

Miller, Tracy, Braun, Funk & Miller, Ltd. Presents

# The Education Reform Act:

Implications, Adjustment, & Practical Considerations

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## REDUCTION IN FORCE

Reduction in force (RIF) is the decision of a school board to decrease the number of teachers employed or to discontinue some particular type of teaching service. A school board must comply with all procedures required by its collective bargaining agreement in conducting a reduction in force.

Reductions in force (RIFs) must now be tied to teacher performance. Overall ratings will now be assigned a value for purposes of determining who will be reduced or recalled. Ratings are:

- Excellent = 4
- Proficient/Satisfactory = 3
- Needs Improvement = 2
- Unsatisfactory = 1

The values will result in teachers being categorized into one of four groupings. Depending on how the district agrees with its teachers to implement the provisions, the groupings may result in teachers (even tenured teachers) with inferior ratings becoming susceptible to RIF. Prior to implementation, the provisions of the law must be discussed with a joint committee.

### Grandfathered Districts

The Education Reform Act changed the way RIFs are performed for teachers. Collective bargaining agreements signed before January 1, 2011 are exempt from the requirements insofar as the collective bargaining agreement may conflict with the Act until June 30, 2013 or the expiration of the agreement, whichever occurs first. These “grandfathered” contracts must comply with the contractual provisions on RIF. Boards have broad latitude to dismiss probationary teachers, but must reduce tenured teachers in seniority order according to certification and qualification.

Districts engaging in bargaining for a successor contract should review the contract carefully for anything that addresses seniority (which may very well violate the law). It is certainly ideal to simply remove the language (the more language in a contract, the more likely a grievance may be had on that grievance). If you must add language, be sure that the language does not conflict the law: consider language such as “The district will comply with applicable law as of the time of the reduction in force.”

### Districts Not Grandfathered

Districts not grandfathered are subject to new procedures under the Education Reform Act. Each teacher must be categorized into one or more positions for which the teacher is qualified, on or before the May 10 prior to the school year during which the sequence of dismissal is determined. Within each position and subject to other agreements, the school district must establish four groupings of teachers qualified to hold the position.

Each teacher must be categorized into one or more positions for which the teacher is qualified to hold, based upon legal qualifications and any other qualifications established in a district or joint agreement job description, on or before the May 10 prior to the school year during which the sequence of dismissal is determined. Within each position and subject to other agreements, the school district must establish 4 groupings of teachers qualified to hold the position.

### **Groupings**

**Grouping 1** must consist of each teacher not in contractual continued service who has not received a performance evaluation rating.

The risk with grouping 1 is that probationary teachers must be evaluated at least annually. Failure to evaluate an employee by the date of the RIF in order to place an employee into this grouping would likely result in a challenge by the employee that the *process* was impure because the reasoning for dismissal was mere pretextual for illegal motivation.

Therefore, administrators should conduct proper and complete evaluations early to avoid challenge.

**Grouping 2** must consist of each teacher with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last two performance evaluation ratings.

Evaluating a teacher negatively may subject a district to *process* challenge of a RIF because the employee falls into grouping 2. Moreover, challenge will not occur until RIF, months after evaluation.

Administrators should carefully examine and support evaluations *at the time they are crafted* ensuring that documentation is complete and well-supports the conclusion reached.

**Grouping 3** must consist of each teacher with a performance evaluation rating of at least Satisfactory or Proficient on both of the teacher's last two performance evaluation ratings, if two ratings are available, or on the teacher's last performance evaluation rating, if only one rating is available, unless the teacher qualifies for placement into grouping 4.

The danger with this category is the number of employees who likely will fall here. An employee who falls into this grouping(of which there are likely many) and is subsequently RIF'd may argue that they should have been in Grouping 4 but for the failure of some *process*.

Again, evaluation is the key to avoiding trouble in this category. Carefully examine and support evaluation documentation *before* it is delivered, and be sure all evaluations are complete. No longer should any teacher be treated as though the evaluation is "unimportant" or merely a foregone conclusion.

**Grouping 4** must consist of each teacher with two Excellent performance evaluation ratings out of the teacher's last three performance evaluation ratings with a third rating of at least Satisfactory or Proficient.

### **Ramifications of Groupings**

Among teachers qualified to hold a position, teachers must be dismissed in the order of their groupings, with teachers in grouping 1 dismissed first and teachers in grouping 4 dismissed last.

Within grouping one, the sequence of dismissal must be at the discretion of the school district or joint agreement.

Within grouping 2, the sequence of dismissal must be based upon average performance evaluation ratings, with the teacher or teachers with the lowest average performance evaluation rating dismissed first.

As between or among teachers in grouping 2 with the same average performance evaluation rating and within each of groupings 3 and 4, the teacher or teachers with the shorter length of continuing service with the school district or joint agreement must be dismissed first unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement or contract between the board and a professional faculty members' organization.

If a tenured teacher is removed, reduced, or dismissed as a result of the decision of the school board to decrease the number of teachers employed by the board or to discontinue a type of teaching service, a written notice must be mailed to the teacher and given to the teacher either by certified mail, return receipt requested, or personal delivery with receipt at least 45 days before the end of the school term, together with a statement of honorable dismissal and the reason therefor.

However, probationary teachers, except those in their final probationary year, need not be provided reasons for their terminations. The relevant statute requires that these employees be properly notified of termination not later than 45 days before the end of the school term.

### **Recall**

Recall order must now be in the order of performance, with the teachers with the highest overall ratings being recalled first.

### **Seniority/Grouping Lists**

Each board, including the governing board of a joint agreement, shall, in consultation with any exclusive employee representatives, each year establish a sequence of honorable dismissal list categorized by positions and the groupings. Copies of the list must be distributed to the exclusive bargaining representative at least 75 days before the end of the school term, provided that the school district or joint agreement may, with notice to any exclusive employee representatives, move teachers from grouping one into another grouping during the period of time from 75 days until 45 days before the end of the school term.

The best practice for dealing with these lists is to begin discussions and release the lists that result early. Give the union plenty of time to object or request changes. Get agreements in writing and be careful that the agreement allows you to get what you need with evaluations.

### **Joint Committees**

Each school district and special education joint agreement must use a joint committee composed of equal representation selected by the school board and its teachers or, if applicable, the exclusive bargaining representative of its teachers, to address the matters described in the law pertaining to honorable dismissals. The committee must be formed and must hold its first meeting by **December 1, 2011**.

Unlike RIF groupings, the formation of the joint committee is not protected by grandfathering. The committee must reach agreement by majority vote by February 1 of any year for the changes to become effective for implementation during that year.

The joint committee must discuss the following topics:

- (1) The joint committee must consider and may agree to criteria for excluding from grouping 2 and placing into grouping 3 a teacher whose last 2 performance evaluations include a Needs Improvement and either a Proficient or Excellent.
- (2) The joint committee must consider and may agree to an alternative definition for grouping 4, which definition must take into account prior performance evaluation ratings and may take into account other factors that relate to the school district's or program's educational objectives. An alternative definition for grouping 4 may not permit the inclusion of a teacher in the grouping with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last 2 performance evaluation ratings.
- (3) The joint committee may agree to including within the definition of a performance evaluation rating a performance evaluation rating administered by a school district or joint agreement other than the school district or joint agreement determining the sequence of dismissal.
- (4) For each school district or joint agreement that administers performance evaluation ratings that are inconsistent with either of the rating category systems... the school district or joint agreement must consult with the joint committee on the basis for assigning a rating that complies with [the four categories required by law] to each performance evaluation rating that will be used in a sequence of dismissal.
- (5) Upon request by a joint committee member submitted to the employing board by no later than 10 days after the distribution of the sequence of honorable dismissal list, a representative of the employing board shall, within 5 days after the request, provide to members of the joint committee a list showing the most recent and prior performance evaluation ratings of each teacher identified only by length of continuing service in the district or joint agreement and not by name.

If, after review of this list, a member of the joint committee has a good faith belief that a disproportionate number of teachers with greater length of continuing service with the district or joint agreement have received a recent performance evaluation rating lower than the prior rating, the member may request that the joint committee review the list to assess whether such a trend may exist.

Following the joint committee's review, but by no later than the end of the applicable school term, the joint committee or any member or members of the joint committee may submit a report of the review to the employing board and exclusive bargaining representative, if any.

The formation of the committee is a pre-requisite to the implementation of RIF procedure which is compliant with the law. So long as the district and employees are equally represented and the first meeting is held **prior to December 1, 2011**, no crisis exists. Notes should be taken at a meeting prior to the implementation of the new RIF procedure to document that the required topics were discussed.

### 105 ILCS 5/10-16a. Board Member Training

Every voting member of a school board elected or appointed after June 13, 2011 must complete board member training before June 13, 2012 or within the first year of his or her first term. While not explicitly stated, “first term” should be interpreted as the board member’s first term after June 13, 2011.

Training shall be a minimum of 4 hours and shall cover financial oversight and accountability, education and labor law, and fiduciary responsibilities of a school board member.

Training may be provided by an association established under the School Code for the purpose of training school board members or other qualified providers approved by the Illinois State Board of Education (ISBE).

School Districts must list on their website (if any) the names of all voting members of the school board who have successfully completed the training.

### 105 ILCS 5/2-3.153 Survey of Learning Conditions

The State Board of Education shall select for statewide administration an instrument (the survey) to provide feedback from students in grades 6 – 12.

Feedback will focus on the instructional environment within a school after giving consideration to the recommendations of the Performance Evaluation Advisory Council regarding evaluation of principals on the instructional environment within a school. 105 ILCS 5/24A-20(a)(6).

The Performance Evaluation Advisory Council shall be convened and staffed by ISBE. Members shall be selected by the State Superintendent and shall include teachers unions, school management, experts in performance evaluation and other stakeholders. 105 ILCS 5/24A-7.

Beginning with the 2012–2013 school year school districts must administer the survey at least biannually in each attendance center. The administration must take place by a date specified by the State Superintendent, and data must be provided to ISBE.

The survey component that requires completion by teachers must be administered during teacher meetings or professional development day or at other times that would not interfere with the teachers’ regular classroom and direct instructional duties.



The State Superintendent, following consultation with teachers, principals, and other appropriate stakeholders, shall publicly report on selected indicators of learning conditions resulting from administration of the instrument at the individual school, district and State levels and shall identify whether the indicators result from an anonymous administration of the instrument.

If in any year the appropriation to the ISBE is insufficient for the State's costs associated with statewide administration of the instrument, ISBE shall give priority to districts with low-performing schools and a representative sample of other districts.

### Certificate Revocation/Suspension

The definition of "incompetency" in 105 ILCS 5/21-23 has changed:

Incompetency: 2 or more school terms in which a teacher has received an unsatisfactory rating on a performance evaluation (pursuant to Article 24A of the School Code) within a 7 school term period. The factors to be considered by the State Superintendent in determining whether to initiate action:

- 1 – Whether the unsatisfactory rating occurred prior to June 13, 2011.
- 2 – Whether the unsatisfactory rating occurred prior to or after the implementation date of the district's new evaluation system.
- 3 – Whether the evaluator(s) performing the unsatisfactory evaluation met the pre-certification and training requirements of Section 24A-3.
- 4 – The time between the unsatisfactory evaluation ratings (over the seven year window).
- 5 – The quality of the remediation plans associated with the unsatisfactory ratings and whether the teacher successfully completed the remediation plans.
- 6 – Whether the unsatisfactory ratings were related to the same or different assignments performed by the certificate holder.
- 7 – Whether one or more of the unsatisfactory evaluation ratings occurred in the first year of a teaching or administrative assignment.

When initiating action against one or more certificates, the State Superintendent may seek required professional development as a sanction in lieu of or in addition to

suspension or revocation. Any such professional development shall be at the expense of the teacher, who may use, if available and applicable, training, coursework or other professional development funds in accordance with the terms of any collective bargaining agreement in effect after June 13, 2011, unless the agreement specifically precludes the use of funds for such purpose.

#### 105 ILCS 5/24-1.5 New/Vacant Positions

Filling a new or vacant teaching position, which is not otherwise required to be filled pursuant to Section 24-12 (recall of tenured teachers), requires consideration of factors that include without limitation, certifications, qualifications, merit and ability (including performance evaluations, if available) and relevant experience.

Length of continuing service with a school district must not be considered unless all other factors are determined by the district to be equal.

A school district's decision to select a particular candidate is NOT subject to a CBA's grievance procedure provided that in making the decision the district adheres to the procedural requirements in the CBA relating to the filling of new or vacant positions.

New position and vacancy provisions existing in CBAs in effect on June 13, 2011 shall remain in full force and effect for the term of the agreement, unless terminated by mutual agreement.

Nothing in Section 24-1.5 or SB7 limits or otherwise impacts management's right to hire new employees, affects what currently is or may be a mandatory subject of bargaining or creates a statutory cause of action for a candidate, or a candidate's representative to challenge a district's selection based on the district's failure to adhere to the requirements of Section 24-1.5.

To avoid claims of illegal discrimination, districts must document, in as much detail as possible, each applicant's strengths and weaknesses in relation to the relevant statutory criteria, i.e. certifications, qualifications, merit and ability (including performance evaluations, if available), and relevant experience.

#### Changes to Sections 12 and 13 of the Illinois Educational Labor Relations Act

If parties have not reached agreement by 90 days before the scheduled start of the school year, they must notify the IELRB concerning the status of negotiations. The notice must now include a statement on whether mediation has been used.

Either party may petition the IELRB to initiate mediation if after a reasonable period of negotiation and within 90 (formerly 45) days of the scheduled start of the school year, the parties have reached an impasse. The IELRB shall invoke mediation if parties have not reached agreement by 45 (formerly 15) days of the scheduled start of the school year.

115 ILCS 5/12(a-5)--new

After 15 days of mediation, either party may declare negotiations are at an impasse. At any time during mediation, the mediator may declare an impasse. Notification of impasse must be filed with IELRB and submitted to parties on same day as IELRB filing.

After declaration of impasse, each party has 7 days to submit to the mediator, the IELRB and other party its final offer on all unresolved issues and a cost summary of the offer. After receipt of the final offers, the IELRB holds them for 7 days.

After the 7th day, the IELRB is required to make public the final offers and each party's cost summary of the unresolved issues by immediately posting the offers on its website.

On the same day of publication by the mediator (IELRB), at a minimum, the school district must distribute notice of the availability of the final offers and cost summaries on the IELRB's website to all news media that receives notices pursuant to the Open Meetings Act.

When may employees strike?

Mediation must have been used at least once without success. If impasse has been declared under 12(a-5) at least 15 days of mediation must elapse unless impasse has been declared by mediator. 7 days for parties to submit final offers and cost summaries to mediator and IELRB must elapse. 7 additional days must elapse for the IELRB to hold the parties' final offer and cost summaries before making them public. 14 more days must elapse after the IELRB has made the final offers public.

10 days must also elapse after the union has voted on and filed a Notice of Intent to Strike with the School District, ROE and IELRB which can run concurrently with the 12(a-5) timeline.

If mediation has been initiated under 12(a) then mediation must have been used at least once without success and 10 days must elapse after the union has voted on and filed a Notice of Intent to Strike with the School District, ROE and IELRB (can run concurrently with the 12(a-5) timeline).

CONCERNS:

How will we know if mediation has been initiated under 12(a) or 12(a-5)?

If a District unilaterally declares impasse or a mediator declares impasse under 12(a-5)—with the intent to go public with the parties’ final offers and cost summaries this may be an Unfair Labor Practice trap.

What is the difference between “impasse,” and “IMPASSE”?

“impasse” is when either or both parties may request mediation.

“IMPASSE” is when the Board may unilaterally impose its final offer as a self-help measure.

If a Board goes public with the parties’ final offers and cost summaries, the union may file a ULP alleging that genuine impasse did not exist at the time of a Board or mediator’s declaration of impasse and that the Board or mediator’s actions to declare impasse and go public was in bad faith and violated the IELRA.

The problem—the trap—is by what standard will the IELRB define “impasse” in the context of 12(a-5)? Will it be defined the same as “IMPASSE”?

IMPASSE exists if, in view of all the circumstances of the bargaining, further discussions would be futile. IMPASSE does not exist if there is “a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.”

The IELRB looks at five factors in determining whether negotiations have reached an IMPASSE: (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues as to which there is disagreement; and (5) the contemporaneous understanding of the parties as to the state of negotiations.

## Tenure, Evaluations, and Dismissal

### I. Tenure

#### A. Changes Effective June 13, 2011

1. For purposes of determining contractual continued service, a school term shall be counted only toward attainment of contractual continued service if the teacher actually teaches or is otherwise present and participating in the district's or program's educational program for 120 days or more, provided that any leave under the federal Family Medical Leave Act that the teacher is required to take until the end of the school term shall be considered days of teaching or participation in the district's or program's educational program.

A school term that is not counted toward attainment of contractual continued service shall not be considered a break in service for purposes of determining whether a teacher has been employed for 4 consecutive school terms, provided that the teacher actually teaches or is otherwise present and participating in the district's or program's educational program the following school term.

#### B. Changes Effective upon PERA Implementation

##### 1. Three Potential Probationary Periods

- a. 4 consecutive school terms of service with "Proficient" or better rating in the last school term and either the second or third school term;
- b. 3 consecutive school terms with "Excellent" rating; or
- c. 2 consecutive school terms with "Excellent", but only if the teacher (i) previously attained contractual continued service in another Illinois school district, (ii) voluntarily departed or was honorably dismissed (and in the school term immediately preceding the teacher's first in the current school district), and (iii) received ratings of at least "Proficient" in the 2 most recent evaluations from the prior district and those evaluations were after the PERA implementation date for that district.

2. If, at the conclusion of 4 consecutive school terms of service that count toward attainment of contractual continued service, the teacher's performance does not qualify the teacher for contractual continued service, then the teacher "shall not enter upon contractual continued service and shall be dismissed."

## II. Evaluations

### A. Changes by September 1, 2012 (pursuant to PERA)

1. Pre-qualification training for all evaluators
2. Evaluation frequency:
  - a. Non-tenured = at least once every school year
  - b. Tenured = at least once every 2 school years, UNLESS "Needs Improvement" or "Unsatisfactory"
  - c. A principal shall not be prohibited from evaluating any teachers in his or her first year as principal of a school. (Beware bargaining implications).
3. Four categories for all teachers:  
"Excellent" – "Proficient" – "Needs Improvement" – "Unsatisfactory"
4. Professional development plan for any teacher with "Needs Improvement."
5. Changes to Principal Evaluations
  - a. Evaluated at least once every school year.
  - b. Four categories (same as above)
  - c. Must "provide for the use of data and indicators on student growth as a significant factor in rating performance."

### B. Changes by PERA Implementation Date

1. The PERA Implementation Date for most school districts will be September 1, 2016, except for the lowest performing 20% (September 1, 2015) or Chicago Public Schools (September 1,

2013). However, a school district and its teacher association can agree to expedite the PERA Implementation Date to as soon as September 1, 2013.

2. By the PERA Implementation Date, teacher evaluations must “incorporate the use of data and indicators on student growth as a significant factor in rating teacher performance.” How this data will be incorporated must be determined by a joint committee composed of equal representation selected by the district and its teachers. If no agreement is reached within 180 days of the joint committee’s first meeting, the district shall implement the ISBE model.
3. If a teacher successfully completes a remediation plan and then receives a second unsatisfactory rating in any evaluation during the 36-month period following the completion of the remediation plan, the school district may forego remediation and seek dismissal.

### III. Dismissal – Summary of Significant Changes to Hearing Process

- A. (July 1, 2012+) Hearing Officer Selection:
  - Mutually selected = costs split equally between teacher and board; or
  - Board-selected = board pays all costs
- B. (July 1, 2012+) Hearing Officer Recommendation:
  - The Hearing Officer makes only findings of fact and recommendation, and then the Board of Education retains final decision to dismiss or to retain.
- C. (After PERA Implementation Date) Alternative Dismissal Process
  - PERA training for school board members
  - Second evaluator (process and selection)

**Evaluation Problems not Changed by PA 97-008:**

**1. Non-Tenured Teachers who Should not Achieve Tenure -- but Do.**

- a. Districts define "Excellent," "Satisfactory," "Needs Improvement" and "Unsatisfactory" - not the School Code.
- b. Tenure is a *very valuable* right. District may have very high standards for achieving tenure and prevent non-tenured teachers gaining tenure unless the probationary teachers demonstrated high ability.
- c. Why should minimally "satisfactory" result in tenure?
- d. Some school districts don't seem to *ever* have third and fourth year teachers who are non-renewed. Other schools often do. Why?
- e. Non-tenured teachers could prove competence and capability to the administrator, not *vice-versa*.

**2. How to Allow a Teacher Achieve Tenure who Should Not. - Problems of observation.**

- a. I didn't see the bad behavior when I was observing.
- b. I didn't know we could observe /ask that.
- c. I've never read the evaluation plan. The evaluation instrument is enough.
- d. I missed deadlines.
- e. We'll RIF this position later.
- f. I'm concerned they won't like me. I need the cooperation.
- g. I can't find anybody better, what's the point of a negative evaluation?
- h. In this district everyone is always rated excellent. Why should I buck the system and be the bad guy?
- i. "I'm always dealing with emergencies, so observation/evaluation is a low priority."
- j. "We want to be positive and encourage growth."



- k. Put something in a teacher's personal file?? Why? – "Personal Anecdotal Notes."
  - l. I didn't know what the collective bargaining agreement said about evaluation.
  - m. Evaluation of remote programs done by another school's or building's administrator with no stake in the outcome or understanding of the job?
3. **How the Union Wins the Evaluation Plan/ Evaluation Negotiations or How to Protect the Incapable Tenured Employee.**
- a. The development of the evaluation plan is a low priority and administration gives little thought to how evaluation will actually work.
  - b. There isn't any place on the instrument to rate the teacher about this (predictable) problem.
  - c. There is nothing in the evaluation plan or instrument about this kind of teacher (counselor, librarian, media specialist, social worker, psychologist, specialist teacher.)
  - d. There are no measures of productivity.
  - e. Evaluation plans/instruments have no standards like "effective," "efficient," "capable," "prompt," "consistent," "timely" "best practices" or "implements training."
  - f. There are no requirements that the teacher *demonstrate* all phases of the job or provide artifacts to show effective job performance and best practices.
  - g. "All observations will be made an administrator with full knowledge of the teacher."
  - h. "All deficiencies must be personally observed by an evaluator."
  - i. (In CBA) "All criticism of a teacher's performance which will be in a teacher's personnel file must be reduced to writing and given to the teacher within 10 days of the event."

- j. Evaluation plan requires pre-observation conferences for *every* observation.
- k. All observations must be of at least 20 minutes' duration.
- l. Evaluators can't take into account what parents/students/staff/other teachers say.
- m. Teacher can't be rated "unsatisfactory" unless he/she receive an "unsatisfactory" in two or more major categories.
- n. The evaluation plan or collective bargaining agreement imposes burdens or deadlines on administrators that are inflexible or unrealistic.
- o. The collective bargaining agreement or evaluation plan imposes extra "hoops" that are not required by law. "Probationary teachers must be given remediation plans.
- p. The evaluation plan requires objective proof the administrator must create – rather than the other way round.
- q. The Excellent and Satisfactory categories are too easy to achieve.
- r. The evaluation plan controls the *remediation plan*.
- s. The evaluation plan can't be changed without collective bargaining.

#### 4. Evaluation Plans that Do Not Match 24A

- a. Evaluation plan unrelated to Job Description. - One purpose of 24A was to have teachers evaluated in terms of their job requirements.
- b. "The plan *shall* include a description of each teacher's duties and responsibilities" 24A-5 (2).
  - a. Job descriptions out of date or do not exist.
  - b. Administrator cannot describe the job duties and responsibilities of the teacher being evaluated. Evaluation plan must include "the standards to which *that employee* is expected to conform."

- c. Evaluation plans that focus entirely on self-contained classroom teaching performance. Does the plan/instrument encourage rating:
  - c.i. Unsuccessful or inappropriate rapport with students, parents or other employees.
  - c.ii. Failure to timely and effectively report to parents.
  - c.iii. Failure to cooperate with or work effectively with administration or other employees.
  - c.iv. Failure to work effectively on committees or planning.
  - c.v. Failure to implement IEPs or make accommodations.
  - c.vi. Failure to follow rules, procedures or policies.
  - c.vii. Failure to use prep time effectively for school-related work.
  - c.viii. Failure to apply training to teaching or other duties.
  - c.ix. Failure to perform duties that are *not* teaching curriculum.