



Teacher Employment and Performance Assessment

What is tenure?

Tenure is granted to teachers who complete a period of probationary employment and entitles the teacher to automatically renewing contracts and protection from summary dismissal.¹ Typically, tenured teachers may only be dismissed for specified reasons after statutorily required hearings and appeals.² Forty-nine states and the District of Columbia have laws providing some form of tenure.³ A tenured teacher, in Florida, is employed under either a professional service contract or a continuing contract.⁴

There is a growing national discussion regarding the reform of state teacher tenure policies. At least 13 states enacted legislation in 2010 requiring that teacher performance assessments be primarily based upon student learning gains.⁵ Eight of these states also reformed teacher tenure, hiring practices, or both.⁶

Teacher tenure reform is incorporated into the federal Race to the Top grant program administered by the U.S. Department of Education.⁷ Florida is one of 11 states and the District of Columbia selected to receive Race to the Top funds.⁸

¹ 67B Am. Jur. 2d Schools s. 195; see s. 1012.33(3), F.S.

² Center for American Progress, Ringing the Bell for K-12 Teacher Tenure Reform, at 4 (Feb. 2010), available at http://www.americanprogress.org/issues/2010/02/pdf/teacher_tenure.pdf [hereinafter *Ringing the Bell*]

³ Education Commission of the States, *Teacher Tenure/Continuing Contract Laws*, <http://www.ecs.org/clearinghouse/75/64/7564.htm> (last visited Sept. 23, 2010). State laws often refer to tenure by other terms, such as "continuing contracts." In Wisconsin, tenure policies are determined locally by school districts through the collective bargaining process. *Id.*

⁴ Section 1012.33(3), F.S. For employees hired before July 1, 1984, tenure is conferred by a continuing contract. For employees hired after this date, tenure is conferred by a professional service contract. Section 1012.33(3)(d), F.S.

⁵ National Council for State Legislatures, *Educators (Teachers/Principals) 2010 Enacted Evaluation Legislation*, <http://www.ncsl.org/default.aspx?tabid=21155> (last visited Sept. 28, 2010) (Arizona, California, Colorado, Connecticut, Illinois, Louisiana, Maine, Maryland, Michigan, Nevada, New York, Oklahoma, and Tennessee).

⁶ *Id.* (Arizona, Colorado, Connecticut, Maryland, Michigan, New York, Oklahoma, and Tennessee).

⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009); see also U.S. Department of Education, *Race to the Top Program Executive Summary*, at 3 and 9 (Nov. 9, 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

⁸ Press Release, U.S. Department of Education, *Nine States and the District of Columbia Win Second Round Race to the Top Grants* (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants> (last visited Sept. 22, 2010) [hereinafter *Race to the Top Press Release*]. Delaware and Tennessee were selected to receive Race to the Top grant funds in Phase 1 of the competition. The District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island were selected in Phase 2. The winners were selected from a field of 46 states. *Id.*

What research has been conducted on teacher tenure and effectiveness?

Research indicates that teacher effectiveness is the most important school-level variable influencing student learning. Students who are taught by ineffective teachers perform at much lower levels than students demonstrating comparable ability taught by high-performing teachers. Research shows that students taught by an ineffective teacher for even one year experience long-term negative impacts on achievement.⁹

Several national education think tanks have examined nationwide teacher employment policies to determine best practices for providing students with effective teachers. This research finds that, despite the impact of teacher effectiveness on student achievement, few states use annual performance assessment results when making tenure or retention decisions.¹⁰ Weaknesses in performance assessment systems result in few teachers being rated unsatisfactorily, thereby impeding both identification and remediation of ineffective teachers. Furthermore, tenure protections make removing chronically ineffective teachers difficult and costly.¹¹ Some researchers suggest that states:

- ❖ Make student learning gains the preponderant factor in assessing teacher performance;
- ❖ Require the use of performance assessment results when making tenure and retention decisions; and
- ❖ Relax tenure protections so that chronically ineffective teachers may be more easily dismissed.¹²

According to this research, implementation of these reforms will increase the likelihood that tenure is granted only to effective teachers and that ineffective teachers will be removed from the classroom. This, in turn, will result in improved student performance.¹³

These reforms are incorporated into the Race to the Top grant program. In Florida, Race to the Top funds will be used to develop high quality performance assessments for instructional

⁹ Sanders and Rivers, *Cumulative and Residual Effects of Teachers on Future Student Achievement*, at 6-8 (Nov. 1996), available at

<http://www.mccsc.edu/~curriculum/cumulative%20and%20residual%20effects%20of%20teachers.pdf>. Sanders and Rivers found that standardized mathematics assessment scores for students who were taught by a low-performing teacher for three consecutive years were 53 percentile points lower than those of students who were taught by a high-performing teacher for three consecutive years. *Id.* at 3.

¹⁰ See, e.g., *Ring the Bell*, *supra* note 2, at 7; see, e.g., National Council on Teacher Quality, *2009 State Teacher Policy Yearbook: Florida*, at 78-80 (2009), available at http://www.nctq.org/stpy09/reports/stpy_florida.pdf [hereinafter NCTQ 2009 State Report]; see, e.g., The New Teacher Project, *The Widget Effect, Our Failure to Acknowledge and Act on Differences in Teacher Effectiveness*, at 24 (2009), available at <http://widgeteffect.org/downloads/TheWidgetEffect.pdf> [hereinafter *The Widget Effect*].

¹¹ Center for American Progress, *Removing Chronically Ineffective Teachers, Barriers and Opportunities*, at 9-11 (March 2010), available at http://www.americanprogress.org/issues/2010/03/pdf/teacher_dismissal.pdf; The Brookings Institution, *Identifying Effective Teachers Using Performance on the Job*, at 13-15 (April 2006), available at http://www.brookings.edu/views/papers/200604hamilton_1.pdf [hereinafter *Brookings Report*].

¹² *Ring the Bell*, *supra* note 2, at 24; *NCTQ 2009 State Report*, *supra* note 10, at 70-73, 78-80, and 125-133; *The Widget Effect*, *supra* note 10, at 27-30; *Brookings Report*, *supra* note 11, at 13-15.

¹³ *Brookings Report*, *supra* note 11, at 13-15; *The Widget Effect*, *supra* note 10, at 27-30.

personnel. These performance assessments will be predominantly based upon student learning gains and relied upon to make tenure, retention, or other employment decisions.¹⁴

What types of contracts are used to employ instructional personnel?

Three types of contracts are used to employ instructional personnel¹⁵ in Florida – continuing contracts, professional service contracts, and annual contracts. The eligibility and renewal requirements for each type of contract differ.¹⁶ Holding a continuing contract or professional service contract signifies tenured status.¹⁷

Instructional personnel hired before July 1, 1984, were given continuing contracts upon meeting eligibility requirements.¹⁸ After completing three years of probationary service on annual contracts, an employee was eligible for a continuing contract if he or she was fully certified, recommended for a continuing contract by the superintendent, and reappointed by the school board.¹⁹

Unlike a professional service contract, a continuing contract entitles the employee to continued employment without the necessity of annual renewal until discontinuation of the position, resignation, dismissal, or removal from continuing contract status.²⁰ Instructional personnel who were granted continuing contracts may retain such contract or exchange it for a professional service contract.²¹

Instructional personnel hired on or after July 1, 1984, are entitled to and must receive a professional service contract after three years of probationary service on annual contracts if fully certified, recommended for a professional service contract by the superintendent, and reappointed by the school board.²²

¹⁴ U.S. Department of Education, *Florida's Race to the Top Application for Initial Funding*, at 135-159 (June 1, 2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/florida.pdf> [hereinafter *Race to the Top Application*]; see *infra* text accompanying notes 90-96.

¹⁵ Instructional personnel provide direct instructional services or direct instructional support to students in grades K-12. Instructional personnel include classroom teachers; staff who provide student personnel services (e.g., guidance counselors, social workers, career specialists, and school psychologists); librarians and media specialists; other instructional staff (e.g., learning resource specialists); and education paraprofessionals under the direct supervision of instructional personnel. Classroom teachers provide classroom instruction to students, including basic instruction, exceptional student education, career education, and adult education. Section 1012.01(2), F.S.

¹⁶ Section 1012.33(3), F.S.; see also s. 231.36, F.S. (1981).

¹⁷ Section 1012.33(3)(d), F.S.

¹⁸ Section 15, ch. 82-242, L.O.F.

¹⁹ Section 231.36(1) and (3)(a)1.-4., F.S. (1981).

²⁰ Section 231.36(3)(e), F.S. (1981). A continuing contract employee may be dismissed or returned to annual contract status for a period of three years based upon the recommendation of the district school superintendent, school principal, or a majority of the school board. Section 1012.33(4)(b), F.S.; see also s. 231.36(4), F.S. (1981).

²¹ Section 1012.33(3)(d) and (4)(a), F.S.

²² Section 1012.33(3)(a)1.-3., F.S. Probationary employment must be completed in the same school district during a period not to exceed five successive years, except for leave duly authorized and granted. *Id.* Probationary employment may be extended to four years if agreed upon in writing by the district school board and the employee. Section 1012.33(3)(c), F.S.

A professional service contract must be renewed each year, unless the employee is charged with unsatisfactory performance based upon his or her annual performance assessment.²³ In such cases, the school district must follow statutorily required due process procedures before dismissing the employee.²⁴

An annual contract expires at the end of its term.²⁵ An employee's first annual contract includes a 97-day period during which the employee's contract may be terminated without cause or the employee may resign without breach of contract.²⁶

What is included in collective bargaining agreements for instructional personnel?

District school boards bargain collectively with the certified bargaining agent (i.e., union) that represents the district's instructional personnel to determine the terms of the collective bargaining agreement.²⁷ The district and union negotiate wages, hours, and terms and conditions of employment.²⁸ The following issues have been collectively bargained in the past:

- ❖ Salary schedules;²⁹
- ❖ Seniority and tenure policies;
- ❖ Performance assessment instruments and procedures;
- ❖ Policies for conduct or performance-related suspension and dismissal;

²³ Sections 1012.33(3)(e) and 1012.34(3)(c)-(d), F.S.

²⁴ Section 1012.34(3)(d), F.S.; see *infra* text accompanying notes 55-60.

²⁵ Section 1012.33(3)(a)4., F.S. An employee on annual contract is not guaranteed continued employment upon expiration of the contract. Thus, any due process provided to a non-renewed annual contract employee after expiration of the contract is optional. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-579 (1972). Some school districts have collectively bargained agreements allowing a non-renewed annual contract employee to request an administrative review. See, e.g., Hillsborough County School District and Hillsborough Classroom Teachers Association, Inc., *Teacher Contract 2007-2010*, at 93-94 (2007), available at http://www.sdhc.k12.fl.us/HumanResources/PDFs/CONTRACT/bargaining_agreement.pdf [hereinafter *Hillsborough County Agreement*].

²⁶ Section 1012.33(3)(a)4., F.S. This 97-day period applies to instructional personnel employed after June 30, 1997. *Id.*

²⁷ Sections 447.203(2), 447.309(1), and 1012.22(1)(c)4., F.S. The State Constitution provides that "the right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." Section 6, Art. I of the State Constitution. The only school district whose instructional personnel are not represented by a union is Calhoun County. Section 447.305, F.S., requires that every employee organization seeking to become a certified bargaining agent for public employees register with the Public Employees Relations Commission (PERC). No such registration exists for Calhoun County. See Public Employees Relations Commission, Search Registration Orders, <http://perc.myflorida.com/co/regfilter.aspx> (last visited Sept. 29, 2010).

²⁸ Section 447.309(1), F.S. The Legislature is constitutionally empowered to provide the standards and guidelines for implementing the collective bargaining rights of public employees, including public school teachers. *Chiles v. State Employees Attorneys Guild*, 734 So.2d 1030, 1032 (Fla. 1999). This includes the authority to determine which public employees and matters are subject to collective bargaining and which issues must be bargained. *State Employees Attorneys Guild*, 734 So.2d at 1032; *School District of Martin County v. Public Employee Relations Commission*, 15 So.3d 42, 45-46 (4th D.C.A. 2009).

²⁹ Salary schedules for instructional personnel are specifically subject to collective bargaining. Section 1012.22(1)(c)4., F.S.; see also Teacher Compensation Fact Sheet.

- ❖ Teacher assignment, transfer, reduction-in-force, and recall policies;
- ❖ Health, life, and disability insurance and workers compensation and retirement benefits;
- ❖ The school district calendar, including the work year, workday hours, and school holidays observed by the school district;
- ❖ Sick, vacation, maternity, medical, military, and other leave policies;
- ❖ Grievance procedures and sexual harassment policies;
- ❖ Instructional personnel responsibilities for maintaining student safety and discipline and interacting with parents; and
- ❖ Resignation and retirement.³⁰

The collective bargaining agreement is the “master contract” for instructional personnel employment. Typically, the terms of the collective bargaining agreement are incorporated by reference in the employment contracts issued to instructional personnel.³¹

How is the job performance of instructional personnel evaluated?

Florida law requires each district school superintendent to establish procedures to assess the job performance of district instructional personnel.³² The Department of Education (DOE) must approve each school district’s performance assessment system.³³ The performance assessment system must be designed to support district- and school-level improvement plans; provide appropriate instruments, procedures, and criteria for improving the quality of instruction; and include opportunities for parental input. Each district’s performance assessment system must address general teaching competencies, include special evaluation procedures for teaching fields that warrant such procedures, and ensure that all individuals with evaluation responsibilities are trained in the proper use of the assessment instrument.³⁴

A performance assessment must be conducted at least once per year for all instructional personnel. The performance assessment must be based upon sound educational principles and

³⁰ See, e.g., *Hillsborough County Agreement*, *supra* note 25, at 4-11; School Board of Orange County and Orange County Classroom Teachers Association, *Teacher Contract*, at 1-2 (May 7, 2010), available at <https://www.ocps.net/es/laborrelations/bargaining/Documents/CTA%20contract%2009-10%20-%20Ratified%205-7-2010.pdf>; see, e.g., Miami-Dade Public Schools and United Teachers of Dade, *Collective Bargaining Agreement*, at 297-314 (2006), available at http://www.dadeschools.net/employees/labor_union/UTD/entire.pdf [hereinafter *Miami-Dade Main Agreement*]. The Miami-Dade collective bargaining agreement is supplemented by amendments adopted in 2009. Provisions of the main agreement not amended by the successor contract remain in effect. Miami-Dade Public Schools and United Teachers of Dade, *Successor Contract 2009-2012*, at cover page (2009), available at http://www2.dadeschools.net/employees/labor_union/UTD/pdfs10/UTD-2009-2012_Successor_Contract-070109-063012.pdf.

³¹ Email, Duval County School District, Employee Support Coordinator (Sept. 27, 2010)(sample annual and professional service contracts for instructional personnel).

³² Section 1012.34(1), F.S. Administrative personnel perform management activities such as developing and executing broad policies for the school district. Administrative personnel include district-based instructional and non-instructional administrators, as well as school administrators who perform administrative duties at the school-level. School administrators include school principals, school directors, career center directors, and assistant principals. “Supervisory personnel” are not defined. Section 1012.01(3), F.S.

³³ Section 1012.34(1), F.S.

³⁴ Section 1012.34(2), F.S.

contemporary research in effective educational practices.³⁵ The assessment procedure for instructional personnel must be primarily based upon the performance of students assigned to their classrooms or school, as appropriate. Student performance must be measured by statewide assessments and, for subjects and grade levels not measured by statewide assessments, local assessments.³⁶ While student performance is the primary factor considered in assessing performance, an employee may be charged with unsatisfactory performance for reasons other than poor student performance.³⁷

Each performance assessment must also measure the employee's subject area knowledge and ability to maintain classroom discipline; plan and deliver instruction; use technology in the classroom; evaluate instructional needs; and collaborate with parents to increase student achievement. Additional performance criteria may be established by the State Board of Education and district school boards.³⁸

How are the performance assessment criteria measured?

State board rule requires each school district to identify the factors and evidence to be used to designate, document, and differentiate unsatisfactory, satisfactory, and outstanding performance.³⁹ Typically, the factors used to measure an employee's score on each performance criterion⁴⁰ are determined through collective bargaining, resulting in considerable variation

³⁵ Section 1012.34(3), F.S.

³⁶ Section 1012.34(3), F.S. The statewide assessment program for public schools includes the Florida Comprehensive Assessment Test and statewide standardized end-of-course assessments. The Florida Comprehensive Assessment Test assesses reading (grades 3-10), mathematics (grades 3-8), science (grades 5 and 8), and writing (grades 4, 8, and 10). Statewide standardized end-of-course examination for high school students include Algebra I (administration begins in 2010-11) and Biology I and geometry (administration begins in 2011-2012). Middle school students will begin taking an end-of-course assessment in Civics beginning in 2012-13.

Section 1008.22(3)(c), F.S.; see also Statewide Assessment Program Fact Sheet.

³⁷ Section 1012.34(3), F.S. In 2004, the Legislature amended this section to clarify that an employee may be charged with unsatisfactory performance based upon performance deficiencies other than student performance (e.g., failure to maintain appropriate discipline, failure to plan instruction, failure to teach assigned subject matter). Section 11, ch. 2004-295, L.O.F. Prior to this clarification, some Florida courts construed this section to require the charge of unsatisfactory performance to be based solely upon student performance. See *Sherrod v. Palm Beach County School Board*, 963 So. 2d 251 (4th D.C.A. 2006) and *Young v. Palm Beach County School Board*, 968 So. 2d 38 (4th D.C.A. 2006).

³⁸ Section 1012.34(3)(a), F.S. The Educator Accomplished Practices are adopted in rule and include several competencies and skills that are essential to effective teaching. Rule 6A-5.065, F.A.C. Likewise, the Florida Principal Leadership Standards provide the standards by which school administrators must demonstrate competency to be considered effective. Rule 6A-5.080, F.A.C.

³⁹ Rule 6B-4.010(1)(c)2., F.A.C. The performance levels used by school districts vary. For example, Miami-Dade School District uses four performance levels – exemplary, proficient, developing/needs improvement, and unsatisfactory. Miami-Dade County School District, *Instructional Performance Evaluation and Growth System*, at 26 (2009), available at <http://ipegs.dadeschools.net/pdfs/Teacher%20Handbook%20FINAL%208-4-09.pdf> [hereinafter *Miami-Dade Performance Assessment*]. In contrast, Sumter School District uses three performance levels – satisfactory, needs improvement, and unsatisfactory. Sumter County Schools, *Instructional Performance Assessment System*, at II-11 (1999), available at <http://www.fldoe.org/profdev/pdf/pa/Sumter.pdf> [hereinafter *Sumter County Performance Assessment*].

⁴⁰ See *supra* text accompanying notes 36-38 (performance assessment criteria).

among districts.⁴¹ For example, one school district measures an employee's ability to evaluate instructional needs based upon the following factors:

- ❖ Uses multiple assessment techniques;
- ❖ Interprets and uses data for individual diagnosis;
- ❖ Plans instruction based on diagnosed student needs; and
- ❖ Provides clear and timely feedback to students to improve performance.⁴²

In contrast, another school district's performance assessment instrument does not have a unique criterion regarding an employee's ability to evaluate instructional needs. Instead, this skill is measured under multiple criteria, such as student performance assessment and lesson planning and delivery.⁴³

The evidence that school districts use to measure individual performance criteria also varies. Typically, such evidence includes student assessment results; student work portfolios; evidence that student data is used to guide instruction; lesson plans; records relating to student discipline, parent interactions, and participation in professional development; and classroom observations.⁴⁴

Since 1999, the performance assessment has been statutorily required to be primarily based upon student performance. Student performance must be measured by statewide assessments and, for subjects and grade levels not measured by statewide assessments, local assessments.⁴⁵ Measurement of student performance varies among school districts.⁴⁶ For example, one school district assigns student performance a point value of "3" and all other performance criteria have a point value of "2" or "1." Despite having the highest point value of the nine performance criteria, it appears that a poor student performance score can be overcome by satisfactory performance on the remaining criteria.⁴⁷ In another school district, student performance does not appear to be weighted higher than any of the other performance criteria.⁴⁸

The extent to which school districts use student performance data from existing statewide assessments to assess instructional personnel performance is unclear. In the 2008-09 academic year, 99.97 percent of teachers received satisfactory performance evaluations, while less than 70

⁴¹ See, e.g., *Miami-Dade Main Agreement*, *supra* note 30, at 38-40; see, e.g., Duval Teachers United and Duval County School Board, *Teacher Collective Bargaining Agreement*, 2009-2012, at 39-40 (2009), available at <http://www.duvalschools.org/static/wearedcps/downloads/Teacher%20Contract%2006-08.pdf> [hereinafter *Duval County Agreement*]. The Miami-Dade School District and Duval County School District collective bargaining agreements both require that changes to the assessment system be made jointly by district and union representatives. *Id.*

⁴² Duval County Public Schools, *Teacher Assessment System*, 2009-10, at 25 (2009), available at <http://www.fldoe.org/profdev/pdf/pa/Duval.pdf> [hereinafter *Duval County Performance Assessment*].

⁴³ Orange County Public Schools, *Instructional Personnel Performance Assessment Procedures Manual*, at 24-25 (2009), available at https://www.ocps.net/es/hr/PDS/assessment/Documents/2009-10_Assessment_Manual_all.pdf [hereinafter *Orange County Performance Assessment*].

⁴⁴ See, e.g., *Duval County Performance Assessment*, *supra* note 42, at 3-13; see, e.g., *Miami-Dade Performance Assessment*, *supra* note 39, at 37-44; see, e.g., *Orange County Performance Assessment*, *supra* note 43, at 24-25.

⁴⁵ Section 58, ch. 99-398, L.O.F., codified at s.1012.34(3), F.S.

⁴⁶ Florida Department of Education, *Legislative Bill Analysis for SB 6* (2010).

⁴⁷ *Duval County Performance Assessment*, *supra* note 42, at 19-20 and 25-26.

⁴⁸ *Orange County Performance Assessment*, *supra* note 43, at 23-26.

percent of reading and mathematics teachers had 50 percent of their students make learning gains on statewide assessments.⁴⁹

School districts typically use multiple student performance measures for performance assessment purposes.⁵⁰ In some cases, the impact that student assessment data has on the teacher's student performance score appears to be diluted by the inclusion of numerous additional measures.⁵¹ In other cases, the district does not clearly require the use of statewide or local assessments to measure student performance over other tests.⁵²

The extent to which school districts use the results of performance assessments when making tenure, retention, or other employment decisions is also unclear. Some school districts include a clear statement in the performance assessment instrument that performance assessment results will be used to determine tenure, retention, or other employment decisions.⁵³ Other districts do not include such a statement in their performance assessment instrument.⁵⁴

On what basis may instructional personnel be dismissed?

Dismissal for Unsatisfactory Performance. Dismissal proceedings may be brought against instructional personnel who are charged with unsatisfactory performance based upon an annual performance assessment.⁵⁵ School districts must follow the following due process procedures for an employee with a professional service contract:

- ❖ The evaluator must notify the employee of unsatisfactory performance in writing and meet with the employee to discuss the performance evaluation.⁵⁶ Thereafter, the employee must be placed on performance probation for a period of 90 days. While on performance probation, the employee must be periodically evaluated, given performance feedback, and provided assistance and inservice opportunities targeted to correcting performance deficiencies.⁵⁷
- ❖ Within 14 days after the close of the 90-day period, the evaluator must determine whether the performance deficiencies have been corrected and make a recommendation to the district school superintendent regarding retention or termination of the employee. Within 14 days

⁴⁹ *Race to the Top Application*, *supra* note 14, at 144.

⁵⁰ *See, e.g., Orange County Performance Assessment*, *supra* note 43, at 24-25. For example, in Orange County School District, factors such as documenting student performance in varied ways, assessing student readiness at the beginning of the year, and recording student grades are among 14 factors used to determine a teacher's student performance score on the performance assessment. *Id.*

⁵¹ *See, e.g., Orange County Performance Assessment*, *supra* note 43, at 25. For example, Orange County School District includes a total of 14 factors in its rubric for measuring student performance on its assessment instrument. *Id.* In contrast, Duval County School District uses only five factors to measure student performance. *Duval County Performance Assessment*, *supra* note 42, at 25-26.

⁵² *Orange County Performance Assessment*, *supra* note 43, at 23-26; *see, e.g., Sumter County Performance Assessment*, *supra* note 39, at II-11. The performance assessment instruments used by Sumter and Orange County School Districts do not clearly state that data from statewide and local assessments must be used to measure student performance over that of other tests, when feasible. *Id.*

⁵³ *See, e.g., Sumter County Performance Assessment*, *supra* note 39, at I-19; *Duval County Performance Assessment*, *supra* note 42, at 2 and 20.

⁵⁴ *See, e.g., Orange County Performance Assessment*, *supra* note 43.

⁵⁵ Section 1012.34(3)(d), F.S.

⁵⁶ Section 1012.34(3)(d)1., F.S.

⁵⁷ Section 1012.34(3)(d)2.a., F.S.

after receipt of this recommendation, the superintendent must notify the employee in writing regarding continuation or termination of his or her employment contract.⁵⁸

- ❖ Within 15 days after receiving notice of the superintendent's recommendation that his or her employment contract be terminated, the employee may request a hearing to contest the recommendation. The hearing must be conducted within 60 days after receipt of the employee's request. The school board may choose to conduct its own hearing or provide for a hearing before an administrative law judge. If the matter is heard by an administrative law judge, the judge hears the case and makes a recommendation on retention or termination to the school board. A majority vote of the membership of the district school board is required to sustain or change the administrative law judge's recommendation. In either case, the school board's determination is final as to the sufficiency or insufficiency of the grounds for termination of employment.⁵⁹
- ❖ The employee may appeal an adverse hearing result in state appellate court. The employee must file a request for appeal within 30 days after the school board's final order.⁶⁰

A less prescriptive process applies to instructional personnel on annual contracts. For these employees, the evaluator must provide written notice of unsatisfactory performance, meet with the employee, and make recommendations for, and assist the employee with, improving performance within a specified timeframe. If the employee's performance does not improve, he or she may be dismissed during the term of the annual contract.⁶¹

Just Cause Dismissal. All instructional personnel may be suspended or dismissed during the term of their contract for just cause.⁶² Just cause includes incompetency, immorality, misconduct in office, gross insubordination, willful neglect of duty, being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.⁶³ State board rule defines these causes as follows:

- ❖ Incompetency is unfitness for, or inability to perform, one's duty resulting from inefficiency⁶⁴ or incapacity,⁶⁵ as determined on a case-by-case basis.
- ❖ Immorality is conduct that offends standards of public decency and is sufficiently notorious to bring disgrace to the individual or education profession in the community.

⁵⁸ Section 1012.34(3)(d)2.b., F.S.

⁵⁹ *Id.*

⁶⁰ Section 120.68(1) and (2)(a), F.S.

⁶¹ Section 1012.34(3)(d)(1.), F.S.

⁶² Section 1012.33(1)(a), (4)(c), and (6)(a), F.S. School-based administrators may also be suspended or dismissed on just cause grounds. Section 1012.33(4)(c) and (6)(b), F.S.

⁶³ Section 1012.33(1)(a), F.S.; rule 6B-4.009, F.A.C. Unlike employees on annual or professional service contracts, the just cause reasons for employees on continuing contracts include drunkenness. Section 1012.33(4)(c), F.S.; rule 6B-4.009(5), F.A.C.

⁶⁴ Inefficiency includes the repeated failure to perform duties or effectively communicate or relate with students. Rule 6B-4.006(1)(a), F.A.C.

⁶⁵ Incapacity includes lack of emotional stability, adequate physical ability, or general education or subject area knowledge. Rule 6B-4.006(1)(b), F.A.C.

- ❖ Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession⁶⁶ and the Principles of Professional Conduct for the Education Profession in Florida⁶⁷ which seriously impairs the individual's effectiveness as an educator.
- ❖ Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.
- ❖ Crimes of moral turpitude are acts so base, vile, or depraved according to accepted societal standards that the doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.⁶⁸

A school district must provide employees charged on just cause grounds with written notice stating the charges and may suspend the employee without pay.⁶⁹ If the employee wishes to contest the charges, he or she may request a hearing.⁷⁰ The school board may choose to conduct its own hearing or provide for a hearing before an administrative law judge.⁷¹ The employee may appeal an adverse hearing result in state appellate court.⁷²

During the 2009-10 academic year, 12,259 instructional personnel left teaching positions in Florida. Of these employees, 121 were released during the 97-day probationary period, 141 were terminated for unsatisfactory performance, and 71 were dismissed for just cause.⁷³

How do school districts determine which instructional personnel to retain when making workforce reductions?

District-wide reductions to instructional positions caused by declining enrollment or budgetary conditions are known as “reductions-in-force.”⁷⁴ In such situations, Florida law requires district school boards to establish policies, through collective bargaining or by rule, for determining which employees are retained during a reduction-in-force.⁷⁵ Sixty-six of 67 Florida school

⁶⁶ Rule 6B-1.001, F.A.C.

⁶⁷ Rule 6B-1.006, F.A.C.

⁶⁸ Rule 6B-4.006(1)-(6), F.A.C.

⁶⁹ Section 1012.33(6)(a), F.S. If the charges are not sustained, the employee must be reinstated with back pay. *Id.*

⁷⁰ Section 1012.33(6)(a), F.S. The request for a hearing must be made within 15 days of receiving notice of the charges. *Id.*

⁷¹ Section 1012.33(6)(a)1. and 2., F.S. In either case, the hearing must be conducted within 60 days of receiving the request for hearing. *Id.*

⁷² Section 1012.33(6), F.S. (flush-left provisions at end of subsection). The request for appeal must be made within 30 days after the school board's or administrative law judge's final order. Section 120.68(1) and (2)(a), F.S.

⁷³ Email from Department of Education, Legislative Affairs Director (Oct. 18, 2010)(data from the department's Automated Staff Information Database, Staff Demographic, Survey 5, 2009-10).

⁷⁴ National Council on Teacher Quality, *Teacher Layoffs: Rethinking “Last Hired, First Fired” Policies*, at 3 (Feb. 2010), available at http://www.nctq.org/p/docs/nctq_dc_layoffs.pdf [hereinafter *Rethinking “Last Hired, First Fired”*]; see, e.g., Collier County School District and Collier County Education Association, *Instructional Personnel Collective Bargaining Agreement*, at 9.01, (2009), available at http://www.ccea-ocap.org/index.php?option=com_content&view=article&id=17&Itemid=70. Reductions-in-force do not typically include reductions in instructional personnel due to routine attrition, decisions not to renew annual contract employees, and dismissal based upon conduct or performance. *Id.* Typically, teachers who lose their jobs may be recalled based on collectively bargained priorities. *Rethinking “Last Hired, First Fired,”* at 5.

⁷⁵ Section 1012.33(5), F.S. Florida law expressly requires school districts to establish priorities for determining whether to retain employees on continuing contracts or professional service contracts. Florida law is silent

districts have collective bargaining agreements for instructional personnel. All 63 agreements reviewed herein address reduction-in-force.⁷⁶

When making reductions-in-force, the school district must determine which schools, grade-levels, and subject areas will be affected and make reductions according to priorities established in the collective bargaining agreement.⁷⁷ In 60 of the 63 district collective bargaining agreements reviewed, the first factors considered when making reductions-in-force are seniority, tenure, or both.⁷⁸ In such cases, the employees with the most seniority are retained in favor of those with less seniority.⁷⁹ Likewise, districts that base reductions-in-force on tenure status retain employees on professional service contracts or continuing contracts in favor of those on annual contracts.⁸⁰ Three school districts require consideration of effectiveness, as measured by annual performance assessments, before seniority or tenured status is considered.⁸¹

regarding how reductions affecting employees on annual contracts must be determined. However, this matter is typically addressed in the school district's rule or collectively bargained reduction-in-force policy. See, e.g., Brevard County School District and Brevard Federation of Teachers, *Collective Bargaining Agreement*, at 54-56 (Feb. 10, 2009), available at <http://hrweb.brevard.k12.fl.us/LR/contracts/bft/FY10/BFT-FY08throughFY10.pdf>; see, e.g., Bay County School District and Association of Bay County Educators, *Master Contract*, at 33-34 (Aug. 12, 2009), available at <http://www.bay.k12.fl.us/DEPARTMENTS/LinkClick.aspx?fileticket=TtY%2bMMN6WrQ%3d&tabid=1144&mid=2770> (priority of reductions is part-time teachers, temporarily certified teachers, annual contract employees, then professional service or continuing contract employees, with seniority being the primary determining factor within each category).

⁷⁶ Staff of the Florida House of Representatives, *Reduction-in-Force Policies: Review of School District Collective Bargaining Agreements* (Oct. 19, 2010)(Collective bargaining agreements were obtained for 63 of the 66 districts that have such agreements. Such agreements were obtained through school district or local teachers union websites or requested directly from district or union staff.)[hereinafter *Reduction-in-Force Review*]. Calhoun County does not have a collective bargaining agreement because its instructional personnel are not unionized. Telephone interview with Calhoun County School District, Assistant Superintendent (Oct. 5, 2010).

⁷⁷ See, e.g., *Hillsborough County Agreement*, *supra* note 25, at 79-80; see, e.g., *Miami-Dade Main Agreement*, *supra* note 30, at 254-247.

⁷⁸ *Reduction-in-Force Review*, *supra* note 76. The use of seniority or tenure status to make reductions-in-force by Florida school districts is consistent with the policies of school districts nationwide. *Rethinking "Last Hired, First Fired," supra* note 74, at 4. The National Council on Teacher Quality recommends that states end the use of seniority or tenure as the primary factor in reductions-in-force and instead base such reductions on effectiveness, as measured by annual performance assessments. *Id.* at 9.

⁷⁹ See, e.g., Alachua County School District and Alachua County Education Association, *Collective Bargaining Agreement*, at 47 (Aug. 1, 2009), available at <http://www2.sbac.edu/~wpops/bargaining/contracts/TeacherAgreement-09-12.pdf>; see, e.g., *Hillsborough County Agreement*, *supra* note 25, at 79-80; see, e.g., *Miami-Dade Main Agreement*, *supra* note 30, at 245. For example, once the teacher certification areas to be reduced are determined, Alachua, Hillsborough, and Miami-Dade County School Districts base reductions almost entirely on seniority. *Id.*

⁸⁰ See, e.g., School District of Escambia County and Escambia Education Association, *Master Contract*, at 39-40 (April 21, 2009), available at http://www.escambia.k12.fl.us/Employee_Services/pdf/EEA_master_contract_2009-2012.pdf. In Escambia County, annual contract teachers within the certification area being cut are released first, and decisions regarding whether to retain continuing or professional service contract employees are based on seniority. *Id.*

⁸¹ See, e.g., School Board of Citrus County and Citrus County Education Association, *Instructional Employee Agreement*, at Art. VIII, C.1.a. (Dec. 9, 2003), available at http://myccea.us/files/2006-2010_Instructional_Contract.pdf; see, e.g., Hamilton County Education Association and School Board of Hamilton County, *Instructional Employee Agreement*, at 14 (Jan. 11, 2008), available at

Has the Legislature made attempts to reform instructional personnel contracting and performance assessments?

Yes. Since 1997, the Legislature has made three attempts to reform Florida's instructional personnel contracting and performance assessment policies. In each case, the reforms sought to increase the emphasis placed on student learning when evaluating instructional personnel and school-based administrators and the use of performance assessments when making tenure, retention, and other employment decisions.⁸²

Legislation filed in 1997 proposed to end the practice of granting tenure for instructional personnel hired after June 30, 1997. This legislation would have ended the use of professional service contracts and required instructional personnel hired after this date to be employed on annual contracts. Additionally, the legislation would have added failure to correct performance deficiencies identified on an annual performance assessment as a just cause reason for dismissal.⁸³ After much compromise, provisions ending the use of professional service contracts and authorizing just cause dismissal for poor performance were removed from the bill. The legislation that eventually passed added a 97-day probationary period to each employee's initial annual contract during which the employee may be terminated without cause or resign without breach of contract. It also created the 90-day performance probation for employees who receive an unsatisfactory performance assessment, authorized the dismissal of employees who fail to correct performance deficiencies, and established due process procedures for such dismissals.⁸⁴

Legislation proposing reforms to instructional personnel contracts and performance assessments was again filed in 2009. Among other things, this legislation, in effect, would have ended the use of professional service contracts and extended the period of probationary service leading to tenure from three to six years for classroom teachers hired on or after July 1, 2009.⁸⁵ After six annual contracts, an employee would earn a professional performance contract of up to five years in length. Unlike a professional service contract, renewal of a professional performance contract would not be automatic. The legislation also proposed allowing just cause dismissal of chronically ineffective classroom teachers and requiring school districts to assess the performance of beginning teachers at least twice during their first year of teaching.⁸⁶ These provisions were removed from the bill that eventually passed the House of Representatives. The bill died in the Senate.⁸⁷

The reform effort was renewed in 2010, with legislation proposing to:

<http://www.hamiltonfl.com/pdf/files/forms/Instructional%20Agreement%2008-10.pdf>; School Board of Nassau County and Nassau Teachers Association, *Instructional Employee Agreement*, at 20 (Oct, 9, 2008), available at http://nassauteachers.org/contracts/NTA_09_10.pdf.

⁸² SB 340 (1997); CS/CS/HB 1411 (2009); CS/CS/SB 6 (2010).

⁸³ SB 340 (1997).

⁸⁴ Sections 1 and 2, ch. 97-310, L.O.F. Initially, performance probation applied to all employees, regardless of contract status. Subsequent legislation limited performance probation only to employees on professional service contracts. Section 58, ch. 99-398, L.O.F.

⁸⁵ CS/CS/HB 1411 (2009). Classroom teachers would initially serve under a year-long probationary contract which could be terminated without cause during its term. After five additional years on annual contracts and demonstrating effectiveness based upon student learning gains, a teacher could earn a professional performance contract of up to five years in length. Such contract could be renewed at the school district's discretion. *Id.*

⁸⁶ CS/CS/HB 1411 (2009).

⁸⁷ CS/CS/HB 1411 Engrossed 1 (2009).

- ❖ Require school districts and charter schools to adopt performance assessments for instructional personnel and school-based administrators which differentiate among four levels of performance - unsatisfactory, needs improvement, effective, and highly effective.⁸⁸
- ❖ Require student learning gains to comprise more than 50 percent of the performance assessment for instructional personnel and school-based administrators.
- ❖ Require school districts and charter schools to use statewide assessments, certain national assessments, and for subjects and grade levels not tested on these assessments, district-determined end-of course assessments to measure student learning gains.
- ❖ Allow just cause dismissal of chronically ineffective classroom teachers.
- ❖ End the use of professional service contracts for classroom teachers newly hired on or after July 1, 2010.
- ❖ Require school districts and charter schools to base annual contract renewal, annual salary adjustments, and reductions-in-force upon performance assessments rather than seniority and tenure.

This legislation passed both chambers of the Legislature, but was vetoed by the Governor.⁸⁹

Will Race to the Top funds be used to reform instructional personnel contracting and performance assessment?

On August 24, 2010, Florida was one of 11 states and the District of Columbia selected to receive Race to the Top funds.⁹⁰ Florida is eligible for up to \$700 million, which, must be used to reform Florida's teacher tenure and performance assessment policies.⁹¹ Among other things, Florida's Race to the Top application proposes to:

- ❖ Develop a high quality performance assessment that is at least 50 percent based upon student achievement and learning gains.⁹²
- ❖ Develop a fair and transparent method for measuring student learning gains that takes into account multiple years of performance.⁹³
- ❖ Require school districts to use statewide assessments, approved national assessments, or district-selected assessments aligned to state standards to measure student achievement and learning gains on annual performance assessments of instructional personnel and school-based administrators.⁹⁴
- ❖ Require that districts use the performance assessment when determining training and professional development, compensation, contract renewal and retention, and dismissal of chronically ineffective teachers and school-based administrators.⁹⁵

⁸⁸ The legislation would have required the state board to adopt rules establishing the method for calculating rates of student learning tied to the four performance levels and DOE to collect and report, by school and by district, the percentage of employees evaluated at each performance level. CS/CS/SB 6 (2010).

⁸⁹ CS/CS/SB 6 Enrolled (2010).

⁹⁰ *Race to the Top Press Release*, *supra* note 8.

⁹¹ U.S. Department of Education, *Race to the Top Funding Status*, <http://www2.ed.gov/programs/racetothetop/funding.html> (last visited Oct. 1, 2010).

⁹² *Race to the Top Application*, *supra* note 14, at 145.

⁹³ *Race to the Top Application*, *supra* note 14, at 141-143.

⁹⁴ *Race to the Top Application*, *supra* note 14, at 139-141.

⁹⁵ *Race to the Top Application*, *supra* note 14, at 152-159.

Various stakeholders, including school districts, professional associations, and DOE will collaborate to implement these reforms. Implementation will begin in the 2010-11 academic year and continue through the 2013-14 academic year.⁹⁶

Where can I get additional information?

Florida Department of Education

Bureau of Educator Recruitment, Development, and Retention
(850) 245-0435
<http://www.fldoe.org/profdev/>

Florida House of Representatives

Education Committee
(850) 488-7451
<http://www.myfloridahouse.gov>

⁹⁶ *Race to the Top Application*, supra note 14, at 148.

