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POLICY ANALYSIS FOR CALIFORNIA EDUCATION

Policy Forum No. PF87-7-11

SB 813 and Teacher Dismissal

David Girard, Julia Koppich

July 1987

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This paper was sponsored and published by Policy Analysis for California Education, PACE. PACE is funded by the William and Flora Hewlett Foundation and directed jointly by James W. Guthrie and Michael W. Kirst. The analyses and conclusions in this paper are those of the authors and are not necessarily endorsed by the Hewlett Foundation.

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From the Editors . . .

In February 1985 PACE convened a group of attorneys representing teacher organizations and school districts. Joining them were education policy experts from legislative and executive offices and from education and private organizations. Our purpose was to explore the effect of Senate Bill 813 on teacher dismissal. SB 813, California's omnibus school reform legislation of 1983, changed the process by which teachers are dismissed for cause.

Senate Education Committee staff had posed the questions: Does SB 813 facilitate the dismissal of teachers? Is there an empirical record demonstrating the effects of the relatively new law? The forum explored the attorneys' experiences with SB 813, their varying interpretations of its provisions, and legal questions or challenges raised as a result. Often in contrast to this practical experience were the policy experts' expectations–differences between what legislators intended to accomplish with these changes and what attorneys knew to be occurring.

By the close of that conversation, we had reached agreement on what SB 813 in fact changed, identified areas of disagreement, contrasted this with legislative intentions, explored school districts' initial experiences with these dismissal provisions, and outlined recommendations to improve information about teacher dismissals and the processes leading to dismissals. Subsequent conversations with key policy experts elaborated legislators' intentions in adopting SB 813's dismissal provisions.

Continuing interest in the content of that morning discussion has encouraged us to publish this summary analysis. In the interim, the California Appeals Court ruled in two cases regarding termination hearing rights of probationary teachers. We included a brief discussion of the court's rulings because they are relevant to a central disagreement addressed by the attorneys. No additional attempt has been made to update the information.

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Policy Analysis for California Education

Policy Analysis for California Education, PACE, is a university-based research center focusing on issues of state educational policy and practice. PACE is located in the Schools of Education at the University of California, Berkeley and Stanford University. It is funded by the William and Flora Hewlett Foundation and directed jointly by James W. Guthrie and Michael W. Kirst. PACE operates satellite centers in Sacramento and Southern California. These are directed by Gerald C. Hayward (Sacramento) and Allan R. Odden (University of Southern California).

PACE efforts center on five tasks: (1) collecting and distributing objective information about the conditions of education in California, (2) analyzing state educational policy issues and the policy environment, (3) evaluating school reforms and state educational practices, (4) providing technical support to policy makers, and (5) facilitating discussion of educational issues.

The PACE research agenda is developed in consultation with public officials and staff. In this way, PACE endeavors to address policy issues of immediate concern and to fill the short-term needs of decision makers for information and analysis.

PACE publications include Policy Papers, which report research findings; the Policy Forum, which presents views of notable individuals; and Update, an annotated list of all PACE papers completed and in progress.

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Note: Organizational associations and titles were current in February 1985.

SB 813 and Teacher Dismissal

Teacher dismissal has long been a thorny issue. School management reports that statutory dismissal procedures are so cumbersome and complicated as to be unusable. Teacher representatives maintain that dismissal procedures are necessary due process safeguards which do not prevent management from firing teachers when appropriate. The public seeks assurances that all students are taught by competent teachers.

Senate Bill 813, the Hughes-Hart Educational Reform Act, in 1983 represented the first serious legislative attempt in several years to modify California's teacher dismissal law. Among its 80-plus reforms, SB 813 changed the process by which teachers may be fired for cause. The law itself, however, has spawned considerable debate and raised a number of questions of interest to policy makers, for example:

1. Does SB 813 make it easier to dismiss teachers?
2. How much of the change is symbolic and how much is meaningful?
3. What legal questions or challenges have been raised?
4. What practical effects, if any, have these statutory changes had in the field?
5. What did the legislature intend to do?
6. Where, if at all, do legislative intent and field experience converge?
7. What issues are left for policy makers to consider?

In an effort to answer these questions, PACE convened a group of education attorneys and policy experts. The three-hour roundtable discussion involved eight lawyers whose clients are either school labor or management, plus representatives of the State Office of Administrative Hearings, State Department of Education, Governor's Office, California Commission on the Teaching Profession, Senate Education Committee, California Taxpayers Association, Association of California School Administrators, California School Boards Association, and School Services of California, Inc. Conference participants discussed their experiences with and understanding of changes in the teacher dismissal law wrought by SB 813. Additional follow-up conversations were held with key education policy experts representing the California Federation of Teachers, Peter Birdsall Associates, Senate Education Committee, School Services of California, Inc., State Department of Education, and Murdock, Mockler Associates. These conversations revolved around policy makers' notions of what the legislature intended when it adopted the SB 813 provisions regarding teacher dismissal.

The ensuing discussion attempted to examine statutory changes in the teacher dismissal law, areas of disagreement, what the legislature intended, and the field experience. This summary of the procedings begins with a review of those teacher dismissal procedures everyone agrees SB 813 changed, moves to an examination of the major areas of disagreement, undertakes an analysis of what the legislature intended, looks

at the early field experience, and finally concludes with recommendations to improve information about teacher dismissals and the process leading to dismissal.

What Everyone Agrees SB 813 Changed

1. *Probation.* The probationary period for new teachers was reduced from three years to two.

2. *Evaluation.* Two new teacher evaluation criteria were added to those already contained in state law. Teachers are now evaluated on (1) the specific instructional techniques and strategies they use and on (2) their adherence to school district curricular objectives. Evaluation is the main tool used by school districts to assess a teacher's ability to teach.

3. *Dismissal of Permanent Teachers.* SB 813 made several changes in the procedure for dismissing permanent teachers for cause, including:

    a. Alcoholism or drug abuse which affects a teacher's job performance was added as a reason for dismissal.

    b. School boards may now suspend a teacher without pay for unprofessional conduct, unless a collective bargaining agreement provides for discipline less than dismissal.

    c. The Commission on Professional Competence is empowered under SB 813, to dismiss, retain, *or* suspend an employee. Suspension may be the decision only if that is what the district originally requested.

    d. In the case of charges of unprofessional conduct, notice was shortened from 90 days prior to filing charges to 45 days.

    e. The requirement that an employee be warned of pending charges in the semester preceding filing was removed.

    f. Discovery was limited to 30 days from the time an employee is served with charges. Previously there was no time limit on discovery.

    g. A sentence was added which states, in part, that the decision of the Commission on Professional Competence to dismiss or suspend an employee "...shall not be based on nonsubstantive procedural errors unless the errors are prejudicial errors."

4. *Layoff and Rehire.* SB 813 made changes in teacher layoff (as opposed to termination for cause) and attendent rehire rights. The specific changes are:

   a. Permits layoff due to a modification in the district's curriculum. The idea is that modification reduces the need for teachers with some kind(s) of credentials and increases the need for different certificated staff.

   b. Allows a district to waive the March 15/May 15 dates for first and final notification of layoff. Specifically, if a district discovers between five days after enactment of the Budget Act and August 15 that its revenue limit will not increase by at least two percent, notices of layoff may be sent to permanent employees, even though the May 15 deadline has obviously passed.

   c. Requires that a district, prior to re-employing a teacher in a subject area in which the teacher has not previously taught, administer to the teacher a subject matter competency test. Laid-off teachers still retain recall rights for 39 months.

   d. Laid-off teachers who serve as substitutes do not receive their regular rates of pay until they have taught for at least 21 days within a 60-day period. Previously, laid-off teachers who substituted during their 39-month recall period continued to receive their pre-layoff rate of pay.

Major Areas of Disagreement

1. Did SB 813 Revoke Termination Hearing Rights of Probationary Teachers?

Labor and management attorneys disagreed most strongly about whether or not SB 813 revoked the termination hearing rights of first-year probationary teachers. Some of the attorneys believed that the legislature intended with SB 813 to create what they characterize as a true probationary period for teachers. They agreed that the statute now allows the employer to dismiss a first-year probationer at the end of the school year without a hearing. Some of the lawyers believed SB 813 made a distinction between first- and second-year probationary teachers with a hearing required anytime a teacher is dismissed prior to the full two years of probation but none at the end of the second year. Some believed that the language of SB 813 does require a hearing at any time prior to dismissal. Still others believed it does not deprive probationary teachers of the hearing rights at any time.

Prior to SB 813's amendments, the statute covering the dismissal of probationary employees was clear. Probationers had all the same rights, including the right to a hearing prior to termination. SB 813, by all accounts, muddied the right-to-hearing waters.

The portion of the law most in dispute is Section 44948.3, which states:

> (a) First and second year probationary employees may be dismissed during the school year for unsatisfactory performance determined pursuant to Article 11 (commencing with Section 44660) of Chapter 3, or for cause pursuant to Section 44932. Any dismissal pursuant to this section shall be in accordance with all of the following procedures.
>
> (1) The superintendent of the school district or the superintendent's designee shall give 30 days' prior written notice of dismissal, not later than March 15 in the case of second year probationary employees. The notice shall include a statement of the reasons for the dismissal and notice of the opportunity to appeal. In the event of a dismissal for unsatisfactory performance, a copy of the evaluation conducted pursuant to Section 44664 shall accompany the written notice.
>
> (2) The employee shall have 15 days from receipt of the notice of dismissal to submit to the governing board a written request for a hearing. The governing board may establish procedures for the appointment of a hearing officer to conduct the hearing and submit a recommended decision to the board. The failure of an employee to request a hearing within 15 days from receipt of a dismissal notice shall constitute a waiver of the right to a hearing.
>
> (b) The governing board may suspend a probationary employee for a specified period of time without pay as an alternative to dismissal pursuant to this section.

Those who believed that SB 813 removes first-year probationers' right to a pre-termination hearing argued that since 44948.3(a)(1) is silent on termination hearings for first-year probationers, the law specifically precludes such hearings. Others argued that since 44948.3 does not speak to the question of *which* employees may request a hearing it must, therefore, be construed to apply to both first- and second-year probationers.

The attorneys' statements point to the level of disagreement on this issue. A management attorney maintained that the new law "...provides for a notice of non-reelection [to a teaching position the next year] and does not require either a hearing or a statement of cause." Another management attorney said he could agree, but could also read the statute to require a hearing for the first-year probationers. Said the latter, "...the school district takes a substantial chance in terms of exposure for three, four, or five years' back pay until the California Supreme Court answers that question." A labor attorney maintained that "...as for the probationary instances, certainly that is the area [in which]

we're going to have the most activity and most litigation of the legislature to remove every vestige of due process [probationary] teachers have. We are going to contest any action to dismiss a teacher without a hearing." A third management attorney agreed with the first that a hearing is not required after the second year, but maintained that a statement of cause for dismissal is necessary. Said the attorney, "...we have many school districts we're working with who are going to give what we think the legislature intended, just the notice that [the teacher is] not expected back the following year, and let the courts unfold whether or not [the teacher is] entitled to more due process."

There are now two court decisions on precisely this issue. The California Court of Appeal (Fifth District) has ruled in two separate cases that, under the changes in the Education Code brought about by SB 813, *neither* a first- nor a second-year probationary teacher is entitled to a hearing prior to dismissal.

In the first case to be decided by the court, *Hutzley v. Lake Elsinore School District*, the appellant was a first-year probationary teacher, but the court extended the no-right-to-hearing to apply to second-year probationers as well. The state Supreme Court declined to review this case, but ordered that it be "unpublished," meaning it has no precedential value.

The second case, *Grimsley v. Board of Trustees of Muroc Joint Unified School District*, was decided by the Fifth District Court of Appeal on March 4, 1987. Once again, the court "lumped together" first- and second-year probationary teachers. In this case, the court ruled that SB 813 removed hearing rights for both first- and second-year probationers (*except* in cases of mid-term dismissals). Probationary teachers have hearing rights, according to the court, if a district chooses to dismiss at mid-year.

In the *Grimsley* decision, the court hedged slightly. The decision acknowledges that school districts could interpret the ruling as authorizing school management to notify a probationary teacher on June 29 that June 30 is his or her last day of work. Such an action, said the court, might be construed as inappropriate and give the teacher the legal right to challenge the "reasonableness" of the school district's action. As of this writing, the appellant in this case has not decided whether or not to seek review by the Supreme Court.

There were at least two other SB 813 issues raised by the attorneys. Though the discussions on these issues were less heated, the issues are significant nonetheless.

2. How Does a District Dismiss a First-Year Probationer at Mid-Year?

Section 44948.3(a) seems to address itself to this concern. A management attorney conjectured that, regarding this subsection, "...there's going to be a good deal of litigation before the matter is resolved. Are there now three ways of releasing...probationary teachers? I think there's a lot of ambiguity [in this section]." Even the most recent court decision does not seem to answer this concern.

3. What is Bargainable?

SB 813 expanded the areas for collective bargaining. On that point, everyone seems to have agreed. How far that bargaining can go is the subject of some controversy. A labor attorney contended that "...where we're going to find one of the biggest places of dispute in the next few years [is] what we can bargain and what will be upheld by the courts." His management counterpart questioned whether or not procedures for releasing probationers are bargainable.

Another issue related to bargaining is intermediate discipline. If intermediate discipline is bargainable, as everyone seems to have agreed it is, what specifically can be bargained? Procedures? Reasons for discipline short of dismissal? This issue raises more questions that, according to the lawyers, will require more litigation.

The bottom line from the attorneys, labor and management alike, is that the courts will have to decide what SB 813 means. They believe it will take five years for the litigation to play itself out. An administrative law judge commented, "No matter what...the legislature passes in law, you are still going to have the legal problems under that legislation which can only be resolved by the courts, no matter how you draft the legislation." Said a management attorney, "It's going to be several years until we know whether this is meaningful reform or not."

One cynic dismisses the attorneys' warnings of protracted litigation with the comment that, "Lawyers aren't paid not to litigate." Nonetheless, it is clear from the lawyers' discussion that SB 813 created new ambiguities in the teacher dismissal process.

What Did the Legislature Intend?

According to the policy experts interviewed subsequently, the personnel section of SB 813 was the most difficult for the legislature. Sacramento was influenced by what Bill

Whiteneck, chief consultant for the Senate Education Committee, described as the "fix the problem" syndrome. There was general agreement among lawmakers that something had to be done to streamline teacher dismissal procedures. The nature of the "something," however, was up for grabs. According to Peter Birdsall, an independent consultant (Peter Birdsall Associates), there was a "glaring lack of expertise and knowledge" about the personnel provisions of the law. There was, said Birdsall, "no specific link between actual [statutory] language and what needed to be done."

Linda Bond, legislative consultant on SB 813, believed that the legislature did intend to abolish hearing rights for first-year probationers, but lawmakers did not intend to eliminate the requirements that first-year probationers who are dismissed be given the reasons for their dismissal. Bond contended that the legislature wanted to make it easier to dismiss beginning teachers based on the belief that due process that begins with the first year of employment means there is no real probationary period. Bill Whiteneck concurred with Bond. He asserted that the legislature intended to give school districts maximum flexibility to fire probationers until March 15 of the second year. Said Whiteneck, "If you take a teaching job, you're beholden to management until you acquire that March 15 date the second year." However, maintained Whiteneck, the person being fired has the right to know why.

Ken Hall, a consultant to several school districts (School Services of California, Inc.), believed the legislature supported SB 813 because they thought there were significant personnel changes. Probation was reduced from three years to two, and in exchange districts were given more "flexibility" to dismiss beginning teachers. Thus, according to Hall, the legislature intended to give school districts "new authority to 'weed out' poor teachers during the next 10 years of anticipated hirings and produce a stronger tenure track over the course of the next 15 years." Hall believed, and others seconded his belief, that the changes in dismissal procedures for permanent teachers were essentially "window-dressing." There was, according to Joe Holsinger, former deputy superintendent of public instruction, "no sentiment for substantial changes in the dismissal of tenured teachers." Tampering with those sections would tread on long-held due process rights and would, according to Holsinger and others, raise serious constitutional questions.

John Mockler, formerly education advisor to Assembly Speaker Willie Brown and now an independent consultant (Murdock, Mockler Associates), believed the legislature intended to "get rid of the identifiable silliness" in the teacher dismissal law. The SB 813 changes "clean up the obvious, glaring loopholes in the law while leaving due process intact."

Senator John Seymour, a Republican member of the SB 813 conference committee, summed up the issue this way: "We thought we had negotiated a reasonable attempt to make dismissal easier. We reduced the probationary period so management

could get rid of people who didn't measure up. We thought we gave management what it needed."

The Field Experience and Some Reasons for It

What has been the practical effect of SB 813's provisions on teacher dismissal? Both attorneys and policy analysts agreed that SB 813 had little initial impact in the field. This finding is confirmed by the results of a study conducted by the California Tax Foundation. The study, *Making the Grade? Assessing School District Progress on SB 813*, found that "Reducing the probationary period from three to two years has made little difference in personnel practices. Changes in dismissal procedures for probationary teachers are mostly ineffective. Few districts have adopted them, none has used them and the law is tied up in litigation."[1]

A variety of people posited reasons why SB 813 had, at least initially, produced no increase in teacher dismissals. John Mockler believed simply that "habits and behaviors are hard to change." Senator Seymour and Joe Holsinger were more blunt. Senator Seymour: "Management has chosen not to use the new legislation. We gave managers additional tools [to fire incompetent teachers] and they haven't used them." Holsinger believed the section on dismissing first-year probationers is "not working because of management laziness." Ken Hall, who did not believe management was given many new tools to dismiss, said the problem is that management, particularly the Association of California School Administrators and the California School Boards Association, "...has never been able to come together to decide what it wants." Joe Holsinger echoed this sentiment: "The mood in the legislature is still for making the probationary period truly probationary. But no one from management is saying how to do it."

Bill Whiteneck suggested yet another reason why the number of teacher firings is not growing: "Two, I think unanticipated, phenomena relieved districts from the pressure to get rid of teachers. Districts began to receive money [to hire additional new teachers] and districts, by a two-to-one margin, were growing rather than declining," thus initiating a teacher shortage.

Perhaps districts have chosen not to increase dismissals because they are having trouble simply finding enough people to staff classrooms. Perhaps districts are wary of unlitigated law. Perhaps the legislative intent of SB 813 is unclear. Or perhaps, as Senator Seymour remarked, "Districts are focusing so much on implementing the other 86 reforms [contained in SB 813] they haven't had time to concentrate on teacher dismissals." Whatever the reason, teacher firings are not on the upswing. As Ken Hall put it, "It's clear

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[1]Loren Kaye, *Making the Grade? Assessing School District Progress on SB 813* (Sacramento, CA: California Tax Foundation, 1985), 63.

that the great wisdom coming out of the Capitol building has absolutely no relationship to the field."

Despite SB 813's minimal impact on teacher dismissals, few of the policy actors believed the legislature will tinker further with the law. Ken Hall said, "The issue [of teacher dismissal] is behind us unless the courts determine management did not get the tools it needs" to make firing incompetent teachers easier. Said Hall, "The legislature just does not want to go through this again. The issue is a [political] 'splitter' and public enthusiasm for it has waned." Senator Seymour asserted, "We haven't anything to trade off with labor. They already made their concessions on changing the law. Besides," said Seymour, "I haven't heard anything from school management."

In fact, none of the education bills introduced or enacted since SB 813 has contained amendments to the teacher dismissal process. The one area in which there is general agreement that additional statutory changes may be forthcoming is that of teacher evaluation. SB 813 made several changes in the teacher evaluation process. Nevertheless, according to Joe Holsinger, "the biggest problem is that management is still not evaluating [teachers] properly, or is not evaluating them at all." Said Bill Whiteneck, "People [in Sacramento] are still not comfortable with who's doing the [teacher] evaluations. The legislature does want to do something about how administrators evaluate."

Recommendations and Conclusions

Policy makers concerned with education and teacher quality are currently confronting several concurrent dilemmas:

1. How to attract enough high quality people to the teaching profession. Policy considerations must encompass the possible effects additional tinkering with and focus on teacher dismissal procedures might have on the profession's ability to attract sufficient numbers of quality people.

2. How to "weed out" undesirable teachers before they spend 20 years in the classroom.

3. How to reconcile seemingly competing forces–the teacher groups which seek the protection of due process guarantees, school managers who seek additional 'flexibility,' the public which simply wants schools to be better.

Accomplishing these goals is no easy task, though some suggestions might help policy makers center on the issues at hand.

Recommendation 1: Establish a data gathering system.

There currently exists no mechanism for statistically assessing the impact of statutory teacher dismissal procedures. A system should be established to "track" teacher dismissals. How many first-year probationers are dismissed each year? How many second-year probationers? In how many cases do the school boards succeed in dismissing permanent teachers? How many cases do school districts lose? How many cases never come to hearing because the teacher resigns? How many cases go to court? Who wins and who loses ?

Lawmakers cannot know if their statutes have the desired effects–whatever those desired effects might be–without some statistical point of reference. A centralized data gathering system would provide those essential hard numbers.

Recommendation 2: Study current evaluation procedures and encourage new types of evaluations.

The policy analysts were not of one mind on the intent or accomplishments of SB 813. There was, however, unanimity of opinion on one topic: teacher evaluation. Teacher evaluations, they all agreed, are simply not done well. Administrators charged with evaluation do not, by all accounts, know how appropriately to assess a teacher's professional performance. Evaluations, in the final analysis, do not perform the task for which they are intended.

Evaluators must be provided with specific training on evaluations–what they are, how to conduct them, how the results should be used. Additionally, districts must be provided encouragement and assistance in helping "at risk" teachers before dismissal is considered.

Experiments with alternate forms of evaluation should be encouraged. One of these experiments might involve a peer evaluation program. Several are being piloted in school districts around the country.

Recommendation 3: Initiate a study on collective bargaining's impact on intermediate discipline.

Termination is not always the answer. SB 813 allows school districts and their bargaining agents to negotiate procedures for discipline short of dismissal. How many districts have such negotiated contract provisions? What is their experience with these mutually agreed upon procedures? How do the experiences in districts which have negotiated intermediate discipline procedures compare with the experiences of districts which have no negotiated procedures and allow the system spelled out in the Education

Code to prevail? Where does collective bargaining fit into the teacher retention/dismissal scheme?

Recommendation 4: Develop a set of useful working definitions.

Presently no standards exist in law to give functional meaning to terms such as "unprofessional conduct" and "incompetence." A clear basis for a teacher dismissal for cause would lend additional clarity to a currently murky area.

Conclusion

The legislature made some changes in teacher dismissal procedures when it enacted SB 813. Results of these legislative efforts appear mixed. Should there be additional interest in altering the teacher dismissal process, the task is the same as it was prior to SB 813: to refine the procedures so as to continue to allow people who should not be teaching to be removed from the classroom, while at the same time protecting the due process guarantees to which all teachers are entitled.