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Teacher Termination and Nonrenewal in Texas Public Schools Symposium on Education Law.

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ARTICLES

TEACHER TERMINATION AND NONRENEWAL IN TEXAS PUBLIC SCHOOLS

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I. INTRODUCTION

The decision to end a teacher's employment with a public school system in Texas requires the school district to face a myriad of issues. There are the obvious questions concerning the factual basis, as well as the personnel or educational justifications for the decision. These business and educational considerations are entangled with statutory and constitutional requirements and prohibitions. These requirements and prohibitions, while affording the teacher a certain amount of job security, have been viewed by many school district officials and administrators as unnecessary obstacles to the maintenance of an efficient and competent school staff. The purpose of this article is to discuss both the substantive and procedural requirements of teacher termination and nonrenewal in the Texas public schools, outlining the problems associated with those requirements, and proposing certain changes to simplify the process.

Analysis of a school district's decision with respect to a teacher's employment, and the procedures necessitated thereby, is best accomplished through division of the relevant facts into three categories. Different grounds or different procedures may be required depending upon: (1) the timing of the decision (nonrenewal versus termination); (2) the type of employment system utilized by the district (continuing versus term); and (3) the status of the teacher (probationary versus tenured). Once the correct categorizations are made, the required reasons and applicable procedures can be found in the appropriate statutes.

A. *Nonrenewal versus Termination*

The first categorization to be made is based on whether a termination or a nonrenewal is involved. For the purposes of this article, "termination" is used to describe a situation in which a teacher is either being discharged during the school year, or, in the case of a teacher with a multi-year contract, the teacher is being discharged at a time prior to the date his contract expires.[1] The term "nonrenewal" refers to a decision to either not continue employment for an upcom-

1. *See* TEX. EDUC. CODE ANN. § 13.109 (Vernon 1972) (teacher discharge under continuing or probationary contract); *id.* § 21.210 (Vernon Supp. 1985) (term contract termination). In Chapter 13, "discharge," as opposed to "termination," is used to describe the mid-year severance of a teacher's employment in continuing contract districts. *See id.* § 13.109 (Vernon 1972).

ing school year, or, if a multi-year contract is involved, not extend the employment beyond the end of the contract's term.[2] There are important substantive and procedural differences between "termination" and "nonrenewal." Attorneys and courts should avoid the tendency to use the two words interchangeably.

B. *Continuing versus Term Contracts*

A second factor to be considered in analyzing a teacher's rights in employment decisions is the type of employment system utilized by the employing school district. In Texas, school districts have one of two types of contractual relationships with full-time teachers: "term contracts"[3] or "continuing contracts."[4] In term contract school districts, a teacher is employed for a term of one or more years.[5] These districts cannot enter into employment contracts for terms exceeding either three or five years, the limit depending upon the scholastic population of the district.[6] Until recently, the only statutory guidance on the employment of term contract teachers was this limitation on the length of the contract term; however, in 1981, the legislature adopted the Term Contract Nonrenewal Act (hereinafter referred to as TCNA).[7]

Prior to TCNA's enactment, a term contract had to be affirmatively renewed at the end of each contract term. In contrast, pursuant to the new statute, a teacher's term contract is automatically renewed unless the district timely initiates nonrenewal procedures.[8] This Act

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2. *See id.* § 13.110 (Vernon Supp. 1985) (release of continuing contract teacher at end of year); *id.* § 21.203 (term contract nonrenewal). In Chapter 13, "release," as opposed to "nonrenewal," is used to describe the cessation of a teacher's employment at the end of the school year in a continuing contract district. *See id.* § 13.110.

3. *See id.* § 21.201(4).

4. *See id.* § 13.106 (Vernon 1972).

5. *See id.* § 21.201(4) (Vernon Supp. 1985).

6. *Compare id.* § 23.28(b) (Vernon 1972) (districts with population less than 5000 shall not have contract term exceeding three years) *with id.* § 23.28(c) (districts with population greater than 5000 shall not have contract term exceeding five years).

7. *See id.* §§ 21.201-.211 (Vernon Supp. 1985) ("Subchapter G. Teachers' Employment Contracts"). Subchapter G applies not only to teachers, but to all full-time term contract employees of a district who are required to hold a valid certificate or teaching permit, except para-professionals. *See id.* § 21.201(1), (4).

8. *Compare* Carl v. South San Antonio Indep. School Dist., 561 S.W.2d 560, 563-64 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (no implied renewal due to school districts, delayed termination) *and* Hix v. Tuloso—Midway Indep. School Dist., 489 S.W.2d 706, 710-11 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (automatic contract renewal void in term

further requires the districts utilizing term contracts to adopt policies establishing the reasons that will support a decision not to renew a teacher's employment at the end of his contract term.[9] Additionally, the Act establishes procedures for notice, hearings, and appeals of nonrenewal decisions,[10] and requires formalized evaluation of teachers during the school year.[11]

Continuing contract districts employ teachers under sections 13.101 to 13.116 of the Texas Education Code.[12] Enacted in 1967, this statute provides a formalized tenure system for a district choosing to have probationary and continuing contracts.[13] A teacher, under this statute, serves a probationary period of not more than four years before obtaining continuing contract status.[14] When continuing contract status is achieved, the employment relationship continues automatically without the necessity of nomination and school board approval.[15] Thereafter, the employment relationship is severed only if the teacher resigns, retires, or the district affirmatively initiates the teacher's termination, nonrenewal, or return to probationary status.[16]

C. *Probationary versus Tenured Teacher*

The final factor to consider in analyzing the procedural requirements for teacher termination is a determination of the teacher's con-

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contract districts) *with* TEX. EDUC. CODE ANN. § 21.204(b) (Vernon Supp. 1985) (teacher employed in same capacity if board fails to give proper notice).

9. *See* TEX. EDUC. CODE ANN. § 21.03 (Vernon Supp. 1985).

10. *See id.* §§ 21.204-.207.

11. *See id.* § 21.202.

12. *See id.* §§ 13.101-.116 (Vernon 1972) ("Subchapter C. Teachers' Employment Contracts") (amendments to §§ 13.110, 13.112(e), and 13.115(c), (d) are codified in Vernon Supp. 1985).

13. *See id.* § 13.101 (Vernon 1972). The probationary or continuing contract statute "applies only to teachers employed after its effective date; and then only if the school board adopts the tenure plan." *See* Garcia v. Pharr, San Juan, Alamo Indep. School Dist., 513 S.W.2d 636, 640 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

14. *See* TEX. EDUC. CODE ANN. § 13.102 (Vernon 1972). Normally, a probationary contract may only be for a term not exceeding three years; however, if the board of trustees has some doubt about a teacher's abilities, they may, by affirmative action, extend the probationary period to four years. *See id.*

15. *See id.* § 13.107.

16. *See id.* § 13.107(1)-(5). The board of trustees may rescind its adoption of subchapter C. *See* Op. Tex. Att'y Gen. No. MW-238 (1980). If the board does rescind its adoption of continuing contracts, employees with valid continuing contracts executed prior to the rescission will continue to be employed under the provisions of subchapter C until the specified conditions for termination occur. *See id.*

tractual status. In Texas, under either a term or continuing contract system, a teacher's status can be either probationary or tenured.[17] In a term contract district, a probationary period for new teachers must be affirmatively established[18] and cannot exceed the teacher's first two years of continuous employment.[19] School districts utilizing continuing contracts, on the other hand, are required by law to offer first time teachers probationary contracts which cannot exceed three years absent action by the district's board of trustees.[20] In the continuing contract system those teachers who are not on probationary status must be regarded as tenured.[21]

II. REASONS FOR TERMINATION

A. *Continuing Contract Districts*

The Education Code provides the only permissible grounds for the termination of a continuing contract teacher.[22] The statutory grounds for mid-year terminations are limited to those instances involving "immorality,[23] conviction of a felony or other crime involving moral

17. *See* TEX. EDUC. CODE ANN. §§ 13.102, .107, 21.209 (Vernon 1972 & Supp. 1985).

18. *See id.* § 21.209 (Vernon Supp. 1985).

19. *See id.* § 21.209.

20. *See id.* § 13.102 (Vernon 1972). Section 13.108 does permit a district to grant an administrator continuing contract status without the necessity of a probationary contract. *See id.* § 13.108.

21. *See id.* § 13.106. If the board of trustees elects the teacher to employment status during the teacher's last probationary year, then an offer is to be made to the teacher which he must accept within 30 days or refusal will be implied. *See id.* § 13.106.

22. *See id.* § 13.109. An additional reason added in the last special session of the Texas Legislature will be the failure to pass the teacher competency test by June 30, 1986. *See id.* § 13.047(d)-(g) (Vernon Supp. 1985).

23. *See* TEX. EDUC. CODE ANN. § 13.109(1) (Vernon 1972). The courts in Texas have held that immorality "is that conduct which is willful, flagrant, or shameless and which shows a moral indifference to the opinion of the good and respectable members of the community." *See* Searcy v. State Bar, 604 S.W.2d 256, 258 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *see also* Muniz v. State, 575 S.W.2d 408, 411 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The termination of a teacher based upon immoral conduct was upheld where the teacher engaged in illicit sexual activity. *See* Ros v. Springfield School Dist., 691 P.2d 509, 511-12 (Or. Ct. App.1984) (teacher caught with his pants down in arcade booth). " 'Immorality' may and often does include sexual misconduct but it is much broader in meaning and scope." *In re* Flannery's Appeal, 178 A.2d 751, 753 (Pa. 1962). A teacher who called a 14-year-old female student a "slut" and a "prostitute" was properly dismissed for immoral conduct. *See* Bovino v. Board of School Directors, 377 A.2d 1284, 1287, 1289 (Pa. Commw. Ct. 1977); *see also* Balog v. McKeesport Area School Dist., 484 A.2d 198, 200 (Pa. Commw. Ct. 1984) ("[i]mmoral conduct may include lying").

turpitude,[24] drunkenness,[25] repeated failure to comply with official directives and official school board policies,[26] physical or mental incapacity preventing performance of the contract,[27] [and] repeated and continuing neglect of duties."[28]

The statutory reasons for discharge are broad in scope, making them as important for the possible justifications they eliminate from consideration as for the guidance they give districts and teachers as to specific factual instances permitting termination. The most important

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24. *See* TEX. EDUC. CODE ANN. § 13.109(2) (Vernon 1972). Public lewdness, a Class A misdemeanor, is considered "to be a crime involving moral turpitude." *See* Green v. County Attorney, 592 S.W.2d 69, 71 (Tex. Civ. App.—Tyler 1979, no writ). " 'Moral Turpitude' is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *See id.* at 71; *see also* Muniz v. State, 575 S.W.2d 408, 411 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). Under Georgia law, which limits dismissals to crimes involving moral turpitude, a school principal was properly terminated after he was convicted of submitting false documents to the Internal Revenue Service. *See* Logan v. Warren County Bd. of Educ., 549 F. Supp. 145, 148 (S.D. Ga. 1982).

25. *See* TEX. EDUC. CODE ANN. § 13.109(3) (Vernon 1972). Can the school district terminate a teacher based upon drunken behavior outside the scope of the teacher's employment? The Supreme Court of Tennessee reinstated a teacher whose dismissal was based upon a DWI conviction. *See* Turk v. Franklin Special School Dist., 640 S.W.2d 218, 219-20 (Tenn. 1982) (absence of charge that teacher had alcohol problem made notice to teacher defective). The court, however, went on to state, in dicta, that a single DWI conviction might in some circumstances be sufficient to support the dismissal of a tenured teacher. *See id.* at 221.

26. *See* TEX. EDUC. CODE ANN. § 13.109(4) (Vernon 1972). A teacher's own "testimony that his method of teaching was better than the prescribed curriculum and that the administrative directives . . . violated academic freedom . . ., [could] not overcome the ample testimony in the record of the [teacher's] repeated failures to comply with official directives . . . ." *See* McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 478 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.). Excessive disciplinary referrals after an administrative letter suggesting remedial actions, along with failure to comply with administrative letters concerning neglect to comply with prescribed curriculum, are sufficient grounds for teacher termination. *See id.* at 473.

27. *See* TEX. EDUC. CODE ANN. § 13.109(5) (Vernon 1972). "Incapacity is incurred by a workman when his injury prevents him from performing the usual tasks of his job." Travelers Ins. Co. v. Smith, 435 S.W.2d 248, 249 (Tex. Civ. App.—Texarkana 1968, writ dism'd) (workman's compensation case). "Total incapacity occurs when a workman is disabled by injury to such extent he can not procure and retain employment at labor of the class he was performing when injured . . . ." *Id.* at 249; *see also* Bradley v. Cothern, 384 F. Supp. 1216, 1222 (E.D. Tex. 1974) (teacher can be forced to discontinue services when physically unable to continue due to pregnancy).

28. *See* TEX. EDUC. CODE ANN. § 13.109(6) (Vernon 1972). Failure to maintain classroom management and discipline is considered neglect of duties. *See* McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 473, 480 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (teacher referred 147 disciplinary problems to administration while next highest number of referrals was 43).

lesson to be learned from section 13.109 is that, in the area of job performance, a grievous single incident will not justify discharge.[29] Because the statute uses "repeated" and "continuing" in discussing the performance of duties and the following of policies and directives, school officials should be wary of discharging an employee for unsatisfactory performance unless there is documented history of job-related deficiencies.[30] School administrators should be encouraged to keep complete and accurate records of a teacher's performance and nonperformance rather than having to recall prior instances of inadequate performance for which no warnings were given and about which no records were made.[31] Such an accurate review process not only aids the district in meeting the requirements of section 13.109, but works to the teacher's advantage in that it gives the teacher advance knowledge of problems and, therefore, an opportunity to correct any deficiencies.

B. *Term Contract Districts*

Statutory guidance regarding the grounds for discharge of term contract teachers is almost nonexistent. The only guidance provided for termination during the term of a teacher's contract is: "Nothing in this subchapter shall prohibit a board of trustees from discharging a teacher for cause during the term of the contract."[32]

The statute permits the widest of latitudes in terminating a term contract teacher and does not require the district to adopt policies stating the grounds for which the board will discharge a teacher during the term of the contract. This absence is confusing in light of the TCNA's requirement that a school board adopt reasons for a

29. *See* TEX. EDUC. CODE ANN. § 13.109(4) (Vernon 1972) (requires "repeated failure"); *id.* § 13.109(6) (requires "repeated and continuing neglect").

30. *See* McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 473 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (administration presented letters and critical reports of teacher's performance as evidence for termination).

31. There are many instances in which administrators are required to keep written performance evaluations of school personnel. *See, e.g.*, TEX. EDUC. CODE ANN. §§ 13.301-.304 (Vernon Supp. 1985) (appraisal process and performance criteria for teachers); *id.* § 21.202 (written evaluation of each teacher required on annual basis); Tex. Educ. Agency, 10 Tex. Reg. 270 (1985) (to be codified at 19 TEX. ADMIN. CODE § 149.41(c)(1)) (appraisal of teacher's performance shall be summarized in one final report placed into teacher's personnel file). Administrators, however, have a tendency to give teachers positive or high marks to boost their morale or to avoid confrontations centered around the evaluation; thus, these evaluations sometimes offer little help to administrators seeking the nonrenewal of an incompetent teacher.

32. TEX. EDUC. CODE ANN. § 21.210 (Vernon Supp. 1985).

teacher's nonrenewal.[33] For some unexplained reason, a district is permitted by statute, when contemplating termination during the contract term, to make a post-incident determination of whether the reasons constituted "cause" for discharge.[34]

Valid "cause" for termination under term contracts would certainly include the reasons for mid-year termination previously discussed in continuing contract districts.[35] Additionally, a single incident of job-related misconduct could justify discharge in a term contract district although it would not constitute sufficient cause in a continuing contract district. The existence of cause for termination of a term contract employee must be judged on a case-by-case basis.[36]

In *Drown v. Portsmouth School District,*[37] the First Circuit held that a school board's determination of cause could be overturned as arbitrary and capricious only if (1) it was based on a reason totally unrelated to the educational process, (2) was totally unsupported by facts, or (3) it was so trivial as to bear no relation to the action taken by the district or the official.[38] Subsequent federal decisions question whether there is any such independent federal cause of action for an arbitrary or capricious termination.[39] These decisions adopt a more

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33. *See id.* § 21.203(b) ("board of trustees of each school district shall establish policies consistent with this subchapter which shall establish the reasons for nonrenewal").

34. *Compare id.* § 21.210 (district can simply terminate for cause) *with id.* § 21.203(b) (district must establish written guidelines for nonrenewal actions).

35. *See id.* § 13.109 (Vernon 1972).

36. *See id.* § 21.210 (Vernon Supp. 1985). " 'For cause' " with respect to dismissal of school teacher "presupposes right to hearing, notice and appeal." Freeman v. Gould Special School Dist., 405 F.2d 1153, 1159 (8th Cir.), *cert. denied,* 396 U.S. 843 (1969); *see also* Napolitano v. Ward, 317 F. Supp. 79, 81 (N.D. Ill. 1970). The phrase "for cause" has been interpreted differently depending upon the jurisdiction hearing the case; in Louisiana, in order to dismiss a police officer for cause, the evidence must show that termination was necessary for discipline and efficiency or needed to avoid detriment to the department. *See* Martin v. City of St. Martinville, 321 So. 2d 532, 535 (Ct. App. 1975), *aff'd,* 325 So. 2d 283 (La. 1976). In Maryland, in order to remove a policeman for cause, the cause must affect or concern his ability and fitness to perform the duty imposed on him. *See* Board of Street Comm'rs v. Williams, 53 A. 923, 925 (Md. 1903). In Missouri, the removal of a civil service employee for cause implies some personal misconduct, or fact, rendering further employment harmful to the public interest. *See* State v. Kansas City, 257 S.W. 197, 200 (Mo. Ct. App. 1923). In Montana, removal for cause requires "legal cause and not merely a cause which the appointing power, in the exercise of discretion, may deem sufficient." *See* State v. O'Hern, 65 P.2d 619, 623 (Mont. 1937).

37. 451 F.2d 1106 (1st Cir. 1971).

38. *See id.* at 1108 (court held teacher's uncooperative nature sufficient to uphold nonrenewal).

39. *See* Weathers v. West Yuma County School Dist., 530 F.2d 1335, 1339-40 (10th Cir.

correct analysis, permitting the courts to examine only the proffered reasons for termination in order to determine if they are mere pretexts for some illegal or unconstitutional reason for the termination or nonrenewal.[40] This approach precludes the courts from attempting to reevaluate the educational merits of a school official's judgment, but would still protect a teacher's constitutional and statutory freedoms.

"Cause" has been found to exist in a wide variety of circumstances, including: incompetency,[41] a teacher's insubordination and failure to follow a supervisor's orders,[42] a teacher being uncooperative and unwilling to carry out department policy,[43] a teacher's failure to get along with a superior,[44] a teacher causing disharmony in the department,[45] improper sexual conduct of a teacher,[46] and unauthorized

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1976); Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4-5 (7th Cir. 1974); Buhr v. Buffalo Pub. School Dist., 509 F.2d 1196, 1202-03 (8th Cir. 1974).

40. Such an analysis would be comparable to the burden established in employment discrimination cases. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

41. *See* Osborne v. Bullitt County Bd. of Educ., 658 P.2d 860, 861 (Colo. 1983) (statute not unconstitutionally vague where it provides for dismissal based upon incompetency). School authorities could reasonably conclude that the teacher was inefficient and incompetent, where the evidence would show that the teacher "did not adhere to her teaching schedule; . . . failed to follow school policies; . . . evaluation reports [indicated] unsatisfactory [performance]; . . . [failed to] discipline her students and . . . was uncooperative" with her superiors. *See* Conder v. Board of Directors, 567 S.W.2d 377, 379-80 (Mo. Ct. App. 1978). Terminations have been held illegal, however, where no valid reasons were given, but only conclusions that the teacher was incompetent and willfully neglected his or her duties, without specifying particular acts constituting such conduct. *See* Serignet v. Livingston Parish School Bd., 282 So. 2d 761, 763 (La. Ct. App. 1973). Additionally, a termination based upon incompetency has been held improper where there were minor discipline problems, some difficulty in communicating to parents and other faculty members, and a slight hygiene problem. *See* Hollingsworth v. Board of Educ., 303 N.W.2d 506, 512 (Neb. 1981).

42. *See* Horton v. Orange County Bd. of Educ., 464 F.2d 536, 537-38 (4th Cir. 1972) (teacher's refusal to obey orders "consisted of downright insubordination"). Insubordination "includes the willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education." *See* State v. Board of Educ., 40 So. 2d 689, 695 (Ala. 1949). Failure to fill out evaluation forms has been held to be insubordination. *See* Ray v. Minneapolis Bd. of Educ., 202 N.W.2d 375, 378 (Minn. 1972). Teacher who deliberately and deceitfully broke agreement not to use the novel *Catcher In The Rye* was properly terminated for being insubordinate. *See* Harris v. Mechanicville Cent. School Dist., 394 N.Y.S.2d 302, 304 (App. Div. 1977), *modified on other grounds,* 380 N.E.2d 213, 408 N.Y.S.2d 384 (1978). Striking the principal in the face and using profane language has also been held to be insubordination. *See* Mockler v. Ambach, 434 N.Y.S.2d 809, 811 (App. Div. 1980).

43. *See* Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971).

44. *See* Mockler v. Ambach, 434 N.Y.S.2d 809, 811 (App. Div. 1980).

45. *See* McEnteggart v. Cataldo, 451 F.2d 1109, 1111 (1st Cir. 1971) (threat to harmony of department sufficient grounds for nonrenewal of contract), *cert. denied,* 408 U.S. 943 (1972).

absences.[47]

III. REASONS FOR NONRENEWAL

A. *Continuing Contract Districts*

In continuing contract school districts, a distinction exists between the reasons permitting nonrenewal or discharge of teachers with continuing contract status and those with probationary status. Teachers with continuing contract status can only be released at the end of the year for the same reasons which permit a mid-year termination and for the following additional reasons:

> 1. incompetency in performance of duties;
> 2. failure to comply with such reasonable requirements as the board of trustees of the employing school district may prescribe for achieving professional improvement and growth;
> 3. willful failure to pay debts;
> 4. habitual use of addictive drugs or hallucinogens;
> 5. excessive use of alcoholic beverages;
> 6. necessary reduction of personnel by the school district (such reductions shall be made in the reverse order of seniority in the specific teaching fields);
> 7. for good cause as determined by the local school board, good cause being the failure of a teacher to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts throughout Texas; or
> 8. failure by a person required to take an examination under Section 13.047 of this code to perform satisfactorily on at least one examination under that section on or before June 30, 1986.[48]

Teachers with probationary contracts in continuing contract districts, however, may be released at the end of the probationary contract if, in the judgment of the school board, "the best interests of the

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46. *See* Gover v. Stoval, 35 S.W.2d 24, 25 (Ky. Ct. App. 1931) (teacher and student went into school building for period exceeding one hour and never turned on lights). Usually an act must be proven, but in *Gover* the court permitted an inference to be sufficient to prove an act. *See id.* at 25.

47. *See, e.g.*, Yuen v. Board of Educ., 222 N.E.2d 570, 571-72 (Ill. App. Ct. 1966) (two days of absence to attend meeting unrelated to education sufficient grounds for dismissal); Fernald v. City of Ellsworth Superintending School Comm., 342 A.2d 704, 706, 708 (Me. 1975) (teacher two day absence for trip to Jamaica entitled school authorities to dismiss because teacher's services became unprofitable); Willis v. School Dist., 606 S.W.2d 189, 195 (Mo. Ct. App. 1980) (excessive absences due to illegal strike sufficient grounds for dismissal).

48. *See* TEX. EDUC. CODE ANN. § 13.110 (Vernon Supp. 1985).

school district will be served . . . ."[49] In most instances, the reasons for nonrenewal of a probationary teacher will be those required for nonrenewal of teachers with continuing contract status, but examples of possible additional reasons for not renewing a probationary teacher might be the ability to obtain a more highly qualified person to fill the probationary teacher's position, personality conflicts with supervisors or co-workers, or questions concerning the teacher's dedication or teaching abilities which do not reach the level of incompetency.

B. *Term Contract Districts*

Districts with term contracts are not statutorily limited to specific reasons permitting nonrenewal, but are only required to adopt policies "which shall establish reasons for nonrenewal."[50] The legislature, however, recently required that these "reasons for nonrenewal must include the failure . . . to take an examination under Section 13.047 of [the Education Code, or failure] to perform satisfactorily on at least one examination under that section on or before June 30, 1986."[51] The emphasis under the statutory scheme for term contract teachers is not to limit a district's discretion on this matter, but to require the district to give the teachers some advance notice of the possible reasons that they may not have a job at the end of their contract term.[52] While the advantages to this system certainly fall with the school district, it does at least require the school district to establish its own individual tenure system which, in turn, gives the teacher a property right in reemployment. In 1972 the United States Supreme Court in *Board of Regents v. Roth,*[53] required a procedurally correct hearing for a nonrenewal decision only for a teacher possessing a propertied or tenured right to reemployment, as opposed to fixed-term contract teachers who only had an expectation of reemployment.[54] Because of *Roth,* some districts were wary of adopting the tenure system established for continuing contract districts or any other semblence of a tenure system since these systems would have automatically exposed them to liability for failing to give a teacher a procedurally correct

49. *See id.* § 13.103 (Vernon 1972).
50. *See id.* § 21.203(b) (Vernon Supp. 1985).
51. *See id.* § 21.203(b).
52. *See id.* § 21.203(b).
53. 408 U.S. 564 (1972).
54. *See id.* at 577 (person must have legitimate claim to property right in order to be entitled to it).

hearing.[55] Now that term and continuing contract districts must both afford procedurally correct hearings, the impetus to avoid any appearance of a tenure system is nonexistent.[56]

Finally, a term contract district is empowered to have a written probationary status for teachers not to exceed two years, during which time the provisions of the TCNA do not apply.[57] During this period, a probationary teacher's contract could be allowed to lapse for any reason not prohibited by law, or as stated in the comparable section of the continuing contract statute, for "the best interests of the school district . . . ."[58]

IV. CONSTITUTIONALLY IMPERMISSIBLE REASONS FOR DISCHARGE OR NONRENEWAL

Not only are school districts limited by law with respect to the reasons for which a teacher may be terminated during, or at the end of, a school year or contract term, they are prohibited from taking adverse action against an employee's status for constitutionally impermissible reasons. When a constitutionally protected right is involved, there is no distinction between nonrenewal and mid-year termination or between a term and continuing contract district. The employee's participation in political activity,[59] public criticism of the school board or administration practices,[60] race,[61] failure to abide by a dress code,[62]

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55. *See id.* at 576-77 (tenured professor's employment safeguarded by due process); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) (tenure system could be implied from circumstances of employment).

56. *See* TEX. EDUC. CODE ANN. §§ 21.203-.207 (Vernon Supp. 1985) (term contract nonrenewal requirements); *id.* §§ 13.111, .112 (Vernon 1972 & Supp. 1985) (continuing contract termination requirements).

57. *See id.* § 21.209 (Vernon Supp. 1985).

58. *See id.* § 13.103 (Vernon 1972).

59. *See* Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966) (overturned nonrenewal based upon teacher's activity in civil rights movement), *cert. denied,* 385 U.S. 1003 (1967); Guerra v. Roma Indep. School Dist., 444 F. Supp. 812, 820-21 (S.D. Tex. 1977) (district cannot fail to renew teacher's contract where nonrenewal is retaliation for teacher's political activity). Public employment cannot be rejected based upon the employee's failure to meet an unreasonable condition, such as a waiver of his or her first amendment rights. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (membership in communist party not sufficient grounds for dismissal); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) ("to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association"); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (Oklahoma statute barring public employees from associating with communist front organizations violates due process).

60. *See* Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968); Lusk v. Estes, 361 F. Supp. 653, 660 (N.D. Tex. 1973) (overturned nonrenewal for criticism of school administra-

expression of controversial views in class,[63] and participation in a teachers' union or association[64] have all been held to constitute constitutionally impermissible criteria for severing the employment relationship.

A school district may not terminate a teacher when the sole reason for the decision to sever the employment relationship is the exercise by that teacher of a constitutionally protected right or activity.[65] In reality, however, a decision to sever the employment relationship normally involves a combination of reasons, only some of which might fall within the category of constitutionally protected activity; or the decision may involve the exercise of speech that in some manner affects the teacher's job performance. For example, when a teacher is critical of a superior about the management of the school system, a conflict arises between the district's right to maintain a cohesive staff and a teacher's first amendment freedom to express his or her beliefs. In *Pickering v. Board of Education,*[66] the United States Supreme

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tors). "Anybody who can size up a redheaded kid on the first day of school and tell whether to put him on the front or back row can also size up the men in public office." J.B. SHEPPERD, FREEDOM'S ADVOCATE 11 (1954).

61. *See* Harkless v. Sweeny Indep. School Dist., 554 F.2d 1353, 1357 (5th Cir.) (school district failed to rehire 70% of black teachers while rehiring 100% of white teachers), *cert. denied,* 434 U.S. 966 (1977). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

62. *See* Hander v. San Jacinto Junior College, 519 F.2d 273, 277 (5th Cir. 1975) (bearded appearance could not be regulated). "School authorities may regulate teachers' appearance and activities only when the regulation has some relevance to legitimate administrative or educational functions." *Id.* at 277. A Texas court of appeals, prior to the *Hander* decision, held that school officials "may adopt all reasonable rules and regulations . . . governing the conduct and dress of teachers." *See* Ball v. Kerrville Indep. School Dist., 504 S.W.2d 791, 797-98 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). However, the court concluded that the State Board of Education properly overturned the termination of a teacher whose termination was based upon the wearing of a Vandyke beard. *See id.* at 798-99.

63. *See* Sterzing v. Fort Bend Indep. School Dist., 496 F.2d 92, 93 (5th Cir. 1974) (district court found termination to violate teacher's right to "speak and express his opinion in the classroom").

64. *See* Pred v. Board of Pub. Instruction, 415 F.2d 851, 854, 859 (5th Cir. 1969) (as long as teacher does not agitate or propangandize within classroom, union activities protected). An Illinois court, prior to the *Pred* decision, held that a teacher's participation in union activities that interfered with his teaching responsibilities was sufficient ground for termination. *See* Yuen v. Board of Educ., 222 N.E.2d 570, 572 (Ill. App. Ct. 1966).

65. *See* Shelton v. Tucker, 364 U.S. 479, 485-86 (1960); Avery v. Homewood City Bd. of Educ., 674 F.2d 337, 341-42 (5th Cir. 1982) (discharge based upon pregnancy of unmarried teacher violates equal protection clause).

66. 391 U.S. 563, 568 (1968). The Court faced a situation in which a teacher had been

Court adopted a balancing test to determine which of these conflicting rights should prevail.[67] The Court held that public employers and trial courts are required to examine each specific situation to determine whether the statement's effect upon the administration of the school would justify restrictions on the teacher's right to participate in public or private discussions of work-related issues.[68]

In *Connick v. Meyers,*[69] the Supreme Court applied the *Pickering* balancing test to a situation where a public employee was dismissed because she circulated a petition surveying co-workers' concern over working conditions in the district attorney's office.[70] The Court balanced the right of the employee to raise limited issues of public concern against the disruptive effect the petition had upon the internal working relationships of the office.[71] The Court found the disruptive effect, in this case, to outweigh the employee's right to raise these issues.[72] In a termination proceeding against a teacher based upon the teacher's statements or writings, the teacher's employment may be terminated where the statements either represent insubordination that materially affects the workings of the school or its environment, or directly inhibit the teacher's performance of his or her duties.[73]

When a combination of permissible and illegal reasons support a

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discharged because of writing a letter to a newspaper; the letter was critical of the school board's prior attempts to raise school revenues and of the superintendent's attempts to prevent teachers from opposing a proposed bond issue. *See id.* at 575-78 app. The board based its decision on the rationale that the teacher's action was "detrimental to the best interests of the schools." *See id.* at 567.

67. *See id.* at 568 (balance of interest between teacher as citizen and state as employer).

68. *See id.* at 570 n.3. The Court reviewed the employment relationship between the teacher and the district's school board and its superintendent, and determined that the relationship was not direct or immediate and, therefore, "no question of maintaining either discipline by immediate superiors or harmony among coworkers" existed. *See id.* at 570. Secondly, the Court looked at the nature of the published criticism of school financing and found it to be of general public concern, about which the teacher's position should not remove her from public debate since neither her teaching duties nor the school's administration would be greatly impeded by the teacher's participation in the debate. *See id.* at 572-73.

69. 461 U.S. 138 (1983).

70. *See id.* at 140-42. The survey included questions "concerning office transfer policy, office morale, . . . and whether employees felt pressured to work in political campaigns." *See id.* at 141.

71. *See id.* at 147 (matters of personal concern in the work place have limited first amendment protection); *id.* at 151 (close working relationships important to efficient function of office operations).

72. *See id.* at 154.

73. *See* Pickering v. Board of Educ., 391 U.S. 563, 570 n.3 (1968). "[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak

district's decision, courts are to apply the test adopted by the Supreme Court in *Mount Healthy City Board of Education v. Doyle.*[74] Doyle argued that his teaching contract had not been renewed because he leaked information concerning the school to a local radio station, and that nonrenewal on such grounds constituted a violation of his protected right to free speech.[75] In terminating Doyle, the school district relied upon both the news-leaking incident and another incident in the school cafeteria in which Doyle had made obscene gestures to students.[76] The trial court found that Doyle's exercise of protected rights had played a "substantial" part in the board's decision not to renew Doyle's contract and held that Doyle must be reinstated with back pay.[77] The Supreme Court, reversing both the trial court and the Sixth Circuit, held that a teacher can recover under a claim of nonrenewal of a contract for constitutionally impermissible reasons only if the school officials fail to prove that absent the protected conduct of a teacher, the same decision on renewal would have been reached.[78] Justice Rehnquist described the two separate issues involved in a claim of nonrenewal for impermissible reasons:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[79]

By focusing on causation, the Court correctly protects the individual from decisions which result from the improper consideration of constitutionally protected activity, but does not disturb the action taken

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on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

74. 429 U.S. 274 (1977).

75. *See id.* at 283 (Doyle communicated information to local radio station that caused undue concern in community).

76. *See id.* at 282 (in addition to utilizing obscene gesture, Doyle referred to students involved in same incident as "sons of bitches").

77. *See id.* at 283.

78. *See id.* at 287.

79. *Id.* at 287.

when the result would have been the same even if the protected activity had not been improperly considered.

V. PROCEDURAL DUE PROCESS FOR TEACHER TERMINATION OR NONRENEWAL

Although a school district may have proper reasons to support a teacher's termination or nonrenewal, it must still afford the teacher the proper procedure. If an unauthorized or impermissible reason is the basis for the decision, no amount of correct procedure can make the decision proper.[80] Similarly, failure to grant a teacher the proper procedure can invalidate a correct decision.[81] Thus, knowledge of how to sever the employment relationship is as important as knowledge and proof of the permissible reasons for the decision.

The fourteenth amendment of the Constitution provides that "[n]o State shall . . . deprive any person of . . . property, without due process of law."[82] Because "property" is a broad term, the Supreme Court has been forced to specifically define the particular property interests protected by the fourteenth amendment.[83] Protected prop-

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80. *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968); Hander v. San Jacinto Junior College, 519 F.2d 273, 277 (5th Cir. 1975); Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967).

81. *Cf.* Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). In *Stanley,* an Illinois statute presumed that unwed fathers were unsuitable as parents. *See id.* at 649. Even though the father may have been unfit as a parent, the denial of a hearing on his fitness made the state action unconstitutional. *See id.* at 658. "Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." *See* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

82. U.S. CONST. amend. XIV, § 1.

83. *See* Board of Regents v. Roth, 408 U.S. 564, 571 (1971) (" '[l]iberty' and 'property' are broad majestic terms"). The meaning of "property" as applied by the due process clause "relate[s] to the whole domain of social and economic fact." *See* National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). The Supreme Court has, on several occasions, specifically defined protected property interests. *See* Barry v. Barchi, 443 U.S. 55, 64 (1979) (horse racing training license); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978) (utility service); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (receipt of disability benefits); Goss v. Lopez, 419 U.S. 565, 573-74 (1975) (high school education); Connell v. Higginbotham, 403 U.S. 207, 208 (1971) (governmental employment); Bell v. Burson, 402 U.S. 535, 542 (1971) (drivers license). Due process protection is dependent upon whether the individual will suffer a grievous loss and does not depend upon whether the "benefit is characterized as a 'right' or as a 'privilege.' " *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole revocation case involving due process). In addition, "[t]he question is not to merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the '. . . property language of the Fourteenth Amendment.' "

erty interests do not "arise from" the Constitution, but are created and defined by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[84] Therefore, the property interest Texas public school teachers have in their employment, secured by the due process clause of the fourteenth amendment, is defined by reference to chapters 21 and 13 of the Texas Education Code and to local board policies and practices.[85]

To deprive a person of a protected property interest, minimum procedural requirements must be followed. Just as property interests cannot be defined without resort to state and federal laws, minimum procedural due process cannot be determined without reference to the applicable state and federal law and local school board policies. Ultimately, the Constitution defines the minimum procedural due process for deprivation of a protected interest.[86] In *Arnett v. Kennedy,*[87] a plurality of the United States Supreme Court stated that an employee's property interest in the retention of employment exists only to the extent it is protected by the procedural safeguards in the ordinance and rules governing their employment.[88] Interpreting *Arnett,* the Fifth Circuit reasoned that because six members of the court (a majority) "rejected" this proposition, *Arnett* "must be read" as hold-

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See Jago v. Van Curen, 454 U.S. 14, 17 (1981); *see also* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

84. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Protected property interests can be created and defined by state statutes or rules entitling citizens to certain benefits. *See, e.g.,* Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Perry v. Sindermann, 408 U.S. 593, 601 (1972); Fuentes v. Shevin, 407 U.S. 67, 86 (1972). "Any significant taking of property by the state is within the purview of the due process clause." Fuentes v. Shevin, 407 U.S. 67, 86 (1972). "[A] temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment." *See id.* at 84-85.

85. *See* TEX. EDUC. CODE ANN. §§ 21.201-.211 (Vernon Supp. 1985); *id.* §§ 13.101-.116 (Vernon 1972 & Supp. 1985). A de facto tenure policy can be established from officially promulgated "rules and understandings." *See* Perry v. Sindermann, 408 U.S. 593, 601 (1972). However, a mere "unilateral expectation," or "abstract need, or desire" will not suffice to establish a constitutionally protected interest. *See* Diggles v. Corsicana Indep. School Dist., 529 F. Supp. 169, 174 (N.D. Tex. 1981) (teacher's aide not reemployed after several years of service).

86. *See* Boddie v. Connecticut, 401 U.S. 371, 378 (1971); City of Houston v. Fore, 401 S.W.2d 921, 923 (Tex. Civ. App.—Waco 1966), *aff'd,* 412 S.W.2d 35 (Tex. 1967).

87. 416 U.S. 134 (1974).

88. *Compare id.* at 151 (statute defines procedures to be used) *with id.* at 185 (White, J., concurring in part & dissenting in part) (notice and hearing required by Constitution).

ing that while the state has the power to define a "property interest" within the meaning of the fourteenth amendment, it is the Constitution which defines the minimum procedures necessary to safeguard against deprivation of that protected interest.[89] The Fifth Circuit concluded that a public employer may not relieve itself from due process responsibilities by promulgating procedures for termination which fall short of constitutional due process guarantees.[90] Recently, the United States Supreme Court confirmed the Fifth Circuit's interpretation of *Arnett*; thus, a public employer is required to comply with the Constitutional minimum due process requirements despite the fact that state procedural requirements for termination are less onerous than the Constitutional requirements.[91] By contrast, where the state law or local policies add to the minimum procedural protection afforded by the Constitution, due process requires the district to comply with the local requirements, as well as the federal constitutional requirements.[92]

Constitutional minimum procedural due process requires that any deprivation of a property interest must "be *preceded* by *notice* and an opportunity for *hearing* appropriate to the nature of the case."[93] Two issues arise from this simple statement: (1) the content and timing of the notice and (2) the type and timing of the hearing.[94]

With respect to proper notice, the Fifth Circuit addressed this issue

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89. *See* Thurston v. Dekle, 531 F.2d 1264, 1271 (5th Cir. 1976), *vacated,* 438 U.S. 901 (1978).

90. *See id.* at 1271-72.

91. *See* Cleveland Bd. of Educ. v. Loudermill, __ U.S. __, __, 105 S. Ct. 1487, 1491-93, __ L. Ed. 2d __, __ (1985).

92. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

93. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis added); *see also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314-15 (1950). "The fundamental requirement of due process is the opportunity to be heard and it is 'an opportunity which must be granted at a meaningful time and in a meaningful manner.' " Parratt v. Taylor, 451 U.S. 527, 540 (1981) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Shawgo v. Spradlin, 701 F.2d 470, 480 (5th Cir. 1983); Cunningham v. Parkdale Bank, 660 S.W.2d 810, 813 (Tex. 1983). "The purpose of notice . . . is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.' " Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978); *see also* Cunningham v. Parkdale Bank, 660 S.W.2d 810, 813 (Tex. 1983).

94. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("once it is determined that due process applies, the question remains what process is due"). "In general, the procedural protections required by the due process clause vary according to the demands of the particular situation." Smith v. Estelle, 445 F. Supp. 647, 655 (N.D. Tex. 1977), *aff'd,* 602 F.2d 694 (5th Cir. 1979), *aff'd,* 451 U.S. 454 (1981).

in *Ferguson v. Thomas,*[95] wherein the court had an occasion to outline the notice required when terminating a teacher for cause.[96] To meet constitutional muster, notice must:

1. advise the teacher of the "cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist";[97] and

2. advise the teacher of the "names and the nature of the testimony of the witnesses against him."[98]

In Texas, the question arises whether it is sufficient for a district to notify a teacher of his proposed termination by merely listing the statutory reasons for termination in the teacher's notice. Such a list would probably be sufficient to meet state law requirements.[99] Broadly assigning a statutory reason for an individual's termination, however, may not contain sufficient detail to enable a teacher to properly respond to the allegations against him and, thus, fail constitutional muster. Likewise, there is no requirement under state law that the teacher be advised of the names and the nature of the testimony of the witnesses against him.[100]

It is clear that due process requires notice to be given, but there is a sub-issue as to when such notice must be given. In dicta, the *Ferguson* court stated that the employer is not required in every case to set out in its initial notice all of the details regarding the reasons for discharge.[101] The court suggested that minimum procedural due process only requires notice that termination for cause is being proposed.[102] If the teacher proceeds to challenge the termination, then the employer must express its allegations in greater detail and provide the teacher with the names of the witnesses and the nature of the testi-

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95. 430 F.2d 852 (5th Cir. 1970).

96. *See id.* at 856.

97. *See id.* at 856. Notice to the teacher's attorney will be imputed to the teacher under § 13.103 of the Education Code. *See* Canutillo Indep. School Dist. v. Kennedy, 673 S.W.2d 407, 409 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

98. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970). Where the board suspends a teacher awaiting a hearing on termination, notice of an emergency meeting of the board of trustees will only have to substantially comply with the requirements of the open meetings law. *See* McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 474-75 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (where it is just suspension, notice must meet requirements of open meetings law and not requirements for teacher termination).

99. *See* TEX. EDUC. CODE ANN. §§ 13.109, .111(a) (Vernon 1972).

100. *See id.* § 13.111(a).

101. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

102. *See id.* at 856.

mony that will be offered in support of the proposed action.[103] Though minimum constitutional procedural due process may only require the initial notice to communicate the proposed action, state law additionally requires this notice to state the grounds.[104] Therefore, Texas law, by requiring at least an outline of the grounds for the proposed action, adds to the minimum constitutional due process guarantees as discussed in *Ferguson.*[105]

With respect to a proper hearing, minimum constitutional requirements demand that before an employee may be deprived of his property interest, the hearing must:

1. take place at a *reasonable* time after proper notice is given;[106]
2. afford the teacher a "meaningful opportunity" to defend him or herself; and[107]
3. take place before a tribunal that "possesses some academic expertise and an apparent impartiality toward the charges."[108]

Regarding the last requirement (3), an issue is raised when the school board utilizes its counsel during the hearing to act as both prosecutor and advisor to the board on questions concerning evidence and procedure.[109] Whether the prosecutor's advice to the presiding

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103. *See id.* at 856; *cf.* Lowrance v. Barker, 347 F. Supp. 588, 593 (E.D. Tex. 1972), *aff'd,* 480 F.2d 923 (5th Cir. 1973).

104. *See* TEX. EDUC. CODE ANN. § 13.111(a) (Vernon 1972) (notice of "proposed action and of the grounds assigned therefor"); *id.* § 21.204(c) (Vernon Supp. 1985) (notice "shall contain a statement of all the reasons").

105. *See* Ferguson v. Thomas, 430 F.2d 852, 856-57 (5th Cir. 1970).

106. *See id.* at 856 (emphasis added). Texas law seems to require that the hearing, if requested, must take place before the proposed termination or nonrenewal. *Cf.* TEX. EDUC. CODE ANN. § 13.113 (Vernon 1972). Some federal courts have sustained, in some circumstances, the constitutionality of a post-termination evidentiary hearing, provided that the employee is given pre-termination notice with specific reasons and is given a reasonable time to respond both in writing and orally to the official or official body charged with making termination decisions. *See* Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Thurston v. Dekle, 531 F.2d 1264, 1272-73 (5th Cir. 1976), *vacated,* 438 U.S. 901 (1978); Davis v. Vandiver, 494 F.2d 830, 832-33 (5th Cir. 1975); Johnson v. San Jacinto Junior College, 498 F. Supp. 555, 570-71 (S.D. Tex. 1980).

107. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970). The type and timing of the hearing "will depend on appropriate accommodation of the competing interests involved." *See* Goss v. Lopez, 419 U.S. 565, 579 (1975); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

108. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970). "The nature of a due process hearing is shaped by the 'risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.' " Califano v. Yamasaki, 442 U.S. 682, 696 (1979) (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

109. "Due process demands impartiality on the part of those who function in judicial or

officer of the hearing taints the impartiality of the board is an issue that has yet to be resolved.[110]

A. *Term Contract Districts*

Section 21.203(b) of the Texas Education Code provides that the board of trustees of each school district must promulgate board policies establishing reasons for the nonrenewal of a teacher's term contract.[111] In addition, the board must adopt policies and procedures for receiving recommendations from the school administration for the nonrenewal of teacher term contracts.[112] Section 21.204 provides that when the board receives a nonrenewal recommendation from the administration, it must consider this recommendation in conjunction with written evaluations required by section 21.202.[113] If the board chooses to accept a recommendation, it must give the teacher written notice of the "proposed" nonrenewal no later than the first of April before the natural termination of the teacher's term contract.[114]

The written notice required by state law specifies only that the notice shall contain a statement of the grounds for such proposed action.[115] This notice requirement is not difficult to meet under state law; however, minimum procedural due process, as required by the Constitution of the United States, may, in some circumstances, re-

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quasi-judicial capacities." Schweiker v. McClure, 456 U.S. 188, 195 (1982); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); Brown v. United States, 377 F. Supp. 530, 539 (N.D. Tex. 1974).

110. Participation by a school district's attorney in a student disciplinary proceeding in such a dual capacity has been held constitutional. *See* Tasby v. Estes, 643 F.2d 1103, 1106 (5th Cir. 1981). "The involvement of the school district's attorney in the disciplinary proceedings does not necessarily endanger the impartiality and integrity of the fact-finding process." *Id.* at 1106; *cf.* Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438, 443 (5th Cir. 1973) ("Due process in the schools does not require that a court of law be convened to hear every [student] suspension.")

111. *See* TEX. EDUC. CODE ANN. § 21.203(b) (Vernon Supp. 1985). The rights of term teachers prior to 1981 are discussed in Wells v. Independent School District, 736 F.2d 243, 251-55 (5th Cir. 1984).

112. *See* TEX. EDUC. CODE ANN. § 21.203(c) (Vernon Supp. 1985).

113. *See id.* § 21.204(a).

114. *See id.* § 21.204(a). The teacher waives any objection to the board's failure to meet the April 1 deadline by merely requesting a hearing as outlined in § 21.205 of the Education Code. *See* Barich v. San Felipe Del Rio Consol. Indep. School Dist., 653 S.W.2d 329, 330 (Tex. App.—San Antonio 1983, no writ). The teacher can seek an injunction to extend his 10 day notice requirement for requesting a hearing. *See id.* at 330-31 (injunction permitted when teacher complained of sufficiency of notice received regarding his nonrenewal).

115. *See* TEX. EDUC. CODE ANN. § 21.204(c) (Vernon Supp. 1985).

quire a more detailed notice than that required by state law.[116] If the board should fail to give proper and timely written notice of the proposed nonrenewal, the board shall be bound to employ the teacher in his or her same capacity for the following year.[117]

Term contract teachers have a protected property interest in the balance of their contract; thus, the federal constitution requires that they be provided procedural due process prior to termination.[118] Although not dictated by state law, minimum due process guarantees would necessitate following the procedures outlined in sections 21.205 through 21.207 when discharging a teacher "for cause" during the term of the contract.[119] However, chapter 21 excludes probationary teachers in a term contract district from its procedural requirements.[120] A term contract district that adopts a probationary period would not have to give such a teacher a hearing on a nonrenewal decision unless its own rules provide such a procedure or grant a form of tenure.[121]

If a term contract teacher desires a hearing upon notice of nonrenewal or notice of termination for cause, he must give written notice to the board of trustees within ten days after receiving the notice.[122]

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116. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

117. *See* TEX. EDUC. CODE ANN. § 21.204(b) (Vernon Supp. 1985).

118. *See* Board of Regents v. Roth, 408 U.S. 564, 576 (1972).

119. *See* Perry v. Sindermann, 408 U.S. 593, 601 (1972) (local rules and understandings can establish procedural due process).

120. *See* TEX. EDUC. CODE ANN. § 21.209 (Vernon Supp. 1985).

121. *Compare id.* (provisions of chapter 21, subchapter G do not apply to probationary term teachers) *with* Board of Regents v. Roth, 408 U.S. 564, 577 (1977) (rights created by existing rules and understandings). The Austin court of appeals upheld a district court's refusal to grant a probationary term contract employee a temporary injunction to restrain a school district from nonrenewing his position. *See* Bormaster v. Lake Travis Indep. School Dist., 668 S.W.2d 491, 494 (Tex. App.—Austin 1984, no writ). The employee complained that he was given defective written notice of the proposed action. *See id.* at 493. The court held that the employee could not establish a "probable right to recover," so as to warrant issuance of a temporary injunction, when, as a probationary employee, he did not show that he is "entitled to complain of any alleged defective notice." See id. at 493-94. *Compare id.* at 494 (temporary injunction to protest defective notice denied to probationary employee) *with* Barich v. San Felipe Del Rio Consol. Indep. School Dist., 653 S.W.2d 329, 331 (Tex. App.—San Antonio 1983, no writ) (injunctive relief to protest defective notice available to term contract employee).

122. *See* TEX. EDUC. CODE ANN. § 21.205(a) (Vernon Supp. 1985). By requesting a hearing under § 21.205, the teacher waives rights as to defects in notice. *See* Barich v. San Felipe Del Rio Consol. Indep. School Dist., 653 S.W.2d 329, 330 (Tex. App.—San Antonio 1983, no writ). Because a teacher is placed in the untenable position of either obtaining his right to hearing, thus waiving an attack on the notice, or foregoing the hearing and relying

If a hearing is requested, the board must hold a hearing no later than fifteen days after receipt of the teacher's request.[123] The hearing will be closed unless the teacher requests an open hearing.[124] To conform with the subchapter addressing term contracts, the board must adopt rules regarding the conduct of hearings.[125] If a teacher does not request a hearing within ten days after receiving his or her written notice, the board can act on the administration's recommendation and must notify the teacher of the action no later than fifteen days after the expiration of the ten day period within which the teacher might have requested a hearing.[126]

After a properly requested and conducted hearing, the board must notify the teacher of its decision not later than fifteen days after the hearing takes place.[127] The statute does not require the written notice to contain anything more than notice of the action taken.[128] This is in contrast to the notice of the "proposed" nonrenewal, which must contain a "statement of all the reasons for such proposed action."[129]

The teacher may appeal the board action to the state commissioner of education.[130] The review by the commissioner of education concerning nonrenewal will be governed by the substantial evidence rule, and the commissioner may only overturn the decision of the board of trustees upon a finding that the board action was "arbitrary, capricious, unlawful or not supported by substantial evidence."[131] In con-

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solely upon an argument of defective notice, a temporary restraining order or temporary injunction may be had in order to delay the board of trustees meeting, where the teacher challenges the notice requirement. *See id.* at 331 (injunctive relief available to postpone 10 day notice requirement).

123. *See* TEX. EDUC. CODE ANN. § 21.205(a) (Vernon Supp. 1985).

124. *See id.*

125. *See id.* § 21.205(b).

126. *See id.* § 21.206(a).

127. *See id.* § 21.206(b).

128. *See id.* § 21.206(b).

129. *Compare id.* § 21.206(b) (board should notify employee of action taken) *with id.* § 21.204(c) (notice shall contain statement of all reasons).

130. *See id.* §§ 11.13, 21.207(a); Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 157.1(b)(1) (Shepard's May 1, 1982) (Nature of Hearings and Appeals).

131. *See* TEX. EDUC. CODE ANN. § 21.207(a) (Vernon Supp. 1985); Tex. Educ. Agency, 8 Tex. Reg. 2759, 2759 (1983) (to be codified at 19 TEX. ADMIN. CODE § 157.64). The party appealing the decision of the board of trustees has an onerous burden to overcome. *See* McConnell v. Alamo Heights Indep. School Dist., 576 S.W.2d 470, 475-76 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); McRae v. Lindale Indep. School Dist., 450 S.W.2d 118, 121-22 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.). The commissioner's review is limited to the record; however, agency regulations permit the submission of new evidence to the commis-

trast, for teacher terminations, the commissioner of education will provide a de novo hearing at no expense to the parties involved.[132] If the teacher is further aggrieved by the decision of the commissioner of education, the teacher may then appeal to a Travis County district court.[133]

B. *Continuing Contract Districts*

As discussed previously, first time teachers in districts utilizing continuing contracts are initially employed under probationary contracts.[134] Chapter 13 of the Education Code, in addition to addressing termination of continuing contract teachers, also provides

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sioner where such evidence is material and its absence at the original hearing is excused by good cause. *See* Tex. Educ. Agency, 8 Tex. Reg. 2759, 2759 (1983) (to be codified at 19 TEX. ADMIN. CODE § 157.64(b)). Additionally, the commissioner may conduct a de novo hearing where it is found that the board of trustees failed to provide the employee with a proper hearing, as required by § 21.205(a) of the Texas Education Code. *See* Calderon v. Texas Educ. Agency, No. 346,494 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Nov. 4, 1983) (judgment). *But cf.* TEX. R. CIV. P. 452(f) ("unpublished opinions shall not be cited as authority by counsel or by a court").

132. *See* TEX. EDUC. CODE ANN. § 11.13(a) (Vernon Supp. 1985); Tex. Educ. Agency, 9 Tex. Reg. 4179, 4179 (1984) (to be codified at 19 TEX. ADMIN. CODE § 157.50-.60). "Section 21.207, the term contract appeal provision, is not specifically limited to nonrenewal; however, its positioning within subchapter G., in relationship to section 21.210, the term contract termination provision, would seem to exclude the use of section 21.207 in termination cases in favor of the general appeal provision of section 11.13." Telephone interview with Mark Robinett, Director of Hearings and Appeals for the Texas Education Agency (Mar. 22, 1985) (de novo hearing for termination of term contract teacher). "In addition, prior to the enactment of Subchapter G, termination cases were heard by the Commissioner on a de novo basis pursuant to section 11.13; nothing in section 21.207 purports to have changed any aspect of terminating the employment of term contract teachers." *Id.; cf.* Tex. Educ. Agency, 8 Tex. Reg. 2759, 2759-60 (1983) (to be codified at 19 TEX. ADMIN. CODE § 157.64) (agency's rule for "Appeals Brought Pursuant to the Term Contract Nonrenewal Act," is limited to nonrenewal situations and makes no reference to terminations under § 21.210).

133. *See* TEX. EDUC. CODE ANN. § 21.207(b) (Vernon Supp. 1985). The Administrative Procedure and Texas Register Act (APTRA) requires that a person exhaust all administrative remedies before seeking judicial review of the agency's decision. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(a) (Vernon Supp. 1985). The Administrative Code provides a procedure for the filing of motions for rehearing upon decisions of the commissioner of education. *See* Tex. Educ. Agency, 9 Tex. Reg. 4179, 4179 (1984) (to be codified at 19 TEX. ADMIN. CODE § 157.62). The Corpus Christi court of appeals has held that the filing of a motion for rehearing within the 15 day time limitation is a required prerequisite to an appeal to the district court. *See* Butler v. State Bd. of Educ., 581 S.W.2d 751, 755 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). *See generally* Hill & Kent, *Administrative Law,* 34 SW. L.J. 471, 476-78 (1980); Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions,* 16 ST. MARY'S L.J. 155, 173-81 (1984).

134. *See supra* text accompanying note 20.

the procedural requirements for terminating teachers employed on a probationary basis.[135] A probationary contract teacher does not have a protected property interest under the fourteenth amendment in the renewal of his contract;[136] thus, minimum procedural due process does not require written notice of the reasons for nonrenewal.[137] The type of notice required is controlled by state statute, and to determine the extent of this notice, a distinction must be made between the *nonrenewal* of a probationary contract and the *termination* of a probationary contract.[138] Section 13.111 of the Education Code articulates the notice required when terminating probationary teachers in a continuing contract district.[139] This section requires written notice with a statement of reasons when a teacher is dismissed during the year or "at the end of a school year but before the end of the term fixed in his contract."[140] However, if a teacher is dismissed at the natural expiration of his or her probationary contract (nonrenewal), section 13.103 controls, and written notification with stated reasons to terminate

135. *See* TEX. EDUC. CODE ANN. §§ 13.102-.105 (Vernon 1972).

136. *See* Board of Regents v. Roth, 408 U.S. 564, 569 n.6, 578 n.16 (1972); Bowen v. Calallen Indep. School Dist., 603 S.W.2d 229, 234-35 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

137. *See* Bormaster v. Lake Travis Indep. School Dist., 668 S.W.2d 491, 494 (Tex. App.—Austin 1984, no writ). If local policies are established which create a notice procedure, then those policies should be followed if they exceed the statutory requirements. *See* Bowen v. Calallen Indep. School Dist., 603 S.W.2d 229, 233 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). Several courts prior to *Roth* held that a non-tenured public employee has no right to a statement of reasons for nonrenewal. *See* Orr v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971), *cert. denied,* 408 U.S. 943 (1972); Jones v. Hopper, 410 F.2d 1323, 1329 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1160-61 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969).

138. Not only is there a statutory distinction between the notice required for termination and nonrenewal, but such a distinction has been determinative in the evaluation of many local board policies and rules pertaining to teacher contracts. *See* White v. South Park Indep. School Dist., 693 F.2d 1163, 1166 (5th Cir. 1982) ("[W]ritten policies and regulations of the Board establish a procedure for the dismissal of an employee, but say nothing about the decision to renew a teacher's contract."). Where, for instance, a board policy has established the notice required for termination, such notice will not control in teacher nonrenewal cases. *See id.;* Moore v. Knowles, 377 F. Supp. 302, 304, 308 (N.D. Tex. 1974) (board policy applied only to termination), *aff'd,* 512 F.2d 72 (5th Cir. 1975); Clutts v. Southern Methodist Univ., 626 S.W.2d 334, 336 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (university bylaw provision did not override one-year appointment, as professor "without tenure"); Bowen v. Calallen Indep. School Dist., 603 S.W.2d 229, 234-35 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (board policy limited to dismissal and not associated with nonrenewal) (pre-TCNA case).

139. *See* TEX. EDUC. CODE ANN. § 13.111 (Vernon 1972).

140. *See id.*

need not be given.[141]

In cases of nonrenewal of a probationary teacher in a continuing contract district, Texas law requires only that notice of the nonrenewal be made to the teacher no later than the first of April preceding the natural expiration of the employment term fixed in the contract.[142] Failure to give timely notice shall result in the automatic reelection of such probationary teacher to continued employment for the next school year.[143] A probationary contract teacher has the right, upon notification of the decision not to offer him a contract, to make a written request for a hearing before the board of trustees.[144] State law does not require the probationary contract teacher to be informed of the reasons for nonrenewal of his employment until the hearing before the board.[145] Upon hearing, the board of trustees may "confirm or revoke" its previous decision.[146] The board's decision is final and nonappealable.[147] Minimum federal constitutional requirements appear to be satisfied because the probationary contract teacher has no property interest in continued employment upon the natural termination of the contract.[148]

Full constitutional protections come into play should the district choose to terminate the probationary contract teacher during the term of the contract. First, the continuing contract district must give written notice of the "*proposed* action and of the grounds assigned therefor."[149] Second, the probationary contract teacher terminated during the probationary period, upon written request, will be granted a hearing before the board of trustees to contest his or her termina-

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141. *See id.* § 13.103.

142. *See id.* § 13.103.

143. *See id.* § 13.103; Cummins v. Board of Trustees, 468 S.W.2d 913, 916 (Tex. Civ. App.—Austin 1971, no writ).

144. *See* TEX. EDUC. CODE ANN. § 13.104 (Vernon 1972).

145. *See id.*

146. *See id.*

147. *See id.* The wording "final and nonappealable" has been construed as "prohibiting only appeals to State administrative authorities and not as denying independent suits such as . . . breach of contract . . . [or] deprivation of constitutional rights." *See* Cummins v. Board of Trustees, 468 S.W.2d 913, 916 (Tex. Civ. App.—Austin 1971, no writ).

148. *See* Board of Regents v. Roth, 408 U.S. 564, 569 n.6, 578 n.16 (1972); Bowen v. Calallen Indep. School Dist., 603 S.W.2d 229, 234-35 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

149. *See* TEX. EDUC. CODE ANN. § 13.111(a) (Vernon 1972) (emphasis added).

tion.[150] Such written request for a hearing must be made within ten days after the date the teacher receives official notice of his or her termination, and the district must fix a hearing date within ten days after receiving the written request from the teacher.[151] The statute provides that this hearing shall be public unless the teacher makes a written request that the hearing be private.[152]

Pursuant to statutory law, the probationary teacher, whom the district proposes to terminate during the course of his probationary period, has the right at a hearing before the board to be represented by counsel, to hear and reply to the evidence upon which the charges are based, to cross-examine witnesses, and to present evidence in opposition or mitigation thereof.[153]

The continuing contract teacher is entitled to continue his employment with the district for as long as he desires.[154] However, the district may terminate his employment contract for statutorily assigned reasons.[155] The teacher terminated from his continuing contract during the year is entitled to written notice from the board of trustees, or its designate, of the "proposed" action and the grounds assigned therefor.[156] A continuing contract teacher dismissed at the end of any year, or returned to probationary contract status at the end of a school year, is likewise entitled to written notification of the proposed action and of the grounds assigned therefor.[157] The procedural steps required for terminating a continuing contract teacher, as provided by chapter 13 of the Education Code, are the same as the steps for terminating a probationary contract teacher.[158] To reiterate, a continuing contract teacher is entitled to written notification of the proposed ac-

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150. *See id.* § 13.112(a); Heins v. Beaumont Indep. School Dist., 525 F. Supp. 367, 372 (E.D. Tex. 1981), *aff'd,* 690 F.2d 903 (5th Cir. 1982).

151. *See* TEX. EDUC. CODE ANN. § 13.112(a) (Vernon 1972).

152. *See id.* § 13.112(c). *Compare* Corpus Christi Classroom Teachers Ass'n v. Corpus Christi Indep. School Dist., 535 S.W.2d 429, 430-31 (Tex. Civ. App.—Corpus Christi 1976, no writ) (teacher requested public hearing, board went into closed session after close of evidence but prior to final vote in open session) *with* Bowen v. Calallen Indep. School Dist., 603 S.W.2d 229, 236 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (teacher failed to object when board went into executive session).

153. *See* TEX. EDUC. CODE ANN. §§ 13.111, .112(d) (Vernon 1972).

154. *See id.* § 13.107; Wells v. Hico Indep. School Dist., 736 F.2d 243, 255 (5th Cir. 1984) (continuing contract law method used to establish tenure).

155. *See* TEX. EDUC. CODE ANN. § 13.109 (Vernon 1972).

156. *See id.* § 13.111(a).

157. *See id.* § 13.111(a).

158. *See supra* notes 149-53 and accompanying text.

tion and a hearing before the board of trustees to contest the proposed action, provided the teacher gives proper and timely notice to the board indicating his or her desire for same.[159] The district is obligated to grant the continuing contract teacher a hearing before the board of trustees.[160] The time and place of such hearing shall be fixed within ten days after receipt of the teacher's written request for same.[161] Similarly, the continuing contract teacher has the right to employ counsel, to present evidence on his behalf, and to cross-examine the district's witnesses.[162] The appeal process for a continuing contract teacher is virtually identical to the process available to terminated term contract teachers.[163]

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159. *See* TEX. EDUC. CODE ANN. § 13.111(a) (Vernon 1972).

160. *See id.* § 13.112(a).

161. *See id.* § 13.112(a).

162. *See id.* § 13.112(d).

163. *See supra* notes 130-33 and accompanying text; TEX. EDUC. CODE ANN. § 13.115 (Vernon 1972 & Supp. 1985). If the teacher is terminated or his contract is not renewed, the teacher may appeal to the commissioner of education. *See* TEX. EDUC. CODE ANN. § 13.115(a), (b) (Vernon 1972) (notice must be given to board of trustees and commissioner within 15 days of termination); *id.* § 11.13(a) (Vernon Supp. 1985) (any dispute with board of trustees may be appealed to commissioner); Tex. Educ. Agency, 9 Tex. Reg. 4179, 4179 (1984) (to be codified at 19 TEX. ADMIN. CODE § 157.1(a)). Section 13.115(a) of the Education Code also provides a direct appeal to the district court of the county or counties in which the school district lies if the teacher is terminated during the year. *See* TEX. EDUC. CODE ANN. § 13.115(a) (Vernon 1972) (appeal must challenge legality of board's action and notice must be given within 30 days of receipt of notice of termination). The passage of APTRA might block appeals made directly from the board to the district court, thereby avoiding the commissioner of education. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 22 (Vernon Supp. 1985) ("all other laws . . . in conflict with this Act are repealed"). APTRA requires administrative remedies to be exhausted prior to judicial review. *See id.* § 19(a); *see also* Butler v. State Bd. of Educ., 581 S.W.2d 751, 755 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). *See generally* Hill & Kent, *Administrative Law,* 34 SW. L.J. 471, 476-78 (1980). Cases have held that administrative remedies need not be exhausted if the question is solely one of law. *See e.g.,* Benton v. Wilmer-Hutchins Indep. School Dist., 662 S.W.2d 696, 698 (Tex. App.—Dallas 1983, no writ); Ector County Indep. School Dist. v. Hopkins, 518 S.W.2d 576, 579 (Tex. Civ. App.—El Paso 1974, no writ); Garcia v. Pharr, San Juan, Alamo Indep. School Dist., 513 S.W.2d 636, 641 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). Administrative remedies must be exhausted prior to instituting suit where factual issues are present. *See, e.g.,* Benton v. Wilmer-Hutchins Indep. School Dist., 662 S.W.2d 696, 698 (Tex. App.—Dallas 1983, no writ); Calvin v. Koltermann, Inc., 563 S.W.2d 950, 954-55 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); De Leon v. Harlingen Consol. Indep. School Dist., 552 S.W.2d 922, 927-28 (Tex. Civ. App.—Corpus Christi 1977, no writ). If either party is dissatisfied after the decision by the commissioner, then the offended party has a right to appeal to the Travis County district court. *See* TEX. EDUC. CODE ANN. § 13.115(c) (Vernon Supp. 1985).

VI. CONCLUSION

Presently, school officials feel as though they are running a legal obstacle course upon which the slightest misstep will result in monetary liability for the district, its officials, and administrators.[164] In addition to the concern of potential liability for a wrongful termination, districts are concerned that legal, rather than educational, reasons are causing them to continue the employment of teachers of questionable merit. At the same time, teachers desire a greater degree of job security and do not want to return to an "at will" employment system. These conflicting interests have resulted in the passage of two separate systems of teacher employment which are not always consistent from either a legal or policy standpoint. Additionally, both systems leave certain questions of job status or procedure unanswered or, at best, confused.

Legislative action could eliminate some of the resultant confusion and uncertainty. For example, there should be statutory guidance for term contract districts on the decision to terminate a teacher. The legislature could assign specific reasons for termination (as is done in continuing contract districts) or it could require term contract districts to adopt policies which set forth the reasons for termination. Further, the present TCNA provides no procedural rules at all for the termination of term contract teachers.

Second, the legislature should endeavor to more clearly define the probationary contract teacher's status in both continuing and term contract districts. Presently, the continuing contract chapter attempts to place the probationary teachers in a quasi-tenured position on the question of contract renewal. This forces the district to risk liability if it attempts to treat the teacher as a non-tenured "at will" employee. The term contract chapter provides no guidance at all except to say that the "term contract provisions do not apply." Here,

164. This fear of monetary liability is certainly not misplaced. *See* Jett v. Dallas Indep. School Dist., No. CA3-83-0824-H (N.D. Tex. Memorandum Opinion and Order, Dec. 10, 1984) ($850,000 damages for wrongful termination); Wells v. Dallas Indep. School Dist., No. CA3-79-1401-G (N.D. Tex. Judgment, Aug. 22, 1984) ($250,000 damages for wrongful termination); Burnam v. Bay City Indep. School Dist., 445 F. Supp. 927, 935 (S.D. Tex. 1978) (awarded $17,000 damages for mental anguish, $16,400 for lost wages, and $25,000 in exemplary damages for violation of teacher's first amendment rights and his right to procedurally correct hearing); Guerra v. Roma Indep. School Dist., 444 F. Supp. 812, 822-23 (S.D. Tex. 1977) (awarded $7500 in back wages and $14,958 in attorney's fees and expenses for nonrenewal of teacher's contract in retaliation for political activities of teacher).

the substance of new legislation would not be nearly as important as the fact that the employee's status would be clearly articulated.

Third, the legislature should either eliminate the lengthy and uneconomical appeals process which (pursuant to section 11.13(a)) entitles a terminated teacher to a de novo appeal to the commissioner of education, or it should provide time lines for speedy resolution of their administrative appeals.[165] Presently, the district is ofttimes in the difficult position of having to prove its case one year after the actual termination, while the teacher is confined in a state of limbo. The commissioner of education should be instructed to uphold the decision of the local board for termination if it is supported by substantial evidence in the record, rather than substituting its judgment for that of the local district. If a terminated teacher complains of a denial of due process at the hearing before the local board, such point could be raised in an appeal to the commissioner and be cured by a remand to the local board, as opposed to the current procedure whereby the commissioner holds a de novo hearing to cure any such defect. Similarly, if the terminated teacher complains of any other error at the local board level, such error could be appealed and resolved by raising those specific points of error to the commissioner, as in the appeal of a civil case, with no actual evidence taken at the appellate level. Such appellate steps would be beneficial to the districts by allowing them to retain their discretion in employment matters while at the same time providing relief for the terminated teacher should errors be made in the termination/nonrenewal process. Both parties would benefit by speedy resolution of the matter. While current statutory schemes create challenging legal problems for attorneys, legislative clarification would permit monies currently spent on resolving legal conflicts to be invested on behalf of the school district's primary function, the education of its students.

165. *See* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting,* 28 STAN. L. REV. 841, 870-76 (1976) ("Reconsidering the Allure of the Due Process Hearing").