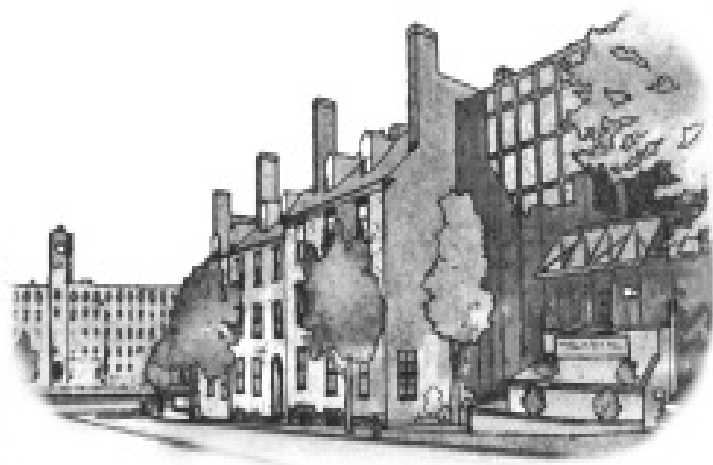


The Intersection of Professional Development, Teacher Evaluation and the Law

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A Word of Caution

This material is designed to provide educators with a general understanding of the law. You are strongly encouraged to seek a legal opinion from the School District's legal counsel regarding any specific case.

The Intersection of Professional Development Teacher Evaluation and the Law

I. Overview

The purpose of this material is to provide the administrator with a working knowledge of the law pertaining to the employment, non-renewal and dismissal of educators. More importantly, the goal of this material is to help the administrator understand the relationship between educator evaluation, professional development, non-renewal and dismissal. This material is not intended to cover the details of the law, but instead is designed to equip the administrator with a working knowledge of the general principles which apply to the area of teacher employment and professional development.

II. The Contractual Relationship

Since the time of the one room schoolhouse, educators have been employed on a contractual basis. Early teacher contracts included such suitable “perks” as room and board, firewood and a cow. Early contracts were subject to some rather unique and provincial terms. For example, in Coleman v. School District of Rochester, 87 NH 465 (1936), the Supreme Court upheld a regulation by a local school board which provided that a female teacher’s marriage shall terminate her contract to teach.

The fact of the matter is that educators are not “at will” employees, but instead are protected by state law, individual contracts and collective bargaining agreements. State law provides in New Hampshire RSA 189:14 that a district “shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of RSA 189:13 to the extent of the full salary for the period for which such teacher was engaged.”¹ The Supreme Court has defined this statute as setting the “outside limit of recovery;” ruling that any earnings by the dismissed teacher after dismissal shall be deducted from her full salary for the contract period. See Spencer v. Laconia School District, 107 NH 125 (1966).

III. Defining the Contractual Relationship

The relationship between educators and their school district is defined by several aspects of the law. The purpose of this section is to identify and understand those areas of the law which impinge upon the relationship between a school district and its educators.

¹“Assumpsit” is a Latin term for a contract claim.

A. State Statutory Law

Part II, Article 83 of the state constitution establishes the fact that public education is a state function. As we understand from the case of Claremont School District v. Governor, 138 NH 183 (1993), a free public education is an important substantive right in New Hampshire. The state is the entity which protects this constitutional right. The state is also the body which has the right to define a constitutionally adequate education. Since education is a state constitutional obligation, state statutory law also generally defines how that constitutional duty is met. NH RSA 186:5 provides that “The State Board [of Education] shall have the same powers of management, supervision and direction over all public schools in the state as the directors of a business corporation have over its business, except as otherwise limited by law. It may make all rules and regulations necessary for the management of its own business and for the conduct of its officer, employees, and agents, and to secure the efficient administration of the public schools.... It shall be the duty of school boards and employees of school districts to comply with the rules and regulations of the State Board.” Obviously, educators are the primary means whereby students receive a constitutionally adequate education.

B. State Regulation

The State Board of Education is given statutory authority to adopt rules and regulations relative to the following:

- Minimum curriculum and educational standards for all grades;
- Qualifications and duties for school superintendents, principals, school administrative unit professionals and other public school employees;
- Certification standards for education personnel;
- Requirements for teachers and teacher preparation programs; and
- Certification standards for advanced teaching credentials.

C. Collective Bargaining Agreements

The relationship between educators and school districts is also defined through the context of a Collective Bargaining Agreement. For example, the Collective Bargaining Agreement with the City of Nashua sets forth terms which pertain to both educator’s employment status and their evaluations. The Collective Bargaining Agreement is best understood as the “master contract” between a teacher and their employer.

D. Contract

Nashua, like most school districts enters into annual, partial year or “continuing contracts” with its teachers. An annual contract teacher is considered the equivalent of a non-tenured teacher whereas a continuing contract teacher is considered the equivalent of a tenured teacher.

E. Caselaw

Our courts have also weighed in on the relationship between a school district and its educators. Courts have been called from time to time to define the ambiguous terms in a contractual relationship and thus further define the law pertaining to the relationship between an educator and their school district.

IV. The Law Pertaining to Non-Renewal

State law is the primary vehicle through which teacher non-renewal is regulated. NH RSA 189:14-A, entitled “Failure to be renominated or re-elected,” governs the process of teacher non-renewal. From an historic perspective, superintendents nominated teachers to the school board for “election,” to another contract year. This historic process has come to be referred to as teacher renewal and connotes the idea that the school board has agreed to renew an educator’s contract. This section is devoted to understanding that statute.

A. The Scope of the Non-Renewal Statute

The non-renewal statute applies to any teacher who has:

A professional standard certificate from the State Board of Education; and

Who has taught for one or more years in the same school district.

In the case of Littkey v. Winchester School District, 129 NH 626 (1987), the term “teacher” was defined by the Supreme Court to include a school principal. This definition was based in part upon the state’s definition of an educator. In the case of Ferreira v. Bedford School District, 133 NH 785 (1990), a school nurse was determined not to be a teacher under the non-renewal section. Please note however, that a Collective Bargaining Agreement, such as Nashua’s Collective Bargaining Agreement which includes several other types of individuals such as guidance counselors, department chair persons, specialists, librarians, school nurses, school psychologists, social workers and the like, may give rise to rights which go beyond the scope of the intended audience for the non-renewal statute.

ED 202.07 defines the term “educator” as “any professional employee of any

school district whose position requires certification by the state as a professional engaged in teaching in accord with the certification requirements of ED 500.” ED 500 sets forth the certification standards for educational personnel. ED 501.02 Definitions (j) defines “educator or educational personnel” to mean “any professional employee of any school district whose position requires certification by the State Board pursuant to RSA 189:39. Superintendents, administrators, principals, specialists in information systems, guidance counselors, educational specialists and teachers are also included within the definition of this term.”

B. The Notice Requirement

The teacher who qualifies under the above recited standards “shall be notified in writing:

On or before April 15; or

within 15 days of the adoption of the district budget by the legislative body,

whichever is later if that teacher is not to be re-nominated or re-elected, provided that no notification shall occur later than the Friday following the second Tuesday in May.

C. The Tenured Teacher Right to Notification and Hearing

Any certified teacher:

Who has taught for three consecutive years or more in the same school district;
or

Who has taught for three consecutive years or more in any school district in the state shall, after having taught for two consecutive years in any other school district in the state;

Be entitled to:

Request in writing within ten (10) days of receipt of a notice of non-renewal;

A hearing before the school board; and

Request a statement of reasons for their failure to be re-nominated or re-elected.

D. Notice of Rights

A notice of non-renewal must advise the educator of “all of the teacher’s rights under RSA 189:14-a(b).” The best way to do such is to provide the educator with a

copy of RSA 189:14-a, as well as reciting the rights within the non-renewal notice letter.

E. School Board's Duty to Respond

The school board, upon receipt of a tenured educator's request for a hearing shall provide for a hearing on the request to be held within fifteen (15) days. The school board is required to issue its decision in writing within fifteen (15) days of the close of the hearing.

F. Leaves of Absence

The statute provides that a leave of absence shall not interrupt the consecutive nature of a teacher's service, but the leave shall not be included in the computation of whether or not the teacher has attained three years of service. Query: What is the status of the teacher who is promoted to a principal?

G. Burden of Proof for Non-Renewal

The burden of proof for non-renewal of a teacher "shall be on the superintendent of the local school district by a preponderance of the evidence." The "preponderance of the evidence standard" is considered a civil standard of proof. The duty of the superintendent is not to demonstrate beyond a reasonable doubt that they had just cause for non-renewal, but instead that the weight of the evidence placed on the scales of justice tips in favor of the superintendent

H. Non-Renewal Because of "Unsatisfactory Performance"

The statute provides that in cases of non-renewal because of unsatisfactory performance, the superintendent of the district shall demonstrate at the school hearing by a preponderance of the evidence:

- That the teacher received written notice that their unsatisfactory performance may lead to non-renomination;
- That the teacher had a reasonable opportunity to correct such unsatisfactory performance; and
- That the teacher had failed to correct their unsatisfactory performance.

I. No Duty

In the case involving unsatisfactory performance the statute is unambiguous that it shall not be construed to require the superintendent or the school board to provide a teacher with remedial assistance to correct any deficiencies that form the basis for the

teacher's non-renewal.

J. Due Process in Non-Renewal

ED 216.02 sets forth the due process standards whereby an educator receives their non-renewal hearing. These minimum due process standards include the following:

The choice by the educator as to whether or not their non-renewal hearing shall be public or private;

A duty to record the hearing;

An obligation on the part of the board to arrange for transcription upon request of either party;

A duty on the part of the requesting party to pay for transcription;

A right to be represented by legal counsel;

An obligation to sequester all witnesses except the party's principal to the action;

Testimony shall be under oath or affirmation;

The superintendent or their representative shall open the proceedings through the production of witnesses and documents;

Party opponents are given the opportunity to cross-examine each witness;

The board may ask questions for purposes of clarification;

Parties shall offer evidence and all relevant and material evidence shall be admissible;

Hearings are not bound by the NH Rules of Evidence or the Federal Rules of Evidence;

School board may receive and consider evidence even though there has been objection to the admissibility of the evidence;

Witnesses shall appear in person unless extenuating circumstances prevent appearance;

By agreement, witnesses may occur through other means including telephone;

Exhibits when offered by either party may be received into evidence by the School board;

The educator has the opportunity to present their case and their witnesses after presentation by the superintendent;

Rebuttal evidence may be presented, but is limited to rebutting evidence previously submitted by the other party;

The educator provides their closing argument first;

The superintendent provides their final closing argument;

The superintendent has the burden of proof by a preponderance of the evidence;

The School board deliberates in accord with the determination as to whether or not the hearing is public or non-public;

The School board has an obligation to provide a written decision within fifteen (15) days of the close of the hearing;

The decision must be in writing and set forth the facts and conclusions of law found by the School board;

The school board must apprise the educator of their right to appeal the decision to the State Board; and

The decision shall be mailed to the educator by certified mail.

K. A Limited Appeal Remedy

Historically, teachers aggrieved by a Board's non-renewal decision had a dual appeal track. They could either grieve the Board's decision under their Collective Bargaining Agreement or appeal to the State Board of Education. Effective August 29, 2003, this "dual track" was eliminated through the adoption of RSA 189:14-b.

RSA 189:14-b provides that a teacher may request the State Board of Education to review the Board's decision. A request for review under RSA 189:14-b "shall constitute the exclusive remedy available to a teacher on the issue of the non-renewal of such teacher."

The request must be in writing and filed with the State Board within ten days after the issuance of the Board's decision. Upon receipt of the request, the State Board has a duty to notify the School board of the request for review and "shall forthwith proceed to a consideration of the matter." Such consideration shall include a hearing if

either party shall request it.” The State Board shall issue its decision within thirty days after the request for review is filed and the decision of the State Board shall be final and binding upon both parties.

The standard of review clearly favors the local school board, Part II of the statute provides that “the State Board of Education shall uphold a decision of the local school board to non-renew a teacher’s contract unless the local school board’s decision is clearly erroneous.” The Supreme Court has interpreted the predecessor to RSA 189:14-b as limiting their judicial review to those circumstances where the board has exceeded its jurisdiction or authority, abuse its discretion or acted illegally, arbitrarily, unreasonably or capriciously. See Petition of Dunlap, 134 NH (1991).

V. The Law Pertaining to Educator Dismissal

The dismissal of a teacher is governed by RSA 189:13 which sets forth a standard which is often referred to as a “for cause,” or “just cause,” standard for teacher dismissal. This section discusses the law pertaining to educator dismissal.

A. Who May Dismiss?

NH RSA 189:13 provides that the **school board** holds the dismissal authority. NH RSA 189:39 provides that the superintendent nominates and school boards elect teachers employed in the schools in their SAU. The Supreme Court has implied that a superintendent, by withholding nomination can effectively bring about a termination. This however, can only occur on a contract-to-contract basis. In short, only a school board has the authority to dismiss an educator.

B. Reasons for a Dismissal

A school board may dismiss any teacher found by them to be:

1. Immoral.

The trend in the law is that termination for immorality must be grounded in some form of immorality which directly affects the teacher’s performance as a role model for the children. The morality must be of a nature which is clearly inconsistent with the character goals set by a school district. Classic examples of immorality include consistently lying to superiors, using vulgar language or engaging in actions which are contrary to the school district’s code of conduct.

2. Incompetent.

Incompetence is best defined through the negative, that is by defining the competent educator. A termination for incompetence must, by definition arise from a

failure on the part of the educator to meet the district's definition of competence. A district which fails to define its expectations with regard to competency will have an extremely difficult time terminating for incompetence.

3. In failure to conform to regulations prescribed.

This is an area where districts frequently fail to lay the requisite ground work. However, examples of termination for failure to follow prescribed regulations would include, but not be limited to, the following:

Failure to conform with state regulations;

Excessive unexcused absences; and

Insubordination.

C. Prior Notice and Hearing

A teacher under contract may not be dismissed until such time as they have been:

Previously notified of the cause of such dismissal; and

Have previously been granted a "full and fair hearing."

The conventional wisdom is that a "full and fair hearing," will follow the state regulatory format for a non-renewal hearing. The term "full and fair," connotes due process and due process is best met through complying with the regulatory standard in ED 216.02. It is safe to assume that the superintendent bears the burden of proof in the dismissal.

D. Mandatory Dismissal

There are certain circumstances which require that a school district terminate an employee without a hearing. Employees of an SAU or school district who have been convicted of: homicide; child pornography; aggravated felonious sexual assault; felonious sexual assault; or kidnapping, in this state or under any statute prohibiting the same conduct in another state, territory, or possession of the United States, **shall have their employment terminated by the School Administrative Unit or school district after it receives notice of the conviction.** There is no "full and fair hearing requirement" for this form of termination.

E. Removal Authority

While a superintendent may not directly terminate an educator, “superintendents have a statutory duty through their principals to direct and supervise the work of teachers.” A superintendent may “for cause” remove a teacher or other employee of the district from the classroom setting. The person so removed shall continue as an employee of the district unless discharged by the local school board, but may not return to the classroom or undertake to perform the duties of such persons position unless reinstated by the superintendent. This is the safety valve whereby a superintendent can remove an educator prior to a dismissal hearing.

Any person so removed (unless dismissed by the school board) has an appeal to the state board. This appeal is governed by NH RSA 189:32 which provides broad latitude to the board in “making such orders as justice requires.” Conventional wisdom suggests that a classroom removal may give rise to a grievance under the grievance procedure of a Collective Bargaining Agreement.

VI. The Relationship Between Educator Evaluation, Professional Development, and Its Impact on Renewal and Dismissal

A. The Duty to Evaluate

ED 302.02 states that a superintendent shall “(n) be responsible for the evaluation of personnel and programs in accordance with local school board policies.” However, ED 304.01 requires that the school principal shall “assign, direct, and be responsible for the evaluation of all personnel employed in the school in accordance with local school board policy, administrative rules and as directed by the superintendent of schools.” See ED 304.01(c).

B. Evaluation Procedure

The Nashua School District’s Collective Bargaining Agreement addresses the procedure for the evaluation of teachers. Section 7.5 entitled “Evaluation of Teachers” states as follows:

1. All observations by a supervisor of the work performance of a teacher in a classroom shall be made openly.
2. When a supervisor enters a classroom of a teacher engaged in teaching, it will be assumed the teacher is being observed for purposes which may include evaluation.
3. When a supervisor makes and signs a written evaluation of a teacher, it will be shown to the teacher who will acknowledge receipt of the evaluation in

writing. The teacher's acknowledgment of receipt shall not necessary be interpreted to indicate the teacher's assent to the evaluation. If the teacher disagrees with all or any part of the evaluation, the teacher may file written comments in their personnel file. The district has no obligation to respond to the teacher's comments and a non-response shall not be interpreted to indicate agreement with the teacher's comments.

4. All evaluations shall be in accord with the evaluation forms and procedures adopted by the board or the superintendent prior to the commencement of a school year.

C. Right of Access to Evaluation

In accord with Section 7.6 of the Collective Bargaining Agreement, each educator is entitled to knowledge of, and access to supervisory records and reports of competence, personal character and efficiency maintained in the teacher's personnel file with reference to evaluation of the teacher's performance in the district. The district has an obligation to provide the teacher with copies of the records and reports pertaining to the educator's performance.

D. Evaluations and Non-Renewal

In accord with the Collective Bargaining Agreement, the district has developed a "Professional Development Process" which includes a detailed evaluation component. With the August 2003 amendment to RSA 189:14-a, non-renewal of a continuing contract teacher for unsatisfactory performance requires the following:

- Proof that the teacher received written notice of their unsatisfactory performance and that their unsatisfactory performance may lead to non-renewal;
- Proof that the teacher had a reasonable opportunity to correct their unsatisfactory performance;
- Proof that the teacher failed to correct their unsatisfactory performance.

While the statute does not require that a district provide a teacher with a plan for remediation or "remedial assistance," the Nashua School District, as a matter of best practice has developed a "plan for remediation."

This statutory amendment has tremendous implications for the teacher evaluation process. From this statutory amendment we glean the following minimum professional development evaluation requirements:

1. All teacher evaluations must be in writing;

2. Unsatisfactory performance must be documented in writing and must be evident from the evaluation;

3. If an evaluation is going to be used as a basis for non-renewing a continuing contract teacher, its delivery must be accompanied by written notice that the evaluation result is unsatisfactory and may lead to a non-renewal recommendation;

4. A continuing contract teacher should be apprised in writing of the time period they have been given in which to correct their unsatisfactory performance.

5. A second written evaluation must document the fact that the teacher failed to correct their unsatisfactory performance.

E. The Divergence Between the Law and Best Educational Practices

Clearly Best Educational Practices require that professional development and evaluation occur with diligence during the first three years of a non-tenured teacher's career. The law, however, does not address any such process. Instead, the matter of evaluation for non-tenured teachers is left to the prerogative and perview of the local school district. Needless to say, a diligent and even aggressive evaluation process used during the non-tenured phase of a teacher's career can avoid the more onerous burden that a principal faces in evaluating continuing contract educators.

F. The Legal Implications of Non-Renewing Continuing Contract Teachers for Unsatisfactory Performance

Whether or not a district has the ability to effectively non-renew a continuing contract teacher for unsatisfactory performance is driven by whether or not the superintendent can meet their burden of proof. In light of the premium placed in our society on documentary evidence, the evaluation plays a pivotal role in the superintendent meeting their burden of proof. Absent clear written documentation of unsatisfactory performance, a district can assume that it will be successful in non-renewing a continuing contract teacher. The district should note that "unsatisfactory performance," is a lower standard than the "incompetence standard" for dismissal.