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ABSTRACT

This paper presents an examination of case law on faculty tenure and promotion as they are affected by institutional financial exigency and an examination of case law on personnel and faculty evaluation. An opening section reviews growing demands for accountability in higher education including legislatively mandated assessment of faculty and of student achievement. The following section reviews cases heard in the United States Supreme Court on faculty layoffs due to financial exigency. These decisions have generally supported the institution so long as appropriate due process was afforded faculty in the form of notice. A discussion of evaluation standards follows. Review of legal precedent relative to faculty evaluation and its link to student achievement shows that two cases have validated student evaluations as instruments that can be used in overall faculty evaluation. The paper closes by arguing that faculties and their institutions must take action now to control the direction of this issue. If they do not, state legislatures will try to write state law to mandate the performance legislators want to see. (Contains 23 references.) (JB)

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A Presentation to Mid South Educational Research Association

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## Legal and Practical Implications of Assessment in Higher Education

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Assessment in higher education carries with it the potential for colleges and universities to lose both their funding and their accreditation if students do not meet minimum achievement expectations and if the faculty does not meet productivity standards, whether self-imposed or legislatively mandated. Assessment has been legislated in at least eleven states. Calls for assessment raise issues beyond the classroom and programs individual higher educational institutions. Some 82% of all United States institutions of higher education are engaged in assessment or the development of assessment programs in order to measure student outcomes. (Mentkwski, Astin, Ewell & Moran, 1991, p. 1). Simultaneously, in 24 states faculty workload is being examined. In 20 states, the law now requires that public colleges and universities establish programs to assess what students learn in college and in seven states, the mid-year budgets in higher education have been cut. (*Chronicle of Higher Education, 1995*)

The demand for assessment and the re-examination of higher education priorities not only call for a reexamination of our mission but may conflict also with some of the basic tenets with which higher education and educators have traditionally operated. In effect, assessment reflects a challenge to long established practices and policies with regard to tenure and academic freedom. Already the legislatures and governors in several states are questioning the value and validity of tenure. Additionally, the basic definitions of research, teaching and service will be profoundly changed by virtue of new views of productivity and different bases for financing post-secondary education. Life in the so-called ivory tower will change significantly within the next decade due, at least in part, to assessment.

Professional roles must and will change as well. The legal implications of assessment are far reaching. Already there is precedent for the termination of educators and/or denial of tenure and promotion based on subjective assessments of teaching, and scholarly production. Assessment plans, written by the faculty themselves, may become yet another parameter for faculty evaluation and consequent administrative decision making. Hammang and Sweeney reported in 1995, in regard to higher education, that governors hold accountability as their top priority. To this end, states such as Arkansas have developed new productivity standards for colleges and universities. Among the standards is the testing of students. In Arkansas, the test is the rising junior examination. External accountability is the goal and focus of such examinations. Failure of students to perform well on these measures will result in funding penalties but may result also in mandated changes in faculty roles, security and status. While we may not agree with the content of such standards, they are a fact and the standards, requirements and expectations of the state and federal governments will drive much what we do and the decisions which we must make to an increasing degree within the next decade.

In Arkansas as in other states, accreditation depends on regional associations. It is from these associations, such as NCATE, that some of the impetus for assessment has emanated. Arkansas Governor Jim Guy Tucker argues, in an article which he wrote for Education, (1996) that accreditation maybe a meaningful and important process but it falls short of true accountability. Accordingly, the governor and legislature have replaced enrollment numbers as a basis for evaluating productivity with the following measures:

- increased retention of students
- increased graduation rates
- increased quality of programs
- increased student mastery in general education
- increased efficiencies at the university/college
- increased responsiveness to business and industry
- increased diversity of faculty and staff

There is a direct linkage between these externally imposed productivity standards and state funding. Absent adequate funding,

higher education institutions must declare financial exigency. That, of course, can lead to significant restructuring, the elimination of specific programs and the deletion of the positions held even by tenured professors who teach within the programs. Given enough pressure in the financial realm, restructuring will cause universities to refocus their missions and may lead to the demise of tenure as a practice in higher education. Already, post-tenure reviews are being conducted in some quarters to ensure the quality of the teaching and scholarship of long time faculty members. In other words, tenure does not carry with it the security generally assumed by the public and some higher educators themselves. The clear implication of such reviews is that tenure is not a guarantor of quality. That being the case, if academic freedom is not valued outside of the academy, then tenure has no clear, strong basis in the minds of either the public or its elected governmental representatives. If we, as higher educators, wish to preserve the relative freedom with which we operate, we must be prepared to act not simply discuss the implications of these emerging educational priorities and the agenda which they represent.

An examination of case law relative to faculty tenure and promotion issues as they are impacted by financial exigency and personnel evaluation is warranted, as is a review of case law relative to faculty evaluation. Initially, we should focus on the fact that "even if colleges do not entirely follow their own rules in tenure reviews, most courts will affirm tenure denials if there is no clear evidence of bad faith." (Olivas, 1989, p. 383) In the 1988 Supreme Court case, Watson v. Fort Worth, Justice Sandra Day O'Connor, writing the plurality opinion stated that "in the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a manifest relationship to the employment in question" (at 999) In the case of White v. University of Arkansas (1985), the court held that "subjective evaluations are unlawful only if they are unrelated to an essential business purpose." (at 792) These two opinions may open the door to judicial support for assessment based decisions not only in terms of students achievement and programmatic changes but also in regard to faculty roles and status..

### Financial Exigency

Situations have arisen in recent years, and will continue to arise within the next decade, in which colleges and universities have to address significant funding deficits. Address to financial problems generally comes in the form of down sizing which involves the elimination of programs and/or significant programmatic restructuring. In either case, the usual effect is layoff of faculty. Failure to meet new productivity standards, which are designed to recognize success with increased funding, may cause a general decline in the amount of money available to institutions already facing budgetary problems. Such losses will be sufficient to cause a declaration of financial exigency if faculty and students do not meet mandated standards. Court cases in which faculty have challenged layoffs due to financial exigency have generally resulted in support for the university so long as appropriate due process is afforded faculty in the form of notice, generally a hearing, prior to dismissal, at which the effected professors are informed of the grounds for the dismissal. The professors are also entitled to an opportunity to challenge the facts, i.e. to view the evidence of financial exigency on which the decision to restructure was made. (Kirk, 1987-84)

Cases on point have been heard in several states and in the United States Supreme Court. Among those cases are University of Alaska v. Chauvin, (1974), Milbouer v. Keppler (Idaho, 1986), Christensen v. Terrell (Washington, 1988), NLRB v. Yeshiva University, (1980), which case was heard by the United States Supreme Court. The last case, Yeshiva, though related to a private institution, reflects court decisions in the preceding cases and many others. The courts have held that even though

"faculty have the power to determine the content of their own courses, evaluate their own students, and supervise their own research...in no reported case of termination for financial exigency at a public or private college or university has a court found a faculty right to take what could be termed a managerial role in deciding where reductions would be made or which faculty would be dismissed." (in Kirk, p. 541-542).

Although there is some dispute as to what constitutes bona fide financial exigency, the courts have held that if there is sufficient evidence of such and if due process rights are accorded, even tenured senior faculty may be terminated.

Surely this fact alone would give us pause as we consider the impact of new productivity standards and the potential consequences of the failure of faculty to employ student outcomes assessment and programmatic assessment, which they themselves developed, as tools for the improvement of teaching, research and service. Even though colleges and universities generate tuition, we are dependent on external funding. Whether this funding is public or private, the perceptions of those who control the purse strings will ultimately determine whether or not higher educational institutions have adequate resources or must restructure or down size.

#### **Evaluative Standards**

Many of the decisions made relative to what assessment actually is and should do are still in the hands of faculty. The current lack of external definition provides an opportunity for faculties to take charge of their own efforts and their futures relative to the education of students and expenditure of faculty time. On the other hand, the future may be problematic for assessment of student outcomes in the hands of the legislatures and the public may translate to assessment of professorial performance. (Sewall, 1995) This possibility coupled with uncertainty about legislative and public perceptions of outcomes, predicated on measures which neither understands, will impact individual faculty members, what they teach and how they conduct research. There is also a high probability of negative impact on faculty morale as new parameters for faculty evaluation may raise the specter of lost or impaired academic freedom and well as the potential for loss of opportunities for both promotion and tenure. For example, the demand for greater support from businesses will translate into new and different research agendas throughout the academy.

Faculty governance has traditionally been the decision making base from which the parameters of faculty evaluation are derived, however, the legislatively mandated testing of students adds a new wrinkle to the usual criteria, teaching as measured by student evaluations and

occasionally by peer visitation and observation; scholarly activity as measured by the production of a curriculum vitae reflective unpublished manuscripts completed during a specified time period, the sharing of proceedings, articles, monographs, and texts written and published by the faculty member; and university and community service, as noted in the curriculum vita.

In the k-12 educational arena, state legislators have viewed assessment as an educational tax dollar accountability tool for some time. State mandated minimum performance tests and the annual administration to all students of a standardized examinations have provided a basis for comparison among schools and districts. Additional bases for comparison are to be found in legislatively mandated state reports which annually evaluate districts' performance and are published in the media thereby lending credence to or creating public perceptions of the quality of schools and teachers.

For some time, teachers in public education have feared the possibility of a change in the evaluation process which would link their own annual evaluations with student standardized test performance. The same issue is developing in higher education. With the advent of the rising junior examination, which is a standardized examination, the basis for such comparison will exist between and among higher education institutions in the state. The question is what impact will these test results have on the evaluation of higher educators. One might also inquire as to the impact of such comparisons on future enrollment of students, allocation of resources, and the influence that results of examinations have on the research agendas of institutions and their faculties.

Consideration of legal precedent relative to faculty evaluation illuminates the direction in which higher education and the courts are moving relative to tenure, promotion and academic freedom. Denial of tenure and/or termination may predicated on lack of competence, unprofessional behavior (In the Matter of Dismissal Proceedings Against Dr. Barney K. Huang, (1994)), unsatisfactory performance (Mary Carroll Smith v. University of North Carolina at Chapel Hill (1980)), grading policies (Levi v. University of Texas at San Antonio, (1988)), negligent scholarship, or unethical activities. Poor teaching ability



may be the reason for denial of tenure as in the case Fields v. Clark University, (1991). In Sinha v. The State University of New York at Farmingdale, (1991), denial of promotion was predicated on a faculty member's seeming inability to follow university rules, his failure to appear at class, his failure to file grades in a timely fashion and his failure to make arrangements for classes to be covered during his absences. While all of these cases represent usual causes of action in employee discipline and none of them appears to facially confront established university and peer evaluation practice, some cases have made their way to the courts which reflect a different approach to the entire evaluation process. These cases relate to the denial of tenure for faculty members predicated on student evaluations of teaching in the classroom.

A tenured professor at the University of Colorado sought to enjoin the university from administering a standardized teacher evaluation in her classroom, the results of which were a factor in the denial of merit salary increases for her. The court held that such an evaluation did not violate academic freedom Wirsing v. University of Colorado, (1990). This case validates student evaluations as instruments for faculty evaluation in and of themselves so long as the assessment is incorporated into a faculty contract and personnel policy for all employees. (Van Patten, 1994, p.6). The case also provided a precedent for further litigation. In Lovelace v. Southeastern Massachusetts University, (1986), a non tenured teacher's contract was not renewed predicated on student course evaluations. The court held that an untenured teacher's grading policy is not constitutionally protected and does not insulate a teacher from termination or non-renewal when his standards conflict with those of the university.

In Lattimore v. the President and Board of Governors of the University of North Carolina at Charlotte (1987), an assistant professor brought action against the university for denial of tenure. The teaching of this individual was rated as satisfactory, however, his departmental service and professional activities were below average (at 1347). His student evaluations were just satisfactory, but, his advising, classes, preparations were inferior and disappointing according to the university administration (at 1347). In its opinion,

the court noted that "Tenure is one of the most difficult academic decisions...a privilege, an honor... which is not to be accorded to all... professors".(at 1352) Further, the court found that "a teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests." (at 1352) The court went on to say that these are matters which should be within the perview of university officials to exercise their judgment. (Consider case of consistent poor performance by students from one professor's classes and the probability that sooner or later, that performance will be linked to the evaluation of the professor and his or her teaching.) This is the new accountability.

Although student evaluations are not the sole teaching assessment criteria at many institutions, the fact there is legal precedent for acceptance of subjective assessment for denial of tenure and promotion and for termination does create an expectation that less subjective external and internal (faculty developed) assessments may become the basis for future decisions with regard to faculty merit. Governor Tucker, in his paper, writes that "if universities cannot restructure their mission statements in light of the evolving expectations of the constituencies they serve, then state legislatures will likely become more frustrated and attempt to write state law to mandate the achievement of this end. We will have a better result if the universities will undertake this task themselves." (p. 10).

The challenge is clear. The opportunity to take control of our own destinies and to form the new legislation with regard to accountability into a force for positive change in higher education is in the hands of the faculty of the academy. Whether or not we make such changes is up to us. If we do not and if we cannot demonstrate that we are responsive to the demands of the communities with which we work, there will surely be others who will make these changes and impose them upon us. "A future that holds change as the only constant leaves us no choice." (Wilson & Daviss, p. 229).

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