AB 729: An Opportunity to Improve Teaching Staffs

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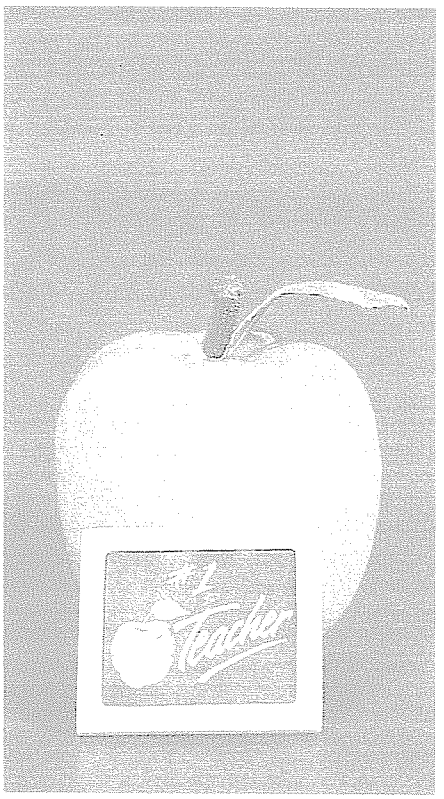
A new standard of "unsatisfactory performance" as a cause for dismissal of permanent certificated employees becomes effective January 1, 1996. The previous standard of "incompetency" was problematic for school districts and courts. Teachers could be legally competent to teach; e.g., they had the proper credential, knew how to prepare lesson plans, etc., but were simply not performing in a satisfactory manner. As a practical matter, districts faced an uphill battle in attempts to dismiss unsatisfactory teachers since that level of performance might not rise (or sink) to the level of incompetence.

Faced with this dilemma, members of the California Association of Suburban School Districts (CALSSD) decided to propose legislation to revise the evaluation and dismissal standards to one of satisfactory performance based on the idea that teaching *performance* is the more accurate measure for retention of teachers, rather than some clinical notion of technical competence. Working with Assembly member Susan Davis, they were successful in enacting AB 729, statutes of 1995, Chapter 392. AB 729 makes four changes to Education Code sections governing dismissal and evaluation, as follows:

1. *Section 44932.* This section lists 12 causes for dismissal. Section (a)(4) has been amended to eliminate "incompetency" and replace it with "unsatisfactory performance."

2. *Section 44934.* This section formerly referred to a notice of intent to dismiss based on charges of incompetence; it now reads "unsatisfactory performance."



3. *Section 44938.* The so-called "90 day notice of incompetency" is now a "90 day notice of unsatisfactory performance."

4. *Section 44662.* Formerly, this provision of the Stull Act required assessment and evaluation of "employee competency." Such assessment will now instead be based on "employee performance."

Any confusion regarding the intent of AB 729 should be removed by reading Assemblymember Davis's "Statement of Legislative Intent" to the Assembly Daily Journal, which provides in part: *The singular purpose of this legislation was to enable the dismissal of teachers who are not meeting performance standards established by the governing board and district administration. The bill therefore establishes a standard less than incompetency (which means not qualified or not able), in favor of one which means less than adequate performance. The intent of the bill was to increase, rather than diminish, a district's ability to dismiss unsatisfactory employees. A district will no longer need to prove a teacher is beyond remediation; rather, it need only demonstrate the teacher is not meeting established standards of performance.*

According to the Statement, incompetency would, in effect, still be grounds for permanent teacher dismissal "since

that level of performance would more than meet the 'unsatisfactory performance' standard now in the Education Code." Thus, incompetency, although eliminated, "remains as the most extreme example of, but is now subsumed by the cause of 'unsatisfactory performance.'"

The Statement also addresses questions likely to arise regarding the *negotiability* of these legislative changes: *Before approving the bill, the Committee did not envision or discuss the bill as having any impact on a governing board's authority to establish evaluation and performance standards under the Stull Act, or on a board's established managerial discretion to decide whether and when to issue notices of unsatisfactory performance and dismissal, pursuant to code sections regulating teacher dismissal. Therefore, the scope of negotiations under the Educational Employment Relations Act (Gov. Code, section 3540 et seq.) remained unaffected and unchanged by the bill and, as such, is limited to "procedures" related to evaluation, as opposed to the substance thereof, or to a board's utilization of disciplinary procedures under the Education Code.*

Although the changes to the Education Code are seemingly straightforward, and the Statement of Legislative Intent clarifies the intent and impact of AB 729, the following issues may arise:

MAY THE NEW LAW BE APPLIED RETROACTIVELY?

In other words, as of January 1, 1996, may one apply the unsatisfactory performance standard to conduct which occurred prior to the change in the law, when incompetency was the standard? We believe a strong argument can be made that such application is permissible, based on analogous court precedent interpreting other changes in the laws affecting teacher status and due process rights. (See, e.g., *Grimsley v. Board of Trustees* [Muroc] (1987) 189 Cal.App.3d 1440.)

WHAT IS THE NEW STANDARD AND WHERE SHOULD IT BE DEFINED?

The new standard requires districts to assess teachers based on performance and to dismiss permanent teachers who fail to meet performance standards established by the governing board. Definition of the standard (either as unsatisfactory or satisfactory performance) will vary by district, but may be found in areas such as the following:

"STULL" EVALUATION CRITERIA

Education Code Section 44662 set forth four areas on which teachers must be evaluated: 1) the progress of pupils toward governing board established standards of expected pupil achievement; 2) instructional techniques and strategies used by the employee; 3) the employee's adherence to curricular objectives; and 4) the establishment and maintenance of a suitable learning environment.

THE EVALUATION FORM

Most forms contain a list of factors and areas of performance on which the employee is to be evaluated. These factors should reflect standards of expected performance.

BOARD POLICY/ADMINISTRATIVE REGULATIONS

The Board's statement of philosophy and expectations, and regulations implementing that policy, should establish standards.

THE EVALUATION PROCESS ITSELF

A heightened level of attention should be paid to steps of the evaluation process involving interaction between the teacher and evaluator. For example, at the "goal setting conference," the evaluator and the teacher are really establishing expectations for the year which, if met, would presumably constitute satisfactory performance by the employee. Anytime the evaluator notes less than acceptable performance, e.g., on an observation or evaluation form, he/she should be discussing areas of unsatisfactory performance with the teacher and, in most cases, reducing to writing the nature of the concern, expectations for the future, offers of assistance, etc.

TEACHER JOB DESCRIPTIONS

Often thought of as applying exclusively to classified school employees, job descriptions can effectively and efficiently set forth expectations, required duties, and other standards.

Other vehicles for establishing the standard exist in local districts depending on past practice (using such tools as evaluation handbooks, course of study descriptions, and the like). Districts should examine every area which touches on teacher performance and develop an integrated standard of satisfactory performance.

DO DISTRICTS NEED TO ESTABLISH STANDARDS OF EXPECTED PUPIL PROGRESS AT EACH GRADE LEVEL?

Yes. Education Code Section 44662, subdivision (a) already provides that "*[t]he governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.*" The first of the four "Stull criteria" mentioned above requires the board to evaluate employees based on student progress as measured by these levels of expected achievement. The new satisfactory performance standard makes establishment and communication of these standards crucial.

MUST DISTRICTS REVISE EVALUATION AND/OR OBSERVATION FORMS?

Nothing in the legislation requires revision of forms; however, evaluation instruments should be scrutinized to determine whether they might impede imple-

mentation of the new law. For instance, does the evaluation form contain a summary rating tantamount to "unsatisfactory"? Do district forms accurately reflect board established standards of assessment? If the answer to either of these questions is "no," revisions might be in order.

MUST DISTRICTS BE WARY OF STANDARDS ESTABLISHED BY OTHER DISTRICTS?

Generally, no. Although districts should anticipate an argument that its standards are "out of line" with another given district, the Education Code speaks to local standards and systems of assessment "established within each school district." (Ed. Code, 44660.) Of course, if a district's satisfactory performance standard is challenged as being arbitrary, capricious, and/or discriminatory, such an argument would probably rely on comparisons with other districts.

MUST DISTRICTS NEGOTIATE STANDARDS OF EXPECTED PUPIL ACHIEVEMENT AND/OR THE DEFINITION OF UNSATISFACTORY PERFORMANCE?

A strong argument can be made that none of these areas is within the scope of negotiations. The Statement of Legislative Intent certainly supports this view, as does the language of the Rodda Act itself (specifying that only *procedures* for evaluation are negotiable.) Also, the mandate of Section 44662 to establish expected levels of student achievement has existed for decades, and these standards have not typically been negotiated. Since AB 729 does not affect that requirement, it would be difficult to argue that the legislation created a new area of negotiations.

It would appear that the California Teachers Association agrees with this conclusion. In the October 1995 edition of *CTA Action*, the official newspaper of the union, CTA's Chief Legal Counsel wrote:

It is likely that districts will propose bargaining a definition of unsatisfactory performance; chapters should resist such demands. The interpretation of the phrase "unsatisfactory performance" within Education Code Section 44932(a) is a matter for the Commission on Professional Competence and reviewing courts, not for the bargaining table. [Cite.] Matters concerning causes for the dismissal of permanent certificated employees are not mandatory subjects of meeting and negotiating under the EERA, but instead are prohibited subjects falling outside the scope of representation since the Education Code controls this subject. (Government Code Sections 3540 and 3543.2(a).)

MUST DISTRICTS CHANGE HOW THEY EVALUATE?

Districts should at least reexamine their procedures and how these procedures are implemented since, in some respects, the new law will require more effort from evaluators in order to document proof under a more subjective standard than existed previously. While unsatisfactory performance might be viewed as an "easier" standard in the short term, successful utilization of the standard may depend on administrative vigilance over the long term.

Specifically, districts should consider:

- Training and inservice of evaluators with the new standard in mind, and with emphasis on board established standards of performance.
- Providing a detailed "blueprint" of the evaluation process, covering substance, format and approach.
- Defining standards of performance as clearly as possible.
- Establishing a process which promotes consistent application of board established standards.

CONCLUSION

In order to effectuate the intent of AB 729 in a manner which "significantly enhances a district's ability to improve classroom education for students" (Statement of Legislative Intent), it is incumbent upon district boards and administrators to strengthen evaluation standards. AB 729 presents districts with a real opportunity to improve teaching staffs; that opportunity will be lost only through inattention to these areas.