

LEGAL IMPACTS AND IMPLICATIONS FOR BARGAINING OF THE TEACHER/PRINCIPAL EVALUATION LEGISLATION

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In light of the recently passed legislation that revises how certificated employees are evaluated, we are providing assistance in addressing commonly asked legal and practical questions about the impact of the new legislation. The following guidance provides a general overview of a number of the issues raised in a question and answer format, focusing separately on non-supervisory certificated instructional staff in classroom teaching positions and certificated administrative staff in principal positions. These materials should not be used as a substitute for legal advice applicable to specific situations or issues, particularly because school districts must consider collective bargaining agreements, board policies and individual employee contracts unique to each district. We encourage personnel administrators to consult with legal counsel on specific questions arising from their unique situations.

Certificated Instructional Staff in Classroom Teaching Positions

1. What is the basis of the new evaluation system my school district will need to implement for classroom teachers?

OSPI will identify up to three preferred, research-based instructional frameworks for the evaluation of certificated classroom teachers by September 1, 2012. Each district will need to implement one of these three frameworks. Although the determination has yet to be finalized, it appears that OSPI will approve the following three frameworks: Charlotte Danielson's Framework for Teaching; the UW Center for Educational Leadership's 5 Dimensions of Teaching & Learning; and the Marzano Teacher Evaluation Model. More information about each can be found at <http://tpep-wa.org/resources/instructional-frameworks>.

2. How will the new evaluation systems work?

Although each of the three OSPI-recommended instructional frameworks will have differences in focus and application, each will be based on the eight minimum statutory evaluation criteria currently found in RCW 28A.405.100(2)(b): (i) centering instruction on high expectations for student achievement; (ii) demonstrating effective teaching practices; (iii) recognizing individual student learning needs and developing strategies to address those needs; (iv) providing clear and intentional focus on subject matter content and curriculum; (v) fostering and managing a safe, positive learning environment; (vi) using multiple student data elements to modify instruction and improve student learning; (vii) communicating and collaborating with parents and the school community; and (viii) exhibiting collaborative and collegial practices focused on improving

instructional practice and student learning. Each system will have a uniform, four-tiered summative evaluation performance rating with the following levels:

- Level 1 - Unsatisfactory;
- Level 2 - Basic;
- Level 3 - Proficient; and
- Level 4 - Distinguished.

A classroom teacher will receive one of the four summative evaluation performance ratings for each of the eight evaluation criteria as well as a “comprehensive summative rating” for the evaluation as a whole. By December 1, OSPI must adopt rules with descriptors for the four rating levels and a common method of calculating the summative ratings for each of the eight evaluation criteria and the comprehensive summative rating for the entire evaluation.

3. Will my school district be allowed to use a different or modified evaluation rubric?

Only to a very limited degree. The new legislation requires OSPI to develop a process for districts to apply for “minor modifications or adaptations” to the instructional frameworks. Although the legislature did not define “minor,” it is clear that districts will not be allowed to use an evaluation rubric that is entirely or significantly different than the three preferred instructional frameworks.

4. When does my school district need to implement a new evaluation system?

Each district must adopt one of the OSPI-approved evaluation rubrics for classroom teachers by the start of the 2013-14 school year. Additionally, each district must adopt an implementation schedule for the transition of classroom teachers to the new evaluation system by the start of the 2013-14 school year. The transition of your district to the new evaluation system can be spread over three years, although it is permissible to transition faster. By the start of the 2015-16 school year, each district must evaluate all classroom teachers under the new evaluation system.

5. Who must my school district transition to the new evaluation system first?

The new legislation requires probationary and provisional classroom teachers to be transitioned to the new evaluation system in the 2013-14 school year. Apart from those teachers, each district may develop its own transition schedule to meet the unique needs or choices of the district, taking into account factors like the number of classroom teachers, the number of evaluators, and the number of overall buildings. It is important to note that during a teacher’s first year of being evaluated under the new system, he or she must receive a comprehensive rather than a focused evaluation (discussed below in more detail). Accordingly, dispersing the number of

teachers on focused and comprehensive evaluations will be one of the key factors in determining a reasonable implementation schedule.

6. Do the new evaluation systems incorporate the use student growth data?

Yes. Student growth data must be “a substantial factor” in evaluating classroom teachers for at least three of eight evaluation criteria categories listed in RCW 28A.405.100(2)(b). The new legislation is silent, however, on how districts should weight student growth data as a substantial factor in its evaluations and to which of the eight criteria student growth data should be applied. Each district will need to bargain this issue with its teachers’ union.

7. What student growth data is used in the new evaluation systems?

The law does not identify or require a specific assessment of student learning be used in the evaluation. Instead, it defines “student growth” as the change in student achievement between two points in time and states that any such data must be relevant to the teacher and subject, and must be based on multiple measures that can include classroom-based, school-based, district-based, and state-based tools. The new legislation allows districts to measure student growth based on a teacher’s performance as a member of an instructional or school-wide team, when that use of student growth data is relevant and appropriate. Each district will need to bargain this issue with its teachers’ union.

8. Must student input be included in the new evaluation system?

No. The new legislation states that student input may be included in the evaluation process but does not require it. Whether and how a district does so is subject to collective bargaining.

9. Will my school district need to evaluate its teachers on an annual basis?

Yes. Annual evaluations must be conducted for all certificated instructional staff who have been transitioned to the new evaluation system.

10. Under the new evaluation system, will there be allowances for different types of evaluations, e.g., professional growth and short-form options?

Yes, but with substantial changes. The new legislation creates two categories of evaluations: a “comprehensive evaluation” and a “focused evaluation.”

For classroom teachers transitioned to the new evaluation system, each district is required to conduct a comprehensive evaluation at least once every four years. The new legislation requires that a comprehensive evaluation consider all eight statutory evaluation criteria currently found in RCW 28A.405.100(2)(b). Additionally, the comprehensive evaluation must be used every year for

provisional teachers and any teacher who scored a comprehensive summative rating of Level 1 or 2 in the previous year's evaluation.

In any year when a comprehensive evaluation is not required, a teacher who scored a comprehensive summative rating of Level 3 or 4 in the previous year's evaluation is eligible to be evaluated by the district using a focused evaluation. The new legislation states that a focused evaluation must include an assessment of one of the eight statutory evaluation criteria currently found in RCW 28A.405.100(2)(b) plus professional growth activities linked to the selected criteria. The single criteria must be pre-approved by the teacher's evaluator and may have been identified in the previous year's evaluation as an area of focus. Groups of teachers eligible for a focused evaluation may focus jointly on the same single criteria and share professional growth activities during the year. Teachers evaluated on a focused evaluation will be assigned a comprehensive summative performance rating using a methodology to be adopted by OSPI.

11. Does the new legislation change the current observation process?

Yes and no. The new legislation did not revise the number of required observations nor the minimum length of such observations. However, unlike the current short-form or professional growth option evaluations, there are no exceptions to the minimum observations for focused evaluations. In other words, both a comprehensive and a focused evaluation will include a minimum of two observations for a total of at least sixty minutes, with one of those observations being at least thirty minutes in length.

12. Does the new legislation require that artifacts or portfolios of teacher work be reviewed as a part of the evaluation process?

No. Although there has been discussion about and use of such components in the pilot district work on the new evaluation system, the legislation is completely silent about this type of performance data. It is neither prohibited, nor required. As long as the evaluation includes the minimum classroom observations and the student data discussed above, districts are free to include or exclude additional artifacts or portfolios of teacher work. This is another topic that is subject to collective bargaining with the local teachers' union.

13. Is probation still required prior to terminating a teacher with poor performance?

Yes and no. In most cases, probation is still required prior to the termination of a poorly performing teacher. Changes to the probationary process are discussed below in more detail. The new legislation does, however, create an exception to the probation requirement. If a teacher with five or more years of experience scores a comprehensive summative rating below Level 2 for two consecutive years, a school district must initiate a notification for discharge as provided for in RCW 28A.405.300 within 10 days of the second evaluation or by May 15 of that school year, whichever is earlier.

14. Does the new legislation change the probationary period?

Yes. The new legislation allows a district to increase the number of days of probation (currently a required 60 days) if it is necessary to complete the program for improvement and evaluate the employee's performance, as long as the probationary period is concluded before May 15 of the school year. For teachers with five or more years of experience and a comprehensive summative rating below Level 2 as of May 15, a district may extend the probationary period into the following school year. However, if that teacher fails to show improvement in the second year and scores another comprehensive summative rating below Level 2, the district must initiate notification for discharge within 10 days of second evaluation or May 15 of that school year (whichever is earlier).

15. Under the new evaluation systems, how does my school district determine who should be on probation?

A classroom teacher evaluated using the new evaluation system is "not satisfactory" for purposes of being placed on probation if: (i) the teacher scored a comprehensive summative rating of Level 1 in the previous annual evaluation; or (ii) the teacher has a continuing contract and more than five years' experience, and has scored a comprehensive summative rating of Level 2 in either two consecutive years or two out of three consecutive years.

16. Under the new evaluation systems, how does my school district determine if a teacher should be removed from probation?

A teacher on probation must be removed from probation if the teacher demonstrates improvement to the satisfaction of the evaluator. That improvement will be defined by the comprehensive performance evaluation rating for classroom teachers under the new system. For provisional teachers or teachers on continuing contracts with five or fewer years of experience, a comprehensive summative rating of Level 2 or higher will remove them from probation. For teachers on continuing contracts with more than five years of experience, a comprehensive summative rating of Level 3 or higher will remove them from probation.

The new law also clarifies that procedural errors in the implementation of the program for improvement will not invalidate the plan or the evaluation activities unless the error "materially affects the effectiveness of the plan or the ability to evaluate the probationer's performance." We anticipate that the "materially affect" standard will be a subject of future litigation and require clarification from the courts.

17. Does the new legislation give any additional rights to teachers on probation?

Yes. A teacher on probation has a right to request an additional evaluator if one is not authorized by the teacher's evaluator. In such case, an additional evaluator must be assigned by

the ESD from a list of experienced evaluators maintained by the ESD. This is a new right for teachers, and a new duty for ESDs. The timing for requesting the additional evaluator, the role of the additional evaluator in the probationary process, and who pays for the additional evaluator are not defined in the new law. Because of the ambiguity in the law and because the additional evaluator could be a key witness in a nonrenewal hearing, we recommend school districts work very closely with ESDs to ensure the experienced evaluators on the list and the process for assigning them are trustworthy.

18. Does the new evaluation systems affect provisional contract status?

If a provisional classroom teacher receives a comprehensive summative evaluation rating below a Level 2 during the teacher's third year of employment, the teacher must remain on provisional contract status until the teacher scores a comprehensive summative rating of Level 2 or higher on a subsequent annual evaluation.

19. Does the new evaluation system affect other personnel decisions?

Yes. Beginning in the 2015-16 school year, the new legislation requires school districts to use evaluation results as one of multiple factors in making human resource and personnel decisions, including assignments and reductions in force. Specifics as to how evaluation results will be used as a factor in such decisions are left to collective bargaining.

20. Will my school district receive training on the new evaluation system?

The new legislation requires principals and administrators who will conduct evaluations under the new system to engage in professional development on how to implement the new evaluation system. Such professional development must occur before any teachers are evaluated under the new system. OSPI is directed to develop a professional development program that addresses the new evaluation system, including a comprehensive online training package. Additionally, beginning in 2016, PESB must incorporate continuing education competencies related to the new evaluation system as a requirement for renewal of continuing and professional certificates.

21. Does the new legislation change the evaluation or probation requirements for certificated employees in non-classroom teaching positions?

No, with minor exceptions related to probation. The clarification regarding adding days beyond 60 to the probationary period, the new right to an additional evaluator during probation, and the statutory change about procedural errors during probation will apply to non-classroom teachers as well as classroom teachers who have not yet transitioned to the new evaluation system. Non-classroom teachers will continue to be evaluated on the criteria in the existing law; will continue to be subject to the same minimum observations; and will continue to have short-form

and professional growth options for evaluation. A four-level rating system and the use of student growth data are not required for non-classroom teachers. The standard for placing a non-classroom teacher on probation remains the same (“an employee whose work is not judged satisfactory based on district evaluation criteria”).

22. Does the new legislation define which non-supervisory certificated positions are considered to be classroom teaching positions?

No. Although there are many obvious distinctions (e.g., a school psychologist is not a classroom teacher, a high school math teacher is), there may be a few positions for which it will be arguable whether the position is a classroom or non-classroom teaching position (e.g., an elementary librarian who provides instruction to students during a portion of his or her day). In addition, some employees will fill a split position with a portion that is clearly a non-classroom teaching position (e.g., .5 FTE counselor) and a portion that is clearly a classroom teaching position (.5 FTE resource room teacher). The law does not address specifically how such positions and employees must be evaluated. Although a district could insist that an employee with any classroom teaching duties legally must be evaluated under the new system, we anticipate that many districts will bargain the definition of “classroom teacher” with the teachers’ union.

Certificated Administrative Staff in Principal Positions

23. What is the basis of the new evaluation system my school district will need to implement for principals?

OSPI will identify up to three preferred, research-based leadership frameworks for the evaluation of certificated administrative staff in principal positions by September 1, 2012. Each district will need to implement one of these three frameworks. As opposed to the almost-finalized frameworks for instructional staff, the only leadership framework with any significant work already published by the TPEP Steering Committee is the AWSP Leadership Framework. The three frameworks for instructional staff would not be applicable to principal evaluations without substantial revisions.

24. How will the new evaluation systems work?

Like the instructional frameworks for teachers, each of the OSPI-recommended leadership frameworks for principals will be based on the eight statutory evaluation criteria currently found in RCW 28A.405.100(6)(b): (i) creating a school culture that promotes the ongoing improvement of learning and teaching for students and staff; (ii) demonstrating commitment to closing the achievement gap; (iii) providing for school safety; (iv) leading the development, implementation, and evaluation of a data-driven plan for increasing student achievement, including the use of multiple student data elements; (v) assisting instructional staff with alignment of curriculum, instruction, and assessment with state and local district learning goals; (vi) monitoring, assisting,

and evaluating effective instruction and assessment practices; (vii) managing both staff and fiscal resources to support student achievement and legal responsibilities; and (viii) partnering with the school community to promote student learning. Each system will have a uniform, four-tiered summative evaluation performance rating with the following levels:

- Level 1 - Unsatisfactory;
- Level 2 - Basic;
- Level 3 - Proficient; and
- Level 4 - Distinguished.

A principal will receive one of the four summative evaluation performance ratings for each of the eight evaluation criteria as well as a comprehensive summative rating for the evaluation as a whole. By December 1, OSPI must adopt descriptors for the four rating levels and a common method of calculating the summative ratings for each of the eight evaluation criteria and the comprehensive summative rating for the entire evaluation.

25. Will my school district be allowed to use a different or modified evaluation rubric?

Only to a very limited degree. The new legislation requires OSPI to develop a process for districts to apply for “minor modifications or adaptations” to the leadership frameworks. Although the legislature did not define “minor,” it is clear that districts will not be allowed to use an evaluation rubric that is entirely or significantly different than the three preferred leadership frameworks.

26. When does my school district need to implement a new evaluation system?

Each district must adopt one of the OSPI-approved evaluation rubrics for principals by the start of the 2013-14 school year. Additionally, each district must adopt an implementation schedule for the transition of principals to the new evaluation system by the start of the 2013-14 school year. The transition of your district to the new evaluation system can be spread over three years, although it is permissible to transition faster. By the start of the 2015-16 school year, each district must evaluate all principals under the new evaluation system.

27. Who must my school district transition to the new evaluation system first?

The new legislation requires principals with fewer than three years’ experience, principals in their first year with the district, and principals whose performance was judged unsatisfactory in the previous year to be transitioned first to the new evaluation system. Apart from those principals, each district may develop its own transition schedule to meet the unique needs or choices of the district, taking into account factors like the number of principals, the number of evaluators, and the number of overall buildings. It is important to note that during a principal’s first year of being evaluated under the new system, he or she must receive a comprehensive rather

than a focused evaluation (discussed below in more detail). Accordingly, dispersing the number of principals on focused and comprehensive evaluations will be one of the key factors in determining a reasonable implementation schedule.

28. Do the new evaluation systems incorporate the use of student growth data?

Yes. Student growth data must be “a substantial factor” in evaluating principals for at least three of eight evaluation criteria categories listed in RCW 28A.405.100(6)(b). The new legislation is silent, however, on how districts should weight student growth data as a substantial factor in its evaluations and to which of the eight criteria student growth data should be applied. If the principals are represented in a union, the district may choose to bargain this issue; however, evaluations are outside the limited scope of mandatory subjects of bargaining for principals under RCW 41.59.080(7) and the district has discretion to unilaterally determine how to incorporate student growth data in the evaluations.

29. What student growth data is used in the new evaluation systems?

The law does not identify or require a specific assessment of student learning be used in the evaluation. Instead, it defines “student growth” as the change in student achievement between two points in time and states that any such data must be relevant to the principal and based on multiple measures that can include classroom-based, school-based, district-based, and state-based tools.

30. Must staff input be included in the new evaluation system?

No. The new legislation allows districts to use building staff input in the evaluation process for principals, but does not require it. Districts may choose to bargain this issue with the principal bargaining unit, if one exists, or may make this decision unilaterally because the topic of evaluation is not a mandatory subject of bargaining with principals.

31. Will my school district need to evaluate its principals on an annual basis?

Yes. Annual evaluations must be conducted for all principals who have been transitioned to the new evaluation system.

32. Under the new evaluation system, will there be allowances for different types of evaluations, e.g., professional growth and short-form options?

Yes, but with substantial changes. The new legislation creates two categories of evaluations: a “comprehensive evaluation” and a “focused evaluation.”

For principals transitioned to the new evaluation system, each district is required to conduct a comprehensive evaluation at least once every four years. The new legislation requires

that a comprehensive evaluation consider all eight statutory evaluation criteria currently found in RCW 28A.405.100(6)(b). Additionally, the comprehensive evaluation must be used every year for principals with fewer than three years' experience, principals in their first year with the district, and principals who scored a comprehensive summative rating of Level 1 or 2 in the previous year's evaluation.

In any year when a comprehensive evaluation is not required, a principal who scored a comprehensive summative rating of Level 3 or 4 in the previous year's evaluation is eligible to be evaluated by the district using a focused evaluation. The new legislation states that a focused evaluation must include an assessment of one of the eight statutory evaluation criteria currently found in RCW 28A.405.100(6)(b) plus professional growth activities linked to the selected criteria. The single criteria must be pre-approved by the principal's evaluator and may have been identified in the previous year's evaluation as an area of focus. Groups of principals eligible for a focused evaluation may focus jointly on the same single criteria and share professional growth activities during the year. Principals evaluated on a focused evaluation will be assigned a comprehensive summative performance rating using a methodology to be adopted by OSPI.

Although the new law allows a focused evaluation for principals, the statute specifically encourages districts to conduct annual comprehensive evaluations for all principals.

33. Does the new law change how principals are nonrenewed?

Yes and no. The law does not create a probationary process for principals, nor require discharge or nonrenewal for a principal with a specific comprehensive performance evaluation rating. Nevertheless, the new law provides that a principal's work is not judged satisfactory if the principal receives a Level 1 rating, or a Level 2 rating if the principal has more than five years experience and the Level 2 rating has been received two consecutive years or two out of three consecutive years. This "not satisfactory" judgment will presumably affect the statutory "sufficient cause" standard for nonrenewal of a principal, but the principal evaluation subsection of the new law does not cross-reference the nonrenewal and discharge statutes.

34. Does the new evaluation system affect other personnel decisions?

Yes. Beginning in the 2015-16 school year, the new legislation requires school district to use evaluation results as one of multiple factor in making human resource and personnel decisions affecting principals, including assignments and reductions in force. Districts may choose to bargain this issue with the principal bargaining unit, if one exists, or may make this decision unilaterally because evaluations, assignments and reductions in force are not within the limited scope of mandatory subjects of bargaining with principals.

35. Will my school district receive training on the new evaluation systems?

The new legislation requires administrators who will conduct evaluations under the new system to engage in professional development on how to implement the new evaluation system. Such professional development must occur before any principals are evaluated under the new system. OSPI is directed to develop a professional development program that addresses the new evaluation system, including a comprehensive online training package. Additionally, beginning in 2016, PESB must incorporate continuing education competencies related to the new evaluation system as a requirement for renewal of continuing and professional certificates.

For more information or individualized assistance in analyzing the impacts and implications for bargaining of the new legislation on certificated employee evaluations, please contact your regular school district counsel or any of the Dionne & Rorick attorneys listed below at (206) 622-0203.

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