 (1979).

86. *Id.*

boards determine whether the penalty of dismissal is disproportionate to the offense. The problem is caused both by broad statutory language and by the courts' failure to establish clear standards for teacher conduct or for school board actions. While this may represent a desire to allow local determination of standards, the lack of guidance makes a school board's range of discretion in dismissing incompetent teachers unclear. For example, in *Clayton v. Board of Education*⁸⁷ the Appellate Division of the Supreme Court held that dismissal was not justified where a teacher was charged with insubordination and conduct unbecoming a teacher because of his use of excessive force against pupils, failure to prepare lesson plans, and publication in local papers of letters concerning physical abuse of teachers by students. The court reached its finding after eliminating the charge of excessive use of force. It reasoned that this could not constitute a separate charge for dismissal since it was not a reason enumerated in the Education Law.⁸⁸ The court noted that the excessive use of force charge could have been used as the basis of a charge of insubordination if the teacher had been given specific instructions not to use corporal punishment. Hence, a critically important charge was dismissed not for substantive reasons, but because the court did not find the charge within the statutory language. Whether the school board was allowed to dismiss the teacher turned not on the validity of the charge but on the school board's definition of conduct unbecoming a teacher. Contrasted with case law indicating dismissal is justified for refusing a physical examination,⁸⁹ taking a three day absence to attend a conference and reporting it as sick time,⁹⁰ failing to maintain discipline,⁹¹ and failing to comply with curriculum standards,⁹² there is not a clear definition of what constitutes conduct unbecoming a teacher or insubordination.

The subjective nature of these charges makes the applicable standard uncertain. Competence, at least to the extent that it is statutorily defined,⁹³ should be less subjective and should provide

87. 49 A.D.2d 343, 375 N.Y.S.2d 169 (3d Dep't 1975).

88. *See id.*

89. *Gargiul v. Board of Educ.*, 69 A.D.2d 986, 416 N.Y.S.2d 119 (4th Dep't 1979).

90. *Pell v. Board of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974).

91. *Linfield v. Nyquist*, 65 A.D.2d 846, 410 N.Y.S.2d 172 (3d Dep't 1978).

92. *Root v. Board of Educ.*, 59 A.D.2d 328, 399 N.Y.S.2d 785 (4th Dep't 1977).

93. *See N.Y. EDUC. LAW* § 3001 (McKinney Supp. 1979); 8 NY CRR 80.

school boards with a clearer standard. While the substantive standard regarding competence is clearer, the uncertainty of what is adequate procedural safeguards again makes school boards reluctant to act.

Under the present system a teacher can be entitled to the protections of tenure before he has met the requirements for permanent certification. Provisionally certified teachers have five years to meet the requirements for permanent certification.⁹⁴ However, if their work is satisfactory, they are granted tenure at the end of three years.⁹⁵ Problems arise when a tenured teacher fails to obtain permanent certification. Once provisional certification has expired the teacher is no longer qualified to teach, but still enjoys the job protection of tenure.⁹⁶ In this situation, courts have held that even though a tenured teacher is no longer legally qualified to teach, he cannot be dismissed without a hearing under § 3020-a of the Education Law.⁹⁷

If the teacher was suspended during the hearing period, the school board was required to continue paying his salary even though it is also illegal for a school board to pay an unqualified teacher.⁹⁸ The requirement to continue paying a suspended teacher put an additional financial burden on school boards because of the need to hire and pay a substitute teacher. The New York Court of Appeals has recognized the fiscal responsibilities of school boards and has changed its interpretation of the protections of § 3020-a.⁹⁹ School boards may now suspend without pay those teachers charged with incompetence because they lack certification.¹⁰⁰ When a suspension is based on any other charge, however, the teacher must still be paid.¹⁰¹ This holding reemphasized the stat-

94. 8 NY CRR 80. See text accompanying notes 16-23 *supra*.

95. N.Y. EDUC. LAW § 3012 (McKinney Supp. 1979). See text accompanying notes 21-23 *supra*.

96. N.Y. EDUC. LAW § 3001 (McKinney Supp. 1979). See *Linton v. Board of Educ.*, 47 N.Y.2d 726, 390 N.E.2d 1170, 417 N.Y.S.2d 246 (1979).

97. See *Mannix v. Board of Educ.*, 21 N.Y.2d 455, 235 N.E.2d 892, 288 N.Y.S.2d 881 (1968).

98. N.Y. EDUC. LAW § 3010 (McKinney Supp. 1979) makes it a misdemeanor for a school board to authorize payment to an unqualified teacher. *But see* *Jerry v. Board of Educ.*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974).

99. See *Meliti v. Nyquist*, 41 N.Y.2d 183, 359 N.E.2d 988, 391 N.Y.S.2d 398 (1976).

100. *Id.*

101. In view of the division in the current policy, allowing payless suspensions where the teacher is not certified, but requiring school boards to continue payments for those sus-

ute prohibiting payment to an unqualified teacher and gave it priority over the Court's previous interpretation of § 3020-a as prohibiting all payless suspension. This ruling is indicative of a change in the Court's interpretation of those statutes designed to protect teachers. Previously these statutes were interpreted to allow school boards no discretion in the administration of dismissals.

This lack of administrative flexibility was demonstrated in *Boyd v. Collins*,¹⁰² where the Court of Appeals held that agreements designed to circumvent the procedures for dismissal under § 3020-a violated the policies behind tenure.¹⁰³ The Court reasoned that hearing procedures were established to support tenure and any waiver of those procedures violated the policy of affording due process protections to tenured teachers to protect them from the arbitrary discretion of school boards.¹⁰⁴ The Court of Appeals has recently begun to allow school boards increased discretion in dismissal procedures. School boards may now negotiate an agreement with a tenured teacher who might otherwise be dismissed, in which the teacher agrees to waive his rights to a hearing under § 3020-a in exchange for an opportunity to improve his teaching abilities.¹⁰⁵ The Court, in overruling *Boyd v. Collins*, specifically stated that "section 3020-a is not so sacrosanct as to be impervious to waiver under all circumstances."¹⁰⁶ The Court was careful to point out, however, that the increased flexibility it was giving both teachers and school boards in dealing with dismissals has the potential for abuse through coercion unless the parties heed the court's admonishments that require an agreement through true negotiation with full disclosure of alternative statutory procedural rights.¹⁰⁷ Use of negotiated agreements allows school boards both flexibility in han-

pending on other charges, the Court of Appeals will likely hear a case soon on paid suspension. The Court may exercise this opportunity to grant school boards further flexibility in dismissal procedures. See 4 3020-A REPORTER 1 (1979); *Hatta v. Board of Educ.*, 57 A.D.2d 1005, 394 N.Y.S.2d 467 (3d Dep't 1977).

102. 11 N.Y.2d 228, 182 N.E.2d 610, 228 N.Y.S.2d 228 (1962).

103. *Id.* "The purpose of the tenure law is to give security to competent members of the educational system For the courts to validate a 'waiver' . . . by a teacher of such rights would be violative of the spirit and public purpose of the act which protects the system" *Id.* at 233-34.

104. *Id.* at 233.

105. See *Amramovich v. Board of Educ.*, 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109 (1979).

106. 46 N.Y.2d at 455, 386 N.E.2d at 1079, 414 N.Y.S.2d at 112.

107. *Id.*

dling personnel and the ability to avoid the expense connected with the formal procedural route.¹⁰⁸

In sanctioning alternative routes for resolution of disputes the Court of Appeals reasoned that it was updating this area of the law to "[conform] with a competing public policy favoring the nonjudicial resolution of legal claims—a means of facilitating the vindication of rights without having to endure the travail and vicissitudes of litigation."¹⁰⁹ This updating of procedures by the Court of Appeals means that more informal, less costly, and less complex means of dispute resolution can be developed. This flexibility in procedure will allow school boards greater discretion to work with teachers and their unions to improve the school system through contract clauses regulating review and inservice training of tenured teachers.¹¹⁰

Besides allowing school boards more discretion in establishing procedure, the Court is also allowing them more flexibility in setting the standards of conduct appropriate for dismissal by limiting the scope of the Court's review. For example, in *Bott v. Board of Education*,¹¹¹ the Court of Appeals upheld the local school board and reversed the Appellate Division, which had reduced dismissal to a three month suspension. The Appellate Division reasoned that because excessive use of force against a student was not a specific statutory ground for dismissal such a charge could not result in dismissal.¹¹² The Court of Appeals held that the Commissioner's past rulings established excessive use of force as adequate grounds for dismissal and thus effectively incorporated the rulings into the statute.¹¹³ A similar factual situation arose in *Hodgkins v. Board of Education*,¹¹⁴ where the school board brought charges of insubordination when a teacher used excessive force despite his superior's warnings against using physical punishment. As in *Bott*, the Ap-

108. School boards incur considerable expense in the hearing procedure including legal fees, salaries for substitute teachers for personnel who are testifying or preparing evidence, and the cost of facilities for the hearing.

109. 46 N.Y.2d at 455, 386 N.E.2d at 1079, 414 N.Y.S.2d at 112.

110. *Id.*; see also *Board of Educ. v. Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S. 17 (1972).

111. 41 N.Y.2d 265, 360 N.E.2d 952, 392 N.Y.S.2d 274 (1977).

112. *Bott v. Board of Educ.*, 51 A.D.2d 81 at 84, 379 N.Y.S.2d 172 at 175 (3d Dep't 1976) modified 41 N.Y.2d 265, 360 N.E.2d 952, 392 N.Y.S.2d 274 (1977). See text accompanying note 87 *supra*.

113. 41 N.Y.2d at 268, 360 N.E.2d at 955, 292 N.Y.S.2d at 277.

114. 41 N.Y.2d 962, 363 N.E.2d 588, 394 N.Y.S.2d 882 (1977).

pellate Division held such a charge could not support dismissal;¹¹⁵ the Court of Appeals reversed, supporting the local school board.¹¹⁶

Despite the Court of Appeals decisions allowing school boards greater control over both the procedure and the substance of charges against tenured teachers, the Regents proposals recommend retention of the dismissal procedure under § 3020-a.¹¹⁷ Retention of § 3020-a means, of course, that the uncertain standards and procedural complexity inherent in that system will remain.

In addition to local discipline conducted under § 3020-a, the proposals would make teaching, as a licensed profession, subject to the standards of conduct applicable to other professions such as medicine, which the Department of Education currently regulates.¹¹⁸ The enforcement of these standards would be part of the responsibility of a State Board for Teachers.¹¹⁹ This State Board

115. *Hodgkins v. Central School Dist.*, 48 A.D.2d 302, 369 N.Y.S.2d 891 (3d Dep't 1976) modified 41 N.Y.2d 962, 363 N.E.2d 588, 394 N.Y.S.2d 882 (1977).

116. 41 N.Y.2d 962 (1977).

117. COMMISSIONER'S PROPOSALS, *supra* note 8, at 46.

118. The Department of Education is charged with regulating most professions in New York such as medicine, nursing, and architecture. N.Y. EDUC. LAW § 101 (McKinney Supp. 1979). N.Y. EDUC. LAW § 6509 (McKinney Supp. 1979). The proposed legislation defines professional misconduct as:

- a. Obtaining the license fraudulently;
- b. Practicing the profession fraudulently, beyond its authorized scope, with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion;
- c. Practicing the profession while the ability to practice is impaired by alcohol, drugs, physical disability, or mental disability;
- d. Being habitually drunk or being dependent on, or an habitual user of narcotics, barbiturates, amphetamines, hallucinogens or other drugs having similar effects;
- e. Being convicted of committing an act constituting a crime under:
 - New York State law,
 - Federal law or,
 - The law of another jurisdiction and which, if committed within this state would have constituted a crime under New York State law;
- f. Refusing to provide professional services to a person because of such person's race, creed, color, or national origin;
- g. Permitting, aiding or abetting an unlicensed person to perform activities requiring a license;
- h. Practicing the profession while the license is suspended;
- i. Committing unprofessional conduct, as defined by the Board of Regents in its rules or by the Commissioner in regulations approved by the Board of Regents.

IMPLEMENTATION PLAN, *supra* note 8, at 3.

119. IMPLEMENTATION PLAN, *supra* note 8, at 3.

replaces the TECPB, and is composed of licensed teachers, licensed administrators, and public representatives appointed by the Regents. Like the TECPB, a panel from the new State Board investigates charges of unprofessional conduct. They have the additional guidance of the more precise statutory definition of unprofessional conduct and a more flexible range of penalties, including censure and fines in addition to suspension and revocation of a teacher's license.¹²⁰ The determination of whether misconduct occurred and the appropriate sanction to be applied is made at a hearing procedurally similar to those conducted by the TECPB. The panel's findings are reviewable by the Regents Review Committee,¹²¹ whose decision can be appealed to the courts.¹²²

An active review board can be an effective tool in developing and enforcing professional standards since the most effective professional discipline is motivated from within a profession, reflecting that profession's concepts of its functions and responsibilities. The proposal for a State Board would promote the development of professional standards more effectively, however, if in addition to its function of recommending educational policies affecting teaching to the Commissioner and Regents¹²³ it was charged with developing a code of ethics for teachers. A code developed by teachers, educators, and the public would address problems unique to teaching, while protecting the public's interest. Both teachers and school boards could use this code for guidance on appropriate conduct and sanctions. An ethical code would also help assure similar standards of professionalism throughout the state.

The application of any ethical code, however, is hindered by retention of review procedures that function separately on the state and local levels. Local school boards could still discharge

120. The proposed legislation would make the following range of penalties applicable for professional misconduct:

- a. Censure and reprimand;
- b. Suspension of license;
- c. Revocation of license;
- d. Annulment of license;
- e. Limitation on issuance of any further license; and
- f. A fine not to exceed \$5000.

IMPLEMENTATION PLAN, *supra* note 8. See also N.Y. EDUC. LAW § 6511 (McKinney Supp. 1979).

121. IMPLEMENTATION PLAN, *supra* note 8, at 5.

122. COMMISSIONER'S PROPOSALS, *supra* note 8, at 46.

123. IMPLEMENTATION PLAN, *supra* note 8, at 3.

teachers under the vague standards of § 3020-a, since the statutory definitions of professional misconduct, although providing local boards with some guidance, will only be binding on State Board hearings.¹²⁴ Mandatory review by the State Board would at least insure that school boards do not, in their application of local standards, negate a teacher's ability to exercise professional judgment and discretion. Automatic review would also insure that those found incompetent would no longer be licensed and could not teach in another school district. To be effective, professional standards cannot depend solely on local implementation and interpretation.

Implementation and enforcement of any standards of professional conduct, whether developed at the state or local level, is hampered by continued use of dismissal procedures under § 3020-a. This system is procedurally too complex and outdated to be effective.¹²⁵ The Regents should adopt two simple steps to reduce costs and improve efficiency. One is to reduce the three man hearing panel to a single arbitrator. This would reduce personnel costs, eliminate negotiation over the composition of the panel and facilitate decision making. The other provision would be to institute prehearing discovery. By allowing discovery on demand, much like the current practice in the courts, cases would be better prepared and more cogently presented.

Retention of state mandated procedure under § 3020-a also restricts local boards in developing less formal routes for discipline of professional staff. The Regents should consider means to encourage alternative routes to review and correct problems of teacher incompetence. Negotiation of contracts with local teacher unions which contain review and just cause-due process provisions would assure adequate protection for both local school boards and teachers. In addition, the informality of these procedures reduces and eliminates many procedural problems. This encourages local school boards to take action when a teacher's conduct does not meet contractual standards, action they now hesitate to take because of the procedural complexity and vague standards which they must apply. Abuse of informal procedures would be checked by union representation and appeal to the State Board. Finally,

124. COMMISSIONER'S PROPOSALS, *supra* note 8, at 46.

125. See, e.g., Jacobsen, *supra* note 44; Finlayson, *supra* note 81; Nolte, *supra* note 82.

under negotiated and informal procedures, school boards and teachers can work toward a common goal of improving teacher competence through professional growth and development rather than maintaining the adversary relationship created by the present statutory system. The proposals of the Regents should encourage the development of these informal routes of professional discipline as one means to reduce the procedural complexity and give school boards more flexibility in dealing with their teachers. This flexibility is necessary not only in dealing with dismissals for cause, but also for dismissals required to facilitate change or meet fiscal problems.

IV. ADMINISTRATIVE DISMISSALS

The necessity of dismissing tenured teachers also arises when school districts restructure for academic reasons¹²⁶ or are forced to reduce staff for financial reasons. Reduced interest in certain non-required areas, such as foreign languages, combined with the declining overall enrollments, results in fewer students in those courses and consequent layoffs of teachers.¹²⁷ The declining enrollments of the last decade have also forced cut backs of personnel in required curriculum areas, such as English.¹²⁸ The enrollment decline may additionally affect school district funding because state aid is computed under a formula based partly on attendance figures.¹²⁹ In addition, school boards have had to cope with inflated costs for supplies, building maintenance, employee fringe benefits, and salary increases.¹³⁰ Such cost problems are significant in school budgets because school budgets are subject to voter approval, and

126. School boards may restructure, for example, by closing schools, or by moving grade levels, i.e. switching from an elementary—junior high—high school plan (grades divided 6-3-3) to a middle school plan (grades divided 4-4-4). In making these decisions, consideration is given to utilization of facilities, including the need to close outdated and costly buildings, management of personnel, and educational concerns, such as the amount of contact between younger and older students. See, e.g., *In re Scism*, 11 Educ. Dep't Rep. 172 (1978), *In re Fura*, 5 Educ. Dep't Rep. 154 (1972). See generally Nolte, *supra* note 82.

127. See *Chambers v. Board of Educ.*, 47 N.Y.2d 279, 391 N.E.2d 1270, 418 N.Y.S.2d 291 (1979). See generally Divoky, *supra* note 3; Nolte, *supra* note 82; *Amos v. Board of Educ.*, 43 N.Y.2d 706, 372 N.E.2d 41, 401 N.Y.S.2d 207 (1977); Plumleigh, *supra* note 1.

128. See generally Divoky, *supra* note 3; Nolte, *supra* note 82; Plumleigh, *supra* note 1.

129. 8 NY CRR 175.

130. See Divoky, *supra* note 3, at 88, noting studies by the National Institute of Education which estimate that it now costs 50% more to operate primary and secondary schools than it did in 1971.

taxpaying voters have become less willing to approve budgets resulting in tax increases.¹³¹ The combined effect of these economic factors forces school boards to eliminate services,¹³² cut costs by replacing professional personnel with less expensive non-teaching employees,¹³³ and contract with outside agencies for services, such as speech therapy, at reduced costs.¹³⁴

The ability of local school boards to make these adjustments is restricted by the Education Law. This statute mandates that when a position is abolished and a similar position created, the school board must appoint the person who held the eliminated position to the new position without loss of salary or benefits.¹³⁵ If a new position is not created immediately, the person who held the eliminated position must be placed on a preferred hiring list and reinstated without reduction in salary or benefits when an opening occurs in a similar position.¹³⁶ The statute also mandates that when staff reductions occur, a school board must first dismiss the teacher with the least seniority within a position's tenure area.¹³⁷ Similarly, hiring from the preferred eligibility list must be in order of seniority.¹³⁸ An employee terminated under these provisions can appeal to the Commissioner of Education.¹³⁹ The Commissioner will review the school board's actions to determine if the board failed to give the teacher the full benefit of these protections by creating a similar position but not appointing the former teacher, by retaining a teacher with less seniority, or by failing to properly rehire the terminated employee.¹⁴⁰

131. See *Give Us Better Schools*, *supra* note 1, at 32; Divoky, *supra* note 3, at 88. See also Gallup, *supra* note 1, at 37 indicating the public's average estimate of the cost of education per child was \$1,200 when the actual estimated cost was \$2,100.

132. See *In re Fura*, 5 Educ. Dep't Rep. 154 (1966); see generally, Divoky, *supra* note 3.

133. See *Bork v. City School Dist.*, 60 A.D.2d 13, 400 N.Y.S.2d 241 (4th Dep't 1977) in which school nurse-teachers, who are specially certified because they are trained as both teachers and nurses, were replaced by registered nurses.

134. Cf. *Mairs v. Board of Educ.*, 82 Misc.2d 989, 370 N.Y.S.2d 848 (Sup. Ct. 1975). See also Comment, *Providing Municipal Services in New York State: The "Private Contract" Alternative*, 28 BUFFALO L. REV. 589 (1979).

135. N.Y. EDUC. LAW § 2510(1) (McKinney Supp. 1979).

136. N.Y. EDUC. LAW § 2510(3) (McKinney Supp. 1979).

137. N.Y. EDUC. LAW § 2510(2) (McKinney Supp. 1979). See text accompanying notes 148-51.

138. N.Y. EDUC. LAW § 2510(3) (McKinney Supp. 1979).

139. See, e.g., *In re Chauvel*, 14 Educ. Dep't Rep. 426 (1975); *In re Abrams*, 12 Educ. Dep't Rep. 54 (1972).

140. See *In re Abrams*, 14 Educ. Dep't Rep. 131 (1974), *In re Schiliro*, 13 Educ. Dep't

There have been many appeals and much litigation over who may be dismissed, who must be reappointed, when a position is similar enough to entitle the former teacher to reappointment, and what a school board must show to prove it is acting in good faith. The New York Court of Appeals has recognized that school boards attempting to restructure or dismiss a tenured teacher for administrative reasons face a combination of vague standards and procedural complexities which act as a maze that often trap the unwary or inartful.¹⁴¹ The Court has called upon the legislature to review and rework this area of the law,¹⁴² but until the legislature acts, the Court is attempting to establish some standards that will allow school boards to make the necessary adjustments while providing adequate protection for teachers.

The issue of what constitutes a "similar" position illustrates the uncertain standards school boards have been forced to apply. The Commissioner of Education had ruled that by definition "part-time" duties were not and could not be the same as "full-time" duties so as to require reinstatement. This ruling was overturned in *Abrams v. Ambach*,¹⁴³ the Appellate Division of Supreme Court holding that creation of an unquestionably similar part-time position entitles the former employee to reinstatement. The Court reasoned that tenure in the position prevailed even though the position was converted to part-time.¹⁴⁴ However, when the position remains full-time but instructional duties are eliminated the position is not deemed similar.¹⁴⁵ This allows registered nurses to replace school nurse-teachers even though their duties are the same, with the exception of the possibility of classroom instruction. However, where the position is eliminated and its duties are contracted to an outside agency, reinstatement can be ordered.¹⁴⁶ This has

163 (1973), *In re Englert*, 12 Educ. Dep't Rep. 234 (1973), *In re O'Leary*, 6 Educ. Dep't Rep. 134 (1967).

141. See *Chauvel v. Nyquist*, 43 N.Y.2d 48, 371 N.E.2d 473, 400 N.Y.S.2d 753 (1977): "This is another of several cases which collectively describe the maze which must be followed by teachers and boards of education alike through the interrelated provisions of the Education Law. . . ." *Id.* at 45. See also *Amos v. Board of Educ.*, 43 N.Y.2d 706, 372 N.E.2d 41, 401 N.Y.S.2d 207 (1977).

142. See *Chauvel v. Nyquist*, 43 N.Y.2d 48 (1977).

143. 43 A.D.2d 883, 351 N.Y.S.2d 750 (3d Dep't 1974); see *Baron v. Mackett*, 30 A.D.2d 810, 292 N.Y.S.2d 339 (2d Dep't 1968).

144. *Id.* at 884.

145. See *Bork v. City School Dist.*, 60 A.D.2d 13, 400 N.Y.S.2d 241 (4th Dep't 1977).

146. See *Mairs v. Board of Educ.*, 82 Misc.2d 989, 370 N.Y.S.2d 848 (Sup. Ct. 1975); see

prevented a school district from dismissing a tenured speech teacher and contracting out her work to a local speech clinic. The court reasoned that although the school board has flexibility to abolish positions for economic reasons, it could not create a similar position, even in an outside agency, without protecting the teacher's tenure rights. The Commissioner of Education has likewise ruled that the issue is whether a position exists with similar duties, and that any other interpretation leads to the erosion of tenure right.¹⁴⁷

The protection of tenure rights, however, often forces school boards back into the procedural maze of dismissal for incompetence because tenure and certification are not granted to cover identical subject areas.¹⁴⁸ The statute requires that when a position is eliminated the school board dismiss the teacher "having the least seniority in the system within the tenure of the position abolished . . ."¹⁴⁹ This means that when a school board eliminates a position in English a teacher who is certified only in English but has been granted tenure in a tenure area historically designated by the school board to include English, Social Studies, and Mathematics, may "bump" a tenured, certified Mathematics teacher who has less seniority.¹⁵⁰ This is true even though the senior teacher is uncertified in, and, unqualified to teach Mathematics. The school board must then bring a charge of incompetency and conduct proceedings under § 3020-a in order to dismiss this unqualified teacher.¹⁵¹ Even when the school board followed this procedure they were required to show that they had made a good faith effort to adjust its schedules to allow the tenured teacher to continue to

generally Comment, *supra* note 134.

147. See *In re Englert*, 12 Educ. Dep't Rep. 234 (1973).

148. Certification is granted in academic areas designated by the Commissioner of Education. 8 NY CRR 80. Tenure areas are developed by individual school boards under state guidelines, but are often unique in scope. School boards often attempt to manipulate these tenure areas to give themselves greater flexibility in determining who shall be dismissed. This raises complex legal questions discussed in Comment, *New York's Tenure Areas—A Blackboard Jungle*, 44 BROOKLYN L. REV. 409 (1978).

149. N.Y. EDUC. LAW § 2510(2) (McKinney Supp. 1979).

150. See, e.g., *Amos v. Board of Educ.*, 43 N.Y.2d 706 (1977).

151. The Court of Appeals upheld this procedural route in *Chauvel v. Nyquist*, 43 N.Y.2d 48, 371 N.E.2d 473, 400 N.Y.S.2d 753 (1977), despite the Commissioner of Education's holding that such a "construction . . . would be absurd." *In re Chauvel*, 14 Educ. Dep't Rep. 426, 428 (1975).

teach within his certification area.¹⁵² This could be accomplished by assigning an English teacher to an available English class or two, and to one class outside his area, and several supervisory tasks such as study hall or cafeteria duty. The Court of Appeals in *Chambers v. Board of Education*¹⁵³ held that "the board of education is not required to arrange such a schedule, although permitted under regulations of the Commissioner of Education when it demonstrates that such a schedule is not educationally or financially feasible."¹⁵⁴ In reaching this decision, the Court took particular note of the school board's argument that it was required to weigh heavily educational and financial factors in making scheduling decisions.

Financial considerations often force school districts to eliminate personnel, and city school districts, funded through city budgets, have been hard hit by their cities' fiscal crises. Yonkers experienced such a crisis, and to cut staff the school board brought charges against all its teachers who had not completed the requirements for permanent certification and whose provisional certification had expired. One teacher was discharged despite the fact he completed the necessary requirements for permanent certification and was merely waiting for the certificate to be issued.¹⁵⁵ The Court of Appeals, following its recent pattern of allowing school boards increased discretion, upheld this dismissal, holding that lack of certification was substantial evidence of incompetence.¹⁵⁶

The current proposals to make teaching a licensed profession do not directly address the need for greater procedural flexibility in administrative dismissals, nor do they provide any guidance for teachers or school boards on the range of discretion a board may exercise in restructuring its schools.¹⁵⁷ Considerations of staff re-

152. See, e.g., *Amos v. Board of Educ.*, 43 N.Y.2d 706 (1977). Scheduling is an area where school boards must make many policy decisions. It directly affects the type of program that will be offered and the number of teachers that will be employed. In setting up the schedule, school boards must decide whether to allow teachers to work one period per day outside their certification area, which is allowed under the Commissioner's regulations, and must decide whether or not to use professional employees for tasks such as cafeteria supervision. 8 NY CRR 80.

153. 47 N.Y.2d 279, 391 N.E.2d 1270, 418 N.Y.S.2d 291 (1979).

154. 47 N.Y.2d at 281, 391 N.E.2d at 1271, 418 N.Y.S.2d at 292.

155. *Linton v. Board of Educ.*, 63 A.D.2d 1003, 406 N.Y.S.2d 705 (2d Dep't 1978).

156. *Linton v. Board of Educ.*, 47 N.Y.2d 726, 390 N.E.2d 1170, 417 N.Y.S.2d 246 (1979).

157. See note 126 *supra*.

duction, restructuring, and cost consciousness are intimately related to making the schools meet the public's expectations of better education implemented by a capable teaching staff and managed by a fiscally conscious school board. These problems should be addressed by the proposals.¹⁵⁸

There are several additional provisions which could be added to the responsibilities of the proposed State Board in order to give both school boards and teachers guidance in reducing staffs and restructuring. School boards will be forced to continue dealing with declining enrollments and increased operating costs by eliminating positions, reducing them from full-time to part-time or replacing professionals with non-teaching personnel.¹⁵⁹ The State Board, as part of its duties to advise on all aspects of the teaching profession,¹⁶⁰ should be commissioned to develop a comprehensive set of guidelines for school boards to take the place of the current statutory phrase "similar."¹⁶¹ These guidelines would make the school board's range of discretion clearer as well as give teachers a better perspective on the extent of their rights. In addition, the need to litigate whether a position was in fact "similar" would be eliminated.

Unnecessary litigation results not only from lack of adequate guidelines, but also from the outdated procedural structure that requires a school board to retain uncertified and therefore unqualified teachers and then to institute dismissal proceedings against them because they are uncertified and unqualified.¹⁶² This problem remains under the proposal because licenses will be issued for grade level or academic areas as certificates currently are, but tenure areas will continue to be determined by each school board.¹⁶³ Instead, the State Board could develop a state-wide system of tenure areas paralleling the licensing system. This would remove a traditional area from the domain of local school boards, but, because it is an area school boards manipulate in order to evade the

158. See generally Evans & Harmon, *supra* note 52; Gallup, *supra* note 1; Nolte, *supra* note 82.

159. See text accompanying notes 143-47 *supra*.

160. See IMPLEMENTATION PLAN, *supra* note 8, at 3.

161. N.Y. EDUC. LAW § 2510 (McKinney Supp. 1979).

162. See N.Y. EDUC. LAW § 3001 & text accompanying notes 149-151 *supra*.

163. See IMPLEMENTATION PLAN, *supra* note 8, at 2; see also COMMISSIONER'S PROPOSALS, *supra* note 8, at 26.

protections of tenure,¹⁶⁴ establishing state-wide standards would enhance teaching professionalism. A simpler solution, also in keeping with the concept of professionalism, would be to redraft the statute so that the critical consideration in determining who is dismissed and who must be reappointed is not tenure area but license area.

CONCLUSION

Making teaching a licensed profession is consistently recommended as a means of improving schools and teacher competence.¹⁶⁵ The current proposals of the Regents recognize that teaching possesses the characteristics of a profession:

There are certain characteristics common to most if not all intellectually based, service-oriented occupations commonly thought of as professions. Such occupations are generally considered to be discrete disciplines, requiring specific and intensive academic preparation and specialized knowledge and skills. In addition, practitioners of a profession must be certified as competent to practice.¹⁶⁶

Recognition alone, however, is not adequate to improve the public schools. Having recognized the professional standing of teachers and having acted to assure professional competence, the Regents must act to use these professionals' knowledge to improve schools and teaching. Currently, professional expertise is severely hampered because the structure of public school education does not allow its professionals a policy making role. Teachers are assigned schedules, course content, teaching materials, and expected results. They have little, if any, authority over their teaching environment, procedure, or educational policy.¹⁶⁷ New York's proposals concentrate on development of teaching expertise without affording the profession meaningful input into education's development.

164. See, e.g., *Baer v. Nyquist*, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974); see also Comment, *supra* note 134.

165. See OFFICE OF HIGHER AND PROFESSIONAL EDUCATION, STATE EDUCATION DEPARTMENT, UNIVERSITY OF THE STATE OF NEW YORK, RECOMMENDATIONS OF THE COMMISSIONER'S TASK FORCE ON TEACHER EDUCATION AND CERTIFICATION (1977); COMMISSIONER'S PROPOSALS, *supra* note 8.

166. TEACHING AS A PROFESSION, *supra* note 35, at 10.11.

167. See Mitchell-Wise, *Participatory Management: A Teacher's Point of View*, 8 THRUST 12 (1978); Wollett, *supra* note 4, at 1020. Thanks to Larry, Bob, and Joanne who, among many, have attempted to do a professional job in this atmosphere and, in the process, made others aware of the limitations.

The proposed State Board could be developed into an effective policy making body so teaching would no longer be a "one-dimensional profession" but would have professional authority as well as professional responsibility.¹⁶⁸ An active review board could stimulate professional growth through the inservice training programs which bring professionals together to formulate common goals and develop strategies to reach those goals.¹⁶⁹

The Board could also facilitate interaction among teachers to meet common problems and check unprofessional conduct through upgrading administrative review and developing peer review.¹⁷⁰ Such encouragement of professional growth and discipline would come at a point where improvement, rather than only removal, is possible, thus encouraging teacher competency and reducing the need for formal disciplinary proceedings.¹⁷¹

The proposals also fail to update disciplinary procedures to reflect the professional status of teachers. Retention of review procedures that function separately on state and local levels does not facilitate development of professional standards. The State Board should be charged with developing an ethical code for teachers that reflects the unique characteristics and responsibilities of the teaching profession.¹⁷² This code would guide teachers and school boards as to what conduct is acceptable and what would require discipline or dismissal. Automatic review of local dismissals would insure consistent application of state-wide professional standards as well as protection against arbitrary actions against individual teachers on the part of local school boards.

In addition to promulgating standards for dismissal in disciplinary situations, the State Board could develop guidelines for local school boards who are forced to reduce their teaching staffs in order to cope with declining enrollments and increased operating costs.¹⁷³ These guidelines could clarify or replace the vague statutory language¹⁷⁴ and reconcile conflicting considerations of certifi-

168. *See id.*

169. Florida currently has such a peer review program. *TEACHING AS A PROFESSION*, *supra* note 35, at V.4.

170. *See id.*; Kane, *supra* note 42.

171. *See* COMMISSIONER'S PROPOSALS, *supra* note 8, at 49-53; *see also* Wollett, *supra* note 4, at 1018-21; Divoky, *supra* note 3.

172. *See* text accompanying note 123 *supra*.

173. *See* Divoky, *supra* note 3.

174. *See* text accompanying notes 84-92 & 141-47 *supra*.

cation and tenure.¹⁷⁵ This would give school boards a clear range of discretion, and teachers would be assured of protection against restructuring of schools or teaching positions solely to dismiss tenured teachers.¹⁷⁶

After professional standards designed specifically for teaching are established, their implementation and enforcement can be facilitated by updating the dismissal procedure. The present system is so complex, costly, and time consuming that local school boards are reluctant to use it.¹⁷⁷ It could be improved by adopting procedures such as prehearing discovery and a single arbitrator rather than a hearing panel. In addition, the Regents could actively encourage school boards to work with local teachers' organizations to develop alternative routes of dispute resolution, such as arbitration agreements.

If the proposed legislation designating teaching as a licensed profession is passed, and regulations implementing the other provisions are formulated and funded, there will be significant progress toward improving the competence of public school teachers. However, until teachers themselves are allowed to help develop policy, and until the archaic procedures that school boards use in dealing with their teachers are reformed, the development of teaching as a profession will be stymied, and the public demands for better, more efficiently run schools with more competent teachers will not be met.

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175. See text accompanying notes 149-51 *supra*.

176. Compare *Young v. Board of Educ.*, 35 N.Y.2d 31, 315 N.E.2d 768, 350 N.Y.S.2d 709 (1974) with *Baer v. Nyquist*, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974).

177. See *Jacobsen, Sperry & Jensen*, *supra* note 44.