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MAKING ENEMIES OUT OF EDUCATORS: THE LEGAL AND SOCIAL CONSEQUENCES OF DISCLOSING NEW YORK CITY TEACHER DATA REPORTS

I. INTRODUCTION

Rigoberto Ruelas, Jr. was a fifth-grade teacher at Miramonte Elementary School, located in an impoverished neighborhood of Los Angeles, California. Conscientious of the grim realities facing many of his students on a daily basis, Ruelas voluntarily took on a mentorship position with the toughest kids, regularly encouraging them to make positive decisions, talking them out of associating with gangs and spending countless after-school hours working with them. Ruelas had nearly perfect attendance in his fourteen years as a teacher—real proof of the passion he had for his calling.

In August 2010, the *Los Angeles Times* published and posted online the “value-added” ratings of about 11,500 Los Angeles elementary school teachers,¹ including those at Miramonte. These “value-added” teacher ratings were calculated primarily upon on the progress made by the Los Angeles students on the California Standards Tests for English and math.² Based upon the test scores of 149 students, Ruelas was dubbed “ineffective.”³ Although the ratings were attacked as being imprecise, unreliable, and inconsistent, Ruelas was understandably humiliated and depressed over being called “ineffective” in the media.⁴ Just over a month after the publication of the ratings, Ruelas’s body was found in a ravine about 100 feet below a bridge in a nearby national forest. The coroner determined that Ruelas committed suicide.⁵

1. *Los Angeles Teacher Ratings*, L.A. TIMES (2011), <http://projects.latimes.com/value-added>.

2. *Id.* (“The difference between a student’s expected growth and actual performance is the ‘value’ a teacher added or subtracted during the year.”).

3. *Los Angeles Teacher Ratings: Rigoberto Ruelas*, L.A. TIMES (2011), <http://projects.latimes.com/value-added/teacher/rigoberto-ruelas/>.

4. Daniel Denvir, *Not Much Value in “Value-Added” Evaluations*, FAIRNESS AND ACCURACY IN REPORTING (FAIR) (Apr. 11, 2011), <http://www.fair.org/index.php?page=4270>.

5. Susan Troller, *Chalkboard: “Ineffective” L.A. Teacher Commits Suicide*, THE CAP TIMES (Sept. 28, 2010), http://host.madison.com/ct/news/local/education/blog/article_cae9f3ba-cb11-11df-8a36-001cc4c03286.html; Alexandra Zavis & Tony Barboza, *Teacher’s Suicide Shocks School*, L.A. TIMES (Sept. 28, 2010), <http://articles.latimes.com/2010/sep/28/local/la-me-south-gate->

This Note does not purport to argue that the newspaper's database was responsible for Ruelas's suicide; the reasons for anyone's decision to take his or her own life are undoubtedly complicated and inscrutable. However, the story of Ruelas is of particular import as one example of thousands of teachers whose true value and impact upon students has gone and will continue to go unnoticed as more cities and states look to "value-added" assessment methods.

In February 2012, in the wake of a year-long legal battle that ended in New York's highest court,⁶ the New York City Department of Education ("DOE") released to numerous media organizations a list of more than 18,000 ratings of individual schoolteachers.⁷ The release of these ratings—dubbed "Teacher Data Reports" ("TDRs")—which came on the heels of the ongoing controversy in Los Angeles, angered and frustrated teachers across the city's five boroughs.⁸

In championing the release of the TDRs, the DOE has chosen to isolate and victimize its teachers, despite the fact that teachers constitute "the single most important school-related factor in a child's education."⁹ This Note argues that, given the importance of teachers to student achievement, it is counterintuitive and simply bad policy to publicly rank teachers based on the performance of their students on a single exam so as to embarrass, punish, and shame them. Furthermore, this Note argues that the First Department's decision, which failed to give adequate weight to the flawed and subjective nature of the TDRs, as well as the privacy interests of educators, will have profound consequences for teachers and students alike and will

teacher-20100928.

6. The Court of Appeals is the highest court in the state of New York. "Matters argued before the Court have often been heard by two lower courts (a trial court and the Appellate Division). Except in cases involving a Federal question, where the Supreme Court of the United States has the last word, the Court of Appeals makes the final statement of decisional law in New York State." Court of Appeals, State of N.Y., *Court System Outline*, <http://www.nycourts.gov/ctapps/outline.htm> (last visited Dec. 23, 2012). On February 14, 2012, the Court of Appeals denied the New York City teachers' union's motion for leave to appeal from a decision of the New York State Appellate Division, First Department, thus ending any attempt to avert the release of thousands of teacher data reports. *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 963 N.E.2d 792 (N.Y. 2012).

7. Fernanda Santos & Sharon Otterman, *City Teacher Data Reports Are Released*, SCHOOLBOOK (Feb. 24, 2012), <http://www.schoolbook.org/2012/02/24/teacher-data-reports-are-released>.

8. *Id.*

9. *Id.*

only hinder real education reform efforts.

Although New York City and Los Angeles are currently at the forefront of the “teacher value ratings” debate, such forms of assessment are spreading to other cities and states. This development is coming at a time of increased political hostility toward teachers; many politicians, including President Barack Obama, have voiced their support for the mass firings of educators,¹⁰ while “teacher accountability”¹¹ has become the predominant rallying cry of politicians and education critics alike, who have singled teachers out as scapegoats for all of the failings in American education today.¹²

Part II of this Note will discuss the TDRs. Specifically, it will examine what the TDRs purport to assess, the circumstances surrounding the DOE’s decision to release the TDRs, and the legal battle waged by the United Federation of Teachers (“UFT”) to prevent their release. Part III will address the major legal and policy arguments against the public disclosure of the TDRs, beginning with an analysis of the relevant exceptions to disclosure under New York’s Freedom of Information Act (“FOIL”) and an explanation as to why, under these exceptions, the city was not mandated to disclose teachers’ names and, in fact, wielded great discretionary power to decide whether or not to do so. Part III will argue that both the DOE and the courts could and should have afforded greater weight to the teachers’ interests in preventing the disclosure of the TDRs, in light of the subjective, experimental, and flawed nature of the data contained therein and the likelihood that the release of such information would cause foreseeable and irreparable damage to teachers’ reputations and careers. Part III will then shift its focus to

10. Michael A. Fletcher & Nick Anderson, *Obama Angers Union Officials with Remarks in Support of R.I. Teacher Firings*, WASH. POST (Mar. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103560.html>.

11. *Id.*

12. *See e.g.*, Lynda Dobyns, *Stop the Education “Blame Game”: Let’s Get Real About Accountability*, HUFFINGTON POST (Apr. 17, 2012), http://www.huffingtonpost.com/lydia-dobyns/stop-the-education-blame-_b_1432162.html (criticizing society’s rush to single out for blame individual adults—particularly and primarily teachers—for the failings of the nation’s schools generally); Glen Lineberry, *Accountability*, HUFFINGTON POST (July 18, 2012), http://www.huffingtonpost.com/glen-lineberry/teacher-accountability-_b_1683967.html (explaining that teachers have borne the brunt of school reform because they are the one group on whom everyone else can focus, despite numerous other characters in education, such as students, administrators, school boards, parents, communities, as well as educational experts, consultants, and bureaucrats).

the serious potential of widespread misuse of the data, as well as the devastating effects that such exercises in public shaming could have on teacher morale. Finally, Part IV will articulate the goals toward which school officials and politicians should be striving in order to make meaningful and lasting improvements in teacher performance and student achievement.

II. TEACHER DATA REPORTS: THE CONTROVERSY, THE BATTLE, AND THE FALLOUT

At the start of the 2007-2008 school year, the DOE began distributing TDRs to English and math teachers in grades four through eight throughout New York City.¹³ These reports used the “value-added” assessment method, which is based primarily on predictions regarding student performance on standardized tests. These predictions take into consideration a student’s prior test performance, as well as factors outside of a teacher’s control, such as a student’s socio-economic or special education status.¹⁴ A student’s predicted performance was then compared with his or her actual performance to determine “the teacher’s contribution to the student’s learning.”¹⁵ Finally, the average of the actual improvement for all of a teacher’s students was calculated. This resulting number purports to measure the teacher’s positive or negative “added value.”¹⁶ The DOE collected this data for three years, ending with the 2009-2010 school year.¹⁷

Recognizing the nature of these reports as “works-in-progress” and the potential for misuse by parents to render judgments about individual teachers, the DOE initially sought to use these reports solely as professional development tools.¹⁸ The DOE acknowledged that value-added data should be used as only one of multiple measures of teacher effectiveness; it would be “irresponsible” to draw conclusions as to the effectiveness of individual teachers based solely

13. N.Y.C. DEP’T OF EDUC., OVERVIEW OF THE TEACHER DATA REPORTS RELEASE 4 (Feb. 24, 2012), [http://schools.nyc.gov/NR/rdonlyres/972039D0-F689-430E-ACBD-E941573BF510/0/](http://schools.nyc.gov/NR/rdonlyres/972039D0-F689-430E-ACBD-E941573BF510/0/TeacherDataReportsReleaseOverviewPresentation22412.pdf)

TeacherDataReportsReleaseOverviewPresentation22412.pdf [hereinafter OVERVIEW].

14. *Id.* at 8.

15. *Id.*

16. *See id.* at 11-12.

17. *Id.* at 5.

18. *Id.* at 6.

on value-added measures.¹⁹ As a result, the DOE entered into an agreement with the UFT²⁰ to prevent public disclosure of the reports.²¹ In a letter from DOE Deputy Chancellor Christopher Cerf to then-president of the UFT Randi Weingarten, the Deputy Chancellor stated, “It is DOE’s firm position and expectation that [TDRs] will not and should not be disclosed or shared outside of the school community, defined to include administrators, coaches, mentors and other professional colleagues authorized by the teacher in question.”²² He further agreed that should “a FOIL request for such documents [be] made, [the DOE] will work with the UFT to craft the best legal arguments available to the effect that such documents fall within an exemption from disclosure.”²³

Over the next year, various news organizations made FOIL requests for the TDRs; however, no explicit request was made that the DOE include the teachers’ names.²⁴ The DOE responded accordingly by releasing the TDRs with the teachers’ names redacted.²⁵ However, in the summer and fall of 2010, over a dozen news media organizations made nine more FOIL requests, each explicitly requesting that teachers’ names be disclosed.²⁶ The UFT learned of these FOIL requests from various members of the press and was informed shortly thereafter of the DOE’s intention to release the TDRs in a manner that would reveal the teachers’ names²⁷—in

19. OVERVIEW, *supra* note 13, at 6.

20. United Fed’n of Teachers, *Who We Are* (2012), <http://www.uft.org/who-we-are> (“Over 200,000 members strong, the UFT is a federation of teachers, nurses and other professionals working in New York City’s five boroughs.”).

21. Anna Phillips, *City Release of Teacher Ratings Would Break 2008 Deal with Union*, GOTHAM SCHOOLS (Oct. 20, 2010), <http://gothamschools.org/2010/10/20/city-release-of-teacher-ratings-would-break-2008-deal-with-union>.

22. Letter from Christopher Cerf, Deputy Chancellor, N.Y.C. Dep’t of Educ., to Randi Weingarten, President, United Fed’n of Teachers (Oct. 1, 2008), <http://www.scribd.com/doc/39755009/Foil>.

23. *Id.* The purpose of FOIL is “to promote disclosure by government but also to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL.” *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 919 N.Y.S.2d 786, 788 (N.Y. Sup. Ct. 2011) (citing *Dairylea Cooperative, Inc. v. Walkely*, 38 N.Y.2d 6 (N.Y. 1975)), *aff’d*, 928 N.Y.S.2d 701 (N.Y. App. Div. 2011). *See* Part III *infra*.

24. *Mulgrew*, 919 N.Y.S.2d at 788.

25. *Id.*

26. *Id.*

27. *Id.*

direct contravention to its promise to the UFT.²⁸

A. *The Legal Battle*

On October 21, 2010, the UFT petitioned the Supreme Court of New York, seeking a temporary order enjoining the DOE from releasing the TDRs.²⁹ Various major news organizations, including the *New York Times*, the *Wall Street Journal*, and the *New York Daily News*, moved to intervene, seeking access to the data under FOIL.³⁰ In an opinion by Judge Cynthia Kern, the trial court denied the UFT's petition, allowing the "TDRs [to] be released regardless of whether and to what extent they may be unreliable or otherwise flawed."³¹

On appeal, the First Department, Appellate Division affirmed the Supreme Court's decision and threw out the union's lawsuit, finding proper the DOE's determination that the requested reports be released under FOIL.³² The appellate court held that the UFT failed to sustain its burden of proving its entitlement to a FOIL exemption.³³ Specifically, the court considered the reports to be

28. See Letter from Christopher Cerf to Randi Weingarten, *supra* note 22.

29. Brief of Petitioner-Appellant at 13, *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 928 N.Y.S.2d 701 (N.Y. App. Div. 2011) (No. 113813/2010). Michael Mulgrew, the named plaintiff in the action, is the President of the United Federation of Teachers and was elected in 2009. Anna Phillips, *Michael Mulgrew is Elected President of Teachers Union*, GOTHAM SCHOOLS (July 29, 2009), <http://gothamschools.org/2009/07/29/michael-mulgrew-is-elected-president-of-teachers-union/>.

30. *Mulgrew*, 919 N.Y.S.2d at 787; Emmeline Zhao, *New York City Teacher Ratings: Teacher Data Reports Publicly Released Amid Controversy*, HUFFINGTON POST (Feb. 24, 2012), http://www.huffingtonpost.com/2012/02/24/new-york-city-teacher-rat_n_1299837.html.

31. *Mulgrew*, 919 N.Y.S.2d at 789. The court went on to conclude that the DOE's determination that it was required to disclose the teachers' names under FOIL was not "without a rational basis." *Id.* at 787. The court reviewed the UFT's petition under New York Civil Practice Law and Rules Section 7803, which is the "arbitrary and capricious" standard. Under this standard, a court will find that an agency acted arbitrarily only when it acted "without sound basis in reason and . . . without regard to the facts." *Pell v. Bd. of Educ.*, 313 N.E.2d 321, 325 (N.Y. 1974).

32. *Mulgrew*, 928 N.Y.S.2d at 702 (finding that although the "Supreme Court improperly reviewed respondents' determination to release the requested reports under the 'arbitrary and capricious' standard set forth in [N.Y. C.P.L.R. §] 7803(3)" and "[t]he court should have determined whether respondents' determination 'was affected by an error of law,'" it didn't matter because the DOE properly determined that the reports should have been released).

33. *Id.*

“statistical or factual tabulations or data”³⁴ subject to disclosure, despite the UFT’s insistence that the data contained in the TDRs are subjective and experimental.³⁵ Moreover, the court found that the public has a “compelling interest” in information contained in the reports sufficient to outweigh the teachers’ privacy interests in avoiding disclosure of their names.³⁶

The UFT turned to the Court of Appeals in what was the union’s last chance to prevent the release of thousands of New York City teachers’ ratings. However, on February 14, 2012, New York’s highest court denied the UFT’s appeal of the First Department’s ruling.³⁷ On February 24, the DOE released the TDRs and rankings of 18,000 New York City public school teachers amidst a storm of controversy.³⁸

B. The Fallout

On the eve of the release of the TDRs, DOE Schools Chancellor Dennis Walcott,³⁹ in an op-ed piece in the *New York Daily News*, voiced his fear that members of the news media might use this information as an excuse to denigrate many of the city’s hardworking teachers.⁴⁰ Within twenty-four hours, Chancellor Walcott’s fears

34. *Id.* (quoting N.Y. PUB. OFF. LAW § 87(2)(g)(i) (2011) (“Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . . are inter-agency or intra-agency materials which are not . . . statistical or factual tabulations or data . . . ”)).

35. See Brief of Petitioner-Appellant, *supra* note 29, at 19-24.

36. *Mulgrew*, 928 N.Y.S.2d at 703.

37. *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 963 N.E.2d 792 (N.Y. 2012); Anna M. Phillips, *City to Release Teacher Ratings After Union Loses Suit*, SCHOOLBOOK (Feb. 14, 2012), <http://www.nytimes.com/schoolbook/2012/02/14/city-to-release-teacher-ratings-after-union-loses-suit/>.

38. Santos & Otterman, *supra* note 7.

39. Dennis Walcott, the current New York City DOE Schools Chancellor, is a former teacher and the city’s former Deputy Mayor for Education. Walcott was appointed to the position of Schools Chancellor in April 2011, notably months after the DOE made the decision to release the data reports. Dave Evans, *Black Out, Dennis Walcott in as Schools Chancellor*, ABC NEWS (Apr. 8, 2011), <http://abclocal.go.com/wabc/story?section=news/education&id=8058715>.

40. “Teacher Data Reports were created primarily as a tool to help teachers improve, and not to be used in isolation.

I’m deeply concerned that some of our hardworking teachers might be denigrated in the media based on this information. That would be inexcusable. Ultimately, each news organization will make its own choices about how to proceed, and this may result in teacher names appearing in

were realized;⁴¹ on February 25, 2012, the *New York Post's* front page read, in full-page fashion: "REVEALED: TEACHER GRADES."⁴² The same day, the *Post* published a picture and story about the city's "best teacher"⁴³ and the next day, a picture and story about the city's "worst teacher."⁴⁴

Many teachers reacted with disgust and anger upon returning to school the next Monday.⁴⁵ Their feelings were further vindicated as, almost as soon as the rankings were released, stories began to pour in concerning some very deep flaws and simple errors inherent in the TDRs.⁴⁶ Among these errors were student test scores attributed to a teacher at Public School 321 while he was out on child-care leave.⁴⁷ Similar incidents were reported by other teachers.⁴⁸ A teacher of

the paper or on media websites. Although we can't control how reporters use this information, we will work hard to make sure parents and the public understand how to interpret the Teacher Data Reports. I hope news organizations will report on the data responsibly and treat our teachers with respect." Dennis Walcott, *Teacher Data: A Partial Picture*, N.Y. DAILY NEWS (Feb. 24, 2012), http://articles.nydailynews.com/2012-02-24/news/31097278_1_teacher-data-reports-value-added-data-important-job.

41. See Louis Freedberg, *Publishing Teacher Effectiveness Rankings, Pioneered In California, Draws More Criticism*, HUFFINGTON POST (Apr. 2, 2012), http://www.huffingtonpost.com/2012/04/02/teacher-effectiveness-ran_n_1397536.html.

42. Yoav Gonen et al., *Revealed: Teacher Grades*, N.Y. POST, Feb. 25, 2012, at 1, available at <http://www.pressdisplay.com/pressdisplay/viewer.aspx>. See Diane Ravitch, *How to Demoralize Teachers*, EDUC. WEEK (Feb. 28, 2012), http://blogs.edweek.org/edweek/Bridging-Differences/2012/02/how_to_demoralize_teachers.html. To be fair, there was actually one New York City media organization—GothamSchools.org—that refused to name names. Gotham Schools explained, "[w]e determined that the data were flawed, that the public might easily be misled by the ratings, and that no amount of context could justify attaching teachers' names to the statistics. When the city released the reports, we decided, we would write about them, and maybe even release Excel files with names wiped out. But we would not enable our readers to generate lists of the city's 'best' and 'worst' teachers or to search for individual teachers at all." *Id.*

43. Ravitch, *supra* note 42.

44. *Id.*

45. Maisie McAdoo, *Members "Disgusted and Angry"*, UNITED FED'N TEACHERS (Mar. 8, 2012), <http://www.uft.org/print/42842>.

46. Laura Clawson, *New York City's Flawed Data Fuels the Right's War on Teachers*, DAILY KOS (Mar. 4, 2012), <http://www.dailykos.com/story/2012/03/04/1069927/-New-York-City-s-flawed-data-fuels-the-right-s-war-on-teachers>.

47. Elizabeth Phillips, *A Principal at a High Performing School Explains Why She Is "Absolutely Sick" About the Public Release of the TDRs*, NYC PUBLIC SCHOOL PARENTS (Feb. 25, 2012), <http://nycpublicschoolparents.blogspot.com/2012/02/principal-at-high-performing-school.html> ("The amount of data that is simply wrong is staggering. . . . One teacher who taught in 08-09 but was on child care leave for years before that time has data for a previous year--impossible. . . . it must be data from someone who was in that same room the previous year.").

48. See Jodi Rudoren, *Teachers: An Invitation to Respond to Your Data Report*,

gifted and talented children received a very low rating because her students' scores dropped from 3.97 to 3.92. This miniscule dip banished her to the lowest sixth percentile citywide.⁴⁹ One of the city's "worst" teachers—a sixth-grade English as a Second Language ("ESL") teacher who, over the last five years, has taught small, self-contained classes of recently arrived, non-English speaking immigrants—was assessed based on an average sample size of eleven students per year and pitted against middle school teachers with average sample sizes as large as 160.⁵⁰ Other teachers' ratings were based on courses they had not actually taught,⁵¹ while others were given sole credit for classes that they co-taught.⁵²

This deluge of criticism from teachers and principals led to an attempt by the DOE to distance itself from the release of the TDRs.⁵³ The DOE even sent a guide to school principals shortly after the data reports were released suggesting that they respond to teachers' concerns by telling them that the DOE "did not support the release of this data," but instead was "required to do so by the courts."⁵⁴ DOE spokesman Matthew Mittenthal affirmed those sentiments, stating that "[m]ore than a dozen media outlets filed

SCHOOLBOOK (Feb. 23, 2012), <http://www.nytimes.com/schoolbook/2012/02/23/teachers-an-invitation-to-respond-to-your-data-report/>.

49. Ravitch, *supra* note 42.

50. Leo Casey, *The True Story of Pascale Maclair*, EDWIZE (Feb. 28, 2012), <http://www.edwize.org/the-true-story-of-pascale-maclair>. A small sample size of student test-takers is one of the major factors known to produce contorted TDR results. *Id.* Discrepancies in sample size are particularly prevalent in the sixth grade—the grade taught by Pascale Maclair, who was rated as one of the worst teachers in New York City. *Id.* This typically occurs because most sixth-grade teachers of English language arts and math, who teach in the middle school model, are responsible for only one subject, which they teach to four or five different classes each day. *Id.* Sixth grade teachers in the elementary school model are responsible for teaching all of the core academic subjects to one classroom of students. *Id.* Hence the impact that a few low scores will have on the ranking of a teacher of a small class will be that much more significant. *Id.*

51. Fernanda Santos & Robert Gebeloff, *Teacher Quality Widely Diffused, Ratings Indicate*, N.Y. TIMES (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/education/teacher-quality-widely-diffused-nyc-ratings-indicate.html?pagewanted=all>.

52. Maisie McAdoo, *Full-Court Press to Halt Teacher Data Release*, UNITED FED'N TEACHERS (Dec. 16, 2010), <http://www.uft.org/news-stories/full-court-press-halt-teacher-data-release>.

53. See Anna M. Phillips, *After Championing Release, City Says It Did Not Want Teacher Data Public*, SCHOOLBOOK (Feb. 24, 2012), <http://www.nytimes.com/schoolbook/2012/02/24/after-championing-release-city-says-it-did-not-want-teacher-data-public>.

54. *Id.*

requests for this data with names, the courts ruled we had to release it, and we have always been clear and consistent about our concerns.”⁵⁵ Despite the DOE’s self-victimizing, “the-court-made-us-do-it” mantra, the DOE was neither forced by the courts nor coerced by the news media organizations to release the teachers’ names.⁵⁶

III. LEGAL AND POLICY ARGUMENTS AGAINST THE NEW PUBLIC SHAMING

A. The Teacher Data Reports Should Have Been Exempted From Disclosure Under New York’s Freedom of Information Act

In her opinion, Justice Kern of the Supreme Court of New York wrote that the purpose of New York’s FOIL is “to promote disclosure by government but also to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL.”⁵⁷ Although an agency is required to release records to which no exemption applies,⁵⁸ it is within the agency’s discretion whether to withhold records to which an exemption applies.⁵⁹ The pertinent exemptions include “inter-agency or intra-agency materials which are not . . . statistical or factual tabulations or data”⁶⁰ and “records . . . that . . . if disclosed would constitute an unwarranted invasion of personal privacy.”⁶¹

55. *Id.*

56. In fact, a story by the Columbia Journalism Review reported that the DOE had actually dropped hints to some news reporters that their competitors had already submitted FOIL requests. Also, the speed at which the DOE responded to the FOIL requests raised some eyebrows. Typically, such requests take months to process and are the product of intense negotiations. Here, “it was service with a smile.” LynNell Hancock, *Tested: Covering Schools in the Age of Micro-Measurement*, COLUM. JOURNALISM REV. 6 (Mar./Apr. 2011), available at http://www.cjr.org/cover_story/tested.php?page=all (quoting Maura Walz, a reporter for GothamSchools.org).

57. *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 919 N.Y.S.2d 786, 788 (N.Y. Sup. Ct. 2011) (citing *Dairyalea Cooperative, Inc. v. Walkely*, 38 N.Y.2d 6 (N.Y. 1975)).

58. N.Y. PUB. OFF. LAW § 87(2) (2011) (“Each agency shall . . . make available for public inspection and copying all records”).

59. *Id.* (emphasis added).

60. *Id.* § 87(2)(g)(i).

61. *Id.* § 87(2)(b).

1. Intra-agency materials which are not statistical or factual tabulations of data

In establishing whether the TDRs constitute purely statistical or factual tabulations of data, one must define what it means for data to be “factual.” In *Gould v. New York City Police Department*,⁶² the New York Court of Appeals defined “factual data” as “objective information”⁶³ and held that police reports containing “names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators,” as well as “a checklist that indicates whether the victims and witnesses have been interviewed and shown photos” were objective and therefore not subject to exemption under FOIL.⁶⁴

The TDRs, which “are the result of layer upon layer of subjective determinations,”⁶⁵ are distinguishable from the purely objective and ministerial reports at issue in *Gould*. Despite the quantitative nature of the TDRs, the end result of which purports to “measure” teacher effectiveness, the “data” at issue is actually the result of a “myriad of subjective and material choices” that impact the scores of individual teachers.⁶⁶ For example, in deciding which variables to include and exclude in its value-added assessments, the DOE chose to ignore school-based factors, such as the condition of the schools, available resources, school policies, and school leadership—all of which have been proven to have significant impact on student gains.⁶⁷ The DOE’s decision to ignore school-based factors was a purely subjective determination that undoubtedly had a drastic impact on teachers’ scores.

Equally as subjective was the DOE’s arbitrary determination to report English language arts value-added results for elementary school teachers with ten or more students, but only report TDRs for middle school teachers with twenty students or more.⁶⁸ The story of Pascale Mauclair is a frustrating illustration as to how this subjective

62. *Gould v. N.Y.C. Police Dep’t*, 89 N.Y.2d 267 (N.Y. 1996).

63. *Id.* at 277 (“Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.”).

64. *Id.*

65. See Petitioner-Appellant’s Brief, *supra* note 29, at 20 (quoting testimony of Professor Henry Braun, an expert in educational research and measurement).

66. *Id.* at 21.

67. *Id.* at 23.

68. *Id.* at 22.

determination has already led to flawed results.⁶⁹ Mauclair, a sixth-grade ESL teacher, taught small, self-contained classes of recently arrived, non-English speaking immigrants. Given the fundamental statistical tenet that the smaller the sample size, the more unreliable the results, it is unsurprising that Mauclair was among the lowest ranked teachers in the city.⁷⁰ Despite the fact that the principal at Mauclair's school views Mauclair as a strong teacher with whom she would entrust the education of her own children,⁷¹ regretfully, it is the DOE's subjective determinations as to what constitutes teacher effectiveness—not the determinations of the teacher's direct supervisor—that have publicly tarnished the reputation of Mauclair, along with thousands of other educators.

Ultimately, the DOE made subjective determinations based on what it understood teacher effectiveness to mean and what factors should be measured. These subjective determinations were the basis for the DOE's "predictions" as to what each student's anticipated score would be. Thus, it was error for the First Department to assume that a number, simply because it is the product of a mathematical formula, is necessarily an objective fact subject to disclosure under New York's FOIL.

2. Records that if disclosed would constitute an unwarranted invasion of personal privacy

To determine if an unwarranted invasion of privacy would result from disclosure of agency records, a court must balance the "privacy interests at stake" against the "public interest in disclosure of the information."⁷² Such an unwarranted invasion of privacy is measured by "what would be objectionable to a reasonable person of ordinary

69. See Casey, *supra* note 50.

70. Pascale Mauclair was among the unlucky few targeted by the *New York Post*, whose reporters appeared at her door looking to interview her. Upon being told to leave, the reporters continued to ring Mauclair's bell and knock on her window all Saturday morning. *Id.*

71. *Id.*

72. *N.Y. Times Co. v. N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (N.Y. 2005). The privacy exception created by Section 87(2)(b) refers to Section 89(2), which provides a non-exhaustive list of the types of records that would constitute "unwarranted invasions of privacy" subject to exemption under Section 87(2)(b). *Id.* at 486. This list includes (a) employment histories or personal references of applicants for employment; (b) lists of names and addresses if such lists would be used for commercial or fund-raising purposes; and (c) information of a personal nature that when disclosed would result in economic or personal hardship to the subject party where such information is not relevant to the work of the agency requesting or maintaining it. N.Y. PUB. OFF. LAW § 89 (2011). This list, however, is inapplicable in the present case.

sensibilities.”⁷³ Additionally, in situations in which the public’s right to know would still be satisfied without disclosing personal information such as names and home addresses, courts have ordered the redaction of such identifying details.⁷⁴

The First Department concluded that “the [TDRs] concern information of a type that is of compelling interest to the public, namely, the proficiency of public employees in the performance of their job duties.”⁷⁵ Given the underlying policy of protecting the interests of parties that would be harmed by the government disclosure, however, the court’s application of the balancing test fails on several fronts. First, the court failed to give any weight to the teachers’ interest in avoiding the substantial harm that would immediately befall as a consequence of the serious and systematic flaws inherent in the TDRs, including the inevitability that the public would misconstrue and misuse the data.⁷⁶ Moreover, the host of inaccuracies contained in the TDRs is not only an affront to the teachers to whom they pertain, but it also undermines the degree to which the data is “compelling” to the public.⁷⁷ Indeed, the public disclosure of such indisputably flawed and misleading data ultimately undercuts the very purpose of FOIL: “to assist the public in formulating ‘intelligent, informed choices with respect to both the direction and scope of governmental activities.’”⁷⁸ TDRs, which are

73. *Empire Realty Corp. v. N.Y. State Div. of the Lottery*, 657 N.Y.S.2d 504, 507 (N.Y. App. Div. 1997) (citing *Dobranksi v. Houper*, 546 N.Y.S.2d 180 (N.Y. App. Div. 1989)).

74. *See, e.g., Harris v. City Univ. of N.Y., Baruch Coll.*, 495 N.Y.S.2d 175 (N.Y. App. Div. 1985) (compelling disclosure of *curricula vitae* of all faculty at Baruch College who were promoted to full professor during the preceding five years but requiring deletion of identifying information such as names, addresses and Social Security numbers); *United Fed’n of Teachers v. N.Y.C. Health & Hosps. Corp.*, 428 N.Y.S.2d 823, 825 (N.Y. 1980) (directing respondent to redact and delete all personal identifying details of grievances and grievance decisions “in order to balance the legitimate rights and expectations of privacy of the grievants against the legitimate interest of petitioner in obtaining disclosure thereof”).

75. *Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 928 N.Y.S.2d 701, 703 (N.Y. App. Div. 2011).

76. *Id.*

77. *See United Fed’n of Teachers, President Mulgrew Responds to Judge’s Ruling on Data Reports* (Jan. 10, 2011), <http://www.uft.org/press-releases/president-mulgrew-responds-judges-ruling-data-reports> (“The reports, which are largely based on discredited state tests, have huge margins of error and are filled with inaccuracies, will only serve to mislead parents looking for real information.”).

78. *See Petitioner-Appellant’s Reply Brief at 28, Mulgrew v. Bd. of Educ. of City Sch. Dist.*, 928 N.Y.S.2d 701 (N.Y. App. Div. 2011) (citing *Fink v. Lefkowitz*, 47 N.Y.2d 567 (N.Y. 1979)).

arguably unreliable and deceptive, do not assist the public in making well-informed choices.⁷⁹

Second, even accepting the court's decision to permit the release of the TDRs, the court could and should have fashioned a solution that would allow "the press to obtain the information they seek and the public interest . . . to be served without costing teachers their reputations and livelihoods."⁸⁰ A solution consisting of simple disclosure of the TDRs with teachers' names redacted would promptly serve the public's interest in "the proficiency of public employees in the performance of their job duties"⁸¹ no less than it would with the names included. Moreover, this solution would satisfy public interests without "linking known inaccurate and damaging information to people whose only vice was cooperation in a pilot project under an explicit promise of confidentiality."⁸²

Of course, this damage cannot be undone and no court can take back the professional harm done to the reputations of thousands of New York City teachers whose personal privacy has been invaded. As "value-added" assessments become more common and more popular as assessment tools in school districts throughout the country, the more important freedom of information laws will become.⁸³ Given the fact that "a majority of state freedom of information laws include some form of privacy exemption,"⁸⁴ and that, with few exceptions, the exemptions closely track the Federal Freedom of Information Act's sixth exemption,⁸⁵ there is hope that the lessons learned at the expense of New York City and Los Angeles teachers will resonate at the ground level in school districts nationwide.

79. *Id.*

80. Petitioner-Appellant's Brief, *supra* note 29, at 50-51.

81. *Mulgrew*, 928 N.Y.S.2d at 703.

82. Petitioner-Appellant's Brief, *supra* note 29, at 51.

83. *See* Ravitch, *supra* note 42 ("Impelled by Race to the Top and Secretary of Education Arne Duncan's No Child Left Behind waivers, teacher value-added ratings are rapidly spreading to other districts and states. And in these many other districts and states, the media will file requests for release of these ratings Wherever there are value-added ratings, you can be sure that there will be public disclosure of those ratings to the media.")

84. Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt From Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act*, 26 A.L.R. 4th 666 § 2a (2012).

85. 5 U.S.C. § 552(b)(6) (2012) (The Federal Freedom of Information Act privacy exemption excludes "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.")

B. Public Shaming of Teachers Will Hurt the Teaching Profession and Ultimately Students

Notwithstanding the myriad inaccuracies and mistakes inherent in the TDRs, the public ranking of teachers by name is simply bad education policy and will only hinder well-intentioned reform efforts.

At their core, public teacher ratings are shaming mechanisms.⁸⁶ No matter how accurate the ratings, “when teachers are graded on a curve, 50 percent of them will always wind up in the bottom half and 25 percent will always find themselves in the bottom quartile.”⁸⁷ The unsurprising result is that teacher morale will plummet. Some will leave the profession; others will think twice before entering it.⁸⁸ Respect for the profession, already dwindling, will continue to falter.⁸⁹ Parents might overreact as well. Some parents will undoubtedly demand new teachers for their children based on the TDRs alone, while others might move their children to new schools altogether.⁹⁰

Of course, by attaching such high stakes to students’ test scores, the public ranking of teachers will only amplify the shortcomings and problems associated with mass standardized testing generally.⁹¹ Teachers who “teach to the test” could be rewarded with higher rankings than those who stimulate their students with creative, interesting, and advanced projects and lessons.⁹² Young teachers whose principals make tenure decisions based on value-added data⁹³ will have little incentive to diversify their curricular focuses to cover

86. See Ravitch, *supra* note 42.

87. *Id.*

88. *Id.*

89. *Id.* It is by no means a stretch to envision the scenario in which a particularly rambunctious student with internet access looks up the ranking of his English or math teacher, goes to that teacher’s class the next day, and makes it a point to let that teacher know that he or she is one of the worst teachers in the city. While many teachers are typically well-trained and quite capable of handling student disrespect, there is certainly no reason to arm students with official “data” to support their teacher-directed insults. *Id.*

90. Anna M. Phillips, *Parents Have Mixed Views on Teacher Rankings*, SCHOOLBOOK (Feb. 27, 2011), <http://www.nytimes.com/schoolbook/2012/02/27/parents-have-mixed-views-on-teacher-rankings/>.

91. See LINDA M. MCNEIL, *CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS FOR STANDARDIZED TESTING 6* (2000) (arguing that the standardization of curricula undermines academic standards and limits the opportunities for children to learn at a “high standard”).

92. Zhao, *supra* note 30.

93. See Santos & Otterman, *supra* note 7.

topics or skills that are outside the scope of what is routinely tested.

Many of the best teachers will go unrecognized as a result of the public teacher ratings. After all, the best teachers are those who realize that their true “value added” lies not in their ability to prepare a student over the course of a school year to pass one test on one day, but in their ability and willingness to motivate, encourage, inspire, influence, mentor, advise, assure, reassure, comfort, correct, and listen to their students. Teachers like Rigoberto Ruelas,⁹⁴ who do much more than just teach math or English, should not be publicly shamed based on an assessment tool that measures only “one of multiple indicators of teacher effectiveness.”⁹⁵

C. New Approaches in Moving Forward

Just days before the DOE released its value-added rankings, philanthropist Bill Gates⁹⁶ wrote an op-ed that was published in the *New York Times* in which he criticized New York City’s decision to make those rankings public.⁹⁷ Gates advocated for more sophisticated personnel systems that incorporate multiple measures of teacher effectiveness, including “students’ feedback about their teachers and classroom observations by highly trained peer evaluators and principals.”⁹⁸ He stated that “[a] good personnel system encourages employees and managers to work together to set clear, achievable goals” and allows teachers to “get honest feedback and create a plan for improvement.”⁹⁹

Teachers are an indispensable part of education. As such, they must be fairly and routinely evaluated. Very few would disagree with education scholar Diane Ravitch’s assertion that incompetent

94. *See* Part I *supra*.

95. OVERVIEW, *supra* note 13, at 4.

96. Bill Gates is the co-founder and co-chair of the Bill & Melinda Gates Foundation, the stated goal of which is to “help all people lead healthy, productive lives.” Bill & Melinda Gates Found., *Foundation Fact Sheet*, ABOUT THE FOUNDATION (2012), <http://www.gatesfoundation.org/about/Pages/foundation-fact-sheet.aspx> (last visited Apr. 15, 2012). In the field of education, the Foundation’s top priority on the K-12 side “is helping schools implement a personnel system that improves the effectiveness of teaching, because research shows that effective teaching is the most important in-school factor in student achievement.” Bill Gates, *2012 Annual Letter From Bill Gates: U.S. Education*, BILL & MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/annual-letter/2012/Pages/home-en.aspx#useducation>.

97. Bill Gates, Op-Ed., *Shame is Not the Solution*, N.Y. TIMES, Feb. 22, 2012, at A27.

98. *Id.*

99. *Id.*

teachers who cannot teach and improve “should [not] be allowed to remain in the classroom.”¹⁰⁰ However, blaming and shaming teachers for low scores will not help teachers improve nor will it fix a sputtering economy, reduce poverty, or taper the escalation of income inequality.¹⁰¹

Instead, teachers should be evaluated by their principals, peers,¹⁰² and other experienced educators who can help struggling teachers become good teachers and good teachers become great teachers. Teachers, like students, can only improve if they are given specific feedback.¹⁰³ Publication of job performance data is not the solution because it fails to give teachers the specific feedback they require. In a profession as complex and challenging as teaching, real and lasting improvement can only be accomplished through constructive criticism, personalized evaluations, and honest feedback.¹⁰⁴

IV. CONCLUSION

“What the teacher is, is more important than what he teaches.”¹⁰⁵ The truth and beauty of this simple saying is often lost in an era in

100. Diane Ravitch, *No Student Left Untested*, NEW YORK REVIEW OF BOOKS BLOG (Feb. 21, 2012, 11:45 AM), http://www.nybooks.com/blogs/nyrblog/2012/feb/21/no-student-left-untested/?utm_medium=email&utm_campaign=February+21+2012&utm_content=February+21+2012+CID_de2c64c7a06e3bf166b06f89f274b365&utm_source=Email+marketing+software&utm_term=No+Student+Left+Untested.

101. *Id.*

102. *Id.*

103. *See* Gates, *supra* note 97.

104. Though much of this Note is dedicated to explaining the dangers of using value-added information in the assessment of teachers, I decline the opportunity to define what I believe the precise role of value-added data should be in such assessments. Although value-added data may have utility as only one of several indicators of teacher effectiveness, *see* Part I *supra*, overreliance on such data would be, as the DOE itself acknowledged, “irresponsible.” *See* OVERVIEW, *supra* note 13, at 6. Having already expounded at length upon the flaws inherent in the data, the hazards of publicly releasing the data, and what I believe to be the superior methods of teacher evaluation and assessment, *see* Part III *supra*, I will say only that I believe that schools and administrators have the duty to exercise the utmost caution in determining whether, and to what degree, value-added data will be used in evaluating teacher progress.

105. Karl Menninger, *Quotations about Teachers*, QUOTEGARDEN.COM (2011), <http://www.quotegarden.com/teachers.html>. Karl Menninger (1893-1990) was an American psychiatrist and a member of the family of psychiatrists that founded the Menninger Foundation and the Menninger Clinic in Topeka, Kansas. *Karl Menninger*, KANSAPEDIA: KANSAS HISTORICAL SOCIETY (2012), <http://www.kshs.org/kansapedia/karl-menninger/17218>.

which the two largest school districts in the United States¹⁰⁶ have turned calls for real education reform into an opportunity to scapegoat teachers for the many ills plaguing the state of K-12 education in the United States. In failing to prevent the DOE from disclosing the names and “value-added” rankings of 18,000 of its elementary and middle school English and math teachers, the First Department squandered a genuine opportunity to stick up for teachers and force the DOE to solve its problems productively and cooperatively. Instead, the court decided that the public’s interest in having access to the names of New York City school teachers—ranked according to the DOE’s admittedly flawed and subjective predictions—outweighed the teachers’ interests in their own reputational and professional dignity. In allowing the DOE to shame and embarrass its teachers, the profession will suffer, school morale will suffer, and, ultimately, students will suffer. It is imperative that other cities and school districts—especially those that have already started collecting “value-added” data¹⁰⁷—understand that, should they opt to release that information publicly, they risk losing the trust and cooperation of the single most important person in a child’s education: the teacher.

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106. The first- and second-largest school districts in the United States in terms of enrollment are New York City and Los Angeles Unified, respectively. THOMAS D. SNYDER ET AL., DIGEST OF EDUCATION STATISTICS 2008 146 (2009) (listing enrollment for the 100 largest school districts by enrollment size).

107. Calls for publicizing “value-added” data in other cities have already begun. In March 2012, the editorial board of the *Chicago Tribune* urged Illinois parents to demand that the state emulate New York City by publicizing individual teacher “value-added” ratings. See Gregory Michie, *What Value Is Added by Publicly Shaming Teachers?*, HUFFINGTON POST (Mar. 7, 2012), http://www.huffingtonpost.com/gregory-michie/what-value-is-added-by-pu_b_1325487.html.

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