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# THE QUEST FOR TEACHER QUALITY: EARLY LESSONS FROM RACE TO THE TOP AND STATE LEGISLATIVE EFFORTS REGARDING TEACHER EVALUATION

## INTRODUCTION

The dismal state of public education in the United States is widely acknowledged, and teachers have increasingly become scapegoats for the unconscionable systemic failure to sufficiently educate our youth.<sup>1</sup> Bolstering the argument that teachers are to blame is the shocking infrequency with which teachers are dismissed for incompetence.<sup>2</sup> This phenomenon, paired with infrequent but highly publicized stories of unquestionably incompetent educators drawing paychecks while sitting idle,<sup>3</sup> degrades the teaching profession and perpetuates the injustice of denying many American students an adequate public education.<sup>4</sup>

Yet, this systematic failure is not the fault of teachers, but rather the result of ineffective evaluation policies that have produced a deeply engrained practice of treating all teachers as if they are equally talented. Terminating an incompetent teacher is neither a novel idea nor a legal impossibility—yet it rarely occurs.<sup>5</sup> Frequently, teachers unions and the tenure system are asked to shoulder the blame. Critics from politicians to parents have argued that unions protect underperforming teachers and prevent districts from making changes to improve educational outcomes for students.<sup>6</sup> Specifically, opponents

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1. See Tom Crean, *Lessons of SB 7 Bill—Illinois Democrats' Assault on Teachers' Unions*, SOCIALIST ALTERNATIVE (June 9, 2011), <http://www.socialistalternative.org/news/article14.php?id=1615>; Howard Ryan, *Billionaires Target Teachers—And Take the Gloves Off in Illinois*, LABOR NOTES (Dec. 21, 2010), <http://labornotes.org/blogs/2010/12/billionaires-target-teachers%E2%80%94and-take-gloves-illinois>.

2. See *infra* notes 51–55 and accompanying text.

3. See Steven Brill, *The Rubber Room: The Battle over New York City's Worst Teachers*, NEW YORKER, Aug. 31, 2009, at 30. *The Rubber Room* describes the holding rooms that are home to teachers who have been removed from the classroom for disciplinary and performance reasons. *Id.* While their dismissal hearings await arbitration, the teachers receive full salaries. *Id.*

4. See *infra* notes 20–25 and accompanying text.

5. See Andrew J. Rotherham, *Fixing Teacher Tenure Without a Pass–Fail Grade*, TIME (Jan. 27, 2011), <http://www.time.com/time/nation/article/0,8599,2044529,00.html>.

6. *Are Teachers Unions to Blame for Failing Schools?, Intelligence Squared U.S.*, NPR (Mar. 23, 2010, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=125019386>.

of teachers unions claim that unions have negotiated protections for their members that make it difficult to remove ineffective teachers.<sup>7</sup>

The tenure system, despite accusations to the contrary, was not designed to protect ineffective teachers.<sup>8</sup> In reality, tenure is merely a legal commitment to procedural due process.<sup>9</sup> If a district wants to terminate a teacher, tenure obligates the district to provide notice of and a hearing on the grounds for termination.<sup>10</sup> Despite its infrequent occurrence, tenure does not prohibit a teacher from being dismissed.<sup>11</sup> However, the confusion surrounding teacher evaluation and the legal process of dismissal has created the belief, and occasionally the reality, that it is so costly and difficult to fire an ineffective teacher that administrators shy away from the process.<sup>12</sup> The true barrier to increasing performance standards for teachers and dismissing those who are truly incompetent is the widespread use of ineffective and unreliable procedures for teacher evaluation.<sup>13</sup> The use of inadequate teacher evaluation systems makes it difficult for school districts to identify ineffective, effective, or exceptional teachers.<sup>14</sup> If a district cannot identify a teacher as ineffective, it cannot pursue dismissal on grounds of incompetence because doing so would violate the requirements of procedural due process.<sup>15</sup> To remedy this problem, and ensure that only effective teachers are tasked with educating our youth, states must engage in comprehensive reform of teacher evaluation policies.<sup>16</sup>

Race to the Top offers hope that comprehensive reforms will take place and that public education in the United States will improve as a

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7. See, e.g., Transcript: *Don't Blame Teachers Unions for Our Failing Schools*, INTELLIGENCE SQUARED U.S. 1, 5 (Mar. 16, 2010), <http://intelligencesquaredus.org/images/debates/past/transcripts/teachers-unions.pdf>. In a public education debate hosted by Intelligence Squared, Terry Moe, a professor of education who has written extensively in opposition to teachers unions, claimed that teachers unions have fought for protections in labor contracts that "make it virtually impossible to get bad teachers out of the classroom." *Id.*

8. Perry Zirkel, *The Myth of Teacher Tenure*, WASH. POST (July 13, 2010, 6:30 AM), <http://voices.washingtonpost.com/answer-sheet/teachers/the-myth-of-teacher-tenure.html>.

9. *Id.*

10. *Id.* Generally accepted grounds for termination include incompetency, insubordination, and immorality. *Id.*

11. *Id.*

12. See M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://www.time.com/time/nation/article/0,8599,1859505,00.html> (noting that the costs of dismissing a teacher can total nearly \$100,000).

13. DANIEL WEISBERG ET AL., THE NEW TEACHER PROJECT, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS 2 (2d ed. 2009), available at <http://widgeteffect.org/downloads/TheWidgetEffect.pdf>.

14. *Id.*

15. *Id.*

16. *Id.* at 7.

result.<sup>17</sup> By providing financial incentives for states to create high-quality, comprehensive teacher evaluation systems, Race to the Top motivates states to create high standards for teacher performance and to support teachers in improving their practice.<sup>18</sup> The lessons from the early winners of Race to the Top demonstrate that prioritizing teacher effectiveness is a critical but complex undertaking.<sup>19</sup> The experiences of the winning states provide standards and best practices that other states should adopt to create manageable and credible evaluation systems, which would help ensure that American students have equal access to a high-quality public education.

This Comment asserts that states seeking to improve education for students must create legislation that prioritizes measures to identify and increase teacher effectiveness. States must also implement strategies to attract and retain highly qualified teachers. Additionally, this Comment argues that both union representation and the tenure system can be leveraged to entice highly qualified candidates to the profession by offering job security and career advancement. Finally, this Comment advocates for a streamlined teacher evaluation and dismissal process that honors the due process rights of teachers while minimizing the procedural burden borne by administrators. This model will ensure highly effective teachers—the key factor that has consistently led to higher student achievement. As a result, students in public schools will truly have access to high-quality instruction, and the achievement gap between students with access to privilege and students without can finally be narrowed.

## II. BACKGROUND

Public education in the United States is in a state of crisis. Nationwide, only about 72% of students graduated from high school on time in 2008.<sup>20</sup> In urban districts, that number drops significantly—only 59% in New York City public schools and 55.8% in Chicago public schools in 2010.<sup>21</sup> Among those students who manage to graduate,

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17. See generally U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. Race to the Top is a competitive grant program administered by the U.S. Department of Education. *Id.* Comprehensive reform to teacher evaluation is one of its highest priorities. *Id.* at 2.

18. See *infra* notes 186–216 and accompanying text.

19. See *infra* notes 186–216 and accompanying text.

20. Jason Koebler, *National High School Graduation Rates Improve*, U.S. NEWS (June 13, 2011), <http://www.usnews.com/education/blogs/high-school-notes/2011/06/13/national-high-school-graduation-rates-improve>.

21. Rachel Monahan, *New York City High School Graduation Rate Up, but 75% of Students Not Prepared for College*, N.Y. DAILY NEWS (June 14, 2011, 4:00 AM), [http://articles.nydailynews.com/2011-06-14/local/29675551\\_1\\_graduation-rate-english-regents-regents-exams](http://articles.nydailynews.com/2011-06-14/local/29675551_1_graduation-rate-english-regents-regents-exams); Cassan-

few possess the baseline skills needed to succeed in college.<sup>22</sup> Further, when a young American is able to clear these hurdles and receive a college degree, she is still likely to lag behind her international counterparts.<sup>23</sup> These dismal statistics affect not only our nation's youth, but also the health of our nation's economy.<sup>24</sup> In the highly competitive global marketplace, American college graduates cannot compete with international graduates who received superior public educations.<sup>25</sup>

This Part examines how the failure to address teacher effectiveness has contributed to the dismal state of public education. First, it describes the current problems created by ineffective teacher evaluation systems, as well as recent legislative attempts to improve teacher effectiveness.<sup>26</sup> Second, it summarizes the challenges regarding teacher evaluation and dismissal in light of due process concerns.<sup>27</sup>

### A. *Teacher Quality and the "Widget Effect"*

Ineffective teacher evaluation procedures have resulted in several problems that undermine the efficacy of public education. By failing to meaningfully evaluate teachers, school districts allow ineffective teachers to remain in the classroom, render themselves powerless to remove them, and deprive students of quality instruction.<sup>28</sup> This failure prevents administrations from identifying high-quality teachers

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dra West, *For the Record: High School Graduation Rates*, CATALYST CHI. (July 14, 2011), <http://www.catalyst-chicago.org/notebook/2011/07/14/record-high-school-graduation-rates>.

22. See Monahan, *supra* note 21 (stating that although New York City's high school graduation rate increased, only 25% of graduates possessed the skills to adequately prepare them for college).

23. Cf. *U.S. Falls in World Education Rankings, Rated 'Average'*, HUFFINGTON POST, [http://www.huffingtonpost.com/2010/12/07/us-falls-in-world-education-rankings\\_n\\_793185.html](http://www.huffingtonpost.com/2010/12/07/us-falls-in-world-education-rankings_n_793185.html) (last updated Oct. 1, 2012, 10:28 AM). A three-yearly international study, known as the OECD Programme for International Student Assessment (PISA) report, compares the knowledge and skills of fifteen-year-olds in seventy countries around the world. *Id.* This report ranked the United States fourteenth out of thirty-four countries for reading skills, seventeenth for science, and a below-average twenty-fifth for mathematics. *Id.*

24. See ALLIANCE FOR EXCELLENT EDUC., *THE HIGH COST OF HIGH SCHOOL DROPOUTS: WHAT THE NATION PAYS FOR INADEQUATE HIGH SCHOOLS 1* (2007), available at [www.all4ed.org/files/archive/publications/HighCost.pdf](http://www.all4ed.org/files/archive/publications/HighCost.pdf) (explaining that if the high school students who dropped out instead of graduating as part of the class of 2007 had actually graduated, they would have contributed an additional \$329 billion in income to the national economy over the course of their lifetimes).

25. See generally Eric A. Hanushek & Paul E. Peterson, *Why Can't American Students Compete with the Rest of the World?*, NEWSWEEK (ATLANTIC EDITION), Sept. 5, 2011.

26. See *infra* notes 28–35, 60–67 and accompanying text.

27. See *infra* notes 115–38 and accompanying text.

28. See generally WEISBERG ET AL., *supra* note 13, at 2 (“[T]enured teachers are identified as ineffective and dismissed from employment with exceptional infrequency.”).

and leveraging their skills to maximize student achievement.<sup>29</sup> Finally, in the absence of meaningful evaluation procedures, all teachers are treated as equals, thus devaluing true excellence and inhibiting growth.<sup>30</sup>

The New Teacher Project (TNTP)<sup>31</sup> terms this failure to identify teacher quality as “The Widget Effect.”<sup>32</sup> The Widget Effect is “the tendency of school districts to assume classroom effectiveness is the same from teacher to teacher,” leading them to treat teachers as equivalent, “interchangeable parts.”<sup>33</sup> Yet teachers clearly impact student achievement in different ways.<sup>34</sup> Multiple studies have “shown that there are large differences in effectiveness from one teacher to another and that these differences can have a lifelong impact on students.”<sup>35</sup>

Following the passage of No Child Left Behind (NCLB), policymakers attempted to address the quality of the teaching force by requiring specific degrees, pre-service tests, and state certification.<sup>36</sup> However, once teachers were hired, little was done to differentiate them by ability.<sup>37</sup> Tenure was routinely awarded after two or three years and very few teachers were dismissed.<sup>38</sup> Both critics and proponents of tenure acknowledge that the current system demands reform.<sup>39</sup> Albert Shanker, the late, long-time president of the American Federation of Teachers, warned that “districts paid too little attention to the quality of teaching when making tenure decisions.”<sup>40</sup> Thus, it is both conceivable and likely that poor quality teachers have achieved

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29. *See id.*

30. *See id.*

31. *About TNTP*, TNTP, <http://www.tntp.org/about-us> (last visited Feb. 21, 2013) (“TNTP is a national nonprofit committed to ending the injustice of educational inequality. Founded by teachers in 1997, TNTP works with schools, districts and states to provide excellent teachers to the students who need them most and advance policies and practices that ensure effective teaching in every classroom.”).

32. WEISBERG ET AL., *supra* note 13, at 4.

33. *Id.*

34. *See generally* TNTP, ‘MET’ MADE SIMPLE: BUILDING RESEARCH-BASED TEACHER EVALUATIONS (2012), available at [http://tntp.org/assets/documents/TNTP\\_METMadeSimple\\_2012.pdf](http://tntp.org/assets/documents/TNTP_METMadeSimple_2012.pdf).

35. *Id.* at 1.

36. ROBERT GORDON ET AL., THE HAMILTON PROJECT, THE BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 5 (2006), available at [www.brookings.edu/views/papers/200604hamilton\\_1.pdf](http://www.brookings.edu/views/papers/200604hamilton_1.pdf).

37. *Id.*

38. *Id.*

39. *See generally* JOAN BARATZ-SNOWDEN, CTR. FOR AM. PROGRESS, FIXING TENURE: A PROPOSAL FOR ASSURING TEACHER EFFECTIVENESS AND DUE PROCESS (2009), available at [http://www.americanprogress.org/issues/2009/06/pdf/teacher\\_tenure.pdf](http://www.americanprogress.org/issues/2009/06/pdf/teacher_tenure.pdf).

40. *Id.* at 7.

tenure.<sup>41</sup> Outlandish stories of teachers maintaining employment despite allegations of serious misconduct or incompetence have received widespread attention.<sup>42</sup> The allegation that incompetent teachers continue to teach in public school classrooms throughout the country is bolstered by statistics showing that through 2011, very few teachers received negative evaluations and even fewer teachers were dismissed.<sup>43</sup>

A potentially premature or indiscriminate award of tenure is not the only factor that allows an ineffective teacher to remain in the classroom. Lack of both evaluation expertise and legal knowledge also leads administrators to contribute to the Widget Effect.<sup>44</sup> Evidence suggests that administrators, who typically bear sole responsibility for carrying out teacher evaluations, are not sufficiently trained on evaluation procedures and their related legal responsibilities.<sup>45</sup> At Harvard's 1994 and 1995 summer institute on education law, a group of school administrators and attorneys received low scores on a quiz assessing legal knowledge related to teacher evaluation.<sup>46</sup> Similarly, at a Connecticut professional development conference for school administrators, the administrators engaged in a hypothetical case scenario concerning teacher evaluation and then attempted to predict the outcome of the case.<sup>47</sup> One hundred administrators voted unanimously, and erroneously, that the school district had lost.<sup>48</sup> Finally, in the twelve districts surveyed in *The Widget Effect*, only 51% of administrators claimed that they had an adequate level of training in how to conduct an effective evaluation.<sup>49</sup>

This practice of underutilizing evaluation systems and awarding all teachers the same rating is well documented.<sup>50</sup> A 2009 study revealed that in districts that used binary ratings, rating teachers either as satisfactory or unsatisfactory, more than 99% of teachers were rated as

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41. *See id.*

42. *See Brill, supra* note 3.

43. *See infra* notes 148–51 and accompanying text.

44. *See Perry Zirkel, Legal Boundaries for Performance Evaluation of Public School Professional Personnel*, 172 *EDUC. L. REP.* 1, 3 (West 2003); *see also WEISBERG ET AL., supra* note 13, at 20.

45. *See Zirkel, supra* note 44 at 3 (“As an overlapping matter, the knowledge base of the applicable legal requirements among those responsible for the evaluation of professional personnel in the public schools is limited, not being clearly cognizant of legal requirements as compared with professional norms.”).

46. *Id.*

47. *Id.*

48. *Id.*

49. WEISBERG ET AL., *supra* note 13, at 5, 22.

50. *See id.* at 6.

satisfactory.<sup>51</sup> In the few surveyed districts that used multi-tiered rating systems, 94% of teachers were rated in the top two categories and less than 1% were rated unsatisfactory.<sup>52</sup> Yet in this same study, both “teachers and administrators agree[d] that there [was] a small but significant subset of teachers who perform[ed] poorly.”<sup>53</sup> Furthermore, an overwhelming majority of teachers and administrators (68% and 91%, respectively) believed that dismissing poor performing teachers was important to maintaining high-quality instructional teams.<sup>54</sup> Nevertheless, these ineffective teachers continued to teach.<sup>55</sup>

Poorly designed evaluation systems, inadequate training, and the accepted practice of awarding tenure to virtually all teachers have created the Widget Effect.<sup>56</sup> The Widget Effect thus leads excellent teachers to be valued professionally at the same exact level as their underperforming peers.<sup>57</sup> “In its denial of individual strengths and weaknesses, [the Widget Effect] is deeply disrespectful to teachers.”<sup>58</sup> Moreover, it is thoroughly detrimental to students in public schools due to “its indifference to instructional effectiveness.”<sup>59</sup>

### B. *Highly Qualified Versus Highly Effective*

The implications of the Widget Effect caused policymakers to rethink how they could use teacher evaluation to demand and enhance teacher quality and improve outcomes for students. In recent decades, federal and state legislation defined teacher quality through certificate or credential programs.<sup>60</sup> Indeed, NCLB demanded that states create measures to place “highly qualified teachers” in classrooms.<sup>61</sup> Under NCLB, “highly qualified” merely meant that a teacher had obtained full state credentials.<sup>62</sup> Furthermore, states

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51. *Id.*

52. *Id.*

53. *Id.* at 16.

54. *Id.*

55. See WEISBERG ET AL., *supra* note 13, at 6.

56. *Id.*

57. *Id.*

58. *Id.* at 4.

59. *Id.*

60. GORDON ET AL., *supra* note 36, at 5.

61. No Child Left Behind Act of 2001, 20 U.S.C. § 7801(23) (2006); see also 34 C.F.R. § 200.56 (2012).

62. See 20 U.S.C. § 7801(23).

A teacher described in § 200.55(a) and (b)(1) is a “highly qualified teacher” if the teacher meets the requirements in paragraph (a) and paragraph (b), (c), or (d) of this section.

(a) *In general.* (1) Except as provided in paragraph (a)(3) of this section, a teacher covered under § 200.55 must—



could bypass this minimal standard via a loophole in the NCLB legislation that allowed states to use emergency certification for teachers in high-need subject areas.<sup>63</sup>

In the years following the passage of NCLB, it became apparent that establishing credential-based standards was insufficient with regards to increasing student achievement.<sup>64</sup> “Highly qualified” teachers were not necessarily highly effective.<sup>65</sup> Thus, the focus on education reform narrowed toward defining and assessing teacher ef-

(i) Have obtained full State certification as a teacher, which may include certification obtained through alternative routes to certification; or

(ii)(A) Have passed the State teacher licensing examination; and

(B) Hold a license to teach in the State.

34 C.F.R. § 200.56.

63. See 20 U.S.C. § 7801(23).

(2) A teacher [is considered highly qualified] if the teacher—

(i) Has fulfilled the State’s certification and licensure requirements applicable to the years of experience the teacher possesses; or

(ii) Is participating in an alternative route to certification program under which—

(A) The teacher—

(1) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

(2) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(3) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

(4) Demonstrates satisfactory progress toward full certification as prescribed by the State; and

(B) The State ensures, through its certification and licensure process, that the provisions in paragraph (a)(2)(ii) of this section are met.

34 C.F.R. § 200.56.

This second provision allows states to create or partner with “alternative” certification programs, such as Teach for America. See generally Julian Vasquez Heilig et al., *Alternative Certification and Teach for America: The Search for High Quality Teachers*, 20 KAN. J.L. & PUB. POL’Y 388 (2011). These programs bypass the traditional route of studying education at a four-year university, student teaching for a semester or a school year, and receiving teaching certification as a component of an undergraduate or graduate degree. *Id.* at 392. Instead, in alternative certification programs, which are often highly selective, individuals who have not studied education are permitted to receive emergency certification to teach in high-need areas or high-needs schools. *Id.* at 390. These teachers are often sent to the classroom with only five weeks of preparation. See *id.* at 392. However, under NCLB they are “highly qualified.” *Id.* at 389–90.

64. “A growing body of research . . . suggests that . . . certification of teachers bears little relationship to teacher effectiveness (measured by impacts of student achievement).” GORDON ET AL., *supra* note 36.

65. “To put it simply, teachers vary considerably in the extent to which they promote student learning, but whether a teacher is certified or not is largely irrelevant to predicting his or her effectiveness.” *Id.* at 7.

fectiveness.<sup>66</sup> Unfortunately, defining and identifying teacher effectiveness also presents significant challenges.<sup>67</sup>

Throughout the twentieth century, determining whether or not a teacher was effective involved the purely subjective judgment of an administrator.<sup>68</sup> A good teacher was thought to possess certain observable characteristics, such as an open mind, a positive attitude, patience, dedication, flexibility, and high expectations for her students.<sup>69</sup> For years, administrators observed teachers and subjectively determined whether or not a teacher possessed these traits.<sup>70</sup> Those observations formed the foundation of a teacher's evaluation.<sup>71</sup> But, over recent decades, there has been a movement to both sophisticate these subjective measures and introduce objective measures into evaluations.<sup>72</sup> More recently, observations have become much more specific and comprehensive.<sup>73</sup> Research-based, multi-faceted observation forms are now standard.<sup>74</sup> Modern observational tools, such as Charlotte Danielson's Framework for Teaching, have been subjected to validation testing, pilot studies, and ongoing modifications.<sup>75</sup> The data these tools generate is far more detailed and reliable than that produced by their predecessors.<sup>76</sup> Yet for many policymakers this data is not enough.<sup>77</sup>

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66. U.S. DEP'T OF EDUC., *supra* note 17, at 9 (noting that creation of "rigorous, transparent, and fair evaluation systems for teachers" was a key criterion in the Race to the Top rubric).

67. See BILL & MELINDA GATES FOUND., MET PROJECT: DANIELSON'S FRAMEWORK FOR TEACHING FOR CLASSROOM OBSERVATIONS 3 (2010), available at [http://metproject.org/resources/Danielson%20FFT\\_10\\_29\\_10.pdf](http://metproject.org/resources/Danielson%20FFT_10_29_10.pdf).

68. Cf. Jonah E. Rockoff & Cecilia Speroni, *Subjective and Objective Evaluations of Teacher Effectiveness: Evidence from New York City*, 18 LAB. ECON. 687, 688 & n.1 (2011).

69. *5 Traits of Effective Teachers*, CHI. TRIB. (Nov. 7, 2011), <http://www.chicagotribune.com/classified/jobs/chi-teaching-habits-education-careers-20111107,0,4183936.story>.

70. Cf. Rockoff & Speroni, *supra* note 68, at 688 & n.1.

71. Cf. *id.*

72. Cf. *id.* at 688. See also *infra* notes 83–97 and accompanying text.

73. See generally Rockoff & Speroni, *supra* note 68 (arguing for an evaluation system that incorporates both subjective and objective observations of effectiveness).

74. See Aaron Pallas, *Reasonable Doubt on Teacher Evaluation*, WASH. POST (Feb. 8, 2012, 4:00 AM), [http://www.washingtonpost.com/blogs/answer-sheet/post/reasonable-doubt-on-teacher-evaluation/2012/02/07/gIQACKuzxQ\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/reasonable-doubt-on-teacher-evaluation/2012/02/07/gIQACKuzxQ_blog.html) (noting that Charlotte Danielson's Framework for Teaching (FFT) and Robert Pianta's Classroom Assessment Scoring System are widely adopted observation tools, which involve highly detailed rubrics that assess observable competencies across multiple categories); see also BILL & MELINDA GATES FOUND., *supra* note 67, at 2 (noting the detail of the FFT as an instrument of teacher evaluation).

75. See BILL & MELINDA GATES FOUND., *supra* note 67, at 3.

76. See generally *id.*

77. See, e.g., Rockoff & Speroni, *supra* note 68, at 688.

Identifying and increasing teacher effectiveness is a critical step to increase student achievement in American public schools.<sup>78</sup> In 2006, researchers at the Brookings Institution analyzed Los Angeles public school data and concluded that teacher effectiveness was the strongest predictor of individual student achievement.<sup>79</sup> In fact, the Brookings Report determined that “having a top-quartile teacher rather than a bottom-quartile teacher four years in a row would be enough to close the black–white test score gap.”<sup>80</sup> This significant finding has heavily shaped education policy over the last several years.<sup>81</sup>

Several current themes in education reform can be traced to the Brookings Report. The report lobbied for a “value-added” component in teacher evaluation, merit pay for effective teachers, and tenure reforms, each of which has created contentious debate among and between legislators, educators, and school administrators.<sup>82</sup> Value-added analysis is a particularly confusing and controversial method of assessing teacher effectiveness.<sup>83</sup> In essence, value-added analysis attempts to isolate the effect a teacher has on an individual student’s achievement, as measured by standardized test scores.<sup>84</sup> To complete the analysis, statisticians look at an individual student’s past standardized test scores and use that information to predict the student’s future test scores.<sup>85</sup> “The difference between the prediction and students’ actual scores each year is the estimated ‘value’ that the teacher added—or subtracted.”<sup>86</sup>

Value-added analysis was a potentially groundbreaking tool for measuring teacher effectiveness.<sup>87</sup> It is the only purely objective measure to date.<sup>88</sup> Yet value-added analysis is a divisive concept.<sup>89</sup> Some

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78. See BILL & MELINDA GATES FOUND., *supra* note 67, at 4; see also WEISBERG ET AL., *supra* note 13, at 3.

79. See GORDON ET AL., *supra* note 36, at 7–8; see also BARATZ-SNOWDEN, *supra* note 39, at 1 (“Studies have shown that teacher quality is the most important in-school factor related to student academic achievement.”).

80. GORDON ET AL., *supra* note 36, at 8.

81. See BARATZ-SNOWDEN, *supra* note 39, at 1.

82. See *infra* notes 186–216 and accompanying text.

83. See Teresa Watanabe, *LAUSD Tackles a Tough Formula*, L.A. TIMES, Mar. 28, 2011, at A1; see also Jason Felch & Jason Song, *Superintendent Spreads the Gospel of ‘Value-Added’ Teacher Evaluations*, L.A. TIMES (Oct. 18, 2009), <http://www.latimes.com/news/local/la-me-teacher-eval18-2009oct18,0,5822570,full.story>.

84. Watanabe, *supra* note 83.

85. *Id.*

86. *Id.*

87. See *id.*

88. Cf. Rockoff & Speroni, *supra* note 68, at 687–88. Prior to the development of value-added analysis, teacher effectiveness was gauged through observations by administrators, requiring a level of subjective judgment.

89. See Watanabe, *supra* note 83. But see Felch & Song, *supra* note 83.

critics question the reliability of value-added analysis, given that a student's standardized test score is influenced by several variables, of which teacher effectiveness is merely one.<sup>90</sup> These other factors include class size, curriculum, instructional time, resources, home and community supports, health, attendance, peer culture, and prior educational experience, amongst others.<sup>91</sup> Additional complications involve factoring in additional variables, such as whether a student is an English language learner or transferred schools in the middle of the year.<sup>92</sup> Another criticism is that there is no universally accepted formula with which to measure a teacher's effectiveness, and different formulas produce different results.<sup>93</sup>

In addition, there are concerns about errors in the application of the analysis.<sup>94</sup> In New York City, for example, some teachers found critical errors in their value-added reports: several teachers received scores for students they had never met or subjects they never taught.<sup>95</sup> Finally, even if value-added analysis were error free in both design and application, it could not measure every teacher's effectiveness because most teachers in the United States teach subjects that are not assessed via standardized tests.<sup>96</sup>

### C. *Race to the Top*

Despite its many challenges and complications, value-added analysis is now a prominent feature of teacher evaluation in several dis-

90. See Watanabe, *supra* note 83; see also Valerie Strauss, *Getting Teacher Evaluation Right*, WASH. POST (Sept. 15, 2011, 3:35 PM), [http://www.washingtonpost.com/blogs/answer-sheet/post/getting-teacher-evaluation-right/2011/09/15/gIQAPzs9UK\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/getting-teacher-evaluation-right/2011/09/15/gIQAPzs9UK_blog.html).

91. Strauss, *supra* note 90.

92. Watanabe, *supra* note 83. Perhaps even more concerning are the ethical and moral questions raised by the value-added analysis, such as whether race or poverty should be factored into the formula. See *id.* Both demographic identifiers have been determined to "affect achievement," but not to "determine or predict it." *Id.*

93. *Id.*

94. The president of the Houston Federation of Teachers claims that the formulas are unreliable and difficult to communicate with teachers. *Id.* In fact, the general formula used in Houston is the "linear mixed model," which consists of symbols and letters more than eighty characters long and is considered doctorate-level math:

$$y = X\beta + Zv + \gamma \text{ where } \gamma \text{ is a } p\text{-by-1 vector of fixed effects; } X \text{ is an } n\text{-by-}p \text{ matrix; } v \text{ is a } q\text{-by-1 vector of random effects; } Z \text{ is an } n\text{-by-}q \text{ matrix; } E(v) = 0, \text{Var}(v) = G; E(\gamma) = 0, \text{Var}(\gamma) = R; \text{Cov}(v, \gamma) = 0. } V = \text{Var}(y) = \text{Var}(y - X\beta) = \text{Var}(Zv + \gamma) = ZGZ^T + R.$$

*Id.*

95. *Id.*

96. Andrew J. Rotherham, *Rating Teachers: The Trouble with Value-Added Data*, TIME (Sept. 23, 2010), <http://www.time.com/time/nation/article/0,8599,2020867,00.html#ixzz1dvH75kZI>.

tricts.<sup>97</sup> Value-added analysis has also played a key role in Race to the Top.<sup>98</sup> Congress enacted Race to the Top as a component of the American Recovery and Reinvestment Act of 2009 (ARRA),<sup>99</sup> which created a \$4.35 billion fund for the program.<sup>100</sup> Race to the Top, a competitive grant program, seeks to “encourage and reward States that are creating the conditions for education innovation and reform . . . in four core education reform areas.”<sup>101</sup> The objective given the most weight in the federal rubric was whether a plan contained steps to create “Great Leaders and Great Teachers.”<sup>102</sup> To win Race to the Top funds, a state had to create legislation to identify and improve teacher effectiveness.<sup>103</sup> Though Race to the Top guidelines do not explicitly mention “value-added analysis,” many state legislators determined that a requirement to include some form of value-added analysis was implicit.<sup>104</sup> Indeed, the criteria displayed a bias towards a value-added model.<sup>105</sup> States were encouraged to take the following actions:

- (ii) Design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effec-

97. See Felch & Song, *supra* note 83. In addition to Los Angeles and New York City, value-added analysis has been used as a measure of teacher effectiveness in Houston, Texas; Williamson County, Tennessee; and across the state of North Carolina. *Id.*

98. *See id.*

99. U.S. DEP’T OF EDUC., *supra* note 17, at 2.

100. *Id.*

101. *Id.*

102. The “Overview of Program and Points” shows the distribution of points awarded to each component of state plans. *Id.* at 3. A total of 500 points are available between six categories of selection criteria and one priority. *Id.* One hundred and thirty-eight of these points are assigned to the category entitled “Great Teachers and Great Leaders.” *Id.* This means that nearly 28% of the criteria related directly to a state’s plan to assess and improve teacher effectiveness and to use that data to equally distribute effective teachers. *Id.*

103. *See id.* Within the “Great Teachers and Great Leaders” category, the most highly prioritized element was identifying and improving teacher effectiveness:

D. Great Teachers and Leaders (138 points)

(D)(1) Providing high-quality pathways for aspiring teachers and principals (21 points)

(D)(2) Improving teacher and principal effectiveness based on performance (58 points)

(D)(3) Ensuring equitable distribution of effective teachers and principals (25 points)

(D)(4) Improving the effectiveness of teacher and principal preparation programs (14 points)

(D)(5) Providing effective support to teachers and principals (20 points).

*Id.* (emphasis added).

104. Nearly all states competing for Race to the Top funds included some form of value-added analysis in their legislation. See NAT’L COUNCIL ON TEACHER QUALITY, STATE OF THE STATES: TRENDS AND EARLY LESSONS ON TEACHER EVALUATION AND EFFECTIVENESS POLICIES 5–8 (2011) [hereinafter NCTQ], available at [www.nctq.org/p/publications/docs/nctq\\_stateOfTheStates.pdf](http://www.nctq.org/p/publications/docs/nctq_stateOfTheStates.pdf).

105. See U.S. DEP’T OF EDUC., *supra* note 17, at 9.

tiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement; . . .

(iii) Conduct annual evaluations of teachers and principals that include timely and constructive feedback; as part of such evaluations, provide teachers and principals with data on student growth for their students, classes, and schools . . . .<sup>106</sup>

To secure Race to the Top funds, the legislation required states to use teacher evaluations, including student growth data, to inform decisions regarding compensation, retention, promotion, and tenure.<sup>107</sup> The legislation also encouraged states to use these evaluations to remove ineffective teachers, both tenured and untenured, provided the teachers were given ample time to improve their performance and the removal decisions were “made using rigorous standards and streamlined, transparent, and fair procedures.”<sup>108</sup> Thus, in order to win the “Race,” states had to create evaluation policies that complied with due process requirements.<sup>109</sup>

### III. ANALYSIS

The historically inadequate process of teacher evaluation has indisputably created an established practice of treating teachers as equivalent, interchangeable parts, rather than individual professionals with varying levels of competence and expertise.<sup>110</sup> This Part argues that, despite the prevalence of meaningless evaluation procedures, the ample evidence demonstrates that states, by working in concert with teacher leadership and school administration, can create legislation that values teacher effectiveness while honoring due process rights.<sup>111</sup> This Part provides an analysis of due process rights related to teacher evaluation and argues that inadequate evaluation policies, rather than the tenure system, have prevented efficient removal of ineffective teachers.<sup>112</sup> Next, this Part evaluates recent state efforts to improve teacher evaluation systems while preserving due process rights.<sup>113</sup> Finally, this Part synthesizes the lessons of recent state legislation and offers recommendations for future education policy.<sup>114</sup>

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106. *Id.*

107. *Id.*

108. *Id.*

109. *See infra* notes 115–46 and accompanying text.

110. WEISBERG ET AL., *supra* note 13, at 2.

111. *See infra* notes 124–53 and accompanying text.

112. *See infra* notes 115–46 and accompanying text.

113. *See infra* notes 154–216 and accompanying text.

114. *See infra* notes 223–68 and accompanying text.

A. *Due Process and the Myth of Lifetime Employment*

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving individuals of “life, liberty or property without due process of law.”<sup>115</sup> The Supreme Court has determined that this clause contains both substantive and procedural elements: “[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.”<sup>116</sup> Substantive due process protects individuals from arbitrary and irrational government actions, regardless of whether the procedure used is fair.<sup>117</sup> Procedural due process, on the other hand, guarantees individuals an appropriate procedure prior to government deprivation of a protected interest in life, liberty, or property.<sup>118</sup> In the case of procedural due process, the deprivation is permitted so long as it is affected in accordance with sufficiently accurate and trustworthy procedures.<sup>119</sup>

The right to procedural due process stems from the possession of a protected interest and protects that interest from erroneous government deprivation.<sup>120</sup> Specifically, states create a property interest in public employment when legislation entitles an employee to maintain employment during satisfactory performance and specifies a criteria and procedure for dismissal.<sup>121</sup> Tenure provisions, which are codified by most states, create a property interest by (1) guaranteeing employment to teachers who receive satisfactory ratings and fulfill other statutory obligations (the substantive right) and (2) specifying criteria and procedures for dismissal when performance is unsatisfactory (the procedural right).<sup>122</sup> It follows, then, that a tenured teacher is entitled to procedural due process if the state, or its agent (a school district), seeks to deprive that teacher of her property right in employment.<sup>123</sup>

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115. U.S. CONST. amend. XIV, § 1.

116. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

117. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

118. *Loudermill*, 470 U.S. at 542.

119. *See id.* at 542–43.

120. *Id.* at 541–42.

121. *See id.* at 538–42.

122. *See* MICHEAL IMBER & TYLL VAN GEEL, *A TEACHER'S GUIDE TO EDUCATION LAW* 221 (3d ed. 2005).

123. *Id.* In contrast, a property interest is not definitively created for probationary or non-tenured teachers. *Id.* As a result of a state or district practice of continued employment an interest may be implied, but the teacher would bear the burden of proving that she has a legitimate claim of entitlement to continued employment. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Despite the widespread public misconception that tenure provisions grant teachers lifetime employment, the creation of a property interest and the corresponding right to procedural due process does not guarantee such an entitlement.<sup>124</sup> The existence of such an interest merely guarantees the tenured teacher the right to a procedure, which ensures that her school district does not deprive her of that interest without justification.<sup>125</sup> In fact, as states create the property interest through tenure provisions, they simultaneously create the procedure by which a school district can deprive a teacher of those interests.<sup>126</sup>

### B. *How Much Process Is Due?*

The scope of procedure, and the confusion surrounding it, has created the conditions under which the misconceptions about tenure have thrived.<sup>127</sup> The Supreme Court ruled that to determine what type of process is due, a court must balance competing interests: the private interest in the property against the public interest in the deprivation.<sup>128</sup> Regarding dismissal of a teacher, the balancing test compares the private interest of the teacher in maintaining employment against the public interests of providing effective public education and minimizing administrative burdens.<sup>129</sup> An additional factor, the risk of erroneous deprivation, also weighs into the analysis.<sup>130</sup>

The essential principle of procedural due process is that deprivation of life, liberty, or property must be preceded by notice and an opportunity for a hearing that is tailored to the interests at stake.<sup>131</sup> The Supreme Court has consistently recognized the interest in maintaining employment as a significant and carefully guarded property interest.<sup>132</sup> Thus, the opportunity for a hearing must be tailored to this interest. Also, because dismissals for cause often involve factual dis-

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124. Zirkel, *supra* note 8.

125. See *Loudermill*, 470 U.S. at 542.

126. See NCTQ, *supra* note 104, at 23–27 (demonstrating that most states create procedures for dismissal in tandem with tenure policies).

127. See generally Zirkel, *supra* note 8 (asserting that the widely accepted idea that tenure guarantees lifetime employment is a myth).

128. *Loudermill*, 470 U.S. at 542–43 (1985); see also *Mathews v. Eldridge*, 424 U.S. 319, 343–48 (1976) (noting that in its analysis a court must also consider the value and cost of more accurate procedures).

129. *Loudermill*, 470 U.S. at 542–43.

130. *Id.*

131. *Id.* at 542.

132. See *id.* at 543 (“[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.” (citations omitted)).



putes, it is critical that a teacher is permitted to present her side of the dispute.<sup>133</sup> Thus, an oral, pre-termination hearing is appropriate.<sup>134</sup>

The government's interest in expedient termination does not outweigh these private interests.<sup>135</sup> According to the Supreme Court, providing an employee the opportunity to respond prior to termination imposes neither a significant administrative burden nor an intolerable delay.<sup>136</sup> In addition, a pre-termination hearing has the benefit of reducing the risk of erroneous deprivation.<sup>137</sup> Thus, when the government seeks to dismiss a teacher on grounds of incompetence, due process includes notice and the opportunity for an oral, pre-termination hearing.<sup>138</sup>

Accordingly, most states with tenure provisions have developed procedures that ensure both notice and a hearing for tenured teachers facing dismissal.<sup>139</sup> Additionally, nearly all of these states afford a period of remediation—an opportunity for poorly performing teachers to improve through professional development. Remediation serves several purposes.<sup>140</sup> First, it minimizes the risk of erroneous deprivation by providing an opportunity for performance improvement and a corresponding review of the grounds for dismissal.<sup>141</sup> It also protects a school district's investment in an employee by allowing an experienced teacher to remain and improve.<sup>142</sup> This benefit is even more valuable when the teacher has the imminent threat of termination as an added motivation to improve her practice. However, the most important function of the remediation period, in terms of due process protections, is that it provides administrators with additional time to

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133. *Id.*

134. *See id.* at 542–43.

135. *Loudermill*, 470 U.S. at 544.

136. *See id.* (“[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.”). *But see* Brill, *supra* note 3. The “rubber room” was a holding tank for New York City teachers accused of incompetence or misconduct. *Id.* Some teachers allegedly sat, suspended with pay, in the rubber room for up to three years awaiting their pre-termination hearing. *Id.* While the article details the economic ramifications of paying teachers who do not actually teach, it fails to discuss the source of the delay or discuss why the hearings have not already occurred. *See id.* at 30–36.

137. *Loudermill*, 470 U.S. at 544.

138. *Id.* at 543–44.

139. *See* NCTQ, *supra* note 104, at 23–25.

140. *Id.*

141. *Cf. Loudermill*, 470 U.S. at 544.

142. *Cf. id.* (“[U]ntil the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one.”).

collect evidence that could be used to support a termination decision.<sup>143</sup>

Despite media claims that suggest otherwise, the process due to teachers facing dismissal is entirely practicable. If a teacher is charged with incompetence, the government has a valid interest in seeking her dismissal—the government must ensure that students have access to quality instruction. Once it is established that a teacher is ineffective and should therefore be dismissed, the school district needs only to provide the teacher with notice of the grounds for its determination and an opportunity for her to respond.<sup>144</sup> However, if the state has enhanced its dismissal procedures in any way, such as by requiring a remediation period, then it must substantially comply with its own procedures.<sup>145</sup> If the district has met this burden, it has satisfied due process requirements and has, from a procedural standpoint, justified dismissal.<sup>146</sup>

Given this entirely manageable burden and the increasing prevalence of stories of teacher incompetence, it is perplexing that so few teachers have been dismissed. But the source of this problem is not the much maligned tenure system, the advocacy and protections of teachers unions, or the burdensome procedural requirements. Instead, the reason that so few teachers have been dismissed for incompetence is that so few teachers have been rated as incompetent.<sup>147</sup> “For example, a study in eastern Pennsylvania revealed that over 90[%] of the administrators gave teachers perfect ratings . . . .”<sup>148</sup> In Toledo public schools, only three out of over a thousand teachers received an unsatisfactory rating.<sup>149</sup> In Chicago public schools, which uses a four-tiered rating system, still only four-tenths of a single percent of teachers were rated as unsatisfactory.<sup>150</sup>

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143. See Joseph Beckham, *Education Law Into Practice: Ten Judicial “Commandments” for Legally Sound Teacher Evaluation*, 117 *EDUC. L. REP.* 435, 438 (West 1997) (“Evidence that a teacher failed to follow a reasonable plan of remediation or refused to follow a plan designed to correct performance deficiencies might reflect neglect of duty or insubordination as a basis for an adverse employment decision.”).

144. *Loudermill*, 470 U.S. at 542.

145. Judges have adopted a “substantial compliance” standard when determining whether districts complied with their own evaluation and dismissal policies. Beckham, *supra* note 143, at 435; see also *Powell v. Bd. of Educ.*, 545 N.E.2d 767 (Ill. App. Ct. 1989); *Thomas v. Bd. of Educ.*, 643 N.E.2d 131 (Ohio 1994); *Phillis v. Bd. of Sch. Dirs.*, 617 A.2d 830 (Pa. 1992).

146. See Zirkel, *supra* note 44, at 6–10 (asserting that courts typically defer to the decisions of school districts, rather than substitute their own judgment for that of education experts).

147. See *supra* notes 28–35 and accompanying text.

148. Zirkel, *supra* note 44, at 3.

149. WEISBERG ET AL., *supra* note 13, at 11.

150. *Id.* Though one might hope that teacher evaluation systems that utilize a broader range of ratings would more accurately reflect the performance differences among teachers, this has

These facts demonstrate the difficulty in dismissing ineffective teachers. “Not surprisingly, the number of teachers terminated as a result of performance evaluation is . . . negligible.”<sup>151</sup> This unconscionable practice preserves the problem of undervaluing teacher quality and prevents districts from improving instructional effectiveness—resulting in a devastating loss of opportunity for students.<sup>152</sup> In addition, this systemic failure to offer evidence of teacher incompetence has led to the characterization of dismissal decisions as arbitrary and capricious.<sup>153</sup> To remedy this failure, and to offer all students the opportunities created by a quality education, policy surrounding teacher evaluation demands comprehensive reform.

### C. *Post-Race Efforts to Meet Due Process Burdens and Increase Teacher Effectiveness*

Initial state efforts following Race to the Top offer hope that reformation is underway—elevating the teaching profession and ensuring access to high-quality public education for all students. However, the experiences of one state offer a cautionary tale of how efforts to improve teacher accountability and evaluation policies can be undermined by unnecessary, unmanageable administrative burdens and premature reliance on objective measures of effectiveness that may not ultimately be reliable.

#### I. *Winning the Race? Tennessee’s “Prize”*

Though a few states had already created new legislation regarding teacher evaluation, Race to the Top was certainly an impetus for change.<sup>154</sup> Thirty-three states have changed teacher evaluation policies following Race to the Top’s enactment in 2009.<sup>155</sup> The states that

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not been the case. *Id.* Even when administrators are given multiple ratings to choose from, evaluators in several districts rated the majority of teachers in the highest category, instead of reserving that category for teachers who consistently outperform their peers. *Id.* This evaluation inflation proves that the Widget Effect has been equally coercive in districts using four or more ratings as in those using only two. *See id.* More importantly, virtually no teachers are identified as ineffective instructors. *Id.*

151. Zirkel, *supra* note 44, at 3; *see also* WEISBERG ET AL., *supra* note 13, at 22 (noting that even among administrators who reported receiving “very extensive” training in how to conduct an evaluation, “only 36[%] have recommended dismissal of a tenured teacher for poor instruction in the last five years”).

152. *See* WEISBERG ET AL., *supra* note 13, at 2.

153. *See id.* at 30.

154. NCTQ, *supra* note 104, at 5.

155. Rebecca Harris, *New Teacher Evaluation Takes Step Forward*, CATALYST CHI. (Oct. 26, 2011), <http://www.catalyst-chicago.org/notebook/2011/10/26/new-teacher-evaluation-takes-step-forward>.

created the most aggressive and specific plans for teacher evaluation ultimately won the Race to the Top and secured federal funds.<sup>156</sup> Tennessee and Delaware, ranked first and second respectively, were awarded Race to the Top funding.<sup>157</sup> Both states created legislation demanding that teacher evaluations: (1) include objective evidence of student learning; (2) are significantly informed by student achievement; (3) use student achievement as the preponderant criterion; and (4) lead to dismissal for teachers with poor evaluations.”<sup>158</sup>

Education Secretary Arne Duncan praised Tennessee’s legislation (named the Tennessee First to the Top Act of 2010), stating that Tennessee had the courage and commitment to improve outcomes for students.<sup>159</sup> Tennessee even created a new state motto, “First to the Top.”<sup>160</sup> In accordance with the Race to the Top rubric, Tennessee enacted aggressive legislation to address teacher quality through highly detailed, high-stakes evaluation procedures that left little implementation discretion to local education agencies.<sup>161</sup> Under the new legislation, evaluations were based on two components: (1) student test scores and (2) frequent principal observations.<sup>162</sup> Of all the states that enacted new legislation to secure Race to the Top funding, Tennessee developed the most labor-intensive teacher evaluation plan, requiring six annual observations for probationary (non-tenured) teachers.<sup>163</sup> These observations, along with other subjective criteria, comprise 50% of a teacher’s comprehensive evaluation.<sup>164</sup> The other 50% of the evaluation is based primarily on objective measures of student achievement.<sup>165</sup> Thirty-five percent of this achievement score must rely on student growth data, which is based on standardized test

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156. See *Delaware and Tennessee Win First Race to the Top Grants*, U.S. DEP’T EDUC. (Mar. 29, 2010), <http://www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants>; see also NCTQ, *supra* note 104, at 16–19; *Nine States and the District of Columbia Win Second Round Race to the Top Grants*, U.S. DEP’T EDUC. (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

157. *Delaware and Tennessee Win First Race to the Top Grants*, *supra* note 156, at 6–7 fig.1.

158. NCTQ, *supra* note 104, at 6–7. Using student achievement or growth as the preponderant criterion in teacher evaluations proved to be a less popular provision, with only thirteen out of the thirty-three states including such a measure in their legislation. *Id.*

159. Michael Winerip, *In Tennessee, Following the Rules for Evaluations Off a Cliff*, N.Y. TIMES, Nov. 7, 2011, at A18.

160. *Id.*

161. See *id.*

162. *Id.*

163. See NCTQ, *supra* note 104, at 13 (demonstrating that Tennessee’s frequent evaluations are excessive in comparison to most other states that enacted post-Race to the Top legislation, with nearly all other states requiring three or fewer observations).

164. *Id.* at 16.

165. *Id.*

scores from the Tennessee Value-Added Assessment System.<sup>166</sup> The remaining 15% must be based on other measures of achievement data selected from a list of options created by the state.<sup>167</sup>

Unfortunately, only a year after Tennessee received the award, many Tennessee educators and administrators felt that winning may not have been such a prize.<sup>168</sup> Implementation of Tennessee First to the Top created pervasive, counterproductive problems in teacher evaluation, simultaneously overwhelming administrators and demoralizing teachers.<sup>169</sup> At Blackman Middle School, for example, the principal said that his job changed entirely after the legislation passed.<sup>170</sup> In Tennessee, principals bear the sole responsibility for conducting teacher observations and evaluations.<sup>171</sup> Instead of spending time supporting and coaching teachers each day in the classroom, he spent his days engaged in the various procedures and paperwork connected to the evaluations.<sup>172</sup> In addition, he had to spend the same amount of time observing his strongest teachers as he did supporting his weakest.<sup>173</sup> According to the Blackman principal, the new observation and evaluation practice is “an insult to [his] best teachers” and “also a terrible waste of time.”<sup>174</sup>

Further complicating the new evaluation system was the student achievement component. Modeled on value-added analysis and reliant on standardized test scores, the new system had several holes, the most perplexing of which was that many Tennessee teachers did not teach students or subjects that produced standardized test scores.<sup>175</sup> Students in kindergarten through third grade were not tested at all, nor were the subjects of art, music, and various vocations, which left

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166. TENN. CODE ANN. § 49-1-302(d)(2)(A)(i) (Supp. 2012); NCTQ, *supra* note 104, at 16 (comparing Tennessee’s legislation to that of New York and Washington D.C.).

167. TENN. CODE ANN. § 49-1-302(d)(2)(A)(ii) (Supp. 2012); NCTQ, *supra* note 104, at 16.

168. *See* Winerip, *supra* note 159.

169. *See id.*

170. *See id.*

171. NCTQ, *supra* note 104, at 32. Compare Tennessee’s requirement to other states, which allow broader discretion to local education agencies to determine who can complete observations and evaluations. *Id.* Florida allows the broadest discretion, stating only that “[t]he individual responsible for supervising the teacher” is responsible for conducting teacher observations and evaluations. *Id.* Tennessee, in contrast, delegates little discretionary authority, mandating that principals create all evaluation data. *Id.*

172. *See* Winerip, *supra* note 159. The Blackman principal is required to complete a minimum of four annual observations for each of the sixty-five teachers at his school. *Id.* Each individual observation requires over two hours of work: fifty minutes on the actual observation and an additional eighty minutes to comply with the procedural and reporting requirements, including pre- and post-observations and a scoring rubric. *Id.*

173. *Id.*

174. *Id.* (internal quotation marks omitted).

175. *Id.*

more than half of Tennessee's teachers without any relationship to the standardized test scores in the Tennessee Value-Added Assessment System.<sup>176</sup> To compensate, the state created an additional set of assessment rules.<sup>177</sup> These rules permitted teachers without a direct match to test scores to choose the subject test that they wanted to be judged on and this score became 15% of their overall evaluation score.<sup>178</sup> As a result, teachers played the odds, guessing which subject would deliver the best scores.<sup>179</sup> Unsurprisingly, morale at Blackman and many other Tennessee schools plummeted as Tennessee raced to be First to the Top.<sup>180</sup>

These observations, scores, and the resulting comprehensive evaluation became the high-stakes data upon which employment decisions were made,<sup>181</sup> including eligibility for tenure, promotion, and dismissal.<sup>182</sup> In Tennessee, which ranks teachers in one of four tiers of effectiveness,<sup>183</sup> teachers must teach for five years and be ranked in the highest two tiers for at least two of those years before they are eligible for tenure.<sup>184</sup> Probationary teachers are consistently eligible for dismissal.<sup>185</sup> Tenured teachers, however, are eligible to be returned to probationary status, and therefore eligible for dismissal, after receiving two consecutive years of ratings that show performance below or significantly below expectations.<sup>186</sup>

## 2. *Lessons from Other States*

Fortunately, the experiences of other states that enacted post-Race legislation offer hope for meaningful improvements to public education. These experiences can be synthesized to create guidelines and best practices for future policy related to teacher effectiveness. Nearly all states that passed post-Race legislation have taken steps to eliminate the conditions that created the Widget Effect.<sup>187</sup> Instead of binary, all-or-nothing ratings systems in which teachers were classified

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176. *Id.*

177. *Id.*

178. Winerip, *supra* note 159.

179. *Id.*

180. *See id.*

181. *See* TENN. CODE ANN. § 49-5-503 (Supp. 2012).

182. NCTQ, *supra* note 104, at 23–27.

183. *Id.* at 20.

184. *See* TENN. CODE ANN. § 49-5-503.

185. *See* NCTQ, *supra* note 104, at 25; *cf.* Winerip, *supra* note 159.

186. NCTQ, *supra* note 104, at 25.

187. *See id.* at ii (noting that thirty-two states and the District of Columbia have made changes to their evaluation policy since 2008, and that these evaluations are being used to identify and increase teacher effectiveness).

as either effective or ineffective, all but two states have modified their ratings to better approximate and illustrate the range of competencies for teachers.<sup>188</sup> Most of these states have broadened their range of teacher evaluation performance levels, with four levels being the most common.<sup>189</sup> “Multiple, distinct rating options . . . allow administrators to precisely describe and compare differences in instructional performance” and also allow teachers room and motivation to improve their practice.<sup>190</sup>

In accordance with more sophisticated evaluation categories, states have also created more specific and rigorous observation protocols for teachers and administrators.<sup>191</sup> Each state that competed for Race to the Top funds mandated a minimum of one annual observation for probationary teachers.<sup>192</sup> Eleven out of the eighteen states surveyed require two or more annual observations.<sup>193</sup> Washington D.C. requires five observations while Rhode Island requires four, two of which are shorter, unannounced classroom visits.<sup>194</sup> Tennessee is a noted outlier, requiring six annual observations.<sup>195</sup> All other states required three or less observations or evaluations.<sup>196</sup> Multiple observations allow administrators to discern the strengths and weaknesses of human capital in their building and form a more reliable foundation for a summative evaluation.<sup>197</sup> With this information, administrators can provide teachers with frequent feedback, which gives them notice of their perceived performance and provides differentiated targets for improvement.<sup>198</sup> Frequent observations also allow administrators to

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188. *See id.* at 20. Idaho and Louisiana maintained a limited rating scale of proficient or unsatisfactory and effective or ineffective, respectively. *Id.* at 20 fig.6. However, legislation draft materials indicate that Louisiana is creating additional ratings categories. *Id.* at 20 n.23.

189. *See id.* Only Oklahoma has five categories: superior, highly effective, effective, needs improvement, and ineffective. *Id.* at 20 fig.6.

190. WEISBERG ET AL., *supra* note 13, at 27.

191. NCTQ, *supra* note 104, at 17–19 fig.5.

192. *Id.* at 13 fig.3 & n.18.

193. *Id.* at 13 fig.3. The number of annual observations required may actually be higher than described. *See id.* at 13 n.18. Some states use “evaluations” and “observations” interchangeably, but allude to the fact that multiple observations will inform summative, end-of-year evaluations. *Id.* As a result, some of the states that are credited as requiring only one annual observation may, in reality, require one summative evaluation that is informed by multiple observations in one year. *Id.*

194. *Id.* at 13 fig.3.

195. *Id.*

196. *Id.*

197. “Observation” typically refers to a discrete time period during which an evaluator watches an educator teach a lesson. *See* WEISBERG ET AL., *supra* note 13, at 20–21. An evaluation is the sum of data including these observations and any other information mandated by the state or adopted by the district. *See id.*

198. *Cf. id.* at 10.

identify real threats of incompetence and create remediation plans or prepare for dismissal procedures.<sup>199</sup>

States have also taken steps to ensure that teachers are judged, at least in part, on their contribution to academic growth of their students.<sup>200</sup> In 2009, only fifteen states used some form of objective evidence of student learning in teacher evaluation.<sup>201</sup> Following *Race to the Top*, twenty-three states now use value-added analysis or another form of objective evidence of student learning to inform evaluations.<sup>202</sup> Additionally, evidence of student achievement is the preponderant criterion in teacher evaluations in twelve states and Washington D.C., as opposed to only four states prior to the *Race*.<sup>203</sup> Experimentation with value-added data has proven that it can be a useful supplement in the performance evaluation of a narrow class of teachers.<sup>204</sup> However, the lesson from Tennessee demonstrates that using value-added analysis effectively and fairly requires care.<sup>205</sup> Requiring value-added analysis to be the preponderant criterion upon which teacher evaluations are determined could undermine the goal of increasing accountability, as it has in Tennessee.

Several states require a remediation period for teachers who receive ratings that determine they are ineffective.<sup>206</sup> Some states differentiate between remediation policies for probationary and tenured teachers.<sup>207</sup> Colorado, for example, mandates that all teachers rated as ineffective must be provided with the opportunity to improve.<sup>208</sup> Only tenured teachers, however, are entitled to a formal remediation plan, with mandated professional development opportunities and a “reasonable” time to improve.<sup>209</sup> This discretionary language requires Colorado districts to engage in improvement efforts for struggling teachers, but also permits flexibility in formatting the specifications of the remediation program at the district level. This approach both meets the standards of fundamental fairness guaranteed by procedural

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199. *See id.* at 26–30.

200. NCTQ, *supra* note 104, at 16.

201. *Id.* at ii.

202. *Id.*

203. *Id.* at 8 fig.2.

204. WEISBERG ET AL., *supra* note 13, at 27.

205. *See supra* notes 159–85 and accompanying text (describing Tennessee’s predicament with requiring value-added data in teacher evaluations for teachers who do not teach subjects or students addressed by formal, state assessments).

206. NCTQ, *supra* note 104, at 23–25 fig.9.

207. *Id.*

208. *Id.* at 23 fig.9.

209. *Id.* at 25.



due process<sup>210</sup> and limits the negative impact of instructional incompetence.

Many states have taken a hard stance on incompetence, explicitly permitting, and in one case demanding, efficient dismissal of ineffective teachers.<sup>211</sup> States have also taken deliberate efforts to streamline evaluation and dismissal procedures.<sup>212</sup> Both Indiana and New York have included explicit provisions in their legislation to minimize the length of time an ineffective teacher can remain on the payroll and in the classroom.<sup>213</sup> In Indiana, a teacher must appeal a dismissal decision to the local school board, which then has thirty days to reach a decision.<sup>214</sup> The board's decision is final.<sup>215</sup> In New York, the local school board may charge teachers or principals with two consecutive ineffective ratings as incompetent and consider those teachers or principals for termination through an expedited hearing process.<sup>216</sup>

#### D. *Recommendations to Respect Students, Teachers, and Procedural Due Process*

The lessons of post-Race legislation lead to several recommendations for future legislation. First, states should eschew binary rating scales and adopt teacher evaluation policies that contain a multi-tiered rating system.<sup>217</sup> Multiple observations by trained evaluators, including administrators and peer reviewers, should provide the evidentiary foundation of summative evaluations,<sup>218</sup> and evidence of student achievement should supplement this data.<sup>219</sup> Once evaluations are established as reliable, they must matter: evaluations should inform all critical employment decisions, including dismissal and awards of tenure.<sup>220</sup> Finally, information gathered from evaluations should be used

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210. Cf. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1984).

211. See NCTQ, *supra* note 104, at 23–25 fig.9 (noting that Colorado, Delaware, the District of Columbia, Florida, Illinois, Indiana, Louisiana, Michigan, Nevada, New York, Oklahoma, Rhode Island, and Tennessee all explicitly mention in their legislation that teacher ineffectiveness is grounds for dismissal). Rhode Island and Oklahoma have the most aggressive legislation regarding dismissal of ineffective educators, as they are the only states to explicitly require that districts dismiss all educators who are rated ineffective for two or more years. *Id.* at 25.

212. *Id.* at 26.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. See WEISBERG ET AL., *supra* note 13, at 10–11.

218. See TNTP, *supra* note 34, at 5.

219. See *id.* at 7–8.

220. See WEISBERG ET AL., *supra* note 13, at 8.

to determine individualized plans for professional development.<sup>221</sup> When that development plan has failed to transform a poorly performing teacher into an effective teacher, states must require dismissal while providing the teacher adequate procedural protections.<sup>222</sup>

### 1. *Multi-Tiered Ratings Systems*

To recognize the range of abilities and talents in the teacher workforce, each state should adopt a multi-tiered rating system as a component of its evaluation system. In addition to providing notice to teachers of their standing with the administration, multi-tiered ratings provide critical differentiation of skills and ability to administrators and teachers.<sup>223</sup> A five-category rating scale, such as the one developed in Oklahoma,<sup>224</sup> can identify highly effective teachers, yet truly reward superior teachers by classifying them with an elite status. This knowledge can be used to identify teachers for career-enhancing and capacity-building opportunities.<sup>225</sup> Once identified, these elite teachers can serve as instructional leaders, lead professional development or remediation plans, and mentor new or struggling teachers.<sup>226</sup>

### 2. *Annual Summative Evaluations Using Data from Multiple Sources*

The multi-tiered ratings mentioned above should be incorporated into annual, summative teacher evaluations. Annual evaluations are “the only way to ensure that all teachers . . . get the ongoing feedback on their performance that all professionals deserve.”<sup>227</sup> These evaluations should be based primarily on observations, yet should be designed to ensure a manageable administrative burden. The experiences of the administrators in Tennessee illustrate an impractical burden.<sup>228</sup> Six annual observations is excessive and impossible to complete when principals—the only individuals tasked with this responsibility—are required to go through the cumbersome formal observation procedures of pre- and post-observation conferences and

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221. See NCTQ, *supra* note 104, at 35 (“Teacher evaluation policy should reflect the purpose of helping all teachers improve, not just low-performers.”).

222. WEISBERG ET AL., *supra* note 13, at 30.

223. See *id.* at 27.

224. See NCTQ, *supra* note 104, at 20 fig.6 (naming Oklahoma’s five teacher ratings—“superior, highly effective, effective, needs improvement and ineffective”).

225. See WEISBERG ET AL., *supra* note 13, at 29.

226. *Id.*

227. THE NEW TEACHER PROJECT, TEACHER EVALUATION 2.0, at 4 (2010), available at <http://nttp.org/assets/documents/Teacher-Evaluation-Oct10F.pdf>.

228. See Winerip, *supra* note 159.

rubrics for each observation.<sup>229</sup> Instead, multiple observations by multiple observers should be performed annually. Each observation need not result in a formal evaluation, thus eliminating the excessive paperwork.<sup>230</sup> However, each observation should result in data that can be used to inform a summative evaluation.<sup>231</sup>

### 3. *Multiple Observers*

This leads to a third recommendation: engage multiple observers in the process of evaluation. In addition to principals, evaluators could be other administrators in the building, district employees that specialize in evaluation, or coaches or consulting teachers with a vested interest in increasing instructional capacity.<sup>232</sup> A rating formed with feedback from multiple data sources, including input from multiple observers, evidence of student growth, and parent and student feedback, reduces the risk of a personal or political opinion influencing ratings.<sup>233</sup> Such a model also minimizes the burden on administrators.<sup>234</sup> To accommodate multiple observers, states should ensure that districts create clear and rigorous expectations that reflect effectiveness in the classroom.<sup>235</sup> These expectations should leave little room for inference to ensure uniform implementation from various observers and to eliminate the risk of an arbitrary or capricious rating.<sup>236</sup> Accordingly, districts should create or utilize definitive tools, such as the Danielson Framework for Teaching, to assist observers in consistently evaluating teachers against these standards.<sup>237</sup> Finally, districts should provide extensive training to all evaluators to ensure capability and consistency.<sup>238</sup>

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229. *See id.*

230. *See id.*

231. This data could take the form of a simple rubric, used to rate a teacher's lesson on a numeric scale. In accordance with the notice requirement of due process, this standardized rubric should be made available to teachers well in advance of the observation.

232. *See, e.g.,* BARATZ-SNOWDEN, *supra* note 39, at 22 (noting that, in the intern program instituted by the Toledo Federation of Teachers, new teachers worked with "a consulting teacher whose responsibility it [was] to evaluate their progress and assist them in acquiring the skills and knowledge necessary for meeting the performance standards of the Toledo Public Schools").

233. *See* NCTQ, *supra* note 104, at 35.

234. *Cf.* Winerip, *supra* note 159.

235. *See, e.g.,* *In re Meyer*, 581 N.Y.S.2d 920, 921-22 (N.Y. App. Div. 1992) (providing an example of clearly defined evaluation criteria supporting a disciplinary decision). In *In re Meyer*, the court upheld discipline for ineffective lesson plans because the evaluation criteria clearly demanded effective lesson plans and the evidence showed that Meyer did not comply. *Id.*

236. THE NEW TEACHER PROJECT, *supra* note 227, at 4.

237. *See* TNTF, *supra* note 34, at 2.

238. *See id.* at 8; *cf.* Beckham, *supra* note 143, at 435.

#### 4. Use Only Reliable Objective Student Growth Data

Observational data must form the foundation of summative evaluations, taking into account student growth data as a supplemental component. When the data is reliable and used with caution, the measure of student achievement could be informed by a value-added analysis.<sup>239</sup> As previously established, value-added models apply to only “a minority of teachers, those in annual testing grades and subjects in elementary and middle schools.”<sup>240</sup> In addition, instances of misguided and inappropriate use of value-added information have caused public outcry.<sup>241</sup> Substantial research shows that value-added scores derived solely from annual standardized tests can demonstrate only a certain correlation to, rather than causation of, teacher effectiveness, which presents a question of accuracy in the ultimate evaluation.<sup>242</sup> For this reason, states should be wary of significant reliance on value-added data as the essential component of teacher evaluation.<sup>243</sup> Further, decisions made on the basis of these evaluations alone are likely to be characterized as arbitrary and capricious, and fail to meet standards of due process.<sup>244</sup> Additionally, while it may be somewhat reliable in identifying the effectiveness of teachers “on the margins of the performance spectrum,” value-added analysis has proven “less reliable in differentiating among teachers in the middle ranges of performance.”<sup>245</sup>

This does not mean that value-added analysis must be discounted entirely. In fact, sophistication in value-added analysis has allowed researchers to identify “teachers that consistently achieve significant growth with the most disadvantaged students, while similar students fail to make progress with other teachers.”<sup>246</sup> When its reliability is established over time, this valuable information about teacher effectiveness can be used to retain and increase talent. However, value-added analysis is merely one component of objective student data, which should also include summative assessments,<sup>247</sup> progress in the

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239. See TNTP, *supra* note 34, at 4–5 (claiming that value-added analysis has a strong correlation with a teacher’s long-term success, as illustrated by consistently high standardized test scores).

240. WEISBERG ET AL., *supra* note 13, at 27.

241. See Felch & Song, *supra* note 83; Watanabe, *supra* note 83.

242. See TNTP, *supra* note 34, at 5.

243. See WEISBERG ET AL., *supra* note 13, at 27.

244. See *id.* at 30.

245. *Id.* at 27.

246. NCTQ, *supra* note 104, at 2–3.

247. Summative assessments refer to assessments that measure a student’s level of knowledge following a complete unit of instruction, usually completion of a grade level. See NWEA, FOR EVERY CHILD, MULTIPLE MEASURES: WHAT PARENTS AND EDUCATORS WANT FROM K–12 AS-

curriculum, random sampling of student work, and classroom observations “focused on a set of observable standards that gauge student learning.”<sup>248</sup> In contrast to the narrow scope of value-added analysis, comprehensive objective student data can be used to observe the impact of all teachers on student growth.<sup>249</sup>

In determining parameters of objective student data, states should be cautioned that insisting on rigid comparability measures of all teachers could undermine evaluation efforts, regardless of grade or subject taught.<sup>250</sup> Instead, the focus should be on fair and valid measures of student growth, differentiated as necessary for specialty subjects or untested grades or populations.<sup>251</sup> Variance in measures based on the subject matter taught by the teacher is desirable.<sup>252</sup>

Developing objective student data measures in certain subjects or for teachers not accounted for by value-added models remains a major challenge for states, yet several options are available.<sup>253</sup> Delaware is attempting to isolate student growth in various subjects and grade levels by using a pre-assessment and post-assessment model.<sup>254</sup> These assessments are sourced from a bank of commercially produced and validated, teacher-made assessments.<sup>255</sup> Florida, in contrast, is using item banks to assess grades or subjects without test scores.<sup>256</sup> Other states, such as Rhode Island, are developing student learning objectives (SLOs).<sup>257</sup> SLOs are achievement goals that are set for students based on analysis of available state and local measures.<sup>258</sup> Used ap-

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ASSESSMENTS 3 (2012), available at [http://www.grunwald.com/pdfs/NWEA-GRUNWALD\\_Assessment\\_Perceptions\\_b.pdf](http://www.grunwald.com/pdfs/NWEA-GRUNWALD_Assessment_Perceptions_b.pdf). Standardized tests are one form of summative assessments, but there are many others, including unit tests and nationally normed computerized assessments that are increasing in popularity. See *id.*; see also *Computer-Based Adaptive Assessments*, NW. EVALUATION ASS'N, <http://www.nwea.org/products-services/assessments> (last visited Mar. 7, 2013). Northwest Evaluation Association (NWEA) assessments are computer-based assessments that students take three times per school year. *Computer-Based Adaptive Assessments*, *supra* note 247. The scores offer data about the student's individual growth over time and in comparison to peers nationwide. *Id.* NWEA is used in many districts, including Chicago public schools. Press Release, Chi. Pub. Schs., Board Approves Proposal to Adopt NWEA District-Wide as More Rigorous and Accurate Measurement of Student Growth (Feb. 22, 2012), available at [http://www.cps.edu/News/Press\\_releases/Pages/02\\_22\\_2012\\_PR2.aspx](http://www.cps.edu/News/Press_releases/Pages/02_22_2012_PR2.aspx).

248. NCTQ, *supra* note 104, at 3.

249. *Id.*

250. *Id.* at 29.

251. *Id.*

252. *Id.*

253. *Id.*

254. NCTQ, *supra* note 104, at 29.

255. *Id.*

256. *Id.*

257. *Id.* at 30.

258. *Id.*

appropriately, SLOs can provide meaningful benchmarks by which to gauge the effectiveness of teachers. Regardless of the measures used, data on student achievement is clearly a crucial component of a meaningful and reliable teacher evaluation.

### *E. Ensure that Evaluations Count*

To reap sustained support from all stakeholders and truly contribute to the elevation of the teaching profession, the evaluation process must have meaningful implications—both positive and negative.<sup>259</sup> Because evaluations provide an evidentiary basis of excellence and incompetence, they should inform all critical employment decisions and opportunities.<sup>260</sup>

First, information gathered from evaluations should be used to determine individualized professional development plans to foster talents and improve weaknesses.<sup>261</sup> In fact, the primary function of evaluation systems must be to use the collected data to increase teacher effectiveness.<sup>262</sup> A highly effective evaluation system must contain a dynamic system to deliver individualized professional development to all teachers, including those deemed highly effective.<sup>263</sup> Furthermore, evaluations should be used to advance truly superior teachers into leadership roles. Elite teachers should be compensated for these leadership roles, rather than rewarded for their achievement of an elite evaluation rating.<sup>264</sup> In a leadership role, elite teachers add value school- or district-wide by enhancing the instructional effectiveness of other teachers through their specialized knowledge and ability. Additional compensation, recognition, and career advancement will help reward and retain highly effective teachers that might be tempted to leave the classroom or the profession due to lack of advancement opportunities.<sup>265</sup>

This compensation model can be contrasted with merit pay, in which teachers are rewarded for exceptional performance, tradition-

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259. THE NEW TEACHER PROJECT, *supra* note 227, at 8.

260. *Id.*

261. *Id.*

262. *Id.* Teacher evaluations should offer ongoing feedback to a teacher so that she can improve her practice and grow professionally. *Id.* A parallel can be the established best practice in teaching of providing students with ongoing feedback about their performance and academic growth. *See id.*

263. *See id.* at 9.

264. *See* Boris Korsunsky, *Unexpected Benefits: A Defense of Teacher Tenure*, EDUC. WEEK (Oct. 5, 2011), [http://www.edweek.org/tm/articles/2011/10/05/fp\\_korsunsky.html?tkn=RQSVd7%v2BvsPD7LRYCCbeWUGcDDdgGbwyy%2FLleWS&intc=es](http://www.edweek.org/tm/articles/2011/10/05/fp_korsunsky.html?tkn=RQSVd7%v2BvsPD7LRYCCbeWUGcDDdgGbwyy%2FLleWS&intc=es).

265. *Id.*

ally due to above-average gains in standardized test scores.<sup>266</sup> Though merit pay is likely effective in retaining exceptional educators, its benefits to students are narrow.<sup>267</sup> The pay is delivered after the high scores are received, and although it is reasonable to assume that a teacher who has delivered high scores in the past will deliver high scores in the future, her immense value is added only to the fortunate students she teaches. By leveraging exceptional teachers' talents to improve the instructional effectiveness of other teachers, the value of her skills is multiplied and the benefit to student achievement is amplified.<sup>268</sup> The administration can recognize teachers as valuable instructional assets and reward them appropriately, while also allowing them to remain in the classroom where their talents can continue to influence and elevate student achievement. As an added bonus, this model creates the opportunity for highly effective teachers such as primary, arts, or special education teachers, whose value is not validated by test scores, to be leveraged and valued as instructional leaders.

Finally, evaluations must matter when they reveal that a teacher is ineffective. When a teacher has failed to improve her practice through a path of professional development in accordance with the statutory requirements of remediation, states must require expedient dismissal. With an effective evaluation system, districts can provide teachers with adequate notice and procedure in accordance with due process, and students with effective instruction and access to opportunity.

#### IV. IMPACT

When the high-quality, reliable, and manageable teacher evaluation systems described in this Comment become standard practice, public education will be transformed. Teachers will possess critical information about their performance, which creates opportunity for improvement. School districts will use this same information to offer professional development to make effective teachers even more successful, and to efficiently and respectfully remove incompetent teachers. Finally, with meaningful evaluation systems, and an established culture of teacher excellence, all American public school students will have access to quality instruction.

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266. See Esther Quintero, *Why Merit Pay for Teachers Sounds Good—But Isn't*, WASH. POST (Oct. 10, 2011, 5:00 AM), [http://www.washingtonpost.com/blogs/answer-sheet/post/why-merit-pay-for-teachers-sounds-good—but-isnt/2011/10/09/gIQA Vb72YL\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/why-merit-pay-for-teachers-sounds-good—but-isnt/2011/10/09/gIQA Vb72YL_blog.html).

267. *Id.*

268. See WEISBERG ET AL., *supra* note 13, at 29.

### A. *Impact on Teachers*

Valid evaluation systems will restore prestige and honor to the teaching profession, as sensational stories of incompetent teachers continuing to draw a paycheck will be a thing of the past.<sup>269</sup> Teachers who remain employed, and ultimately achieve tenure, will be confident that as a rule of the evaluation system, they are contributing meaningfully to student achievement. In addition, when struggling teachers receive feedback that their performance is inadequate, they will use this information to improve their instruction.<sup>270</sup> However, if a teacher is unable to improve, a meaningful evaluation system will provide her ongoing notice of the district's determination that she is ineffective, and will thus provide her the opportunity to leave the system on her own accord.<sup>271</sup>

Use of thoughtful, validated evaluation tools will provide effective teachers with critical information about their professional strengths and weaknesses.<sup>272</sup> Teachers can use this information to set personal goals for improvement, identify peers to seek out as mentors, and take notice of particular skills or talents in teaching that can be leveraged to maximize student achievement and career advancement. Finally, teachers who have achieved the highest ratings level will look forward to expanding their impact beyond their own classroom.<sup>273</sup> Exceptionally effective teachers will be recognized and utilized as instructional leaders, offering a scope of opportunity that is not currently available in the profession.

### B. *Impact on School Districts*

A quality teacher evaluation policy will also have a tremendously beneficial impact on school districts and administrators. Currently, even when an administrator is certain that a teacher is not effectively instructing her students, she is unlikely to initiate dismissal.<sup>274</sup> However, with a summative evaluation evidencing that a teacher is ineffective, the administrator will be required to seek dismissal. The administrator will do so confidently knowing that her decision was carefully made in accordance with due process rights because the evaluation system virtually eliminates the risk of an arbitrary or capricious

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269. See, e.g., Brill, *supra* note 3, at 30.

270. See *id.* at 14.

271. See *id.* at 29-30.

272. NCTQ, *supra* note 104, at 28.

273. See WEISBERG ET AL., *supra* note 13, at 29 (noting some possible outcomes of identifying exceptional teachers).

274. See Zirkel, *supra* note 44.



decision.<sup>275</sup> Because it will no longer be costly or burdensome to dismiss an ineffective teacher, administrators will seek dismissal when it is appropriate.

Similarly, an improved teacher evaluation policy will allow districts to identify the highest performing teachers.<sup>276</sup> This recognition can help districts design measures to retain teachers who are exceptionally talented.<sup>277</sup> Districts can also use this information to direct these superior teachers to particularly challenging classrooms or instructional leadership opportunities within the district.<sup>278</sup> Thus, instead of highly motivated, highly effective teachers leaving the district due to lack of advancement opportunity, districts can retain and leverage this talent to improve their entire teaching staffs.

### C. *Impact on Students*

The most important impact of effective teacher evaluation, and the impetus for its reform, is that student achievement will increase.<sup>279</sup> Teacher effectiveness has consistently been identified as the single most important factor in student achievement.<sup>280</sup> However, systematically identifying and demanding effectiveness has been an elusive goal in the absence of meaningful teacher evaluation. Valid and reliable evaluation systems will establish a standard of effectiveness and guarantee each student an effective teacher. Each student will have a quality public education and access to the opportunities they deserve.

## V. CONCLUSION

When states fail to design and implement reliable teacher evaluation policies, exceptional teachers are discounted and devalued and ineffective teachers remain charged with educating our nation's youth. This practice demoralizes the profession and paralyzes student achievement. It allows incompetent teachers to remain in the classroom, prevents districts from removing them, and forces American students to suffer the injustice of an inadequate education. The failure to meaningfully evaluate teachers also prevents administrators and policymakers from identifying high quality teachers and leveraging their talents to improve outcomes for students. Evaluations should give schools critical information about teachers as instructional

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275. See WEISBERG ET AL., *supra* note 13, at 30.

276. See *id.* at 29.

277. See *id.*

278. See *id.*

279. GORDON ET AL., *supra* note 36, at 2.

280. See, e.g., TNTP, *supra* note 34, at 5-6.

resources. Only then will schools be able to create the strongest possible instructional teams. In light of the importance of this mission, all public education stakeholders should be invested in the goal of identifying and increasing teacher effectiveness. By working in partnership, rather than as adversaries, parents, legislators, administrators, and teachers can chart a new trajectory for public education and ensure that American high school graduates are ready for college, careers, and the increasingly competitive global market place.

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