



Outside Counsel

Expert Analysis

Evaluation Law Could Limit Ability To Terminate Probationary Teachers

It has been over a year since Governor Andrew Cuomo announced an “historic” settlement between the New York State United Teachers and the State Education Department which he predicted would make New York State “a national leader in holding teachers accountable for student achievement.” The statute, Education Law Section 3012-c and its implementing Regulations, 8 NYCRR Subpart 30-2, which were the product of this settlement, are collectively known as APPR (Annual Professional Performance Review). Together they create a comprehensive and complex evaluation system for rating teachers and principals which places strong emphasis on student achievement and growth as reflected on standardized tests.

As part of this system, teachers are given a numerical score which is then transposed into a rating of “highly effective,” “effective,” “developing” or “ineffective.” Ironically, while the intent of the APPR initiative is to improve teacher performance, another consequence of the legislation is that it will be significantly more difficult for school districts to terminate non-tenured teachers whose performance is inadequate or otherwise problematic.

Prior to the enactment of Education Law Section 3012-c, school districts possessed broad discretion to terminate teachers prior to their being granted tenure. Indeed, more than 37 years ago in *James v. Board of Education of Central School District No. 1 of the Town of Orangetown and Clarkstown*, 37 NY2d 891, 892 (1975) the Court of Appeals stated:

A board of education has an unfettered right to terminate the employment of a teacher during his probationary period unless the teacher establishes that the board terminated for a constitutionally impermissible purpose or in violation of statutory proscription.

In the years since the *James* decision, the principle enunciated in that case has, with

By
**Warren H.
Richmond III**



limited exception, governed the termination of probationary teachers in New York State. See e.g. *Conetta v. Board of Ed. of Patchogue Medford UFSD*, 165 Misc.2d 329 (Sup. Ct. Suffolk Co. 1995) (tenure cannot be denied on the basis of the board’s philosophical opposition to tenure). Although Education Law Section 3031 provides a procedure by which a Superintendent of Schools is required to set forth his or her reasons for recommending termination or a denial of tenure, the courts have held that this process is designed only to allow probationary teachers to ascertain whether any of the reasons were constitutionally or statutorily impermissible. It is not meant in any way to restrict the discretion afforded the Superintendent and the Board of Education. See *Merhige v. Copiague School District*, 76 AD2d 926 (2d Dept. 1980).

The enactment of Education Law Section 3012-c has substantially expanded the protection given to probationary teachers. Section 3012-c(1) specifically provides:

[A]nnual professional performance reviews shall be a significant factor for employment decisions including but not limited to promotion, retention, tenure determination, termination, and supplemental compensation, which decisions are to be made in accordance with locally developed procedures negotiated pursuant to the requirements of article fourteen of the civil service law where applicable. Provided, however, that nothing in this section shall be construed to affect the statutory right of a school district or board of cooperative educational services to terminate a probationary teacher...for

statutorily and constitutionally permissible reasons other than the performance of the teacher...in the classroom..., including but not limited to misconduct.

There can be little question that the above language modifies the long-established rule that a board of education possesses the “unfettered right” to terminate a probationary teacher absent reasons that are constitutionally impermissible or in violation of a statute. What remains unclear, however, is the extent to which this has occurred. Much, but by no means all, of the problem results from the failure of the drafters of Section 3012-c to define two of the pivotal terms in the statute, i.e. “significant factor” and “performance.” The meaning and application of these terms, which will ultimately be left to the courts, will to a great extent set the parameters of the discretion afforded to school boards in making the important decisions as to which members of the teaching staff will obtain tenure.

A consequence of the legislation is that it will be significantly more difficult for school districts to terminate non-tenured teachers whose performance is inadequate or otherwise problematic.

Significant Factor

In providing that the APPR review will be a “significant factor” in employment decisions including tenure determination, Education Law Section 3012-c provides little concrete guidance. It is clear that at a minimum the APPR must be considered in making such decisions. On the other hand, the statute falls short of requiring, as it easily could have, that the APPR review be the determining factor. Thus, the extent to which the APPR rating is to be considered is likely somewhere in between. The problem for school districts, and for that matter for teachers,

is that neither the statute nor its implementing regulations provide any guidance whatsoever as to the nature of the other factors that may be taken into consideration to outweigh an APPR rating of "effective" or "highly effective."

For example, to what extent may a school district consider, and what weight may be accorded, more subjective factors such as ability to get along with other staff, ability to communicate with parents, or concerns about poor judgment? Factors such as these, which are not readily quantifiable, were entirely appropriate considerations in tenure determinations prior to the enactment of Section 3012-c. Indeed, denial of tenure on the basis of considerations of this nature was essentially unreviewable.

While there is nothing in Section 3012-c to suggest that these more subjective considerations are now precluded, it appears that the extent to which they can be the basis for the denial of tenure will necessarily be subject to review. Specifically, a court may be called upon to determine whether such a consideration outweighed the "significant factor" of an "effective" or "highly effective" APPR rating. In this light it is not difficult to see that in many cases it will be the courts, not the board of education, that make the ultimate determination regarding teacher termination.

Performance

Section 3012-c carves out an exception to the consideration of APPR ratings in the making of employment decisions stating,

...nothing in this section shall be construed to affect the statutory right of a school district to terminate a probationary teacher... for statutorily and constitutionally permissible reasons other than the performance of the teacher...in the classroom...including but not limited to misconduct.

However, the term "performance," like the term "significant factor," has been left undefined by the legislation's drafters. Was it their intent that the term be narrowly defined so as to refer solely to performance as reflected by the completed APPR score received by a teacher?

If that were the intended meaning a board of education would retain much of its discretion to determine whether or not to dismiss a probationary teacher. It would, for example, be able to terminate a teacher for largely subjective reasons such as concerns about poor judgment, notwithstanding an "effective" or even "highly effective" APPR rating. At the other end of the spectrum, "performance" in the classroom might be defined to mean anything that is related to teaching performance in its most general sense. Were that to be the meaning, a board's discretion would be significantly constrained. A board might well be precluded from terminating a probationary teacher for performance-related issues (e.g., classroom management or inadequate les-

son planning) notwithstanding an "effective" or "highly effective" APPR rating.

Ultimately, the meaning of the terms "significant factor" and "performance" in the classroom will be defined through litigation. However, until such time as the courts or the Commissioner of Education provide direction regarding these key terms, school districts will remain very much in the dark as to the degree to which they possess discretion to terminate probationary teachers. Unfortunately, in an attempt to avoid litigation, some districts may err on the side of caution and grant tenure to teachers despite significant reservations as to their competence.

The term 'performance,' like the term 'significant factor,' has been left undefined by the legislation's drafters. Was it their intent that the term be narrowly defined so as to refer solely to performance as reflected by the completed APPR score received by a teacher?

Education Law Section 3012-c presents various other difficulties by school districts related to the employment of probationary teachers. First, because the APPR process will not be completed until the end of a school year at the earliest, a question exists as to the ability of a school district to terminate a probationary teacher during his or her first year of teaching. Can a district, for example, terminate a new teacher who has proven to be utterly ineffective after three or four months of teaching or must it allow such a teacher to continue in a classroom for the entire school year?

Guidance issued by the State Education Department is far from helpful, stating cryptically: "Prior to completion of the APPR in the first year of the probationary term, a probationary teacher...may be summarily dismissed for constitutionally and statutorily permissible reasons other than classroom performance without regard to the APPR." Guidance on New York State's Annual Professional Performance Review for Teachers and Principals to Implement Education Law §3012-c and the Commissioner's Regulations, Updated Aug. 13, 2012 (C-13 at p. 24)

Second, the timelines of the APPR do not align with the statutory timelines for decisions regarding teacher termination. The provisions of Education Law set forth a 60-day period in which to terminate a probationary teacher. The teacher is first entitled to 30 days' notice of the meeting at which the board of education will consider termination. Section 3031(a) and (b). Once the board has voted to terminate, the teacher is terminated on 30 days' notice. Section 3019(a).

As a result of these statutory notice periods, board action to terminate probationary teachers

has generally taken place during the months of April and May so that the termination may be effective at the end of the school year. Now that Education Law Section 3012-c(1) requires that the annual professional performance review be a "significant factor" in the decision to terminate a probationary teacher, such action will likely be delayed.

Due to the necessity of incorporating end-of-year student achievement scores, the final APPR rating may not be provided until as late as Sept. 1 of the following school year. Section 3012-c(2)(c)(2). As such, the school district will effectively be precluded from terminating a probationary teacher at the conclusion of a year of poor performance. Given the statutory time periods contained in Section 3031(a) and (b) and 3019(a), such termination may not take place until well into the fall of the next year. Such delay may be further extended by virtue of the teacher taking an appeal from his or her APPR rating. Section 3012-c(5)(6).

Finally, neither the APPR statute, the Commissioners' Regulations nor the Guidance promulgated by the State Education Department provides any guidance as to what is to occur at the end of a teacher's probationary term. Pursuant to Education Law 3013, prior to the expiration of a teacher's probationary term, the superintendent of schools is required to make a recommendation to the board of education as to whether the teacher is to be granted tenure.

Section 3012-c(2) specifically requires that every person who is not to be recommended for tenure be notified in writing not later than 60 days immediately preceding the expiration of the probationary period. Because, in the vast majority of cases, the end of the teacher's probationary term corresponds with the end of the school year, it will effectively be impossible to include the final year's APPR as a "significant factor" in the tenure determination as required by Section 3012-c(2). Adding to this difficulty is the fact that districts will not have the luxury of continuing the teacher's employment into the following school year as it will result in tenure by estoppel. See, e.g., *Lindsey v. Board of Education of Mt. Morris Central School District*, 72 AD2d 185 (4th Dept. 1980).

The issues raised above and no doubt many others related to the application of APPR to probationary teachers will be subject to much litigation in the coming years. Given the significance of tenure, which in effect represents a lifetime job, it is hoped that in applying the provisions of Section 3012-c the courts will, to the greatest extent possible, preserve the sound discretion of school administration to retain only those who they believe are capable of providing quality education.