

## COMMENTS

### High Hopes Hamstrung: How the “Trial De Novo” for Termination of Tenured Teachers’ Contracts Undermines School Reform in Oklahoma\*

#### *I. Introduction*

The numbers suggest that Oklahoma’s public elementary and secondary schools are struggling, both in terms of student performance and in terms of public investment. A 2007 study commissioned by the U.S. Chamber of Commerce found that Oklahoma students ranked in the lowest quintile for overall academic performance relative to their peers nationwide.<sup>1</sup> A national survey of teacher salaries for the 2004–2005 school year revealed that, while average starting salaries for Oklahoma teachers ranked a promising thirty-third in the nation at \$29,174, the state’s average teacher salary came in a lackluster forty-seventh at \$37,879.<sup>2</sup> More recently, a 2009 U.S. Census Bureau report revealed Oklahoma’s annual per-pupil investment—\$7420—to be among the five lowest in the country, well below the national average of \$9666 per student.<sup>3</sup>

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\* The author wishes to dedicate this comment to her parents, James and Nedra Koen Roye, whose combined classroom teaching experience—totaling nearly seventy years—has always embodied the highest ideals of the teaching profession and continually inspires the author to advocate for public education. The author also wishes to express her sincere gratitude to Miami High School teacher Jamie Stephens and University of Oklahoma law professor Mary Sue Backus for their insightful assistance during the drafting of this comment.

1. INST. FOR A COMPETITIVE WORKFORCE, U.S. CHAMBER OF COMMERCE, LEADERS AND LAGGARDS: A STATE-BY-STATE REPORT CARD ON EDUCATIONAL EFFECTIVENESS 47, 64-65 (2007), *available at* <http://www.uschamber.com/reportcard/default> (follow “Downloads” drop-down menu; then follow “Report PDF” hyperlink).

2. Press Release, Am. Fed’n of Teachers, Oklahoma Ranks 47th in the Nation for Teacher Pay (Mar. 29, 2007), *available at* <http://archive.aft.org/presscenter/releases/2007/staterelases/SalarySurvey-OK.pdf>. For the state-mandated minimum salary schedules for school years 2005–2006 through 2007–2008, see 70 OKLA. STAT. § 18-114.12 (Supp. 2007), which indicates a slight increase in minimum starting pay for Oklahoma teachers in recent years—up over \$3500 to \$31,600. *But see* Okla. State Dep’t of Educ., Oklahoma PK-12 Education Highlights–National Rankings, <http://sde.state.ok.us/Services/NatRank/default.html> (last visited Mar. 30, 2010) (indicating that in 2007–2008 the overall average teacher salary in the state—\$43,551—still lagged well behind both the regional and national averages, which the National Education Association (NEA) calculated at \$45,172 and \$52,308, respectively).

3. U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2007, at xiii (2009), *available at* <http://ftp2.census.gov/govs/school/07f33pub.pdf>; *see also* Okla. State Dep’t of Educ., *supra* note 2 (citing NEA data indicating that the 2007–2008 per-pupil expenditure average for states

If these figures provided the only lenses through which to assess Oklahoma's prospects for success in public education, the educational future of the state might look bleak. Fortunately, a few bright spots exist as well. Oklahoma is widely recognized as a leader in early childhood education, ranking first in the nation, according to the National Institute for Early Education Research, for the percentage of four-year-olds who have access to free prekindergarten programs.<sup>4</sup> And in 2008, Oklahoma emerged as the state with the fifth-highest percentage of teachers who had achieved national certification from the National Board for Professional Teaching Standards (NBPTS).<sup>5</sup> By that year, 5.7% of the total teacher workforce in the state had acquired national certification, compared with the nationwide average of just 2%.<sup>6</sup>

These figures represent some of the raw materials needed to spur sustainable educational improvement in this state. The number of teachers pursuing and achieving national certification is especially encouraging, because high quality teachers are unquestionably essential to the educational

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in Oklahoma's region was \$8870). Moreover, in 2007, the Oklahoma Supreme Court held that it lacked the authority to issue a mandate to the state legislature to increase educational funding. *See Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶¶ 25-26, 158 P.3d 1058, 1066 (finding that petitioners lacked standing and that the complaint stated a political question suited for resolution by the legislature, not the courts).

4. NAT'L INST. FOR EARLY EDUC. RESEARCH, RUTGERS GRADUATE SCH. OF EDUC., *THE STATE OF PRESCHOOL 2008*, at 6, 112 (2008), *available at* <http://nieer.org/yearbook/pdf/yearbook.pdf>; *see also* OKLA. STATE DEP'T OF EDUC., *OKLA. EARLY CHILDHOOD PROGRAMS 2007 STATE REPORT (2008)*, *available at* <http://sde.state.ok.us/Programs/ECEduc/pdf/Report.pdf> (providing early childhood education statistics for the state as well as a chronology of the legislation that undergirds Oklahoma's early education programs).

5. Okla. State Dep't of Educ., *supra* note 2.

6. *Id.*; *see also* Press Release, Nat'l Bd. for Prof'l Teaching Standards, Education Reform Takes Major Step Forward with Announcement of 9,600 New National Board Certified Teachers in 2008 (Dec. 9, 2008), *available at* [http://www.nbpts.org/about\\_us/news\\_media/press\\_releases?ID=462](http://www.nbpts.org/about_us/news_media/press_releases?ID=462). This considerably higher rate of national certification for Oklahoma teachers is likely attributable, in part, to the legislature's provision of a \$5000 annual supplemental stipend for those teachers who achieve NBPTS certification. *See* 70 OKLA. STAT. § 6-204.2(J) (2001). Achieving national certification is one of the few ways by which Oklahoma teachers can increase their professional compensation beyond the traditional lockstep salary schedules set by the legislature and local school boards. *Compare* 70 OKLA. STAT. § 18-114.12 (setting forth the statewide minimum salary schedule for varying degree levels and basing compensation increases solely on years of service), *with* Denver Pub. Sch., *Welcome to Teacher ProComp*, <http://denverprocomp.dpsk12.org/about/> (follow "2009-10 ProComp Elements Chart" hyperlink) (last visited Mar. 30, 2010) (describing the Denver Public Schools negotiated teacher compensation plan providing for differentiated compensation based on a variety of factors, including professional development, student performance, and instruction in hard-to-serve schools or hard-to-staff positions).

success of students.<sup>7</sup> But the kind of rigorous teaching standards embodied in the NBPTS certification process are far from universal throughout the state. In fact, the National Council on Teacher Quality's most recent state-by-state analysis assigns Oklahoma's overall teacher-quality policies—including those related to teacher licensure, evaluation, and compensation—a grade of “D+,” characterizing these policies as “in need of improvement.”<sup>8</sup> This kind of assessment suggests that the baseline for teacher performance in the state may be too low to support widespread, long-term gains in the educational success of Oklahoma students.

Moreover, this comment proceeds on the premise that even if every teacher in the state attained national certification, sustainable, across-the-board gains in student performance are unlikely to materialize. Because an exclusive focus on the “quality” of individual teachers (and their *individual* efforts) does not provide a mechanism for systematically addressing the profound social, cultural, and structural challenges that schools face today, something more is needed.<sup>9</sup> Part of this “something more” involves a thorough reexamination and reconceptualization of the role of the teacher. Specifically, this reconceptualization involves expanding the vision of what the professional work of teaching entails to include ongoing collaborative research, practice, and reflection aimed at addressing the concrete educational challenges teachers face in their own schools.<sup>10</sup>

Of particular importance in the context of any such reconceptualization is the statutory framework that governs how school districts evaluate teachers' performance and how school boards make employment decisions on the basis of those evaluations. This comment describes Oklahoma's legal framework for teacher evaluation and continued employment, exploring the extent to which this framework supports or impedes efforts to advance teachers' instructional effectiveness—and, by extension, student learning—in accordance with an expanded vision of teaching practice. On its broadest level, this comment addresses two interrelated questions: First, what must reform-minded educators and educational leaders—teachers, administrators, and school boards alike—do to foster an expanded vision of teaching practice in a way that comports with the existing statutory and regulatory framework

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7. See Linda Gorman, *Good Teachers Raise Student Achievement*, <http://www.nber.org/digest/aug05/w11154.html> (last visited Mar. 30, 2010) (citing Eric A. Hanushek et al., *The Market for Teacher Quality* (Nat'l Bureau of Econ. Research, Working Paper No. 11154, 2005)).

8. NAT'L COUNCIL ON TEACHER QUALITY, 2009 STATE TEACHER POLICY YEARBOOK 88 (2009), available at [http://www.nctq.org/stpy09/reports/stpy\\_national.pdf](http://www.nctq.org/stpy09/reports/stpy_national.pdf).

9. See discussion *infra* Part II.

10. See discussion *infra* Part II.

for teacher evaluation and due process? The exploration of this first question highlights the legal challenges that the current framework poses for educators seeking to lay a foundation for long-term school improvement measures. In light of these challenges, the second question asks, what changes should the statutory and regulatory framework undergo in order to better facilitate the kinds of improvements in teachers' professional and instructional practice that can support sustainable gains in student learning across the state?

Part II sets the stage for delving into these questions by surveying recent educational research that establishes the indispensable role that local, teacher-driven school reform efforts can and must play in the overall drama of educational reform in this country. This Part describes and advocates expanding the vision of what constitutes the professional work of teachers—from one almost exclusively focused on the efforts of individual teachers in their individual classrooms to one that encompasses continuous, collaborative professional problem-solving at the school and district level. In light of the research supporting this expanded vision of teaching, Part III then analyzes Oklahoma's current statutory framework for teacher evaluations,<sup>11</sup> asking whether and under what conditions school districts may go so far as to incorporate into their evaluation instruments a requirement that all teachers engage in ongoing professional collaboration toward site- and district-based improvement. This Part sets forth the legal analysis supporting the conclusion that school districts can incorporate such a requirement. This Part also explains why school districts can implement a professional collaboration requirement without first negotiating for such a provision with local teachers' unions.

Part IV then examines how such a requirement would fare if challenged under the Teacher Due Process Act of 1990<sup>12</sup> (the Act) by a tenured teacher subject to contract termination on the basis of failure to meet the professional collaboration requirement.<sup>13</sup> This Part analyzes the Act and ultimately contends that the standard of review under which the Act requires a court to

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11. See 70 OKLA. STAT. §§ 6-101.10 to -101.11 (2001).

12. 70 OKLA. STAT. §§ 6-101.20 to -101.30 (2001 & Supp. 2009) (originally enacted as Act of Apr. 25, 1990, ch. 2, §§ 76-85, 1989 Okla. Sess. Laws (Supp.) 167, 221).

13. The state legislature ostensibly abolished teacher tenure when it enacted the Teacher Due Process Act as part of its comprehensive 1989–1990 education reform bill, commonly known as House Bill 1017. See *id.* In reality, the Act simply altered the terminology used to describe those teachers upon whom the law confers heightened due process rights after a specified number of years of satisfactory service. Such teachers are now termed “career” teachers rather than “tenured” teachers. 70 OKLA. STAT. § 6-101.3 (2001 & Supp. 2009). Following the lead of the Oklahoma Supreme Court, however, this comment uses the term “tenured” to describe the status of such teachers. See, e.g., *Weston v. Indep. Sch. Dist. No. 35*, 2007 OK 61, ¶ 17, 170 P.3d 539, 543.

review a school board's contract termination decisions—de novo review—yields two unfortunate results: (1) it thwarts the efforts of school districts to raise the professional capacity of their teachers, and (2) it delegitimizes teachers' efforts to develop and maintain high professional standards designed to address the needs of their particular students in their particular communities. Because de novo review thus undermines these crucial aspects of school reform, and because it represents a significant departure from the standard applied to school boards' employment decisions in a majority of other states, this Part urges the state legislature to replace the statutory requirement for a "trial de novo" with a procedure that involves a more deferential standard of review. Finally, Part V underscores the essential contribution that sound evaluation and due process policies at the state and local levels make to the broader enterprise of educational reform in this country.

## *II. Teacher Leadership Is Essential to Sustainable School Improvement*

For more than two decades, educational theorists, researchers, and practitioners have forcefully argued that classroom teachers can and must play a central role in articulating, implementing, and evaluating strategies for systematically improving student learning.<sup>14</sup> Noting the myriad forces that have relegated teachers to the sidelines in the debate over school reform and educational improvement in this country,<sup>15</sup> especially in the current "age of accountability,"<sup>16</sup> these educational advocates have proposed models of school

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14. See, e.g., MARTIN L. KROVETZ & GILBERTO ARRIAZA, *COLLABORATIVE TEACHER LEADERSHIP: HOW TEACHERS CAN FOSTER EQUITABLE SCHOOLS* 84 (2006); Karen Carter & Rob Halsall, *Teacher Research for School Improvement*, in *TEACHER RESEARCH AND SCHOOL IMPROVEMENT: OPENING DOORS FROM THE INSIDE* 71, 75 (Rob Halsall ed., 1998) (applying the argument for teacher-driven reform in the context of British public education); D'Ette Fly Cowan, *The PLC Connection to School Improvement*, in *RECURTURING SCHOOLS AS PROFESSIONAL LEARNING COMMUNITIES* 75, 77-78 (Jane Bumpers Huffman & Kristine Kiefer Hipp eds., 2003) [hereinafter *RECURTURING SCHOOLS*].

15. See, e.g., Frances K. Kochan & Cynthia J. Reed, *Collaborative Leadership, Community Building, and Democracy in Public Education*, in *THE SAGE HANDBOOK OF EDUCATIONAL LEADERSHIP* 68, 69-72 (Fenwick W. English ed., 2005) [hereinafter *SAGE HANDBOOK*] (attributing the rise of centralized "accountability" schemes to the decrease in public trust that evolved from the transformation of schools in the industrial age into large, impersonal, factory-like entities, disassociated with the communities they served and "managed" according to "scientific" principles that privileged "efficiency" over other values); KROVETZ & ARRIAZA, *supra* note 14, at 84 (describing the traditional process by which university researchers conduct "armchair research projects," using schools as "objects of study" and casting teachers as recipients of the limited knowledge generated thereby).

16. Walter F. Heinecke et al., *U.S. Schools and the New Standards and Accountability Initiative*, in *EDUCATIONAL LEADERSHIP IN AN AGE OF ACCOUNTABILITY* 7, 29 (Daniel L. Duke

reform that enable teachers to collaborate with each other, their administrators, institutions of higher education, and other community stakeholders (e.g., parents and business leaders) to collectively and continually generate knowledge about student learning.<sup>17</sup> Essentially, these educational leaders have advocated a wholesale reconceptualization of the teaching profession itself—away from the traditional “solo practitioner” model and toward a highly collaborative professional enterprise model.<sup>18</sup>

Often referred to as “professional learning communities,” or “PLCs,” these models eschew the notion that adopting any particular prepackaged, one-size-fits-all program will lead to sustainable school improvement.<sup>19</sup> Instead, these models focus on creating *conditions* in which teachers themselves can transform their schools into “systematic, collaborative problem-solving organizations that can continually develop and implement new ideas” for achieving better outcomes in student learning.<sup>20</sup> Rather than prescribing a specific plan of action, PLCs seek to cultivate a level of human and organizational “infrastructure” within individual schools or school districts that frees teachers to work together to reflect on their own practices, research and evaluate emerging data, and ultimately devise and implement solutions that are specifically tailored to the needs they have identified in their own students.<sup>21</sup>

The gravitational center for PLC school improvement is thus the local school or school district itself, but this highly localized and highly contextualized improvement process is not incompatible with rigorous state and national standards for student performance. In fact, early research on student outcomes in PLC schools suggests that students in schools where teachers deliberately and systematically engage in ongoing collaborative study and self-evaluation progress faster than students in non-PLC schools.<sup>22</sup>

PLC approaches to school improvement also effectuate the most fundamental purpose of public education in a democracy: the training of citizens for civic, democratic participation.<sup>23</sup> The call to empower practicing

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et al. eds., 2003) (suggesting that the “accountability reforms [of the last decade have been] driven by political rather than rational or professionally defined educational concerns”).

17. See, e.g., Shirley M. Hord, *Professional Learning Communities: An Overview*, in *LEARNING TOGETHER, LEADING TOGETHER: CHANGING SCHOOLS THROUGH PROFESSIONAL LEARNING COMMUNITIES* 5, 5-7 (Shirley M. Hord ed., 2004); Kochan & Reed, *supra* note 15, at 72-75.

18. See KATHLEEN FULTON ET AL., *INDUCTION INTO LEARNING COMMUNITIES* 10-16 (2005), available at [http://www.nctaf.org/documents/NCTAF\\_Induction\\_Paper\\_2005.pdf](http://www.nctaf.org/documents/NCTAF_Induction_Paper_2005.pdf).

19. See Hord, *supra* note 17, at 14.

20. Cowan, *supra* note 14, at 76-77; see also Hord, *supra* note 17, at 7-12.

21. See Cowan, *supra* note 14, at 76, 81.

22. See Hord, *supra* note 17, at 12-14.

23. See DAVID MATHEWS, *WHY PUBLIC SCHOOLS? WHOSE PUBLIC SCHOOLS? WHAT*

teachers to assume a central role in reforming American schools reflects a profound belief—shared by the early architects of American “common schooling”—that because education is the primary mechanism for preserving the capacity of citizens to participate in democracy, the chief end of education must be to cultivate in students the skills necessary for democratic engagement.<sup>24</sup> Many educators argue vigorously that the current high-stakes testing climate, with its myopic focus on standardized test scores, runs directly counter to this goal.<sup>25</sup> These educators maintain that such a one-dimensional educational vision reduces students to mere repositories of discrete knowledge,<sup>26</sup> precluding them from active participation in the construction of their own knowledge about the world and their place in that world.<sup>27</sup> Yet other educational advocates have suggested that high-stakes testing does not pose an insurmountable hurdle to democracy-sustaining pedagogical practices, as long as teachers receive sufficient support in their efforts to do more than simply “teach to the test.”<sup>28</sup>

Assuming, for the sake of argument, that high-stakes standardized testing and democracy-sustaining pedagogy can indeed be reconciled, the question remains whether students can fully appreciate the connection between education and democracy if their teachers do not or cannot *model* robust democratic participation by collaborating with their own peers to address the challenges closest to them. As some theorists have suggested, when teachers are routinely excluded from the decision-making processes that govern their day-to-day practice, cast as mere conduits for policies and programs developed by outside “experts” (whether academics, legislators, or administrators),<sup>29</sup> their own levels of familiarity and competence with democratic processes inevitably

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EARLY COMMUNITIES HAVE TO TELL US 91 (2003) (describing the early development of the public school system in Mobile, Alabama).

24. See Kochan & Reed, *supra* note 15, at 69.

25. See generally ALFIE KOHN, *THE CASE AGAINST STANDARDIZED TESTING* (2000); DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010); see also SCOTT FRANKLIN ABERNATHY, *NO CHILD LEFT BEHIND AND THE PUBLIC SCHOOLS* 12 (2007).

26. See Michael M. Grant & Janette R. Hill, *Weighing the Risks with the Rewards: Implementing Student-Centered Pedagogy Within High Stakes Testing*, in *UNDERSTANDING TEACHER STRESS IN AN AGE OF ACCOUNTABILITY* 19, 20 (Richard Lambert & Christopher McCarthy eds., 2006) [hereinafter *TEACHER STRESS*]; see also *infra* note 163.

27. See CHARLOTTE DANIELSON & THOMAS L. MCGREAL, *TEACHER EVALUATION TO ENHANCE PROFESSIONAL PRACTICE* 14-15 (2000) (listing the proposition “that learners construct their own understanding of the topics they study” as one of the insights that should inform the criteria for what constitutes good teaching).

28. See, e.g., Grant & Hill, *supra* note 26, at 36-37; see also KOHN, *supra* note 25, at 29.

29. See Carter & Halsall, *supra* note 14, at 74-79.

languish.<sup>30</sup> And if teachers, the very people most directly responsible for preparing the young for democratic engagement, are not proficient in such engagement themselves, their ability to foster it in others appears questionable at best.<sup>31</sup> It is at least plausible, therefore, that students will more readily connect their learning to their roles as democratic citizens when those students learn from teachers who possess an intimate familiarity with democratic participation because they marshal it to solve the problems they confront every day.<sup>32</sup>

Yet despite the indications of the effectiveness of PLC approaches and the alignment of those approaches with the most basic democratic ideals, the task of reorienting schools around teachers' collective and continuous inquiry into student improvement faces considerable skepticism on at least two important fronts. On one hand, some critics have questioned whether teachers are willing, or even able, to extricate schools (and school districts) from the grip of teachers' unions, which these critics have characterized as focused more on job security for marginally competent adults than on the educational success of all students.<sup>33</sup> On the other hand, teachers and teachers' unions have warned that where administrators do not or cannot guarantee the underlying conditions for engaging in PLC work—most important, sufficient *time* to collaboratively reflect on and evaluate teaching practices, student data, and student work<sup>34</sup>—the ambitious goals of PLCs devolve into little more than yet another set of unreasonable demands that teachers are expected to meet without adequate resources, support, and compensation.<sup>35</sup>

Both of these criticisms contain a measure of truth, and each underscores crucial aspects of the rationale underlying PLCs. A PLC advocate might respond to the latter set of concerns—those raised by teachers' unions—by emphasizing the basic congruence of PLC approaches with the interests teachers have traditionally looked to unions to protect. The push to develop PLCs affirms that education is fundamentally a *human* enterprise, carried out

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30. See ABERNATHY, *supra* note 25, at 12.

31. See Deborah Meier, *Educating a Democracy*, in WILL STANDARDS SAVE PUBLIC EDUCATION? 3, 4-5 (Joshua Cohen & Joel Rogers eds., 2000).

32. See *id.*

33. See, e.g., MYRON LIEBERMAN, THE TEACHER UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY 29-30 (1997); see also PETER BRIMELOW, THE WORM IN THE APPLE: HOW TEACHER UNIONS ARE DESTROYING AMERICAN EDUCATION 173-74 (2003).

34. See Anita M. Pankake & Gayle Moller, *Overview of Professional Learning Communities*, in RECULTURING SCHOOLS, *supra* note 14, at 3, 13.

35. See Sandra Mathison & Melissa Freeman, *Teacher Stress and High Stakes Testing: How Using One Measure of Academic Success Leads to Multiple Teacher Stressors*, in TEACHER STRESS, *supra* note 26, at 43, 50, 61.

by *human* beings who can, will, and must channel their greatest intellectual and moral strengths toward maximizing the capacities of the next generation.<sup>36</sup> But like teachers' unions, PLC models also presume that those human beings, those teachers, can only fulfill their mission if the material conditions under which they work do not lead down the path to burnout, apathy, and attrition.<sup>37</sup> On a very practical level, then, the advocates of PLCs embrace the basic premise of teachers' unions' reservations—namely, that a teacher-driven school improvement paradigm is doomed to collapse under its own weight in the absence of conditions that support teachers' investment in the work of improvement, such as reasonable schedules, manageable workloads, and professional pay.

The PLC advocate's response to the critics of teachers' unions is somewhat more complex. These critics often contend that teachers' unions, because of their traditionally narrow focus on “the social and economic welfare of their members,”<sup>38</sup> will resist any serious efforts to facilitate teacher leadership for school improvement if such efforts are not directly tied to “bread and butter” benefits for teachers themselves.<sup>39</sup> Two observations speak to this concern. First, some teachers' unions themselves—most notably, the National Education Association—have publically embraced the notion of teacher leadership for school reform at both the macrolevel of policy articulation and the microlevel of site-based solutions to specific student learning challenges.<sup>40</sup> These advocates of “New Unionism” have sought to redefine teachers' unions as truly professional organizations, guided primarily by a commitment to quality educational service.<sup>41</sup> This view of unions does not dismiss traditional union functions out-of-hand, but it does cast them as woefully incomplete, recognizing that while “[c]ollective bargaining legitimated teachers' economic

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36. See Christopher McCarthy & Richard Lambert, *Helping Teachers Balance Demands and Resources in an Era of Accountability*, in *TEACHER STRESS*, *supra* note 26, at 215, 222; see also Michael E. Dantley, *Moral Leadership: Shifting the Management Paradigm*, in *SAGE HANDBOOK*, *supra* note 15, at 34.

37. Cf. MIKE BOTTERY, *THE CHALLENGES OF EDUCATIONAL LEADERSHIP* 12-16 (2004) (describing work patterns for school administrators that have led to marked decreases in qualified persons seeking school leadership positions throughout the United States, the United Kingdom, Canada, and Australia).

38. Todd A. DeMitchell & Casey D. Cobb, Commentary, *Teachers: Their Union and Their Profession. A Tangled Relationship*, 212 *Educ. L. Rep.* (West) 1, 2-3 (2006) (quoting Albert S. Tannenbaum, *Unions*, in *HANDBOOK OF ORGANIZATIONS* 709 (James March ed., 1965)).

39. *Id.* at 7.

40. See generally DON CAMERON, *THE INSIDE STORY OF THE TEACHER REVOLUTION IN AMERICA* 171-78 (2005).

41. See, e.g., CHARLES TAYLOR KERCHNER ET AL., *UNITED MIND WORKERS: UNIONS AND TEACHING IN THE KNOWLEDGE SOCIETY* 8, 59-75 (1997).

interests, . . . it never recognized them as experts about learning.”<sup>42</sup> Thus, the task of teachers’ unions in the twenty-first century, according to these union leaders, is to assist teachers in “organizing” around issues of improvement within the teaching profession and to ensure that *teachers’* expertise regarding student learning is brought to bear in local, state, and national conversations about the future of education.<sup>43</sup> Taken at face value, this mission appears to dovetail seamlessly with the goals of PLCs and thus does not seem to pose a threat to teacher-driven school reform.

Nevertheless, a host of skeptics has questioned the authenticity of this “New Unionism,”<sup>44</sup> and only careful scrutiny of how unions actually implement the rhetoric of professionalism will reveal whether the skeptics’ doubts are well founded. But even if unions remain entrenched in outmoded adversarial postures, a second observation regarding any potential union resistance emerges: the impetus for most teachers to adhere to traditional union agendas may largely evaporate in schools that judiciously foster PLC practices. Healthy PLCs dismantle traditional school hierarchies, reconceptualizing school leadership as a collective endeavor to be shared by teachers and administrators, rather than as an activity within the exclusive purview of a few “managers” who “control” the people and activities within schools.<sup>45</sup> Consequently, genuine PLCs may effectively neutralize the typical “us versus them” or “labor versus management” stance that some teachers’ unions have historically taken,<sup>46</sup> simply by rendering it irrelevant to teachers’ felt concerns.

Such neutralization depends, of course, on the ability of formal school leaders, primarily principals, to build teachers’ capacity to assume the levels of responsibility and engagement required to sustain continuous, teacher-driven school improvement.<sup>47</sup> And building such capacity takes time and patient dedication. Expecting improvements from school faculty prematurely can ground the entire enterprise before takeoff.<sup>48</sup> Also, people in formally recognized school leadership positions must not mistake collaborative school leadership for the mere delegation or distribution of administrative tasks. Such

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42. *Id.* at 7.

43. *See id.* at 8.

44. *See, e.g.,* BRIMELOW, *supra* note 33, at 172-93; *see also* LIEBERMAN, *supra* note 33, at 29-46 (examining sample committee mandates and policy resolutions adopted by the National Education Association and the American Federation of Teachers in the mid-1990s).

45. *See* GORDON A. DONALDSON, JR., CULTIVATING LEADERSHIP IN SCHOOLS: CONNECTING PEOPLE, PURPOSE, AND PRACTICE 4-5, 7-10 (2006); KROVETZ & ARRIAZA, *supra* note 14, at 2-4.

46. *See* DeMitchell & Cobb, *supra* note 38, at 3-4.

47. *See* KROVETZ & ARRIAZA, *supra* note 14, at 25.

48. *See* JERRY WARTGOW, WHY SCHOOL REFORM IS FAILING AND WHAT WE NEED TO DO ABOUT IT 18-19 (2008).

a conception of “teacher leadership” grossly trivializes the nature of PLC work, while simultaneously diverting teachers’ energies *away* from their students’ learning<sup>49</sup> and (ironically) reintroducing the kind of unnecessary and unproductive stressors that teachers have historically looked to unions to remedy.<sup>50</sup>

Thus, for PLC models of teacher-driven school improvement to “make good” on the promise to dramatically impact student learning for the better, they must be cultivated with great care.

### *III. Teacher Leadership and Teacher Evaluation in Oklahoma: Are the Two Compatible?*

Given the tremendous potential for transforming schools through PLCs, and assuming that some number of Oklahoma school districts could lay the necessary groundwork for continuous, teacher-led school improvement, it would be entirely reasonable for those schools to consider incorporating into their evaluation instruments an expectation that all teachers participate in the improvement process. This raises the question, does the state’s statutory and regulatory framework for teacher evaluations permit incorporation of such an expectation? If so, to what extent? For example, could a tenured teacher’s refusal to engage in this kind of ongoing professional development provide sufficient cause for termination of that teacher’s contract?

An analysis of these questions requires examination of the interplay between the legal requirements for teacher evaluation and the legal requirements for termination of tenured teachers’ contracts. This Part sets forth the requirements for teacher evaluation in Oklahoma, exploring specifically whether the relevant statute and corresponding regulations require school districts to obtain the approval of their local teachers’ unions before making PLC participation an element of teacher evaluations. Part IV then analyzes whether a formalized expectation of PLC participation would be legally enforceable for purposes of contract termination under the Teacher Due Process Act of 1990.

At the outset, however, a caveat is in order. The need to deploy the following analysis should be exceedingly rare. At least as far as actual litigation is concerned, the analysis is only applicable to the extent that two conditions obtain: (1) the school district relying on this analysis has managed to establish the material conditions necessary to support PLC work; and (2) despite the district’s good-faith efforts, at least one tenured teacher has refused to participate. The first condition, while certainly difficult to meet, is within

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49. See Mathison & Freeman, *supra* note 35, at 50.

50. See DeMitchell & Cobb, *supra* note 38, at 3-5.

the reach of many school districts. By contrast, the second condition appears highly unlikely, at least where the first condition has, in fact, been met. Where a school district has made genuine, substantive efforts to support PLCs—for example, by securing training for a few teacher-leaders who will lead subgroups, by rearranging schedules and allocating appropriate amounts of time, and possibly even by securing stipend funding—the chances that a teacher would flatly refuse to participate seem remote. The primary value of this analysis thus lies not in its ready application to a small army of recalcitrant teachers (if such teachers even exist). Rather, the analysis is valuable because it exposes the stifling effect of one aspect of Oklahoma’s current tenure regime—the trial de novo provision—on school districts’ efforts to undertake transforming their schools into PLCs in the first place.<sup>51</sup>

*A. Teacher Evaluation in Oklahoma: The Black-Letter Law*

The centerpiece of teacher evaluation law in Oklahoma is section 6-101.10 of the School Code, which reads, in pertinent part:

Each board of education shall maintain and annually review, following consultation with or involvement of representatives selected by local teachers, a written policy of evaluation for all teachers and administrators. In those school districts in which there exists a professional negotiations agreement . . . , the procedure for evaluating members of the negotiations unit and any standards of performance and conduct proposed for adoption beyond those established by the State Board of Education shall be negotiable items. . . . Every policy so adopted shall:

1. Be based upon a set of minimum criteria developed by the State Board of Education;
2. Be prescribed in writing at the time of adoption and at all times when amendments thereto are adopted. The original policy and all amendments to the policy shall be promptly made available to all persons subject to the policy;
3. Provide that all evaluations be made in writing and that evaluation documents and responses thereto be maintained in a personnel file for each evaluated person.<sup>52</sup>

The statute goes on to specify how often teachers must be evaluated and by whom.<sup>53</sup> It also requires that all persons who conduct personnel evaluations

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51. See discussion *infra* Part IV.C.

52. 70 OKLA. STAT. § 6-101.10 (2001).

53. See *id.* § 6-101.10(4)-(6) (indicating that probationary teachers—those having completed less than three years of satisfactory service in one school district, 70 OKLA. STAT.

participate in evaluation training provided by the State Department of Education and authorizes the State Board of Education to “monitor compliance with the provisions of this section by local school districts.”<sup>54</sup>

Though these and other details of evaluation procedure may seem dry and administrative, they reflect important due process concerns. For example, the provision that all current evaluation criteria must be in writing comports with the constitutional notion, implied in the Fourteenth Amendment’s Due Process Clause, that people must have adequate notice of any expectations implicating their property interests—in this context, a teacher’s job, the means of her livelihood.<sup>55</sup> Likewise, the additional provision that evaluations themselves, once executed, must be in writing and accessible to the teachers to whom they pertain<sup>56</sup> also comports with the Fourteenth Amendment’s guarantee of an opportunity to respond to governmental actions taken on the basis of the stated expectations.<sup>57</sup> The general underlying rationale for these evaluation procedures thus reflects unquestionably sound policy.

Some of the specific elements of the above-quoted evaluation statute, however, present thorny interpretive problems. For example, what is meant by “consultation with or involvement of representatives selected by local teachers”?<sup>58</sup> And, more important for the present analysis, what is the difference, if any, between “standards of performance and conduct,” which can be the subject of negotiation under certain circumstances, and the “minimum criteria” on which all evaluation policies must be based?<sup>59</sup>

With respect to the first question, neither the evaluation statute itself nor the definitions section of the set of statutes governing teacher contracts expressly defines “consultation” or “involvement.”<sup>60</sup> Nor does the corresponding portion of the Oklahoma Administrative Code shed any additional light on these terms, reiterating simply that every district’s evaluation policy “shall be developed by the [local school] board in consultation with representative teachers and

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§ 6-101.3(7) (2001 & Supp. 2009)—must be evaluated at least twice per school year, while tenured teachers should only be evaluated once; in both cases, evaluations must be conducted by “certified administrative personnel designated by the local school board”).

54. *Id.* § 6-101.10.

55. *See* LAWRENCE F. ROSSOW & JAMES O. TATE, *THE LAW OF TEACHER EVALUATION* 37, 66-68 (2d ed. 2003); *see also* *Bd. of Regents v. Roth*, 408 U.S. 564, 576-78 (1972) (indicating that a property interest in continued employment can arise under state law or under the express or implied terms of a particular employment contract).

56. 70 OKLA. STAT. § 6-101.11.

57. *See* ROSSOW & TATE, *supra* note 55, at 37.

58. 70 OKLA. STAT. § 6-101.10.

59. *Id.*

60. *See* 70 OKLA. STAT. § 6-101.3 (2001 & Supp. 2009).

administrators.”<sup>61</sup> Thus, the precise degree of “consultation with or involvement of” teachers that the statute requires remains somewhat ambiguous. But clearly the statute envisions that adoption, revision, and review of a school district’s evaluation policy will result from some level of collaboration between teachers, administrators, and school-board members. Moreover, this “consultation or involvement” requirement applies to *all* districts, whether or not the teachers in those districts have formally organized themselves for collective bargaining.<sup>62</sup> The statute thus reflects a fundamental policy judgment that accords with the principles animating PLC models of school improvement: Sound evaluation policies, like any other school policies, are not “hatched” by administrators and school-board members who then unilaterally impose those policies on teachers. Rather, sound evaluation policies develop out of a process that involves teachers’ voices, experience, and expertise.<sup>63</sup>

What is less clear is what exactly unionized school districts must do to ensure that their evaluation policies comport with the statute. For nonunionized school districts, the evaluation statute merely requires that the local school board (1) consult with teacher representatives in some way and (2) observe the mandate of the minimum criteria clause—that is, adopt an evaluation policy that is “based upon a set of minimum criteria developed by the State Board of Education.”<sup>64</sup> By contrast, the statute’s negotiability clause creates a heightened expectation for unionized districts: “In those school districts in which there exists a professional negotiations agreement . . . , the procedure for evaluating members of the negotiations unit and any standards of performance and conduct proposed for adoption beyond those established by the State Board of Education shall be negotiable items.”<sup>65</sup>

This language raises a crucial question: What does this negotiability clause actually render negotiable? The clause certainly contemplates the negotiation of the *procedural* aspects of teacher evaluation in unionized school districts—i.e., the specifics of *how* a district administers evaluations. But the “standards of performance and conduct” phrase suggests that the *content* or *substance* of teacher evaluations is subject to negotiation as well, at least insofar as that content exceeds the “standards . . . established by the State Board of Education.”<sup>66</sup> But what are these “standards”? Are they the same as

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61. OKLA. ADMIN. CODE § 210:1-5-7(d)(1) (2006).

62. See 70 OKLA. STAT. § 6-101.10.

63. See *supra* text accompanying note 21.

64. 70 OKLA. STAT. § 6-101.10(1).

65. *Id.* § 6-101.10.

66. *Id.*

the “minimum criteria developed by the State Board of Education”?<sup>67</sup> If so, does this phrase thereby imply that *any* additional evaluation criteria that surpass the state-mandated minimums must meet with union approval in order to take effect in a unionized school district?<sup>68</sup> If not—that is, if “standards” and “minimum criteria” are somehow distinct—then should a requirement of PLC participation be characterized as a “standard” potentially subject to negotiation, or as an addition to the “minimum criteria” subject to the legitimate discretion of a local school board? Finally, if construed as a “standard,” is there any way in which a requirement of PLC participation would *not* be subject to negotiation?

*B. “Minimum Criteria” and “Standards of Performance and Conduct” Are Distinct Elements of Teacher Evaluation Law*

A casual reader might easily equate the “standards of performance and conduct” with the “minimum criteria” for teacher evaluations and therefore conclude that any elements of a unionized school district’s evaluation instrument exceeding those established by the State Board of Education are subject to negotiation. But closer examination of the text, as well as the legislative and regulatory histories of the two concepts, yields a more complex analysis. The text of the evaluation statute itself,<sup>69</sup> the historical development of its constituent parts (especially in relation to the Teacher Due Process Act of 1990),<sup>70</sup> and its corresponding regulations<sup>71</sup> together suggest that these two

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67. *Id.* § 6-101.10(1).

68. A state attorney general opinion published shortly after the minimum criteria clause was added to the evaluation statute in 1985 assumed that any evaluation criteria that exceeded state-mandated minimums would be subject to negotiation. *See* 1986 OK AG 146, Op. Okla. Att’y Gen. No. 86-146; *see also infra* text accompanying note 76. At the time the attorney general’s office published this advisory opinion, however, the state legislature had not yet added the “standards of performance and conduct” phrase, *see infra* text accompanying notes 77-80; nor had the State Board of Education yet promulgated any minimum criteria, *see infra* text accompanying note 90. Moreover, the minimum criteria that the State Board of Education eventually did promulgate turned out to be *substantive* rather than *procedural* in nature. *See* OKLA. ADMIN. CODE § 210:20-3-4, *reproduced in app. A hereto*. This fact renders the soundness of the assumption in the 1986 attorney general’s opinion doubtful at best, because in 1986 the evaluation statute’s negotiability clause applied only to *procedural* aspects of evaluations. *See* 70 OKLA. STAT. § 6-102.2 (1981 & Supp. 1986). Thus, this attorney general’s opinion should not be relied on for the proposition that additions to the minimum criteria are mandatorily negotiable. For development of the idea that additions to the minimum criteria are not subject to negotiation, *see discussion infra* Part III.C.1.

69. 70 Okla. Stat. § 6-101.10; *see also infra* text accompanying notes 72-74.

70. *See infra* text accompanying notes 75-80.

71. *See* OKLA. ADMIN. CODE § 210:1-5-7 (2006); *see also infra* text accompanying notes 81-92.

aspects of teacher evaluation law are distinct from one another. The upshot of this construction of the statute is this: to the extent that any additional elements of evaluations bear the hallmarks of “minimum criteria,” the evaluation statute does *not* require school districts to formally negotiate those additional elements before incorporating them into their teacher evaluations.

The first and most obvious bit of support for this construction appears on the face of the evaluation statute itself. When outlining the requirements that *all* evaluation policies must satisfy, the statute refers to “minimum criteria.”<sup>72</sup> But when discussing the more limited context of collective bargaining, the statute specifies “standards of performance and conduct [as] . . . negotiable items.”<sup>73</sup> Basic principles of statutory interpretation instruct that the use of different terms in different parts of a statute creates a presumption that the legislature intended the terms to carry different meanings.<sup>74</sup> At a minimum, then, the use of these two distinct terms in the evaluation statute provides a beginning point for the conclusion that they are not synonymous.

The historical development of the evaluation statute provides a second basis for this conclusion. When the original evaluation statute passed in 1977, it deemed all procedural aspects of evaluations subject to negotiation in districts with collective bargaining agreements.<sup>75</sup> The legislature then added the minimum criteria clause in 1985.<sup>76</sup> The phrase “standards of performance and conduct” was not added until 1990, when the legislature passed the landmark education reform bill known as House Bill 1017.<sup>77</sup> Not coincidentally, the Teacher Due Process Act formed part of this same piece of legislation<sup>78</sup> and explicitly cross-referenced the evaluation statute using the very same “standards” terminology that House Bill 1017 grafted onto the evaluation statute.<sup>79</sup> Importantly, however, despite the simultaneous amendment of the

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72. 70 OKLA. STAT. § 6-101.10(1).

73. *Id.* § 6-101.10.

74. 73 AM. JUR. 2D § *Statutes* 131 (2001).

75. *See* Act of June 17, 1977, ch. 262, § 2, Okla. Sess. Laws 957, 958 (codified at 70 OKLA. STAT. § 6-102.2 (Supp. 1977)).

76. *See* Education Improvement Act of 1985, ch. 329, sec. 16, § 6-102.2, 1985 Okla. Sess. Laws 1478, 1486.

77. *See* Act of Apr. 25, 1990, ch. 2, sec. 71, § 6-102.2, 1989 Okla. Sess. Laws (Supp.) 167, 218-19 (current version at 70 OKLA. STAT. 6-101.10).

78. *See id.* §§ 75-85, 1989 Okla. Sess. Laws (Supp.) at 221-25 (codified at 70 OKLA. STAT. §§ 6-101.20 to -101.30 (Supp. 1990)).

79. *See id.* § 76, 1989 Okla. Sess. Laws (Supp.) at 221 (current version at 70 OKLA. STAT. § 6-101.21 (2001)). Specifically, when indicating the benchmarks applicable to performance-based contract termination decisions, the Act pointed (and still points) exclusively to the “standards adopted by the State Board of Education or the local board of education pursuant to [the evaluation statute].” *Id.* (emphasis added); *see also supra* text accompanying notes 216, 237.

evaluation statute and enactment of the Teacher Due Process Act, the legislature left the evaluation statute's minimum criteria clause untouched.<sup>80</sup> This failure to amend the minimum criteria clause to bring it in line with the newly introduced "standards" concept gives rise to the inference that the legislature envisioned the two sets of guidelines as distinct from one another.

The State Board of Education certainly seems to have interpreted the two concepts as distinct. The Board has promulgated both a set of "Minimum Criteria for Effective Teaching Performance"<sup>81</sup> (the Minimum Criteria) and a separate set of "Standards of Performance and Conduct for Teachers"<sup>82</sup> (the Standards), and the two sets of guidelines differ markedly from one another. On one hand, the Minimum Criteria provide, in relatively straightforward (though hardly specific) terms, the minimum expectations for teachers with respect to classroom management, delivery of instruction, and student assessment—all the rather routine aspects of teachers' day-to-day activities.<sup>83</sup> On the other hand, the Standards represent an attempt to articulate, in much loftier terms, the fundamental aims and obligations of the teaching profession.<sup>84</sup> For example, the purpose statement of the Standards affirms that "[t]eachers are charged with the education of the youth of this State. In order to perform effectively, teachers must demonstrate a belief in the worth and dignity of each human being, recognizing the supreme importance of the pursuit of truth, devotion to excellence, and the nurture of democratic principles."<sup>85</sup> Similarly, under the heading "Commitment to the students," the Standards instruct as follows: "The teacher must strive to help each student realize his or her potential as a worthy and effective member of society. The teacher must work to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals."<sup>86</sup> Finally, the Standards recite the exclusive statutory grounds upon which school boards can terminate tenured teachers' contracts.<sup>87</sup>

The striking differences between these two sets of guidelines, as promulgated, point to the State Board of Education's understanding that each was intended to serve a different purpose from the other. The respective regulatory histories of the Minimum Criteria and the Standards further confirm

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80. See Act of Apr. 25, 1990, sec. 71, § 6-102.2, 1989 Okla. Sess. Laws (Supp.) at 219.

81. OKLA. ADMIN. CODE § 210:20-3-4 (2006), reproduced in app. A hereto.

82. OKLA. ADMIN. CODE § 210:20-29-1 to -5 (2006), reproduced in app. B hereto.

83. See OKLA. ADMIN. CODE § 210:20-3-4.

84. See OKLA. ADMIN. CODE § 210:20-29-1.

85. *Id.*

86. *Id.* § 210:20-29-3.

87. *Id.* § 210:20-29-5 (reproducing, in part, the Teacher Due Process Act's dismissal provision, 70 OKLA. STAT. § 6-101.22 (2001 & Supp. 2009)).

this conclusion. As mentioned above, the state legislature amended the evaluation statute to call for the promulgation of minimum evaluation criteria in 1985.<sup>88</sup> Yet, despite the fact that the State Board of Education published an initial Notice of Rulemaking Intent regarding those criteria in 1988,<sup>89</sup> the official Minimum Criteria were not published until 1994.<sup>90</sup> The Minimum Criteria seem to have taken the proverbial “backseat” to the Standards, which the legislature mandated in 1990,<sup>91</sup> and which the State Board of Education successfully promulgated in 1993<sup>92</sup>—well before the final publication of the Minimum Criteria. These separate regulatory trajectories reflect the State Board of Education’s understanding that the legislature intended the two sets of guidelines to remain distinct from one another.

*C. “By Any Other Name”: A PLC Participation Requirement Is Not Subject to Negotiation, Regardless of Characterization*

Based on the foregoing analysis, one would expect school districts to favor characterizing a PLC participation requirement as an addition to the Minimum Criteria, because this characterization would relieve school districts of the need to negotiate such a provision.<sup>93</sup> And, as discussed below, significant support for this characterization exists.<sup>94</sup> Interestingly, however, characterization as an addition to the Minimum Criteria does not appear to constitute an indispensable prerequisite to relief from the duty to negotiate. A plausible argument can be made that a PLC participation requirement would not be subject to negotiation even if it were characterized as a performance standard.<sup>95</sup> Thus, for purposes of determining that a PLC participation requirement is not subject to negotiation, either characterization works.

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88. See Education Improvement Act of 1985, ch. 329, sec. 16, § 6-102.2, 1985 Okla. Sess. Laws 1478, 1486 (current version at 70 OKLA. STAT. § 6-101.10 (2001)); see also text accompanying note 76.

89. Notice of Rulemaking Intent, 5 Okla. Reg. 672 (Feb. 25, 1988).

90. Permanent Final Adoption, 11 Okla. Reg. 3143 (May 20, 1994).

91. See Act of Apr. 25, 1990, ch. 2, § 76, 1989 Okla. Sess. Laws (Supp.) 167, 221 (codified at 70 OKLA. STAT. § 6-101.21 (Supp. 1990)).

92. Permanent Final Adoption, 10 Okla. Reg. 2709 (May 26, 1993). Incidentally, the State Board of Education also amended its existing regulation on evaluation at the same time. See Permanent Final Adoption, 10 Okla. Reg. 2695, 2698-700 (May 26, 1993). This amended regulation uses the term “minimum criteria” no less than four times in one subsection, while cross-referencing the newly minted Standards in an entirely separate subsection. See OKLA. ADMIN. CODE § 210:1-5-7(b), (d) (2006).

93. See 70 OKLA. STAT. § 6-101.10.

94. See discussion *infra* Part III.C.1.

95. See discussion *infra* Part III.C.2.

*1. Characterizing a PLC Participation Requirement as an Addition to the Minimum Criteria*

If characterized as an addition to the Minimum Criteria, a requirement that teachers help to transform their schools into PLCs by participating in collaborative improvement efforts would not be subject to negotiation. Because the minimum criteria clause, by its own terms, applies to all school districts,<sup>96</sup> and because the clause is distinct from the more narrowly applicable negotiability clause, as established above,<sup>97</sup> it follows that a local school board has discretion to determine the specific contours of its evaluation criteria.<sup>98</sup>

A local teachers' union, however, might object to this conclusion on the grounds that the provision for negotiation of both the procedural and the substantive aspects of evaluations in unionized districts<sup>99</sup> creates an implied duty of negotiation with respect to *anything* pertaining to the evaluation instruments used in those districts. In other words, the union might argue that because the "spirit" of the standards amendment to the negotiability clause<sup>100</sup> was to render the substance of evaluations negotiable (like evaluation procedure<sup>101</sup>), the minimum criteria clause effectively establishes an *upper* limit on the criteria unionized school districts may use to evaluate their teachers, absent negotiation.

Three observations speak to this argument. First, if the legislature had intended to create a duty to negotiate additions to the Minimum Criteria, it could have easily done so explicitly by adding "minimum criteria" to the negotiability clause; the fact that the legislature did not do so supplies strong evidence that it did not intend for the Minimum Criteria to be negotiable at all.<sup>102</sup> Second, the plain meaning of the word "minimum" implies that more stringent criteria are permissible.<sup>103</sup> Third, the fact that the clause merely

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96. See 70 OKLA. STAT. § 6-101.10(1).

97. See discussion *supra* Part III.B.

98. Recall that the evaluation statute requires that every district's evaluation policy "[b]e based upon a set of minimum criteria developed by the State Board of Education." 70 OKLA. STAT. § 6-101.10(1).

99. See *id.* § 6-101.10; see also *supra* text accompanying note 65.

100. See *supra* text accompanying notes 66, 77.

101. See Act of June 17, 1977, ch. 262, § 2, 1977 Okla. Sess. Laws 957, 958; see also *supra* text accompanying note 75.

102. See *Patterson v. Beall*, 2000 OK 92, ¶ 24, 19 P.3d 839, 845 (discussing the principle of statutory interpretation, "expressio unius est exclusio alterius," which posits that "the mention of one thing in a statute impliedly excludes another thing").

103. See *Welch v. Crow*, 2009 OK 20, ¶ 10 206 P.3d 599, 603 (reciting the principle of statutory interpretation that holds that "[t]he words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered

requires that evaluation policies “[b]e based upon” the State Board of Education’s Minimum Criteria suggests that the legislature contemplated some degree of variance from district to district.<sup>104</sup> The language of the statute itself thus supports the conclusion that local school boards enjoy some degree of discretion with respect to the specific evaluation criteria that they implement, limited only by the procedural requirement of “consultation or involvement”<sup>105</sup> and the substantive imperative to satisfy the “minimum criteria established by the State Board of Education.”<sup>106</sup>

The more pertinent question is thus whether a PLC participation requirement can be characterized as an addition to the Minimum Criteria, as opposed to some sort of performance standard. On this score, a PLC participation requirement fares well. As mentioned above, the Minimum Criteria simply list all of the basic activities that should compose any teacher’s routine practice.<sup>107</sup> The list is divided into two major subsections, “Practice” and “Products.”<sup>108</sup> The “Practice” subsection further breaks down into “Teacher management indicators” and “Teacher instructional indicators.”<sup>109</sup> “Teacher management indicators” include those practices that create the background conditions for classroom learning—adequate preparation, clear establishment of classroom routines and behavioral expectations, and the overall cultivation of an “orderly climate conducive to learning.”<sup>110</sup> The “Teacher instructional indicators” are similarly unsurprising (though, like the management indicators, they may be difficult to implement and maintain in practice). These declare, among other things, that a satisfactory teacher “[e]stablishes objectives,” “[i]nvolves all learners,” “[e]xplains directions,” and “[p]rovides for independent practice.”<sup>111</sup> Under the “Products” heading, the Minimum Criteria call for various kinds of documentation, all reflective of effective teaching: lesson plans, student files and assessments, and other records of student achievement.<sup>112</sup>

A requirement of PLC participation merely extends the logic of these Minimum Criteria beyond the confines of the individual teacher’s classroom to the broader school environment. For example, a third category, such as

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as a whole”).

104. *See* 70 OKLA. STAT. § 6-101.10(1).

105. *See id.* § 6-101.10.

106. *Id.* § 6-101.10(1).

107. *See* OKLA. ADMIN. CODE § 210:20-3-4 (2006), reproduced in app. A hereto; *see also supra* text accompanying note 83.

108. OKLA. ADMIN. CODE § 210:20-3-4.

109. *Id.* § 210:20-3-4(a).

110. *Id.* § 210:20-3-4(a)(1).

111. *Id.* § 210:20-3-4(a)(2).

112. *See id.* § 210:20-3-4(b).

“Teacher collaboration indicators” or “Teacher professionalism indicators,” inserted under the “Practice” heading would dovetail seamlessly with the existing criteria. Such a category might specify that a teacher, as a member of a professional educational team, identify specific challenges to student learning, research methods of addressing those challenges, select and implement intervention strategies, and evaluate the effectiveness of such strategies over time. These kinds of additional criteria merely build upon and reinforce the goals reflected in the existing Minimum Criteria. Characterizing them as additions to the Minimum Criteria thus appears more than reasonable; therefore, incorporation of such criteria into evaluation instruments seems well within the discretion of local school districts after “consultation or involvement” of their teachers. The heightened requirement for formal negotiation in unionized school districts does not apply under this characterization.

*2. Characterizing a PLC Participation Requirement as a Performance Standard*

Perhaps surprisingly, the same conclusion may obtain even if a PLC participation requirement is characterized as a performance standard. Recall that the evaluation statute deems “any standards of performance and conduct proposed for adoption beyond those established by the State Board of Education . . . negotiable items.”<sup>113</sup> Undoubtedly, this clause renders negotiable any locally developed standard that *exceeds* those established by the State Board of Education. But what about a standard that falls *within* the scope of the existing performance Standards? Might a unionized school district be able to implement such a standard without resorting to formal negotiation first? If so, might a formal requirement for PLC participation fall within the scope of the existing Standards? Several pieces of evidence suggest that it could.

The strongest support for this argument lies at the heart of the Standards themselves. As a whole, the Standards exhibit a strange mix of lofty rhetoric and general proscriptions. “Principle I,” for example, entitled “Commitment to the students,” sets a list of generalized, positive behaviors against a list of specific prohibitions.<sup>114</sup> On one hand, “[t]he teacher must strive to help each student realize his or her potential as a worthy and effective member of society . . . [by] work[ing] to stimulate the spirit of inquiry, the acquisition of

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113. 70 OKLA. STAT. § 6-101.10 (2001).

114. See OKLA. ADMIN. CODE § 210:20-29-3 (2006), reproduced in app. B hereto.

knowledge and understanding, and the thoughtful formulation of worthy goals.”<sup>115</sup> On the other hand,

[i]n fulfillment of the obligation to the student, the teacher:

- (1) Shall not unreasonably restrain the student from independent action in the pursuit of learning,
- (2) Shall not unreasonably deny the student access to varying point of view,
- (3) Shall not deliberately suppress or distort subject matter relevant to the student’s progress.<sup>116</sup>

The regulation continues by specifying five more prohibitions related to the quality of teachers’ interactions with students.<sup>117</sup>

The second principle of the Standards, entitled “Commitment to the profession,” reads similarly.<sup>118</sup> Following an opening declaration that “[t]he teaching profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service,”<sup>119</sup> the regulation sketches an admirable ideal of the professional educator:

In order to assure that the quality of the services of the teaching profession meets the expectations of the State and its citizens, the teacher shall exert every effort to raise professional standards, fulfill professional responsibilities with honor and integrity, promote a climate that encourages the exercise of professional judgment, achieve conditions which attract persons worthy of the trust to careers in education, and assist in preventing the practice of the profession by unqualified persons.<sup>120</sup>

The regulation then itemizes another set of prohibitions, aimed chiefly at various forms of misrepresentation.<sup>121</sup>

The generally expansive rhetoric of these prescriptive portions of the Standards suggests that a formal expectation that teachers participate in continuous PLC school improvement efforts lies well within the scope of the existing Standards. Teachers participating in PLCs accomplish the very goals set forth in these principles through “exert[ion of] every effort to raise professional standards, . . . promot[ion of] a climate that encourages the

115. *Id.* § 210:20-29-3(a).

116. *Id.* § 210:20-29-3(b)(1)-(3).

117. *See id.* § 210:20-29-3(b)(4)-(8).

118. *See id.* § 210:20-29-4.

119. *Id.* § 210:20-29-4(a).

120. *Id.* § 210:20-29-4(b).

121. *See id.* § 210:20-29-4(c).

exercise of professional judgment, [and] achieve[ment of] conditions which attract persons worthy of the trust to careers in education”<sup>122</sup>—all in the service of “help[ing] each student realize his or her potential as a worthy and effective member of society.”<sup>123</sup> Because PLC models of professional development and school improvement reflect the very principles of professionalism demanded by the Standards themselves, a formal expectation that teachers participate in the process of transforming their schools into PLCs does not go “beyond” those Standards and thus does not trigger the duty to negotiate.

Of course, this argument raises the issue of what role judges play in determining whether particular evaluation criteria are, in fact, legally enforceable. The following Part addresses this issue by first examining the likely treatment that a PLC participation requirement would receive under the current Teacher Due Process Act. This Part also proposes modifications to the Act that would better support school districts’ efforts to improve their schools through PLC development.

#### *IV. Diminishing Returns on Teacher Protection: How the Trial De Novo Overextends Teacher Tenure*

Under the Teacher Due Process Act of 1990,<sup>124</sup> a tenured teacher may challenge the termination of his contract in a trial de novo in state district court in the county where the employing school district is located.<sup>125</sup> This provision eliminates any kind of deference to the decisions of local professional educators and elected school boards and therefore marks a significant departure from the deferential judicial posture taken in a majority of states when it comes to this issue.<sup>126</sup> Also, by investing judges with the power to determine the legitimacy of the criteria by which teachers’ performance is evaluated, the trial de novo provision undermines the concerted efforts of teachers themselves to articulate and implement rigorous professional expectations tailored to the needs of their students and their communities. Finally, in light of the litany of other protections for tenured teachers built into the Teacher Due Process Act, the trial de novo provision represents a superfluous level of teacher protection that places an undue burden on school districts seeking to improve the quality of instruction in their schools. Accordingly, the state legislature should repeal the provision and replace it with a procedure involving a more deferential standard of review.

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122. *Id.* § 210:20-29-4(b).

123. *Id.* § 210:20-29-3(a).

124. 70 OKLA. STAT. §§ 6-101.20 to -101.30 (2001).

125. *Id.* § 1-101.27(A).

126. *See app. C hereto.*

A more detailed exploration of these claims requires an introduction to the Teacher Due Process Act as a whole. Before turning to the Act itself, however, it is important to locate the Act within the broader context of teacher due process law, much of which centers around teacher tenure.<sup>127</sup> Because Oklahoma's Teacher Due Process Act represents just one particular iteration of tenure law, understanding the Act requires an initial overview of tenure law generally, from which comparisons and contrasts can be drawn. The following subsection thus briefly sketches the purposes, mechanisms, criticisms, and defenses of tenure for teachers in America's public schools.

*A. Tenure for Public Schoolteachers: An Overview of Common Themes*

The principal aim of the Teacher Due Process Act is to delineate the contours of tenure for public K–12 teachers in Oklahoma.<sup>128</sup> The Act shares many of the basic purposes and features of tenure laws across the country.<sup>129</sup> In the context of public education, the term “tenure” generically refers to the set of statutorily conferred protections<sup>130</sup> that a given state deems necessary to shield qualifying teachers (typically teachers who have taught at least three years in a single school district<sup>131</sup>) “from unlawful, arbitrary, and capricious [school] board actions.”<sup>132</sup> The United States Supreme Court has recognized that these protections invest a tenured teacher with a “legitimate claim of entitlement” to continued employment<sup>133</sup>—that is, employment beyond the duration of a given contract<sup>134</sup>—which constitutes a property interest within the protective purview of the Fourteenth Amendment.<sup>135</sup>

But historically, despite contemporary criticisms of tenure suggesting otherwise,<sup>136</sup> the protections of tenure were not intended to confer any special privileges on individual teachers, nor were they intended primarily to benefit

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127. See STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 285, 395 (6th ed. 2009).

128. See 70 OKLA. STAT. §§ 6-101.20 to -101.30.

129. Compare *id.* with THOMAS ET AL., *supra* note 127, 285-87, 405-24.

130. Cf. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (observing that under the common law of contracts, the *practices* of an educational employer can impliedly create enforceable tenure rights).

131. THOMAS ET AL., *supra* note 127, at 286.

132. RICHARD S. VACCA & WILLIAM C. BOSHER, JR., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 125 (7th ed. 2008).

133. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

134. See *id.* at 578.

135. See *id.* at 576-77.

136. See, e.g., Small Newspaper Group, The Hidden Costs of Tenure, <http://thehiddencostsofentire.com/> (last visited Mar. 30, 2010) [hereinafter Hidden Costs of Tenure].

teachers as a class.<sup>137</sup> Rather, tenure developed primarily as a means of safeguarding the public's interest in a stable, permanent, and qualified teaching force.<sup>138</sup> The Minnesota Supreme Court traced the origin of tenure in this country as far back as 1885, when leaders of the National Education Association proposed a system analogous to the system of protections for civil servants embodied in the first federal civil service act, passed in 1883.<sup>139</sup> The Minnesota court observed that the first civil service act's purpose was to remedy the destabilizing effects of the "spoils system," whereby presidential administrations ousted government employees and replaced them with their own political supporters (many of whom were considerably underqualified for the positions they assumed).<sup>140</sup> Likewise, tenure laws developed to curb such abuses within the country's growing network of public schools.<sup>141</sup> "It was thought," the court explained, "that for the good of the schools and the general public the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage."<sup>142</sup> Thus, at least at its inception, the notion of protecting teachers through tenure was predicated on the idea that such protections would ultimately inure to the benefit of society generally.

Today, most state tenure laws secure these protections—and theoretically their intended societal benefits—through two complementary types of provisions, one more substantive in nature, the other more procedural. Substantively, most tenure statutes enumerate specific grounds for termination of tenured teachers' contracts,<sup>143</sup> or at the very least require school boards to show "good and sufficient" or "good and just" cause for such terminations.<sup>144</sup> These substantive provisions effectively cabin the scope of a school district's power to terminate tenured teachers' employment, conditioning termination on a school district's documentation and affirmative demonstration that a teacher's behavior or performance rises to the level of one of these causes.<sup>145</sup> Tenure statutes also confer procedural protections by "provid[ing] orderly procedures . . . to be followed if and when cause for a teacher's dismissal is established."<sup>146</sup> While these procedures vary from state to state and may be

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137. *See* *McSherry v. City of St. Paul*, 277 N.W. 541, 544, 546 (Minn. 1938).

138. *See id.* at 544.

139. *Id.* at 543.

140. *See id.*

141. *See id.*

142. *Id.*

143. LOUIS FISCHER ET AL., *TEACHERS AND THE LAW* 35 (7th ed. 2007).

144. VACCA & BOSHER, *supra* note 132, at 128 n.105.

145. *See id.*

146. *Id.* at 125.

supplemented by local school board policies and collective bargaining agreements,<sup>147</sup> they must at a minimum satisfy baseline constitutional requirements for due process.<sup>148</sup> But because nontenured teachers are constitutionally entitled to the same minimal level of due process, at least during the terms of their contracts,<sup>149</sup> tenure statutes typically require heightened procedural safeguards for tenured teachers. Missouri's tenure statute, for example, grants tenured teachers the right to appeal an adverse termination decision on the merits, while limiting nontenured teachers to appeals based solely on procedural infractions or violations of constitutional rights.<sup>150</sup> Typically, courts enforce such statutory procedural protections—as well as any other protections generated by local school board policies or collective bargaining agreements—very strictly.<sup>151</sup>

The immediately observable effect of tenure, then, is that teachers who have attained the status enjoy a greater degree of job security than teachers who have not.<sup>152</sup> But as mentioned previously, courts have viewed the benefits of

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147. See THOMAS ET AL., *supra* note 127, at 395, 404.

148. See *id.* at 404; see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (articulating the definitive three-part test for determining whether, in the context of the deprivation of an individual's property or liberty interest, a given set of procedures satisfies the constitutional requirement for procedural due process). The *Mathews* test balances (1) the private interest implicated by official action; (2) the "risk of an erroneous deprivation" posed by the use of the challenged procedures (taking account of the "probable value . . . of additional or substitute procedural safeguards"); and (3) the governmental interest furthered by the use of the challenged procedures. *Id.* Although the *Mathews* test recognizes the highly "flexible" nature of due process, *id.* at 334, and therefore does not prescribe a specific menu of procedures, see FISCHER ET AL., *supra* note 143, at 32, and THOMAS ET AL., *supra* note 127, at 405, for two comparable lists of the procedures that courts have deemed essential in the school-employment context under the Fourteenth Amendment's Due Process Clause.

149. See THOMAS ET AL., *supra* note 127, at 395.

150. Compare Teacher Tenure Act, MO. ANN. STAT. § 168.120 (West 2000) (tenured teacher appeals), with *id.* § 168.126 (West Supp. 2010) (probationary teacher appeals).

151. THOMAS ET AL., *supra* note 127, at 405.

152. Tenure does not, however, "convey the right to teach in a particular school, grade, or subject area. Teachers may be reassigned to [other] positions for which they are certified," regardless of their tenure status. THOMAS ET AL., *supra* note 127, at 286-87. There are two generally recognized limitations on school districts' power to reassign teachers. The first is that a school district must make reassignment decisions in good faith—that is, not as part of a veiled attempt to induce the teacher to voluntarily resign or as a ruse to cover retaliation against the teacher for the exercise of her legal rights. See *id.* at 281. "[T]he legal presumption," however, "is that boards of education act in *good faith* when making personnel decisions." VACCA & BOSHER, *supra* note 132, at 122. Therefore, the burden is usually on the teacher to demonstrate that a school board acted in bad faith in a particular instance. This good-faith requirement thus constitutes a rather weak limitation, in light of the evidentiary challenges associated with proving that a school board acted in bad faith. The second limitation is somewhat stronger because it is more objective: teacher transfers must not constitute demotions. See THOMAS ET

tenure to accrue not only to individual teachers but also—and primarily—to the public at large.<sup>153</sup> Courts have linked the heightened job security associated with tenure to broader public interests in “the integrity and freedom of the educational process” and the achievement of a stable and permanent teaching force, insofar as these tend to foster better educational opportunities for students.<sup>154</sup> Undoubtedly, tenure has its critics, who insist that the system actually jeopardizes the learning of many students by rendering the process of firing a deficient teacher so cumbersome and costly that school officials simply avoid the process in all but the most egregious cases of teacher misconduct.<sup>155</sup> These critics frequently condemn the use of teacher longevity as a proxy for teacher quality, citing union-negotiated salary schedules keyed to time served rather than results produced.<sup>156</sup> In light of such criticisms, some states have abolished tenure for public schoolteachers altogether, replacing that system of protection with extended-term contracts, which usually range in duration from three to five years and entitle teachers to the protections associated with traditional tenure during the terms of those contracts.<sup>157</sup>

But at least two considerations counsel against jettisoning teacher tenure altogether. First is the lack of any credible, long-term, empirical research linking measurably higher student performance to the abolition of tenure (assuming that a scientifically sound mechanism for comparing student performance in tenure and nontenure states could even be generated). Second, the difficulties associated with firing tenured teachers appear to stem at least

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AL., *supra* note 127, at 281-82. In other words, the position to which a school district reassigns a teacher must be “coequal” in responsibility and salary. See VACCA & BOSHER, *supra* note 132, at 129.

153. See *supra* text accompanying notes 137-42.

154. 78 C.J.S. *Schools and School Districts* § 334 (2008).

155. See, e.g., Hidden Costs of Tenure, *supra* note 136 (providing a series of articles on the costs of firing teachers in Illinois).

156. See, e.g., Scott Reeder, ‘Diplomacy’ Undermines Teacher Evaluations, in Hidden Costs of Tenure, *supra* note 136.

157. See, e.g., FLA. STAT. ANN. § 1012.33 (West 2004 & Supp. 2010) (providing for term contracts of up to four years in duration, but preserving tenure—or “continuing contracts”—for teachers who qualified for tenure before July 1, 1984); TEX. EDUC. CODE ANN. §§ 21.002, 21.106, 21.154 (Vernon 2006) (granting school districts authority to choose between term or continuing contracts for teachers who successfully complete the probationary period, but also authorizing school districts to return teachers serving on continuing contracts to probationary status as an alternative to contract termination). In a similar vein, the controversial young chancellor of public schools for the District of Columbia, Michelle Rhee, has proposed granting six-figure salaries to teachers who voluntarily relinquish their tenured status. See Sean J. Miller, *Rheemaking Education*, CHRISTIAN SCI. MONITOR, Jan. 27, 2009, at 20-20, available at <http://features.csmonitor.com/backstory/2009/01/27/is-michelle-rhee-the-new-face-of-education-reform/#>.

as much from administrators' incapacity or unwillingness to document teacher ineffectiveness through evaluations as from tenure itself.<sup>158</sup> This suggests that development of and training in more rigorous evaluation systems may prove more effective than abolishing tenure, especially where administrators who conduct evaluations judiciously utilize such systems to document reasons for declining contract renewal for teachers before they even reach tenured status.<sup>159</sup> Of course, in view of the considerable challenges that new teachers inevitably face, probationary periods may need to be extended and mentoring programs intensified, in order to ensure that new teachers actually receive the time and support they need to hone their skills as competent educators.<sup>160</sup> But assuming (1) the development and deployment of better evaluation systems for all teachers and (2) the provision of adequate time and support for new teachers, tenure can continue to serve the broad public interests for which it was originally developed without shielding ineffective teachers from contract termination.

In fact, given the multiple and often conflicting pressures exerted on public schools today, the public benefits of tenure may be more palpable than ever before. In today's economic climate, for example, tenure prevents cash-strapped school districts from firing experienced teachers as a cost-cutting measure, only to replace them with young, cheap, inexperienced teachers.<sup>161</sup> Similarly, in today's increasingly polarized political and cultural climate, tenure preserves the academic freedom of teachers—especially science teachers—who choose not to toe whatever ideological lines their school boards happen to have drawn.<sup>162</sup> Finally, in today's "accountability" climate, tenure

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158. See CAMERON, *supra* note 40, at 174-75; see also Reeder, *supra* note 156.

159. See PATRICK MCGUINN, CTR. FOR AM. PROGRESS, RINGING THE BELL FOR K-12 TEACHER TENURE REFORM 5-6 (2010), available at [http://www.americanprogress.org/issues/2010/02/pdf/teacher\\_tenure.pdf](http://www.americanprogress.org/issues/2010/02/pdf/teacher_tenure.pdf).

160. Incidentally, PLCs by their very nature provide much of the training and support that new teachers need to grapple with the additional challenges they face. See discussion *supra* Part II. PLCs should not, however, be used as total substitutes for new teacher mentoring programs, which should undergo improvement in their own right.

161. See Wanda Marie Thibodeaux, *Pro & Cons of Teacher Tenure*, EHOW.COM, [http://www.ehow.com/about\\_5121566\\_pro-cons-teacher-tenure.html](http://www.ehow.com/about_5121566_pro-cons-teacher-tenure.html) (last visited Mar. 30, 2010). Statutory reduction-in-force (RIF) provisions sometimes allow school districts greater flexibility in terminating tenured teachers' employment "for reasons related to declining enrollment, financial exigency, and school district consolidation." THOMAS ET AL., *supra* note 127, at 424. Even in these situations, however, tenured teachers often take priority over nontenured teachers. See, e.g., *Babb v. Indep. Sch. Dist. No. 1-5*, 1992 OK 46, ¶ 8, 829 P.2d 973, 976 (holding that Oklahoma tenure law grants "[t]enured faculty . . . a claim to a preferential status over nontenured faculty in implementation of a reduction-in-force plan").

162. See M.J. Stephey, *A Brief History of Tenure*, TIME.COM, Nov. 17, 2008, <http://www.time.com/time/nation/article/0,8599,1859505,00.html>.

protects teachers' ability—and to some extent sustains their incentive—to experiment with new and creative lessons and methods and therefore to resist the pressure to reduce their modes of teaching to correspond to the limited range of thought processes reflected in standardized tests.<sup>163</sup> Under these kinds of economic, cultural, and political conditions, tenure helps to assure the continued employment of educators who diligently apply their experience, integrity, and innovation to help students acquire the skills and knowledge they need to engage in society as active and productive citizens.

*B. Tenure, Oklahoma-Style: The Teacher Due Process Act of 1990*

Because the Teacher Due Process Act substantially preserves the system of tenure that existed in the state before its enactment<sup>164</sup>—though with some

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163. See Grant & Hill, *supra* note 26, at 20. With respect to standardized tests, it is important to distinguish two things: (1) students' *understanding* of the academic content presented on standardized tests; and (2) the methods by which students (a) *come to learn* that content and (b) *convey* their understanding of that content. This comment presumes the value of the substantive knowledge that standardized tests attempt to measure: drawing logical inferences from facts or data, correctly solving mathematical equations, applying the basic rules of grammar, and so on. This comment does not presume, however, that the means by which standardized tests purport to measure such knowledge necessarily correspond to the wide variety of mechanisms—often called “learning styles”—by which individual students actually learn. See HOWARD GARDNER, *THE UNSCHOOLED MIND: HOW CHILDREN THINK AND HOW SCHOOLS SHOULD TEACH* 196 (10th anniv. ed. 2004). Certainly, once a student has found her unique “route” into particular subject matter, with the help of a competent teacher, she can be shown ways of reflecting her acquired understanding through the limited modes of presentation available on most standardized tests (primarily multiple choice questions). Cf. RAVITCH, *supra* note 25, at 159-60 (emphasizing that many schools “game” the standardized testing system by replacing substantive subject-matter curriculum with test preparation programs). If teachers only teach in those limited modes, however, some students may never acquire the requisite knowledge in the first place. See *id.*; see also KOHN, *supra* note 25, at 29-31. Teachers must therefore have the freedom to experiment with alternative methods of engaging students with subject matter. See Grant & Hill, *supra* note 26, at 36-37. Tenure provides some of this freedom for teachers who naturally, or because of their professional training, recognize the need to explore such alternative methods to meet their students' individual learning needs. See P. Taylor Webb, *The Stress of Accountability: Teachers as Policy Brokers in a Poverty School*, in *TEACHER STRESS*, *supra* note 26, at 1, 9-14. And for teachers who might not otherwise explore alternative teaching methods, evaluation systems that require teachers to demonstrate, document, and reflect upon their efforts to employ a variety of methods would likely incentivize improvement in the quality of their instruction. Incidentally, PLCs provide formal channels through which teachers can research, implement, and evaluate their own success with a virtually infinite range of teaching techniques. See discussion *supra* Part II.

164. Compare 70 OKLA. STAT. §§ 6-101 to -103.15 (1981 & Supp. 1989), and *Short v. Kiamichi Area Vocational-Technical Sch. Dist.*, 1988 OK 89, ¶ 9, 761 P.2d 472, 475, with 70 OKLA. STAT. §§ 6-101.20 to -101.30 (Supp. 1990), and *House v. Indep. Sch. Dist. No. I-29*, 1997 OK 35, ¶ 7, 939 P.2d 1127, 1129.

significant modifications, as discussed below<sup>165</sup>—the Act reaffirms the underlying policy of protecting teachers as a means of protecting the public’s interest in quality education for the state’s youth. While the Act also secures certain procedural protections for nontenured, or “probationary,” teachers during the terms of their contracts,<sup>166</sup> its fundamental function, like that of tenure laws throughout the country, is to establish the particular set of protections that the state legislature has deemed necessary to shield tenured teachers from “political, partisan or capricious” school board actions that adversely impact teachers’ livelihoods and jeopardize students’ access to good teachers.<sup>167</sup>

Under the Act, teachers who complete “three (3) or more consecutive complete school years in [a teaching] capacity in one school district under a written teaching contract” achieve the status of “career” (i.e., tenured) teachers.<sup>168</sup> For these teachers, the Act erects four distinct but interrelated barriers to contract termination for performance-related reasons:<sup>169</sup> (1) the assignment of the evidentiary burden to the school district seeking termination,<sup>170</sup> (2) the requirement that a tenured teacher receive a reasonable opportunity and assistance to remediate his performance,<sup>171</sup> (3) a set of detailed procedures regarding notice and the opportunity for a pretermination hearing,<sup>172</sup> and (4) the opportunity to appeal an adverse termination decision in a trial de novo.<sup>173</sup> The first three of these barriers represent fairly standard features of tenure law in other states.<sup>174</sup> For that matter, provisions for some kind of appeal are common, if not virtually universal.<sup>175</sup>

Where Oklahoma departs from the norm of tenure law is in the particular *type* of appeal to which tenured teachers are entitled under the Teacher Due Process Act of 1990. Unlike courts in a majority of other states, which

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165. See discussion *infra* Part IV.C.

166. See 70 OKLA. STAT. §§ 6-101.22(B), 6-101.24(A)-(C), 6-101.26(A), (D)-(E) (2001 & Supp. 2009). Recall that a probationary teacher is one who has taught less than three consecutive school years in one district. 70 OKLA. STAT. § 6-101.3(7) (2001 & Supp. 2009).

167. See VACCA & BOSHER, *supra* note 132, at 125 n.81 (quoting *Birk v. Bd. of Educ.*, 457 N.E.2d 1065, 1067 (Ill. App. Ct. 1983)); see also *supra* text accompanying notes 137-42.

168. 70 OKLA. STAT. § 6-101.3(4); see also *supra* note 13.

169. When non-performance-related incidents or problems give rise to termination decisions, tenured teachers are not guaranteed the remediation period discussed below. See 70 OKLA. STAT. § 6-101.24(D); see also *infra* text accompanying notes 186-93.

170. 70 OKLA. STAT. §§ 6-101.26(C), 6-101.27(D).

171. *Id.* § 6-101.24.

172. See *id.* § 6-101.26(A)-(C).

173. *Id.* § 6-101.27.

174. See THOMAS ET AL., *supra* note 127, at 405-13.

175. See *id.* at 405; see also app. C hereto.

routinely defer to the employment decisions of local school boards in the absence of strong evidence of error or impropriety,<sup>176</sup> Oklahoma's statutory trial de novo requirement relieves a trial court of any obligation to show deference to a school board's decision, allowing the judge to conduct the trial "as if [the question of termination] ha[d] never been resolved."<sup>177</sup> As demonstrated in greater detail below, this provision for de novo review of contract termination decisions undermines the ability of school boards to formally hold tenured teachers to high expectations of professional performance.<sup>178</sup> In so doing, the provision lends credence to the arguments forwarded by the critics of tenure, who contend that tenure laws all too often serve to protect weak and ineffectual teachers rather than foster the employment security that good teachers need to flourish.<sup>179</sup> In view of the array of other protections available to tenured teachers under the Teacher Due Process Act, this provision thus creates a needless obstruction to school improvement efforts, supplying little more than extra fodder for criticism by those who misguidedly advocate the abolition of tenure as a prerequisite to long-term, systematic school improvement.

A closer look at Oklahoma's more typical tenure provisions demonstrates the sufficiency of tenure without the trial de novo provision. First, Oklahoma follows the practice of most states by enumerating—and thereby restricting—the grounds on which the contracts of tenured teachers may be terminated.<sup>180</sup> A probationary teacher may be dismissed or not reemployed simply for *some* cause articulated in writing by the teacher's supervising administrator and endorsed by the school board.<sup>181</sup> By contrast, a school district may only terminate the contract of a tenured teacher on the basis of one or more of the eight grounds listed in the Teacher Due Process Act itself<sup>182</sup>—some of which directly pertain to a teacher's professional performance,<sup>183</sup> others of which pertain more to a teacher's character and

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176. For an overview of the judicial review standards observed tenured teacher contract termination cases nationwide, see app. C hereto.

177. *Hagen v. Indep. Sch. Dist. No I-004*, 2007 OK 19, ¶ 5, 157 P.3d 738, 739.

178. See discussion *infra* Part IV.C.

179. See *supra* text accompanying notes 155-56.

180. See 70 OKLA. STAT. § 6-101.22 (2001); see also FISCHER ET AL., *supra* note 143, at 31, 35.

181. See 70 OKLA. STAT. §§ 6-101.22(B), 6-101.25 to -101.26.

182. *Id.* § 6-101.22(A).

183. The performance-related grounds are willful neglect of duty, repeated negligence in performance of duty, incompetency, instructional ineffectiveness, and unsatisfactory teaching performance. *Id.* § 6-101.22(A)(1)-(2), (4)-(6); see also *id.* § 6-101.24(D) (identifying these as "cause[s] related to inadequate teaching performance," for which a teacher must be afforded an opportunity for remediation).

fitness for the responsibility of caring for the community's children.<sup>184</sup> The statute thus places squarely on the shoulders of the school district the burden of documenting and, when necessary, proving to a court that the teacher's performance or conduct falls within the scope of at least one of these grounds.<sup>185</sup> This appropriation of the evidentiary burden marks the first major check on a school district's power to terminate tenured teachers' contracts. Conversely, then, it also provides tenured teachers their first major line of defense in any termination action.

The second check on a school district's power of contract termination, at least with respect to the performance-related grounds, is the Teacher Due Process Act's admonishment and remediation provision.<sup>186</sup> A school district may not simply adduce evidence that a teacher's performance meets one of these grounds and summarily terminate her contract.<sup>187</sup> Before administrators can even recommend termination, the admonishment and remediation provision requires them to provide poorly performing teachers, whether tenured or not, with both the opportunity to improve and the assistance they need to do so.<sup>188</sup> The relevant part of the statute reads as follows:

When an administrator who has the responsibility of evaluating a teacher identifies poor performance or conduct that the administrator believes may lead to a recommendation for the teacher's dismissal or nonreemployment, the administrator shall:

1. Admonish the teacher, in writing, and make a reasonable effort to assist the teacher in correcting the poor performance or conduct; and
2. Establish a reasonable time for improvement, not to exceed two (2) months, taking into consideration the nature and gravity of the teacher's performance or conduct.<sup>189</sup>

The State Board of Education's corresponding regulations spell out specific examples of the kinds of assistance administrators and school districts should provide to teachers in need of remediation.<sup>190</sup> These include opportunities to observe other teachers, additional planning requirements or opportunities,

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184. The character- and fitness-related grounds are mental or physical abuse to a child and commission of an act of moral turpitude. *Id.* § 6-101.22(A)(3), (7). The eighth ground for termination, abandonment of contract, occupies a category of its own. *See id.* § 6-101.22(A)(8).

185. *See id.* § 6-101.22; *see also id.* §§ 6-101.25 to -101.27.

186. *See id.* § 6-101.24.

187. *See id.*

188. *See id.* § 6-101.24(A).

189. *Id.*

190. *See* OKLA. ADMIN. CODE § 210:1-5-7(d)(12), (e) (2006).

video taping and critique, access to a professional library, and supplemental professional development activities.<sup>191</sup> Moreover, the statute itself further provides that performance-related grounds or causes “shall not be the basis for a recommendation to dismiss or not reemploy [any] teacher unless and until the provisions of this section have been complied with.”<sup>192</sup>

Of course, this second “check” on a school district’s power to terminate tenured teachers’ contracts operates somewhat differently from the others, because it increases the likelihood, at least theoretically, of reaching a mutually beneficial outcome for both an underperforming teacher and her employing school district. If the teacher improves, not only does she keep her job, but the school also effectively gains a better teacher, assuming that the teacher continues her progress. So this provision may be better conceptualized as creating an affirmative obligation to assist struggling teachers, rather than imposing a negative restriction on school districts’ authority to terminate such teachers’ contracts.<sup>193</sup> However characterized, the admonishment and remediation provision constitutes an indispensable prerequisite to a school board’s decision to terminate a teacher’s contract on performance-related grounds, and thus represents the second crucial protection for teachers built into tenure law in Oklahoma.

Only if a teacher “does not correct the poor performance . . . cited in the admonition within the time specified” may an administrator initiate the process that can ultimately culminate in the school board’s decision to terminate a teacher’s contract.<sup>194</sup> The collection of requirements that make up this process represents the third key limitation on school boards’ power of contract termination for tenured teachers. The process begins when a teacher’s administrator recommends to the district superintendent that the teacher’s contract should be terminated.<sup>195</sup> The superintendent must then decide whether

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191. *See id.*

192. 70 OKLA. STAT. § 6-101.24(D). This clause appears to create the kind of condition-precedent requirement that the Oklahoma Supreme Court found lacking under the prior due process regime. *See Jackson v. Indep. Sch. Dist. No. 16*, 1982 OK 74, ¶¶ 4-5, 648 P.2d 26, 29 (finding that the school district’s failure to provide a remediation period did not, under the circumstances, violate the plaintiff-teacher’s procedural rights).

193. Indeed, the State Board of Education’s corresponding regulations cast admonishment and remediation in precisely this affirmative light. Underscoring in particular the administrator’s role in teacher remediation, the regulations link that role to the quality of administrators’ own professional performance: “Principals having delegated administrative responsibilities as a part of the comprehensive operation of their respective schools have an inherent obligation for the professional success of their teaching staff.” OKLA. ADMIN. CODE § 210:1-5-7(e).

194. 70 OKLA. STAT. § 6-101.24(B).

195. *Id.*

to accept that recommendation and, if so, must submit the recommendation in writing to the local school board, specifying both the statutory grounds for the recommendation and the facts that support those grounds.<sup>196</sup> Upon receipt of the recommendation, the school board must ensure that the teacher receives a copy of the recommendation,<sup>197</sup> along with notification of the teacher's right to a hearing before the board at a time the board schedules between twenty and sixty days after the teacher's receipt of the notice.<sup>198</sup>

Once she has received the notice and recommendation, the teacher may decline to challenge the recommendation, but by doing so she forfeits any opportunity to appeal on the basis of a denial of due process.<sup>199</sup> If, on the other hand, the teacher elects to exercise her right to a hearing to contest the recommendation, the school board must consider any evidence or testimony that the teacher or her designated representative presents, weighing such evidence or testimony against that presented by the district superintendent, who bears the burden of proving by a preponderance of the evidence that the teacher's performance falls within one of the statutory grounds for contract termination.<sup>200</sup> Only after such consideration may the school board decide, by vote in an open meeting, whether to terminate or renew the teacher's contract.<sup>201</sup> The board must then notify the teacher of its decision.<sup>202</sup>

This cluster of procedural requirements, together with the enumerated termination grounds and the admonition and remediation provision, corresponds to provisions common to teacher tenure statutes around the country.<sup>203</sup> By contrast, the fourth mechanism by which the Teacher Due Process Act seeks to protect teachers—the provision that a teacher may appeal any adverse termination decision in a trial de novo<sup>204</sup>—places Oklahoma among a minority of states in which courts or other reviewing tribunals show no deference to the personnel decisions of local educational leaders, even when those decisions are supported by substantial evidence or exhibit no

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196. *See id.* § 6-101.25.

197. *Id.* § 6-101.26(A). The statute lists the precise means by which a teacher must be notified: “[T]he board shall mail a copy of the recommendation to the teacher by certified mail, restricted delivery, return receipt requested, by personal delivery to the teacher with a signed acknowledgment of receipt, or by delivery by a process server.” *Id.*

198. *Id.*

199. *See id.* § 6-101.26(C); *see also* THOMAS ET AL., *supra* note 127, at 404.

200. *See* 70 OKLA. STAT. § 6-101.26(C). The hearing must also accommodate the exercise of “all rights [to which a teacher is entitled] under the circumstances by the United States Constitution and the Constitution of Oklahoma.” *Id.* § 6-101.26(A).

201. *Id.* § 6-101.26(C).

202. *Id.*

203. *See* THOMAS ET AL., *supra* note 127, at 404-24.

204. 70 OKLA. STAT. § 6-101.27(A).

arbitrary or capricious quality.<sup>205</sup> The following subsection explores the implications of this unnecessarily stringent provision, concluding that it disincentivizes school districts' efforts to improve the quality of instruction offered in their schools through the development of PLCs.

*C. The Trial De Novo for Performance-Based Termination Decisions: An Exercise in Undue Process*

The problematic—and unusual<sup>206</sup>—aspect of the teacher tenure regime in Oklahoma is the trial de novo provision, applicable in the event that a tenured teacher challenges a school board's decision to terminate his contract.<sup>207</sup> The trial de novo provision establishes that a trial court owes no degree of deference to a local school board with respect to that school board's contract termination decision.<sup>208</sup> In legal terms, this means that the applicable standard of review, should a teacher appeal the school board's decision to a district court, is de novo.<sup>209</sup> The Oklahoma Supreme Court has explained that under the Teacher Due Process Act, “[d]e novo review’ in the trial court means that there must be a complete examination of all issues, both of fact and law, and the cause stands as if it has never been resolved.”<sup>210</sup> This type of appeal presents more than an additional procedural obstacle to performance-based termination decisions. At least where a school board attempts to make its

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205. See app. C hereto; see also VACCA & BOSHER, *supra* note 132, at 122. Ascribing a precise number to the collection of states that show no deference to school board decisions is somewhat difficult, as reflected in Appendix C hereto. Among the states in which school boards themselves actually render termination decisions, the number hovers just over a dozen, but this figure includes states in which courts appear to apply a de novo review standard (or its functional equivalent) to legal questions, while observing greater deference with respect to factual matters. This group comprises Alabama, Arizona, Colorado, Hawaii, Indiana, Maryland, Montana, New Mexico, North Dakota, Oklahoma, Pennsylvania, Texas, and Washington. See app. C hereto. If one also includes states in which the statutory scheme delegates the authority to render initial termination decisions to entities other than local school boards, then five more states must be added to this list: California, Illinois, Kansas, Kentucky, and New York. See *id.* Though this block of states appears to represent a substantial minority, what differentiates many of these states' statutory regimes from Oklahoma's is that the initial decision-making or reviewing entity is often a state educational agency or a hearing officer who has specialized training or experience in educational law. See *id.* In these instances, the initial reviewing tribunal is much more likely than a district judge to be attuned to the issues surrounding educational reform and may be able to more readily ascertain when the failure to meet certain evaluation criteria rises to the level of unsatisfactory performance.

206. See app. C hereto.

207. 70 OKLA. STAT. § 6-101.27(A).

208. See Hagen v. Indep. Sch. Dist. No I-004, 2007 OK 19, ¶ 3, 157 P.3d 738, 739.

209. See *id.*

210. *Id.* ¶ 5, 157 P.3d 738, 739.

termination decisions on the basis of documented deficiencies in a teacher's instructional performance,<sup>211</sup> the provision appoints judges as the final arbiters of what constitutes adequate teaching performance. The provision thus divests school boards of the authority to establish rigorous performance expectations and to render personnel decisions on the basis of those expectations. Ultimately, then, the provision severely restricts a school district's ability to develop structures or systems for generating the kind of long-term, teacher-driven school improvement embodied in PLCs.

De novo review allows a court to show "no deference . . . to [a] School Board's findings of fact or conclusions of law,"<sup>212</sup> no matter how reasonable those findings or conclusions may have been. In the context of performance-related termination decisions, the problem with this standard of review is not so much that it forces school districts to carefully document the factual underpinnings of a charge of unsatisfactory performance; indeed, school districts would still be required to do so under more deferential standards such as abuse of discretion<sup>213</sup> or substantial evidence review.<sup>214</sup> Rather, the problem is that de novo review affords school districts no margin for determining for themselves, within the reasonable bounds of the law, the means by which teachers may be required to demonstrate conformity with the State Board of Education's Standards,<sup>215</sup> which ultimately represent the only benchmarks for "determining whether or not the professional performance of a teacher is

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211. This comment makes no argument regarding whether a de novo review standard is appropriate where a school district alleges non-performance-related grounds—i.e., mental or physical abuse to a child or commission of an act of moral turpitude, *see supra* note 184—as the basis for a termination decision. For insight into how the Oklahoma Supreme Court has construed these grounds in the context of trials de novo, *see Hagen*, 2007 OK 19, 157 P.3d 738 (affirming the trial court's finding that a school district failed to prove by a preponderance of the evidence that a special education teacher who had slapped a sixth-grade special education student twice on the cheek had mentally or physically abused the child), and *Ballard v. Indep. Sch. Dist. No. 4*, 2003 OK 76, 77 P.3d 1084 (holding that a teacher's "unexecuted threat against a school superintendent and another teacher, made on school grounds but outside the general purview of the students, does not constitute moral turpitude under the law of the State of Oklahoma").

212. *Weston v. Indep. Sch. Dist. No. 35*, 2007 OK 61, ¶ 8, 170 P.3d 539, 542.

213. *See, e.g., Caldwell v. Blytheville, Ark. Sch. Dist., No. 5*, 746 S.W.2d 381, 383-84 (Ark. Ct. App. 1988) (reciting the contents of an administrator's letter to a teacher documenting multiple incidents of insubordination, and holding that "[t]he determination not to renew a teacher's contract is a matter within the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the board in the absence of an abuse of that discretion").

214. *See, e.g., Leach v. Bd. of Educ.*, 295 A.2d 582, 585 (Del. Super. Ct. 1972) (holding that substantial evidence supported a school board's finding that a teacher had engaged in a pattern of willful insubordination that warranted contract termination under Delaware law).

215. OKLA. ADMIN. CODE §§ 210:20-29-1 to -5 (2006), *reproduced in app. B hereto*.

adequate” for purposes of continued employment.<sup>216</sup> Ultimately, then, even if a school district’s incorporation of a PLC participation requirement fully complies with the procedures set forth in the evaluation statute,<sup>217</sup> *de novo* review grants judges the final authority to determine whether a teacher’s failure to fulfill that requirement constitutes legal grounds for contract termination. *De novo* review thus stymies a school district’s ability to work with its teachers to develop and maintain robust professional expectations tailored to the needs of its own students, because it deprives the district of the ability to *enforce* such expectations.

The relationship between evaluations and termination decisions is the key to understanding this unfortunate result. As a practical matter, evaluations supply much of the factual basis for a school board’s decision to either retain a tenured teacher or terminate his contract on performance-related grounds.<sup>218</sup> But under a *de novo* standard of review, school boards lack the authority to determine whether the criteria by which they evaluate teachers correspond to the legal grounds on which a tenured teacher’s contract may be terminated for performance-related reasons.<sup>219</sup> *De novo* review displaces this authority, relocating it within the exclusive discretion of state district judges.

Two hypothetical scenarios may help to illustrate the problems that arise from this statutory regime. The first draws on the analysis in Part III.C.2 above to demonstrate the effect of *de novo* review if a school district contends that its PLC participation requirement should be characterized as a performance standard within the scope of the State Board of Education’s existing Standards such that formal negotiation with respect to the requirement is not necessary. The second demonstrates the effect of *de novo* review if a school district either negotiates for a PLC participation requirement or contends that the requirement should be characterized as an addition to the Minimum Criteria under the analysis presented in Part III.C.1. Together, these hypotheticals illustrate how a *de novo* review standard undermines efforts to initiate and sustain long-term educational improvement through PLCs.

In the first hypothetical, a school district recognizes, through the prodding of some of its most effective teachers, that helping its schools transform themselves into professional learning communities holds tremendous potential

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216. See 70 OKLA. STAT. § 6-101.21(D) (2001); see also *infra* text accompanying note 237.

217. See discussion *supra* Part III.A.

218. See ROSSOW & TATE, *supra* note 55, at 19-20.

219. Recall that the statutory grounds for termination of tenured teachers’ contracts are enumerated in section 6-101.22 of the Oklahoma School Code. 70 OKLA. STAT. § 6-101.22; see also *supra* note 183 and accompanying text. Recall also that the State Board of Education’s Standards incorporate these termination grounds. See OKLA. ADMIN. CODE § 210:20-29-5; see also *supra* text accompanying note 87.

for facilitating and supporting long-term improvements in student learning.<sup>220</sup> Accordingly, the district not only implements support mechanisms to allow teachers to meaningfully engage in PLC work, but also incorporates into its evaluation policy a generic requirement that all its teachers participate in PLC work, even defining the minimum level of engagement that would satisfy the requirement. Relying on the kind of analysis given in Part III.C.2, the district believes that this particular requirement falls well within the scope of the State Board of Education's performance Standards.<sup>221</sup> Therefore, although the district consults with its teachers before incorporating the requirement, as the evaluation statute requires for all evaluation policies,<sup>222</sup> the district does not submit the question of the requirement's incorporation to the local teachers' association for formal negotiation.

If a tenured teacher then refuses to participate in the kind of collaborative and reflective work promoted by PLCs, and her subsequent evaluations reflect this refusal, the question arises whether the school board has any legally defensible grounds on which to terminate the teacher's contract. Imagine, for example, that the school district meticulously adheres to all the procedural requirements of the Teacher Due Process Act<sup>223</sup> and terminates the teacher's contract on grounds of "willful neglect of duty."<sup>224</sup> The school board's theory, as conveyed in its notice of termination,<sup>225</sup> is that by not engaging in systematic reflection on her own classroom practices and by not working collaboratively with other teachers to research and develop better instructional practices, the teacher is not exhibiting the kind of "[c]ommitment to the profession" that the State Board's Standards demand.<sup>226</sup> The school board cites the teacher's repeated refusals, documented in the teacher's evaluations, as evidence that the teacher is not, for example, "exert[ing] every effort to raise professional standards" or helping to "achieve conditions which attract persons worthy of the trust to careers in education," as expected under the Standards.<sup>227</sup>

The teacher then appeals this decision in a trial de novo, arguing that the evaluation requirement for PLC participation is unenforceable because it exceeds the State Board's Standards and can therefore only be adopted through

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220. See discussion *supra* Part II.

221. See discussion *supra* Part III.C.2.

222. See 70 OKLA. STAT. § 6-101.10 (2001).

223. See discussion *supra* Part IV.B.

224. 70 OKLA. STAT. § 6-101.22(A)(1).

225. See *id.* § 6-101.26(A).

226. See OKLA. ADMIN. CODE 210:20-29-4 (2006), reproduced in app. B hereto; see also *supra* text accompanying notes 114-23.

227. OKLA. ADMIN. CODE § 210:20-29-4(b).

formal negotiation with the local teachers' association.<sup>228</sup> In short, the teacher argues, the requirement was not adopted in accordance with the evaluation statute and is thus effectively void. The question for the judge to resolve in response to the teacher's contention is whether the requirement falls inside or outside the scope of the existing Standards. And while some judges may be swayed by the argument that the Standards indeed encompass such a requirement,<sup>229</sup> other judges may not be similarly persuaded,<sup>230</sup> and *de novo* review, by definition, relieves these judges of the obligation to defer to the reasonable assessment of the local school board.<sup>231</sup> *De novo* review thus creates considerable uncertainty with respect to the legal enforceability of this kind of evaluation requirement. This uncertainty, in turn, can discourage school districts from undertaking the difficult task of fostering PLCs in the first place.

Moreover, even if the district judge in this hypothetical appeal finds the school board's legal theory compelling and affirms the board's decision to terminate the teacher's contract, the school board still stands divested of much of its authority to guide professional performance in its own district. The net effect of *de novo* review, whether a district judge "buys" the school board's argument or not, is that it vests *judges* with the ultimate discretion to decide what professional activities sufficiently demonstrate the ideals articulated in the Standards. Conversely, then, *de novo* review strips such discretion from the very school boards and professional educators ostensibly responsible for ensuring that those ideals are realized in their own school districts.<sup>232</sup> So while the school board in this case may win the immediate legal argument, the fact that a school district must obtain judicial approval to confirm the legitimacy of a simple evaluation requirement undermines the school board's authority, as guardian of the public's trust with respect to the education of children, to meet the particular educational needs of students its own district. Furthermore, state courts around the country routinely defer to these kinds of personnel decisions by school boards, in recognition of this very authority.<sup>233</sup> Even the

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228. See 70 OKLA. STAT. § 6-101.10 (2001).

229. See discussion *supra* Part III.C.2.

230. Conceivably, judges in this latter category might be reluctant to endorse the notion that teachers' professional "performance" should include more than direct instructional interactions with students, absent some indication that the state legislature or the State Board of Education has embraced this view. Thus, in the absence of an outright repeal of the trial *de novo* provision, some legally binding indication from the state legislature or the State Board of Education may be needed to assure judges that PLC requirements are legitimate and enforceable.

231. See *supra* text accompanying note 212.

232. See THOMAS ET AL., *supra* note 127, at 393.

233. See app. C hereto.

U.S. Supreme Court has recognized that “school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society.”<sup>234</sup>

A second hypothetical scenario further highlights the remarkable degree of authority that the Teacher Due Process Act allocates to district judges. This scenario could play out in either of two variations. The first is almost identical to the previous hypothetical, except that instead of characterizing its PLC participation requirement as a performance standard, the school district successfully convinces a judge that the requirement represents an addition to the Minimum Criteria and that it is therefore not subject to negotiation.<sup>235</sup> The second variation involves a school district that voluntarily submits a proposal for incorporation of a PLC participation requirement to its local teachers’ association. A *de novo* review standard poses essentially the same problem under either of these variants; this hypothetical uses the latter because it better illustrates the reach that the trial *de novo* provision grants a judge into the traditional province of school board authority.

Imagine that the local teachers’ association agrees to the school district’s proposal to incorporate a PLC participation requirement into the district’s evaluation instrument, perhaps as a pure expression of the association’s genuine interest in transforming itself into a more professional organization,<sup>236</sup> or perhaps in exchange for slightly higher salaries, additional personal days, or some other legitimate benefit for the teachers of the district. As in the previous hypothetical, a teacher subsequently refuses to engage in the expected PLC work, the district terminates the teacher’s contract on the same theory of willful neglect of duty, and the teacher appeals. This time, however, the teacher cannot claim that the PLC requirement in the district’s negotiated evaluation policy is void on procedural grounds. Instead, the teacher simply argues that the requirement does not constitute any part of the law that the district court, exercising its power of *de novo* review, must consider when determining whether the evidence the school district has submitted legally indicates willful neglect of duty.

To make this argument, the teacher relies primarily on one small and somewhat enigmatic subsection of the Teacher Due Process Act: “In determining whether or not the professional performance of a teacher is adequate, the standards adopted by the State Board of Education *shall* be

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234. *Adler v. Bd. of Educ.* 342 U.S. 485, 493 (1952), *abrogated in part* by *Keyishian v. Bd. of Regents*, 385 U.S. 589, 595 (1967) (recognizing that school board decisions implicating teachers’ *constitutional* rights merit no judicial deference, but not questioning the soundness of deferring to school board authority with respect to other dismissal grounds).

235. *See* discussion *supra* Part III.C.1.

236. *See supra* text accompanying notes 40-43.

considered. Consideration *may* be given to any written standards of performance which have been adopted by any other education-oriented organization or agency.”<sup>237</sup> Assuming that the school district concedes that the contested evaluation requirement constitutes a performance standard exceeding or supplementing the state Standards,<sup>238</sup> the teacher’s argument might run thus: The Teacher Due Process Act places only one absolute requirement on the process of deciding whether a contract termination is warranted by law—simply that the reviewing court consider the State Board of Education’s Standards. The Act certainly *permits* the court, in the second sentence quoted above, to consider any supplemental standards that the school board used to reach its termination decision. But the permissive nature of this clause appears to relieve a state district judge of any *obligation* to consider supplemental standards when reviewing a particular school board’s decision to terminate a tenured teacher’s contract on the basis of that teacher’s failure to meet the standards incorporated into the district’s evaluation policy. Therefore, because a judge may disregard any supplemental standards when conducting her review, those standards cannot constitute any part of the law that a judge is called on to interpret in the course of de novo review. In other words, the fact that consideration of supplemental standards is merely permissive signals that they do not carry the force of law and are ultimately nonbinding in any action to terminate a tenured teacher’s contract.

This argument, if correct, places the judge in an interpretive bind. On one hand, if she ignores the locally developed and negotiated standard, then she effectively renders hollow the prospect that school districts can, in fact, supplement the state Standards through good-faith negotiation, as suggested by the evaluation statute.<sup>239</sup> What good is a supplemental standard if it cannot be enforced? On the other hand, if she feels compelled to enforce the supplemental standard in order to avoid this result, then she effectively ignores the statutory difference between the mandatory “shall” and the permissive “may” in the Teacher Due Process Act provision quoted above.<sup>240</sup> Moreover, while the judge in this scenario might resort to one of several principles of statutory interpretation to resolve the dilemma in one way, a different judge, also armed with the power of de novo review and facing the same scenario, might resolve the issue differently. So until an appeal reaches the Oklahoma Supreme Court for final determination, school districts have no way of knowing the legal status of a PLC participation requirement.

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237. 70 OKLA. STAT. § 6-101.21(D) (2001) (emphasis added).

238. *See* 70 OKLA. STAT. § 6-101.10 (2001).

239. *See id.*

240. *See* 70 OKLA. STAT. § 6-101.21(D); *see also supra* text accompanying note 237.

By leaving consideration of locally developed and negotiated standards purely to the discretion of district judges, *de novo* review deprives school districts of any predictable means of determining if, when, and to what extent these supplemental standards will ever receive consideration in the course of a judge's deliberations over whether to affirm or reverse a school board's contract termination decision. This unpredictability creates a strong disincentive for districts to attempt to negotiate supplemental standards at all, including any standard regarding PLC development and participation.

This comment thus urges the state legislature to amend the Teacher Due Process Act to provide for a more deferential judicial stance toward the contract termination decisions that school boards make on the basis of locally developed standards of performance, whether those standards arise from some method of teacher consultation or from formal negotiation with local teachers' associations. A more deferential standard of review, such as abuse of discretion, would require a court to defer to local school boards' interpretations of the Standards as long as the boards "made a reasonable choice (not necessarily the best choice) within the bounds of the law."<sup>241</sup> Such deference is typical in administrative law contexts, where the decision-making agency not only carries the responsibility of administering a particular set of statutory mandates but also brings its expertise to bear in doing so.<sup>242</sup> Many jurisdictions apply administrative agency law to school districts,<sup>243</sup> and Oklahoma should follow suit. Under an administrative review regime, the discretion to decide what professional activities demonstrate a teacher's adherence to the high professional ideals set forth in the state Standards would rest largely with school boards and the professional educators—teachers and administrators alike—who help to inform school district policies. A more deferential standard of review would bring Oklahoma in line with many other

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241. John F. Reif, *Standards of Review*, 79 OKLA. B.J. 34, 35 (2008) (discussing the differences between different standards of review, with special focus on how the standards operate under Oklahoma law). Reif further describes abuse of discretion review as "requir[ing] a reviewing court to sustain a decision unless it is so likely wrong that no reasonable person would reach the same conclusion." *Id.*

242. See 2 AM. JUR. 2D *Administrative Law* § 491 (2004).

243. See, e.g., *Lehto v. Bd. of Educ.* 962 A.2d 222, 226 ("If there was presented substantial and credible evidence to support the charges and a fair administrative hearing was had, the Superior Court cannot substitute its judgment for the judgment of the school authorities." (quoting *Bd. of Educ. v. Shockley*, 155 A.2d 323, 327-28 (Del. 1959))); *Moe v. Indep. Sch. Dist. No. 696*, 623 N.W.2d 899, 902 (Minn. Ct. App. 2001) ("The school board's decision is not reviewed *de novo* and will not be set aside unless the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence in the record, not within the school board's jurisdiction, or based on an erroneous theory of law." (citing *Ganyo v. Indep. Sch. Dist. No. 832*, 311 N.W.2d 497, 500 (Minn. 1981))); see also app. C hereto.

states that recognize the valuable and legitimate role that school boards must play—indeed, the duty that school boards owe—to ensure that students receive high-quality instruction from high-quality teachers.<sup>244</sup> More important, a more deferential standard of review would grant school districts the flexibility to foster and sustain cultures of professionalism within their schools that can support long-term school improvement measures that respond to the particular educational needs of local communities.

*V. Conclusion: The Limits and Possibilities of Teacher Evaluation as an Instrument of Reform*

There is no magic bullet that will transform American schools into effective institutions of learning. Creating a system of education that truly leaves no child behind will require the development of sound educational policy at all levels—national, state, and local—and will demand the concerted efforts of educators, parents, businesses, community organizations, legislators, and institutions of higher learning. This type of “all of the above” educational-reform model reflects the urgency with which we must ensure that all children have the knowledge, skills, character, and opportunity to become productive democratic citizens.

Given both the enormity and complexity of this task, the legal structures that frame educational practices in this country must empower rather than ignore or handicap educators, especially teachers, in their efforts to meet the needs of their students. As the professionals who interact most closely with the very students whom the educational system is supposed to serve, teachers themselves can generate some of the most valuable and effective solutions for dealing with our current educational crisis. In fact, if given the right support, teachers *must* participate in the work of designing such solutions. Many individual teachers do this as a matter of course, but the traditional concept of the individual teacher, acting as hero or saint, crafting educational miracles within the isolated confines of her own classroom is simply an unrealistic and unsustainable model for educational success in the twenty-first century. The future of education depends, in large part, on the ability of educational policy makers at all levels to reconceptualize the work of teaching in a way that integrates ongoing, collaborative instructional research and reflection into all teachers’ routine, professional practice.

By extension, then, teacher evaluation systems must evolve to reflect this expanded vision of teaching. At present, Oklahoma’s statutory framework for evaluation does not support this collaborative model of teaching practice, and the foregoing analysis illustrates the kind of legal gymnastics that school

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244. See app. C hereto.

districts could be required to perform if they meet with challenges to their efforts to transform their schools into professional learning communities under the current statutory scheme.

In order to facilitate the development of collaborative teaching practices, the state legislature should clarify the relationship between evaluation criteria and the grounds on which school districts can terminate the contracts of ineffective teachers. Likewise, the legislature should replace the trial de novo provision in the Teacher Due Process Act with a more deferential standard of review in order to enable school districts to terminate the contracts of teachers who cannot or will not adapt constructively to meet today's educational challenges.

*N. Georgeann Roye*

## APPENDIX A

OKLAHOMA ADMINISTRATIVE CODE  
TITLE 210. STATE DEPARTMENT OF EDUCATION  
CHAPTER 20. STAFF  
SUBCHAPTER 3. EVALUATION: MINIMUM CRITERIA  
FOR EFFECTIVE TEACHING AND  
ADMINISTRATIVE PERFORMANCE

210:20-3-4. Oklahoma minimum criteria for effective teaching performance

(a) Practice.

(1) Teacher management indicators. Teacher management indicators are:

(A) Preparation - The teacher plans for delivery of the lesson relative to short-term and long-term objectives.

(B) Routine - The teacher uses minimum class time for non-instructional routines thus maximizing time on task.

(C) Discipline - The teacher clearly defines expected behavior (encourages positive behavior and controls negative behavior).

(D) Learning Environment - The teacher establishes rapport with students and provides a pleasant, safe and orderly climate conducive to learning.

(2) Teacher instructional indicators. Teacher instructional indicators are:

(A) Establishes Objectives - The teacher communicates the instructional objectives to students.

(B) Stresses Sequence - The teacher shows how the present topic is related to those topics that have been taught or that will be taught.

(C) Relates Objectives - The teacher relates subject topics to existing student experiences.

(D) Involves All Learners - The teacher uses signaled responses, questioning techniques and/or guided practices to involve all students.

(E) Explains Content - The teacher teaches the objectives through a variety of methods.

(F) Explains Directions - The teacher gives directions that are clearly stated and related to the learning objectives.

(G) Models - The teacher demonstrates the desired skills.

(H) Monitors - The teacher checks to determine if students are progressing toward stated objectives.

(I) Adjusts Based On Monitoring - The teacher changes instruction bases on the results of monitoring.

(J) Guides Practice - The teacher requires all students to practice newly learned skills while under the direct supervision of the teacher.

(K) Provides for Independent Practice - The teacher requires students to practice newly learned skills without the direct supervision of the teacher.

(L) Establishes Closure - The teacher summarizes and fits into context what has been taught.

(b) Products.

(1) Teacher product indicators. Teacher product indicators are:

(A) Lesson Plans - The teacher writes daily lesson plans designed to achieve the identified objectives.

(B) Student Files - The teacher maintains a written record of student progress.

(C) Grading Patterns - The teacher utilizes grading patterns that are fairly administered and based on identified criteria.

(2) Student achievement indicators. Student achievement indicators include: Students demonstrate mastery of the stated objectives through projects, daily assignments, performance and test scores.

## APPENDIX B

OKLAHOMA ADMINISTRATIVE CODE  
TITLE 210. STATE DEPARTMENT OF EDUCATION  
CHAPTER 20. STAFF  
SUBCHAPTER 29. STANDARDS OF PERFORMANCE  
AND CONDUCT FOR TEACHERS

210:20-29-1. Purpose

- (a) The standards of conduct for teachers in this Subchapter are adopted pursuant to HB 1017, 70 O.S. Supp. 1990 § 6-101.21 and 6-101.22.
- (b) Teachers are charged with the education of the youth of this State. In order to perform effectively, teachers must demonstrate a belief in the worth and dignity of each human being, recognizing the supreme importance of the pursuit of truth, devotion to excellence, and the nurture of democratic principles.

210:20-29-2. Mission statement

In recognition of the magnitude of the responsibility inherent in the teaching process and by virtue of the desire for the respect and confidence of their colleagues, students, parents, and the community, teachers are to be guided in their conduct by their commitment to their students and their profession.

210:20-29-3. Principle I: Commitment to the students

- (a) The teacher must strive to help each student realize his or her potential as a worthy and effective member of society. The teacher must work to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals.
- (b) In fulfillment of the obligation to the student, the teacher:
  - (1) Shall not unreasonably restrain the student from independent action in the pursuit of learning,
  - (2) Shall not unreasonably deny the student access to varying points of view,
  - (3) Shall not deliberately suppress or distort subject matter relevant to the student's progress,
  - (4) Shall make reasonable effort to protect the student from

- conditions harmful to learning or to health and safety,
- (5) Shall not intentionally expose the student to embarrassment or disparagement,
  - (6) Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly
    - (A) Exclude any student from participation in any program
    - (B) Deny benefits to any students
    - (C) Grant any advantage to any student,
  - (7) Shall not use professional relationships with students for private advantage,
  - (8) Shall not disclose information about students obtained in the course of professional service, unless disclosure serves a compelling professional purpose and is permitted by law or is required by law.

210:20-29-4. Principle II: Commitment to the profession

- (a) The teaching profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.
- (b) In order to assure that the quality of the services of the teaching profession meets the expectations of the State and its citizens, the teacher shall exert every effort to raise professional standards, fulfill professional responsibilities with honor and integrity, promote a climate that encourages the exercise of professional judgment, achieve conditions which attract persons worthy of the trust to careers in education, and assist in preventing the practice of the profession by unqualified persons.
- (c) In fulfillment of the obligation to the profession, the educator
  - (1) Shall not in an application for a professional position deliberately make a false statement or fail to disclose a material fact related to competency and qualifications,
  - (2) Shall not misrepresent his/her professional qualifications.
  - (3) Shall not assist any entry into the profession of a person known to be unqualified in respect to character, education, or other relevant attribute,
  - (4) Shall not knowingly make a false statement concerning the qualifications of a candidate for a professional position,
  - (5) Shall not assist an unqualified person in the unauthorized practice of the profession,
  - (6) Shall not disclose information about colleagues obtained in the

- course of professional service unless disclosure serves a compelling professional purpose or is required by law,
- (7) Shall not knowingly make false or malicious statements about a colleague,
  - (8) Shall not accept any gratuity, gift, or favor that might impair or appear to influence professional decisions or actions.

210:20-29-5. Principle III

- (a) A career teacher may be dismissed or not reemployed for:
  - (1) Willful neglect of duty;
  - (2) Repeated negligence in performance of duty;
  - (3) Mental or physical abuse to a child;
  - (4) Incompetency;
  - (5) Instructional ineffectiveness;
  - (6) Unsatisfactory teaching performance; or
  - (7) Any reason involving moral turpitude.
- (b) Subject to the provisions of the Teacher Due Process Act, a probationary teacher may be dismissed or not reemployed for cause.
- (c) A teacher convicted of a felony shall be dismissed or not reemployed unless a presidential or gubernatorial pardon has been issued.
- (d) A teacher may be dismissed, refused employment or not reemployed after a finding that such person has engaged in criminal sexual activity or sexual misconduct that has impeded the effectiveness of the individual's performance of school duties. As used in this subsection:
  - (1) "Criminal sexual activity" means the commission of an act as defined in Section 886 of Title 21 of the Oklahoma Statutes, which is the act of sodomy; and
  - (2) "Sexual misconduct" means the soliciting or imposing of criminal sexual activity. [70:6-101.22]

## APPENDIX C

*State-by-State Standards of Review for Termination of Tenured Teacher Contracts*

\* Indicates that a school board's termination decision must rest on an independent hearing officer's or panel's findings, unless the record does not, in the school board's assessment, support those findings.

† Indicates that a school board technically does not render a termination decision; the statutory regime authorizes qualified hearing officers or another agency to make the initial termination decision, after receiving the school board's recommendation of termination.

State	Standard of Review	Underlying Statute(s)	Judicial Application
Alabama	Initial review conducted by hearing officer under de novo standard.	ALA. CODE § 16-24-10 (LexisNexis 2001 & Supp. 2009).	<i>Ex parte</i> Wilson, 984 So. 2d 1161 (Ala. 2007).
Alaska	"[J]udicial review based on the administrative record." Prior de novo review provision repealed. <i>See</i> Act of May 18, 1996, ch. 31, § 14, 1996 Alaska Sess. Laws 11.	ALASKA STAT. § 14.20.180 (2008).	Linstad v. Sitka Sch. Dist., 863 P.2d 838 (Alaska 1993) (applying the pre-1996 review standard).
Arizona	Initial review conducted by state personnel board under "arbitrary, capricious or otherwise contrary to law" standard.	ARIZ. REV. STAT. ANN. § 15-543 (2009); <i>see also</i> ARIZ. REV. STAT. ANN. § 41-785(c) (2004 & Supp. 2009).	Winters v. Ariz. Bd. of Educ., 83 P.3d 1114 (Ariz. Ct. App. 2004).
Arkansas	Arbitrary or capricious standard.	ARK. CODE ANN. § 6-17-1510 (2007).	Allen v. Texarkana Pub. Sch., 794 S.W.2d 138 (Ark. 1990).
California †	"Independent review," effectively equivalent to de novo standard.	CAL. EDUC. CODE §§ 44944-44945 (West 2006 & Supp. 2010).	Governing Bd. v. Haar, 33 Cal. Rptr. 2d 744 (Cal. Ct. App. 1994).

State	Standard of Review	Underlying Statute(s)	Judicial Application
Colorado *	“[A]rbitrary or capricious or legally impermissible” standard.	COLO. REV. STAT. § 22-63-302 (2009).	Bd. of Educ. v. Flaming, 938 P.2d 151 (Colo. 1997).
Connecticut *	Whether board acted “unreasonably, arbitrarily, illegally, or in abuse of its discretion,” with deference to board regarding reasonable legal conclusions.	CONN. GEN. STAT. ANN. §10-151 (West 2002 & Supp. 2009); <i>see also</i> CONN. GEN. STAT. ANN. § 4-183(j) (West 2007).	Rogers v. Bd. of Educ., 749 A.2d 1173 (Conn. 2000).
Delaware	Substantial evidence standard.	DEL. CODE ANN. tit. 14, § 1414 (2007).	Lehto v. Bd. of Educ., 962 A.2d 222 (Del. Super. Ct. 2008).
Florida	“The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.”	FLA. STAT. ANN. § 1012.33(3)(f) (West 2004 & Supp. 2010).	Webber v. Sch. Bd., 444 So. 2d 70 (Fla. Dist. Ct. App. 1984).
Georgia	Arbitrary or capricious standard invoked under case law; de novo standard expressly precluded by statute.	GA. CODE ANN. §§ 20-2-940(f), 20-2-1160(e) (West 2007).	Brawner v. Marietta City Bd. of Educ., 646 S.E.2d 89 (Ga. Ct. App. 2007).
Hawaii	Clearly erroneous standard applies to factual matters; de novo to conclusions of law. Mixed questions merit deference to agency expertise.	HAW. REV. STAT. ANN. §§ 302A-608 to -609 (West 2008); <i>see also</i> HAW. REV. STAT. ANN. § 91-14(f)-(g) (West 2008).	White v. Bd. of Educ., 501 P.2d 358 (Haw. 1972); <i>see also</i> Peroutka v. Cronin, 179 P.3d 1050 (Haw. 2008).
Idaho	No appeal to state courts from local school board decisions not involving alleged constitutional due process violations or other matters deemed appealable by statute.	IDAHO CODE ANN. §§ 33-513, 33-515 (2008 & Supp. 2009).	Daw <i>ex rel.</i> Daw v. Sch. Dist. 91 Bd. of Trs., 41 P.3d 234 (Idaho 2001).

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Illinois †	“Contrary to the manifest weight of the evidence” standard.	105 ILL. COMP. STAT. ANN. 5/24-12, 5/24-16 (West 2006).	Bd. of Educ. v. Ill. State Bd. of Educ., 577 N.E.2d 900 (Ill. App. Ct. 1991).
Indiana	Abuse of discretion, arbitrary or capricious, substantial evidence, or “in accordance with law” standard.	IND. CODE ANN. § 20-28-7-6 (LexisNexis 2007).	Fiscus v. Bd. of Sch. Trs., 509 N.E.2d 1137 (Ind. Ct. App. 1987).
Iowa	Initial review conducted by adjudicator under abuse of discretion, arbitrary or capricious, or “preponderance of the competent evidence” standard.	IOWA CODE ANN. § 279.17 (West 1996 & Supp. 2010).	Walthart v. Bd. of Dirs., 694 N.W.2d 740 (Iowa 2005).
Kansas †	Arbitrary or capricious or substantial evidence standard, or review to ensure decision was within hearing officer’s “scope of authority.”	KAN. STAT. ANN. §§ 72-5438, 72-5443 (2002 & Supp. 2009).	Dees v. Marion-Florence Unified Sch. Dist. No. 408, 149 P.3d 1 (Kan. Ct. App. 2006).
Kentucky †	Substantial evidence standard.	KY. REV. STAT. ANN. § 161.790 (West 2006 & Supp. 2009).	Gallatin County Bd. of Educ. v. Mann, 971 S.W.2d 295 (Ky. Ct. App. 1998).
Louisiana	Abuse of discretion, arbitrary or capricious, or substantial evidence standard.	LA. REV. STAT. ANN. § 17:443 (2001 & Supp. 2010).	Leban v. Orleans Parish Sch. Bd., 2007-0571 (La. App. 4 Cir. 11/21/07); 972 So. 2d 376.
Maine	No statutory tenure, though tenure may be locally negotiated. Substantial evidence standard applies to factual matters; “reversible error” to legal matters.	ME. REV. STAT. ANN. tit. 20-A, §§ 13201-13202 (2008).	Wright v. Superintending Sch. Comm., 331 A.2d 640 (Me. 1975).

State	Standard of Review	Underlying Statute(s)	Judicial Application
Maryland	Initial review conducted by state board of education under de novo standard.	MD. CODE ANN., EDUC. § 6-202 (West 2002 & Supp. 2009).	Bd. of Sch. Comm'rs v. James, 625 A.2d 361, 370, 381 (Md. Ct. Spec. App. 1993).
Massachusetts	Initial review conducted by arbitration panel, which must consider "the best interests of the pupils . . . and the need for elevation of performance standards."	MASS. ANN. LAWS ch. 71, § 42 (LexisNexis 2002).	Sch. Dist. v. Geller, 755 N.E.2d 1241 (Mass. 2001).
Michigan	Initial review conducted by administrative law judge, who must review for "significant evidence proving that the teacher is unfit to teach."	MICH. COMP. LAWS ANN. § 38.104 (West 2005); <i>see also</i> § MICH. COMP. LAWS ANN. § 24.285 (West 2004).	Lewis v. Bridgman Pub. Sch., 760 N.W.2d 242 (Mich. Ct. App. 2008).
Minnesota	De novo standard expressly disavowed and more limited review standards invoked under case law.	MINN. STAT. ANN. § 122A.40 (West 2008 & Supp. 2010); <i>see also</i> MINN. STAT. ANN. § 572.12(c) (West 2000)	Moe v. Indep. Sch. Dist. No. 696, 623 N.W.2d 899 (Minn. Ct. App. 2001).
Mississippi	No tenure, but judicial review allowed under arbitrary or capricious or substantial evidence standard or for "violation of some . . . right."	MISS. CODE ANN. §§ 37-9-101, 37-9-113 (West 1999 & Supp. 2009).	Bowden v. Lawrence County Sch. Dist., 2005-CA-01462-COA, 2004-CC-00556-SCT (Miss. Ct. App. 2007); 948 So. 2d 487.
Missouri	Substantial evidence standard applies to factual matters; a more stringent standard applies to legal matters, but with "due weight . . . to the [agency's] expertness."	MO. ANN. STAT. § 168.120 (West 2000).	Hellmann v. Union Sch. Dist., 170 S.W.3d 52 (Mo. Ct. App. 2005).

State	Standard of Review	Underlying Statute(s)	Judicial Application
Montana	Initial review conducted by county superintendent under de novo standard; clearly erroneous standard on appeal to district court.	MONT. CODE ANN. § 20-4-204 (2007).	Yanzick v. Sch. Dist. No. 23, 641 P.2d 431 (Mont. 1982).
Nebraska*	“[W]hether the school board acted within its jurisdiction and whether there is sufficient evidence . . . to support its decision.”	NEB. REV. STAT. §§ 79-832, 79-841 (2008).	Boss v. Fillmore County Sch. Dist. No. 19, 559 N.W.2d 448 (Neb. 1997).
Nevada	Appeal conducted “in the manner provided by law for appeals of administrative decisions of state agencies.”	NEV. REV. STAT. ANN. § 391.3194 (West 2006); <i>see also</i> NEV. REV. STAT. ANN. § 233B.135 (West 2008).	Unavailable.
New Hampshire	Initial review conducted by state board of education under clearly erroneous standard.	N.H. REV. STAT. ANN. §§ 189: 14-a to 14-b (LexisNexis 2006 & Supp. 2009).	<i>In re</i> Dunlap, 604 A.2d 945 (N.H. 1991).
New Jersey	Initial review conducted by state commissioner of education under unspecified standard; state-level agency receives judicial deference.	N.J. STAT. ANN. § 18A: 28-5 (West 1999 & Supp. 2008).	Capodilupo v. Bd. of Educ., 528 A.2d 73 (N.J. Super. Ct. App. Div. 1987).
New Mexico	Initial review conducted by independent arbitrator under de novo standard.	N.M. STAT. ANN. §§ 22-10A-25 (West 2003).	Unavailable.
New York †	Initial decision rendered by hearing officer or arbitration panel; decision is final unless procured by statutorily prohibited means.	N.Y. EDUC. LAW § 3020-a (McKinney 2009); <i>see also</i> N.Y. C.P.L.R. 7511 (McKinney 1998 & Supp. 2010).	Lackow v. Dep’t of Educ., 859 N.Y.S.2d 52 (App. Div. 2008).

State	Standard of Review	Underlying Statute(s)	Judicial Application
North Carolina*	Reviewing court may overturn school board's decision if it was the product of "wrongful procedure."	N.C. GEN. STAT. ANN. § 115C-325(h)-(n) (West 2000 & Supp. 2008); <i>see also</i> N.C. GEN. STAT. ANN. § 150B-51 (West 2009).	Farris v. Burke County Bd. of Educ., 559 S.E.2d 774 (N.C. 2002).
North Dakota	"Legally sufficient" standard applies to determination of cause; abuse of discretion standard to factual matters.	N.D. CENT. CODE § 15.1-15-08 (2003 & Supp. 2009).	Dobervich v. Cent. Cass Pub. Sch. Dist. No. 17, 302 N.W.2d 745 (N.D. 1981).
Ohio*	Reviewing court may overturn school board's decision if it is "against the weight of the evidence."	OHIO REV. CODE ANN. § 3319.16 (LexisNexis 2004).	Katz v. Maple Heights City Sch. Dist. Bd. of Educ., 622 N.E.2d 1 (Ohio Ct. App. 1993).
Oklahoma	De novo standard.	70 OKLA. STAT. § 6-101.27 (2001).	Weston v. Indep. Sch. Dist. No. 35, 2007 OK 61, 170 P.3d 539.
Oregon	Initial review conducted by state dismissal review board under "[u]nreasonable, arbitrary, or clearly . . . excessive" standard.	OR. REV. STAT. § 342.905 (2009).	Bergerson v. Salem-Keizer Sch. Dist., 144 P.3d 918 (Or. 2006).
Pennsylvania	Initial review conducted by state superintendent of public instruction under de novo standard.	24 PA. CONS. STAT. ANN. §§ 11-1131 to -1132 (West 1992 & Supp. 2009).	Katruska v. Bethlehem Ctr. Sch. Dist., 767 A.2d 1051 (Pa. 2001).
Rhode Island	Initial review conducted by state department of elementary and secondary education under unspecified standard.	R.I. GEN. LAWS § 16-13-4 (1996 & Supp. 2006).	Barber v. Exeter-W. Greenwich Sch. Comm., 418 A.2d 13 (R.I. 1980).
South Carolina	Substantial evidence standard.	S.C. CODE ANN. § 59-25-480 (2004).	Laws v. Richland County Sch. Dist. No. 1, 243 S.E.2d 192 (S.C. 1978).

State	Standard of Review	Underlying Statute(s)	Judicial Application
South Dakota	Statute calls for trial de novo; however, for schools, state supreme court equates this standard with abuse of discretion or arbitrary or capricious standard.	S.D. CODIFIED LAWS § 13-46-6 (2004).	Hicks v. Gayville-Volin Sch. Dist., 2003 SD 92, 668 N.W.2d 69.
Tennessee	Arbitrary or capricious standard generally; a modified de novo standard applies to alleged "violation[s] of statutory or constitutional rights."	TENN. CODE ANN. § 49-5-513(g) (2009).	Lee v. Franklin Special Sch. Dist. Bd. of Educ., 237 S.W.3d 322 (Tenn. Ct. App. 2007).
Texas*	Initial review conducted by state commissioner of education under arbitrary or capricious, substantial evidence, or "unlawful" standard.	TEX. EDUC. CODE ANN. §§ 21.259, 21.301, 21.303 (Vernon 2006).	Matthews v. Scott, 268 S.W.3d 162 (Tex. App. 2008).
Utah	Arbitrary or capricious standard.	UTAH CODE ANN. §§ 53A-8-104 to -105 (West 2004 & Supp. 2009)	Brough v. Bd. of Educ., 463 P.2d 567 (Utah 1970).
Vermont	Review standard ambiguous; <i>not</i> de novo.	VT. STAT. ANN. tit. 16, § 1752 (2004).	Burroughs v. W. Windsor Bd. of Sch. Dirs., 446 A.2d 377 (Vt. 1982).
Virginia*	Abuse of discretion, arbitrary or capricious, or substantial evidence standard.	VA. CODE ANN. §§ 22.1-313 to -314 (2006 & Supp. 2009).	Russell County Sch. Bd. v. Anderson, 384 S.E.2d 598 (Va. 1989).
Washington*	Clearly erroneous standard applies to factual matters; de novo standard to legal sufficiency of "cause."	WASH. REV. CODE ANN. §§ 28A.405.310, 28A.405.340 (West 2009).	Weems v. N. Franklin Sch. Dist., 37 P.3d 354 (Wash. 2002).

State	Standard of Review	Underlying Statute(s)	Judicial Application
West Virginia	Initial review conducted by administrative law judge under arbitrary or capricious standard.	W. VA. CODE ANN. § 18A-2-8 (LexisNexis 2007); <i>see also</i> W. VA. CODE ANN. §§ 6C-2-3 to -4 (LexisNexis 2006 & Supp. 2009).	Graham v. Putnam County Bd. of Educ., 575 S.E.2d 134 (W.Va 2002).
Wisconsin	Tenure abolished after Dec. 21, 1995; review of dismissals limited to alleged violations of collective bargaining agreements, statutes, or constitutional due process.	WIS. STAT. ANN. §§ 118.22-23 (West 2004).	Fortney v. Sch. Dist., 321 N.W.2d 225 (Wis. 1982).
Wyoming*	Abuse of discretion or arbitrary or capricious standard.	WYO. STAT. ANN. § 21-7-110 (2009); <i>see also</i> WYO. STAT. ANN. § 16-3-114 (2009).	Palmer v. Bd. of Trs., 785 P.2d 1160 (Wyo. 1990).