

**AN EXEMPTION FOR INDIVIDUALLY
IDENTIFIABLE TEACHER PERFORMANCE DATA
UNDER STATE FREEDOM OF INFORMATION
LAWS**

Kathryn Kyle Forman*

I. INTRODUCTION	379
II. BACKGROUND	385
A. Establishment of Student-Growth Based Teacher Evaluation Systems	387
B. Freedom of Information Acts	390
III. ANALYSIS.....	395
A. Flaws in the New York Courts' Application of FOIL's Balancing Test.....	395
B. Public Policy Supports a Decision in Favor of Redacting Teacher Names from the Published Data.	399
C. Contractual and Statutory Relief Are Limited, as the Family Education Right to Privacy Act and Collective Bargaining Are Unlikely to Support Redaction of the Teacher Names.....	403
D. Amendments to State Freedom of Information Laws May Guide Other States in Deciding This Issue	405
IV. CONCLUSION	406

I. INTRODUCTION

On August 14, 2010, a teacher named John Smith had his picture published in the *Los Angeles Times*.¹ In the photograph, he was standing before his class, arms outstretched, in front of a board covered with

* Special thanks to Brian Forman, Merle Hurst-Kyle, Howard Kyle, Professor Charles Sullivan, Dr. Milton Heumann, Kristen Settlemire, Caroline Oks, Steve Nevolis, the faculty and staff of Public School 190, and the Public School 190 Class of 2008.

¹ Jason Felch, Jason Song & Doug Smith, *GRADING THE TEACHERS; Who's Teaching L.A.'s Kids?*, L.A. TIMES, Aug. 14, 2010, at A1, available at <http://www.latimes.com/news/local/la-me-teachers-value-20100815,0,2695044.story?page=1>.

detailed charts.² Based on this description alone, one might assume that Mr. Smith and his students had completed a newsworthy project. The caption below Mr. Smith's photo, however, reflected a surprising reason for his recognition: "[o]ver seven years, John Smith's fifth-graders have started out slightly ahead of those just down the hall but by year's end have been far behind."³ In the article featuring Mr. Smith, the *L.A. Times* announced its controversial new database that listed the names of over 6,000 third through fifth grade teachers and the purported level of effectiveness attributed to these teachers according to a "value-added" analysis based largely upon standardized test scores.⁴ This was the first time that individually identifiable teacher performance data had been published anywhere in the United States.⁵

Prior to the publication of the database, the *L.A. Times* had possessed seven years' worth of standardized test scores that it had obtained pursuant to the California Public Records Act,⁶ but had not analyzed the scores.⁷ Then, about a week before the announcement of the results of Round Two of President Barack Obama's "Race to the Top" competitive grant funding program in which California was a finalist, the *L.A. Times* published the database of "value-added" results, based on the standardized test data.⁸ The publication enlisted Richard Buddin, a Senior Economist and Education Researcher at the Rand Corporation, to assist its own data analysis team and reporters in applying the "value-added methodology."⁹ A \$15,000 grant from an independent non-profit organization associated with Teachers College

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *FAQ & About- Los Angeles Teacher Ratings*, LATIMES.COM, <http://projects.latimes.com/value-added/faq/#top> (last visited, Jan. 12, 2011).

⁷ See Felch, *supra* note 1.

⁸ Felch, *supra* note 1; Press Release, U.S. Dept. of Ed., 18 States and D.C. Named as Finalists for Race to the Top (July 27, 2010), available at <http://www.ed.gov/news/press-releases/18-states-and-dc-named-finalists-race-top>; Press Release, U.S. Dept. of Ed., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), available at www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants. The database was published on August 14, 2010, and the Race to the Top Round Two winners were announced on August 24, 2010.

⁹ *More on the 'value-added' method*, LATIMES.COM, <http://articles.latimes.com/print/2010/aug/22/local/la-me-schools-about-20100822> (last visited Apr. 2, 2012).

2012 EXEMPTION FOR TEACHER PERFORMANCE DATA 381

of Columbia University also helped to fund the project.¹⁰

The Los Angeles teachers' union, United Teachers Los Angeles (UTLA), vehemently opposed the release of the data, characterizing the action as the "reckless posting of [a] flawed database," while citing scholars and researchers who have commented that the "value-added" methodology is unreliable and unstable.¹¹ Conversely, according to the Value Added Research Center in Wisconsin, value-added methods offer a system that "gets the story right" by analyzing student standardized test scores and correcting for errors in the test scales, such as "bias in the administration of the test, in student participation, or in classroom treatments."¹² The *L.A. Times* has described the method as one that "largely controls for outside influences often blamed for academic failure: poverty, prior learning and other factors."¹³

According to the UTLA, however, the "value-added" method relies excessively on standardized test scores, which are imperfect measures that often test low-level skills.¹⁴ In response to what it called the "height of journalistic irresponsibility" of the *L.A. Times*, the UTLA urged its members to boycott the publication and to protest outside the L.A. Times building.¹⁵ The UTLA also claimed that its attorneys investigated the possibility of seeking an injunction against the paper but that it could not prevent the newspaper from posting the information because teachers are public employees.¹⁶

In spite of the West Coast controversy, or perhaps, in part, because of it, media outlets on the East Coast began asking for the "value-added" data of teachers in New York City's public schools.¹⁷ In New York City, this information existed in the form of Teacher Data Reports

¹⁰ *Id.*

¹¹ *UTLA Protests Reckless Posting of Flawed Database*, UTLA.NET, http://www.utla.net/system/files/VAMprotest_20100829.pdf (last visited Feb. 28, 2012).

¹² *VARC: Methodology*, VALUE-ADDED RESEARCH CENTER, <http://varc.wceruw.org/methodology.php> (last visited Feb. 28, 2012).

¹³ See Felch, *supra* note 11.

¹⁴ *What's Wrong With Value-Added Models and Using Standardized Test Scores to Assess Teacher Effectiveness?*, UTLA.NET, <http://www.utla.net/node/3026> (last visited Feb. 28, 2012).

¹⁵ *UTLA Protests Reckless Posting of Flawed Database*, *supra* note 11.

¹⁶ *Id.*

¹⁷ *Union Plans to Try to Block Release of Teacher Ratings*, N.Y. TIMES, Oct. 20, 2010, at A32, available at <http://www.nytimes.com/2010/10/21/nyregion/21value.html?ref=todayspaper>.

(TDRs) possessed by the city's public school principals.¹⁸ At the request of the New York City Department of Education, the Value-Added Research Center at the Wisconsin Center for Education Research compiled the test-based reports.¹⁹ The TDRs requested by the media in New York contain, for approximately 12,000 teachers, the results of a "value-added" calculation like the one used in L.A.²⁰ The reports, however, were based in part on standardized test scores that state officials have since admitted were inflated.²¹ This inflation is evidenced by the fact that in 2009, only 2.8 percent of students who took New York State's reading test earned the lowest possible "Level One" classification.²² In 2010, when the state announced tougher standards, this percentage rose to more than fifteen percent. Moreover, the new scores demonstrated that the achievement gap between Caucasian and African-American students had actually expanded, with the gap between the two groups increasing to 31.7 points, a 4.8 point increase from the difference in 2003.²³ As such, in response to the announcement that New York City planned to release the data to the media, Michael Mulgrew, the President of New York City's teachers' union, the United Federation of Teachers (UFT), stated that "[t]ransparency has to be real . . . we have a responsibility that information that goes out is real and valid. When you send out erroneous information, then all you're doing is misleading."²⁴

Following the media's request for the reports, the UFT filed a request for an injunction in the New York State Supreme Court in

¹⁸ *Id.*

¹⁹ Beth Fertig, *Teachers Union Sues to Halt Release of Teacher Evaluations*, WNYC.ORG, Oct. 20, 2010, available at <http://www.wnyc.org/articles/wnyc-news/2010/oct/20/union-sues-stop-release-teacher-evaluations/#>; Value Added Research Center, *NYC Teacher Data Initiative: Technical Data on the NYC Value-Added Model*, N.Y.C. Dept. Ed. (2010), <http://schools.nyc.gov/NR/rdonlyres/A62750A4-B5F5-43C7-B9A3-F2B55CDF8949/87046/TDINYCTechnicalReportFinal072010.pdf>.

²⁰ Press Release, United Federation of Teachers, UFT to file suit to prevent release of incorrect teacher data (Oct. 20, 2010), available at <http://www.uft.org/press-releases/uft-file-suit-prevent-release-incorrect-teacher-data>.

²¹ Juan Gonzalez, *Kids Are Big Losers in Mayor Bloomberg, Joel Klein's School Test Scores Game*, N.Y. DAILY NEWS, July 30, 2010, http://articles.nydailynews.com/2010-07-30/local/27071161_1_test-scores-school-test-fourth-and-eighth-graders.

²² *Id.*

²³ *Id.*

²⁴ Yoav Gonen & Jeremy Olshan, *UFT's Calls for Transparency Ring False*, N.Y. POST, Oct. 22, 2010, at 4, available at http://www.nypost.com/p/news/local/calls_for_open_book_ring_false_spDGer8unp5mdPSgounx5M

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 383

Manhattan, seeking a restraining order to prevent the city from releasing the data.²⁵ Attorneys for the city reached a compromise with UFT attorneys on October 21, 2010, and agreed to withhold the data in order “to allow the court time to weigh the merits of the case.”²⁶

On January 10, 2011, the Supreme Court of Manhattan held that the individually-identified TDRs did not fall under any exemption of New York’s Freedom of Information Law, and that the Board of Education could rationally have found that the public’s interest in the TDRs outweighed the teachers’ privacy interest in the release of their names as correlated with their TDRs.²⁷ However, Justice Cynthia Kern explicitly asserted in her opinion:

As an initial matter, this court is not making a *de novo* determination as to whether the TDRs with the teachers’ names should be released . . . This court is not passing judgment on the wisdom of the decision of the DOE, whether from a policy perspective or from any perspective, or whether the DOE had discretion under the law to make a different decision, nor is this court making any determination as to the value, accuracy or reliability of the TDRs.²⁸

In its argument to block the release of the TDRs, the UFT’s primary contentions were that the data was flawed,²⁹ the TDRs were misleading, and the release of the unredacted TDRs would harm the affected teachers in a way that outweighed the public’s interest in the data.³⁰ In diffusing the flawed data contention, the State Supreme Court noted that flaws and inaccuracies in data have not previously controlled in determining whether the release of data would be proper under FOIA.³¹ Furthermore, in addressing the privacy argument, the court held that using the names of the teachers would not be an “unwarranted’

²⁵ Sharon Otterman, *Union Plans to Try to Block Release of Teacher Ratings*, N.Y. TIMES, Oct. 20, 2010, at A32, available at <http://www.nytimes.com/2010/10/21/nyregion/21value.html?ref=todayspaper>.

²⁶ Sharon Otterman, *City and Union Agree to Wait on Release of Teacher Data*, CITY ROOM, (Oct. 21, 2010, 6:13 PM), <http://cityroom.blogs.nytimes.com/2010/10/21/city-and-union-agree-to-wait-on-release-of-teacher-data/?src=twrhp>.

²⁷ *Mulgrew v. Bd. of Educ.*, 919 N.Y.S.2d 786, 791 (N.Y. 2011).

²⁸ *Id.* at 787.

²⁹ Press Release, United Federation of Teachers, UFT to file suit to prevent release of incorrect teacher data (Oct. 20, 2010), available at <http://www.uft.org/press-releases/uft-file-suit-prevent-release-incorrect-teacher-data>.

³⁰ Complaint at 14, 29 *Mulgrew v. Bd. of Educ.*, 919 N.Y.S.2d 786 (2011) (No. 10113813), available at http://iapps.courts.state.ny.us/i_scroll/C_PDF?CatID=632735&CID=113813-2010&FName=0.

³¹ *Mulgrew*, 919 N.Y.S.2d at 789.

invasion of privacy” under the law, because other, more potentially invasive information about public employees has been released in New York, and because “the data at issue relates to the teachers’ work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives.”³²

In November 2011, the First Department of the Appellate Division of New York reviewed Judge Kern’s decision and upheld the outcome, but asserted that, under the New York State Civil Practice Laws and Rules, Judge Kern should have reviewed the Board of Education’s decision to release the TDRs for error of law, rather than applying an “arbitrary and capricious” standard of review.³³ The UFT sought leave to appeal this decision, but the New York State Court of Appeals denied the petition on February 14, 2012.³⁴ On February 25, 2012, the Wall Street Journal published a searchable database containing the TDRs of about 18,000 New York City Public School teachers.³⁵

It is evident that America urgently needs education reform. In the United States, seventy percent of eighth graders cannot read at grade level, and nine-year-olds in low-income communities are three grade levels behind their higher-income peers.³⁶ Furthermore, a study by McKinsey & Co. showed that this inequity cost the U.S. between \$400 billion and \$670 billion (or three to five percent of the nation’s GDP) in 2008.³⁷ If these problems are to be addressed, teacher quality needs to improve.³⁸ However, heavy reliance on standardized test scores and the related scapegoating of educators are unlikely to lead to a solution.

³² *Id.* at 790.

³³ *Id.* at 702 .

³⁴ *Mulgrew v. Bd. of Educ.*, No. 2011-1307, Slip. Op. 63972 (N.Y. Ct. App. Feb. 14, 2012).

³⁵ Teacher Ratings Aired in New York, WSJ.COM (Feb. 25, 2012), available at <http://online.wsj.com/article/SB10001424052970203918304577243591163104860.html?KEYWORDS=teacher+ratings>.

³⁶ Institute for a Competitive Workforce, *Corporations, Chambers, and Charters: How Businesses Can Support High-Quality Public Charter Schools*, at 2, available at <http://www.uschamber.com/reports/corporations-chambers-and-charters-how-businesses-can-support-high> (last visited Apr. 2, 2012).

³⁷ McKinsey & Company, *The Economic Impact of the Achievement Gap in America’s Schools*, at 6 (July 2009), available at <http://www.partnersinschools.org/resources/McKinsey%20&%20Co.%20Report.pdf>.

³⁸ Center for Research in Math and Science Education, *Breaking The Cycle: An International Comparison of U.S. Mathematics Teacher Preparation*, MICHIGAN ST. UNIV. 1 (2010), available at <http://www.educ.msu.edu/content/sites/usteds/documents/Breaking-the-Cycle.pdf>.

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 385

As such, this Note explores the policy concerns that weigh in favor of redacting teacher names from standardized test-based data reports if such reports are to be released under a state-level Freedom of Information or Public Records Law. It goes on to discuss the dearth of existing legal remedies that could offer a mandate for such redaction, and ultimately explores legislative amendments that would appropriately reconcile the public's right to know with the teachers' right to privacy.

II. BACKGROUND

Through No Child Left Behind (NCLB), the Bush Administration sought to increase the accountability of states, school districts, and schools by requiring states to implement uniform standards in reading and mathematics and to measure students' mastery of these standards through annual testing for all students in grades three through eight.³⁹ Critics of the program expressed concerns that states responsible for creating instructional standards would have incentives to set the bar too low, schools would have incentives to focus disproportionately on students who were on the cusp of passing state tests (at the expense of those who performed on a somewhat higher, or much lower level), and NCLB would lead to a narrowing of curricula, with a disproportionate focus on math and reading at the expense of other subjects, like science and social studies.⁴⁰

President Barack Obama's answer to these concerns was "Race to the Top" (RTTT), a competitive grant funding program "designed to encourage and reward States that are creating the conditions for

³⁹ U.S. DEP'T. OF EDUC., EXECUTIVE SUMMARY OF THE NO CHILD LEFT BEHIND ACT OF 2001, *available at* <http://www2.ed.gov/nclb/overview/intro/execsumm.html> (last visited Apr. 25, 2012).

⁴⁰ *How to Fix No Child Left Behind*, TIME, May 24, 2007, <http://www.time.com/time/magazine/article/0,9171,1625192-2,00.html>. In February 2012, the Obama Administration, acknowledging the inflexibility and unworkable remedies of NCLB, began granting waivers to states that failed to meet the standards set forth by the Bush II Administration, in exchange for commitments from these states to implement bold reforms with higher standards. No Child Left Behind: Obama administration grants 10 waivers, LATIMES.COM (Feb. 7, 2012, 10:37 AM), <http://latimesblogs.latimes.com/nationnow/2012/02/obama-administration-waiver-no-child-left-behind.html>. Congress is currently considering revisions to the law. *Id.* See also President Obama: Our Children Can't Wait for Congress to Fix No Child Left Behind, Announces Flexibility in Exchange for Reform for Ten States, ED.gov (Feb. 9, 2012) <http://www.ed.gov/news/press-releases/president-obama-our-children-cant-wait-congress-fix-no-child-left-behind-announc>.

education innovation and reform.”⁴¹ While NCLB primarily charged states with developing uniform standards and implementing annual tests,⁴² RTTT invites states to develop comprehensive plans for reform in a broad variety of areas.⁴³ In addition to adopting competitive standards and assessments, RTTT reform encourages building data systems to measure student growth and to drive instruction, to inform recruitment and retention of effective teachers and principals, and to target the lowest achieving schools for turnaround.⁴⁴ RTTT initially invited fifty states and the District of Columbia to submit proposals for reform.⁴⁵ The proposals deemed to create the best conditions for reform were rewarded with funding from the \$4.35 billion that the Obama Administration allotted to the competition.⁴⁶ States were awarded points for their reform proposals based on a scoring rubric developed by the Department of Education.⁴⁷ The program was executed in three phases, with two first round winners, Delaware and Tennessee, announced in March 2010,⁴⁸ and ten second round winners announced in August 2010, including Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, Rhode Island, and the District of Columbia.⁴⁹ The seven winners of Phase Three, announced in December 2011, included Arizona, Colorado, Illinois, Kentucky, Louisiana, New Jersey, and Pennsylvania.⁵⁰

⁴¹ U.S. DEP’T. OF EDUC., EXECUTIVE SUMMARY, RACE TO THE TOP PROGRAM (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

⁴² See U.S. DEP’T. OF EDUC., *supra* note 39.

⁴³ Scoring Rubric, 75 Fed. Reg. 17, app. 11 (Jan. 27, 2010) (to be codified at 34 C.F.R. Subtitle B, Chapter II), available at <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>.

⁴⁴ See U.S. DEP’T. OF EDUC., *supra* note 41.

⁴⁵ *Eligibility*, ED.GOV, <http://www2.ed.gov/print/programs/racetothetop/eligibility.html> (last visited Apr. 2, 2012).

⁴⁶ See U.S. DEP’T. OF EDUC., *supra* note 42.

⁴⁷ See Scoring Rubric, *supra* note 44.

⁴⁸ Press Release, U.S. Dep’t. of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), available at <http://www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants>. See *infra*, note 51.

⁴⁹ Press Release, U.S. Dep’t. of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), available at <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

⁵⁰ Press Release, Department of Education Awards \$200 Million to Seven States to Advance K-12 Reform (Dec. 23, 2011), available at <http://www.ed.gov/news/press-releases/department-education-awards-200-million-seven-states-advance-k-12-reform>.

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 387*A. Establishment of Student-Growth Based Teacher Evaluation Systems*

Many educators have embraced state standards as an important teaching tool and measure of student growth but still oppose standardized testing as a measure of teacher performance due to a variety of intervening variables.⁵¹ In RTTT, the Obama Administration addresses this concern, defining “effective teacher” to mean “a teacher whose students achieve acceptable rates (*e.g.*, at least one grade level in an academic year) of student growth.”⁵² However, in response to feedback that the definition relied too heavily on standardized test scores, the Administration clarified that states, local education agencies (LEAs), and schools should use multiple measures in determining teacher effectiveness.⁵³ The Administration set forth multiple observation-based assessments of teacher performance as an example of such a supplemental measure.⁵⁴ Furthermore, the National Education Association (NEA), a collective action organization that advocates for education professionals,⁵⁵ has suggested multiple measures, including “classroom observations, portfolios, analyses of student work, documentation of teacher leadership, standards-based evaluations of practice, analyses of teacher assignments (including the student populations an educator teaches) and teacher assessments.”⁵⁶

In addition to seeking to expand the bases for teacher effectiveness data, RTTT places a premium on the importance of linking student performance and achievement to teacher evaluations, warning that any state would be ineligible to compete in RTTT if it were to maintain any legal, statutory, or regulatory barriers at the state level prohibiting the use of student growth/achievement data to evaluate teachers and

⁵¹ PAUL E. PETERSON & MARTIN R. WEST, *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 10 (2003); Comments of the National Education Association to Education Secretary Arne Duncan, 3, Aug. 21, 2009, <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a0f3f3>

⁵² *Race to the Top Fund*, 74 Fed. Reg. 221, p. 59,751 (Nov. 18, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-27426.pdf>.

⁵³ *Id.* at 59,750.

⁵⁴ *Id.* at 59,750-51.

⁵⁵ *NEA's Mission, Vision and Values*, NEA.ORG, <http://www.nea.org/home/19583.htm> (last visited Mar. 3, 2011).

⁵⁶ Comments of the National Education Association to Education Secretary Arne Duncan, 13, Aug. 21, 2009, <http://www.edweek.org/media/stephensletter.pdf>.

principals.⁵⁷ Although the Administration has clarified that a state with such limitations in the form of teacher or principal contracts or local-level collective bargaining agreements would still be permitted to compete for funding,⁵⁸ the Scoring Rubric strongly favors state reform proposals that linked this data.⁵⁹

The maximum value that a complete proposal could earn was 500 points, including a category entitled “[i]mproving teacher and principal effectiveness based on performance,” which was valued at a total of fifty-eight points.⁶⁰ These fifty-eight points were awarded from four subcategories: a maximum of five points for establishing clear approaches to measuring student growth and individual student growth specifically, a maximum of fifteen points for designing evaluation systems for principals and teachers that take student growth into account,⁶¹ a maximum of ten points for conducting annual evaluations of teachers and principals that “include timely and constructive feedback” and provide these teachers and principals with data on student growth, and a maximum of twenty-eight points for using these evaluations to inform decisions regarding, among other things, compensation, promotion, retention, tenure, and termination.⁶² Thus, although a state could participate in the RTTT competition with a contract that prohibited the linking of student growth and achievement data to teacher performance, creation of a plan to establish such a connection was worth 11.6 percent of the total points on the RTTT Scoring Rubric.⁶³

Teachers responded to this provision of the program with concerns that the student growth data linked to their performance would be based on standardized test scores, noting that intangible factors, such as the non-random assignment to teachers of students with a wide spectrum of needs and unique characteristics, render it impossible to “disentangle”

⁵⁷ Race to the Top Fund, 74 Fed. Reg. 221, p. 59720 (Nov. 18, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-27426.pdf>.

⁵⁸ *Id.*

⁵⁹ Scoring Rubric, 75 Fed. Reg. 17, app. 11 (Jan. 27, 2010) (to be codified at 34 C.F.R. Subtitle B, Chapter II), *available at* <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

2012 EXEMPTION FOR TEACHER PERFORMANCE DATA 389

appropriate data to be used for teacher evaluations.⁶⁴ Furthermore, citing a major report by the RAND Corporation, the NEA asserted that value-added methodologies based on student test scores are “too unstable and too vulnerable to many sources of error to be used for teacher evaluation.”⁶⁵ Moreover, the NEA projects that mandating such a linkage would create disincentives for teachers to work with some students, “such as special education students and English language learners,” who need them the most.⁶⁶

In spite of teacher opposition, however, the RTTT mandate has led several states to change their practices and to commit to using student growth data as part of teacher evaluations.⁶⁷ New York, for example, projected that its Regents would adopt an “initial student growth model for measuring educator effectiveness” by July of 2011.⁶⁸ This goal has been delayed by negotiations between the Bloomberg Administration and the UFT, but New York City will lose roughly two million dollars in state education aid if the parties do not reach a compromise by January 2013.⁶⁹ California projected that 100 percent of teachers and principals in its participating Local Education Agencies would be evaluated based on a “Multiple Measures Evaluation System” with a minimum of thirty percent of the evaluation attributed to student growth.⁷⁰

While RTTT has led many states to quickly commence planning evaluation systems that link student growth data to teacher performance evaluation, the actual process of making this connection is in its nascent stages. While states like California and New York have committed to build the student-growth based teacher evaluation models, the models

⁶⁴ See Comments of the National Education Association to Education Secretary Arne Duncan, *supra* note 52.

⁶⁵ *Id.* at 14.

⁶⁶ *Id.* at 3.

⁶⁷ *The Race to the Top*, WHITEHOUSE.GOV, http://www.whitehouse.gov/sites/default/files/RTT_factsheet.pdf (last visited Jan. 9, 2011).

⁶⁸ Race to the Top Application- Phase 2, New York, 24 (May 28, 2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/new-york.pdf>. New York was a winner of RTTT’s second round. See Press Release, *supra* note 50.

⁶⁹ Fernanda Santos, *With Release of Teacher Data, Setback for Unions Turns into a Rallying Cry*, NYTIMES.COM (Feb. 26, 2012), <http://www.nytimes.com/2012/02/27/nyregion/teacher-ratings-produce-a-rallying-cry-for-the-union.html>.

⁷⁰ Race to the Top Application- Phase 2, California, A-10 (May 27, 2010), <http://www2.ed.gov/programs/racetothetop/phase2-applications/california.pdf>.

themselves remain controversial, untested, and incomplete.⁷¹ In fact, New York had legislation in place as recently as 2009 that entirely banned the use of student data in teacher tenure decisions.⁷² However, the novelty of the use of the student-growth data to inform decisions on teacher evaluation and the potential inaccuracy of existing methods has not prevented the media from requesting student-growth based teacher performance data for publication.⁷³

B. *Freedom of Information Acts*

Congress enacted the Federal Freedom of Information Act (FOIA) in 1966.⁷⁴ This legislation requires that government agencies make all records publicly available for inspection and copying, except when such records fall under one of nine statutory exemptions.⁷⁵ The United States

⁷¹ Press Release, United Federation of Teachers, UFT to file suit to prevent release of incorrect teacher data (Oct. 20, 2010), <http://www.uft.org/press-releases/uft-file-suit-prevent-release-incorrect-teacher-data>.

⁷² *Final Race to the Top Guidelines Keep Rule That May Exclude New York*, GOTHAM SCHOOLS.ORG, <http://gothamschools.org/2009/11/11/final-race-to-the-top-guidelines-keep-rule-that-may-exclude-ny/> (last visited Jan. 9, 2011).

⁷³ Sharon Otterman, *City and Union Agree to Wait on Release of Teacher Data*, CITY ROOM, (Oct. 21, 2010, 6:13 PM), <http://cityroom.blogs.nytimes.com/2010/10/21/city-and-union-agree-to-wait-on-release-of-teacher-data/?src=twrhp>.

⁷⁴ Introduction, *Department of Justice Guide to the Freedom of Information Act*, U.S. DEP'T. OF JUSTICE, http://www.justice.gov/oip/foia_guide09/introduction.pdf (last visited Jan. 9, 2011).

⁷⁵ 5 U.S.C. § 552(b) (2010). The federal exemptions from FOIA include records that: (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute (other than section 552b of this *title [5 USCS § 552b]*), if that statute-- (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph. (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 391

Supreme Court has asserted that the primary purpose of FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and hold the governors accountable to the governed.”⁷⁶

Because FOIA covers federal agencies, state-level actors are governed by state-level freedom of information acts.⁷⁷ New York State’s Freedom of Information Law (FOIL) is quite similar to FOIA, as § 87(2) of its legislation provides, “[e]ach Agency shall, in accordance with its published rules, make available for public inspection and copying all records” unless such records fall within a delineated exemption under the statute.⁷⁸ New York’s FOIL offers eleven exemptions, rather than the nine offered by the federal statute, but many of New York’s exemptions are analogous to the exemptions provided by the federal FOIA.⁷⁹

a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological or geophysical information and data, including maps, concerning wells.

⁷⁶ Introduction, *supra* note 75 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

⁷⁷ *Id.* *State Freedom of Information Acts*, USLEGAL.COM, <http://freedomofinformationacts.uslegal.com/state-freedom-of-information-acts/> (last visited Apr. 2, 2012).

⁷⁸ N.Y. PUB. OFF. § 87 (2010). New York’s Freedom of Information Law (FOIL) is comprised of Sections 84-90 of the New York Public Officer’s Law. *See Access to Public Records in New York*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/legal-guide/access-public-records-new-york> (last visited Feb. 28, 2012).

⁷⁹ N.Y. PUB. OFF. § 87(2). Exempt from the disclosure requirement are public records that:

(a) are specifically exempted from disclosure by state or federal statute; (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article; (c) if disclosed would impair present or imminent contract awards or collective

Under the New York statute, an agency includes “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.”⁸⁰ Thus, a school board would be governed as an agency. A record is broadly defined as “any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever”⁸¹ Therefore, the TDRs that the media seeks are records.

Under § 87(2)(b), through its incorporation of § 89, the New York statute provides an exemption for “employment histories” that is similar to the exemption for “personnel records” set forth in § 552(b)(6) of the federal statute.⁸² This is accomplished by referencing § 89(2)(b) of New York’s FOIL, which states that “an unwarranted invasion of personal privacy includes, but shall not be limited to . . . disclosure of

bargaining negotiations; (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise; (e) are compiled for law enforcement purposes and which, if disclosed, would: i. interfere with law enforcement investigations or judicial proceedings; ii. deprive a person of a right to a fair trial or impartial adjudication; iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures; (f) if disclosed could endanger the life or safety of any person; (g) are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or (h) are examination questions or answers which are requested prior to the final administration of such questions. (i) if disclosed, would jeopardize [fig 1] the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or (j) [Expires and repealed Dec 1, 2014] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law. (k) [Expires and repealed Dec 1, 2014] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

⁸⁰ N.Y. PUB. OFF. § 86 (2010).

⁸¹ *Id.*

⁸² § 87(2) (2010); § 89 (2010); 5 U.S.C. § 522(b)(6) (2009).

2012 EXEMPTION FOR TEACHER PERFORMANCE DATA 393

employment, medical, or credit histories.”⁸³ California’s Freedom of Information Act provides this exemption as well, as it lists “personnel . . . files . . . the disclosure of which would constitute an unwarranted invasion of personal privacy” under the items a public agency cannot be required to disclose.⁸⁴ The exemptions are analogous to § 552(b)(6) of the federal law, which provides that “matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” are not required to be disclosed.⁸⁵

The federal FOIA statute does not expressly delineate what can be considered a personnel file, and consideration of the scope of this term is absent from the statute’s legislative history.⁸⁶ A definition is similarly absent from the New York and California statutes.⁸⁷ However, the United States Supreme Court previously set forth in dicta that performance evaluations are documents that would be classified under the heading of personnel files.⁸⁸ In *Dep’t of the Air Force v. Rose*, the Court highlighted the private nature of performance evaluations by contrasting such evaluations against data the Court deemed non-exempt, stating, “[b]ut these summaries . . . do not contain the ‘vast amounts of personal data’ . . . which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example . . . evaluations of his work performance.”⁸⁹

The Supreme Court of the United States has interpreted exemption § 552(b)(6) of the federal FOIA, which excludes from the statute’s coverage “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,”⁹⁰ to require application of a balancing test in order to determine whether disclosure of the potentially exempt files would, in fact, result in a “clearly unwarranted invasion of personal privacy.”⁹¹ The Court held:

⁸³ N.Y. PUB. OFF. § 89(2)(b)(i) (2010).

⁸⁴ CAL. GOV. § 6254(c) (2010).

⁸⁵ Freedom of Information Act, 5 U.S.C. § 552(b)(6) (2010).

⁸⁶ *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 377 n.14 (1976).

⁸⁷ See generally N.Y. PUB. OFF. § 89(2)(b)(i) (2010); Cal. GOV. § 6254(c) (2010).

⁸⁸ *Dep’t of the Air Force*, 425 U.S. at 377.

⁸⁹ *Id.*

⁹⁰ 5 U.S.C. § 552(b)(6).

⁹¹ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 502 (1994) (citing 5 U.S.C. § 552(b)(6)).

[I]n evaluating whether a request for information lies within the scope of a [Freedom of Information Act] exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree unwarranted, a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.⁹²

Likewise, state courts have applied the same balancing test in determining whether documents otherwise available under freedom of information laws would fall under an exemption.⁹³

Furthermore, with respect to redaction of identifying information, § 89(2) of New York's Public Officers Law sets forth that in the absence of specifying guidelines from the committee on public records, an agency may delete identifying details from public records when it makes the records available, in order to "prevent unwarranted invasions of personal privacy."⁹⁴ Thus, to determine whether individually-identifiable teacher evaluations can be exempt under the New York Public Officers Law, or a state statute with analogous provisions, it must first be determined whether the evaluations are public agency records under the law. If so, it must be determined whether these evaluations fall under one of the statutory exemptions, and/or whether the release of the records, with names attached, would constitute an "unwarranted invasion of personal privacy."

In deciding whether the decision of the New York City Department of Education (DOE) to release the teachers' names on the TDRs would be proper under New York's Freedom of Information Laws, the New York State Supreme Court held that the teachers' names on the TDRs did not fall under any relevant exemptions of POL § 87(2), and that "the DOE could have

. . . rationally determined that releasing the teachers' names was not an 'unwarranted invasion of personal privacy'" under POL § 87(2)(b) and § 89(2).⁹⁵ The trial court opined that flawed data in reports should not prevent release of the reports under the Public Officers Law,⁹⁶ but implied that, although the DOE could rationally have made the determination that the teacher-identified TDRs did not fall under an

⁹² *Id.* at 495 (citations omitted).

⁹³ *See* *Mulgrew v. Bd. of Educ.*, 919 N.Y.S.2d 786, 790 (N.Y. 2011).

⁹⁴ N.Y. PUB. OFF. § 89(2)(a).

⁹⁵ *Mulgrew*, 919 N.Y.S.2d at 789-90.

⁹⁶ *Id.* at 789.

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 395

exemption or invade privacy in an unwarranted manner, it could also rationally have decided the other way.⁹⁷ Although the Appellate Division, in affirming the trial court, noted the trial court should have applied an “error of law” standard, such a standard would still mandate deference to the agency, unless the agency had applied an unreasonable interpretation of the statute.⁹⁸ Accordingly, the next section of this Note will explore the implications of this decision for states with similar freedom of information laws, the policy implications in favor of withholding the identifying information from the records, the failure of other laws to offer protection in this context, and possible amendments to state freedom of information laws that would provide more guidance on this issue.

III. ANALYSIS

A. Flaws in the New York Courts’ Application of FOIL’s Balancing Test

Fundamental to the holdings of the New York State trial and appellate courts was the issue of whether the teachers’ privacy interest in their names as attached to the TDRs could outweigh the public’s interest in the data.⁹⁹ The trial court noted that “[w]hat constitutes an unwarranted invasion of personal privacy is measured by what would be offensive to a reasonable [person] of ordinary sensibilities.”¹⁰⁰ In deciding that the DOE could have rationally determined that the teachers’ privacy interest was outweighed by the public’s interest in the names attached to the TDRs, the trial court asserted:

[T]he DOE could reasonably have determined that releasing the unredacted TDRs would not be an ‘unwarranted’ invasion of privacy, since the data at issue relates to the teachers’ work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives.¹⁰¹

The court went on to give examples of other data with names attached that had been released under New York’s FOIL, such as

⁹⁷ *Id.* at 787.

⁹⁸ *Id.* at 702. *See also* Vincent C. Alexander, *Questions Raised*, SUPPLEMENTAL PRACTICE COMMENTARIES TO MCKINNEY’S CPLR § 7803 (September 1, 2011).

⁹⁹ *Mulgrew*, 919 N.Y.S.2d at 791.

¹⁰⁰ *Id.* at 790 (quoting *Hoyer, Newcomer, Smiljanich and Yachunis, P.A. v. N.Y.*, 27 Misc.3d 1223(A) (Sup. Ct. New York Cty 2010)).

¹⁰¹ *Id.* at 790.

reprimands, alleged misconduct, and a settlement of disciplinary charges, to demonstrate that the teacher evaluation data paled in comparison to information “which would be potentially more damaging to the parties than simply poor job performance.”¹⁰² With respect to the public interest in the information, Judge Kern wrote:

The public has an interest in the job performance of public employees, particularly in the field of education. Educational issues, including the value of standardized testing and the search for a way to objectively evaluate teachers’ job performance have been of particular interest to policymakers and the public recently. This information is of interest to parents, students, taxpayers and the public generally.¹⁰³

However, even in light of the Appellate Division’s clarification regarding the standard of review,¹⁰⁴ it is implicit that the DOE was permitted, but not necessarily required by FOIL, to release the TDRs with names attached.¹⁰⁵ A look at how the United States Supreme Court has treated similar documents under the analogous federal statute provides context to demonstrate that the court could have found that the teachers’ privacy interest in their names as attached to the data outweighed the public’s interest in their identities.

Recently, courts analyzing the privacy interest under the (b)(6) exemption have looked to the level of harassment or embarrassment that an employee would potentially experience as a consequence of disclosure.¹⁰⁶ For example, in 2005, the United States Court of Appeals for the Second Circuit held that investigators employed by the Federal Bureau of Investigation (FBI) had a strong privacy interest in their identifying information, agreeing with the government that disclosure could subject the investigators to “harassment or unofficial questioning in the conduct of their official duties.”¹⁰⁷ In *Wood*, the court also supported the government’s assertion that the fact that investigators are

¹⁰² *Id.* at 791.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 702. In applying the “error of law standard,” a court will defer to the agency’s interpretation of the law as long as the interpretation is not unreasonable. Vincent C. Alexander, *Questions Raised*, SUPPLEMENTAL PRACTICE COMMENTARIES TO MCKINNEY’S CPLR § 7803 (September 1, 2011).

¹⁰⁵ Justin Snider, *A Closer Look at Justice Kern’s Ruling in NYC Value-Added Case*, THE HUFFINGTON POST (Jan. 13, 2011, 10:13 AM), http://www.huffingtonpost.com/justin-snider/a-closer-look-at-justice-_b_808376.html.

¹⁰⁶ See *O’Keefe v. U.S. Dep’t of Def.*, 463 F. Supp. 2d 317, 326 (E.D. N.Y. 2006).

¹⁰⁷ *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005).

2012 EXEMPTION FOR TEACHER PERFORMANCE DATA 397

public servants “should not subject them to harassment simply for performing their jobs as ordered.”¹⁰⁸ In the same vein, publication of teachers’ performance evaluations, with names attached, could subject teachers to embarrassment and harassment by damaging their professional reputations.

In response to the threat of disclosure, teachers’ unions have expressed concerns about the embarrassment that teachers might experience as a result of having their individually identifiable evaluations published in the media.¹⁰⁹ While the UFT in New York focused on the inaccuracy of the data as the primary reason to block its release,¹¹⁰ the UTLA in Los Angeles contended that the data “could have a long-lasting impact on the careers of teachers who [sic] the Times labeled as ineffective based on just one measure.”¹¹¹ California teachers’ unions have also cited, as a consequence of the publication, the tragic suicide of Rigoberto Ruelas, a fifth grade teacher who “was rated slightly ‘less effective’ than his peers.”¹¹² While the causation between the publication and Ruelas’ death is disputed, the union stated that Ruelas’ family reported that he was depressed about the publication of his low rating.¹¹³

In weighing this privacy interest in avoiding harassment and embarrassment against the public’s interest in disclosure, courts have looked to several factors, including “the employees’ ranks and whether their identities would shed light on the scrutinized government

¹⁰⁸ *Id.*

¹⁰⁹ *Hittelman Responds to L.A. Times Teacher Evaluation Series*, CALIFORNIA FEDERATION OF TEACHERS (August 21, 2010), <http://www.cft.org/index.php/cft-presidents-page/594-hittelman-responds-to-la-times-teacher-evaluation-series-.html> (“Attaching teachers’ names publicly to the scores in the context of this interpretation of data—and without what is arguably more important contextual information—is an invasion of the teachers’ privacy while being unfairly destructive of their reputations.”); Sharon Otterman, *Union Plans to Try to Block Release of Teacher Data*, N.Y. TIMES, Oct. 21, 2010, <http://www.nytimes.com/2010/10/21/nyregion/21value.html?ref=todayspaper> (“There has also been concern about the release of the data to the public, with some experts cautioning that teachers could be unfairly maligned.”).

¹¹⁰ Maisie McAdoo, *DOE Backs off Release of Teacher Data Reports in Face of UFT Lawsuit*, UNITED FEDERATION OF TEACHERS (October 28, 2010), <http://www.uft.org/feature-stories/doe-backs-release-teacher-data-reports-face-uft-lawsuit>.

¹¹¹ *UTLA Protests Reckless Posting of Flawed Database*, UTLA.NET, http://www.utla.net/system/files/VAMprotest_20100829.pdf (last visited Jan. 8, 2011).

¹¹² Alexandra Zavis & Tony Barboza, *Teacher’s Suicide Shocks School*, L.A. TIMES, Sept. 28, 2010, <http://articles.latimes.com/2010/sep/28/local/la-me-south-gate-teacher-20100928>.

¹¹³ *Id.*

activity.”¹¹⁴ With respect to the public’s interest in the teacher evaluation data, the United States Supreme Court has established that “the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contributing significantly to public understanding of the operations or activities of the government.’”¹¹⁵ Consideration of whether individually identifiable information about employees serves a public interest requires an assessment of the rank of the employees and “whether their identities would shed light on” the government activity at issue.¹¹⁶ In *Wood*, the Second Circuit Court of Appeals held that investigators were relatively low level employees and that revealing the identities of the employees would “add little to the public’s understanding” of how the government was performing its duties.¹¹⁷ Similarly, the rank of teachers is relatively low in this context, as the data at issue is based on standardized test scores and the state standards and the format of standardized tests come from the state.¹¹⁸ A number of New York City Public Schools even outsource test preparation, paying representatives from companies like Kaplan to control the flow of test preparation instruction or to disseminate scripted lessons with minimal participation on the part of the teacher who might ultimately be held accountable for the scores.¹¹⁹

Additionally, the New York State Courts failed to give sufficient weight to the state’s admission that standardized test scores had been inflated in prior years, or to the Department of Education’s admission that “it would be irresponsible for anyone to use [the data] to render judgments about individual teachers,” and this is relevant to the role that the teachers actually played in affecting the statistics that the media seek.¹²⁰ If the State admits, as it does,¹²¹ that standardized test scores

¹¹⁴ O’Keefe v. U.S. Dep’t of Def., 463 F. Supp. 2d 317, 327 (E.D. N.Y. 2006).

¹¹⁵ U.S. Dep’t of Def., v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (quoting Dep’t of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749 (1989)).

¹¹⁶ O’Keefe, 463 F. Supp. 2d at 327.

¹¹⁷ Wood v. FBI, 432 F.3d 78, 88 (2d Cir. 2005).

¹¹⁸ Jennifer Medina, *On New York School Tests, Warning Signs Ignored*, N.Y. TIMES, Oct. 11, 2010, http://www.nytimes.com/2010/10/11/education/11scores.html?_r=2&pagewanted=1&hpw.

¹¹⁹ See Jeremy Miller, *Tyranny of the test: One year as a Kaplan coach in the public schools*, HARPERS.ORG (Sept. 2008), <http://harpers.org/archive/2008/09/0082166>.

¹²⁰ See Medina, *supra* note 118; Overview of the Teacher Data Reports Release, NYC DEP’T OF EDUC., at 6 (Feb. 24, 2012), <http://schools.nyc.gov/NR/rdonlyres/972039D0-F689-430E-ACBD->

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 399

were previously inflated, or that the New York State Department of Education itself advises against using the data to evaluate individual teachers, the link between actual teacher effectiveness and the data reports becomes even more attenuated.

Thus, the New York State Supreme Court was not bound to rule as it did on this issue, under either an “arbitrary and capricious” standard or even a more deferential “error of law” standard. Moreover, as Justice Kerns noted, the New York City Department of Education was not bound to act as it did in agreeing to disclose the TDRs.¹²² Since the trial court only decided whether the DOE’s decision was without a rational basis,¹²³ it can be determined that a contrary decision would have been permissible under the State’s Public Officers Law. Furthermore, since the Appellate Division’s proffered standard of review would have evaluated only whether the agency’s application of the law was “unreasonable,” the possibility remains that if the agency had concluded that the law required redaction of the teachers’ names from the data, the court would have been required to defer to this decision, as long as this conclusion was not unreasonable. While the level of deference afforded to administrative agencies may be appropriate when such agencies wield a level of expertise that renders their decisions presumptively the most competent, such a justification does not exist here. The Board of Education may possess a higher level of expertise than the courts or the legislature in the area of education itself, but it is no more equipped than either to interpret FOIL. As such, other states with similar freedom of information laws can, and should, address this issue differently if and when it arises in other jurisdictions.

B. Public Policy Supports a Decision in Favor of Redacting Teacher Names from the Published Data.

Although the New York State Courts note that flaws in data should not preclude the data’s release under FOIL, the question arises as to whether the release of teacher-identified evaluations, where the legitimacy of the methodology used to create them is hotly contested, is good public policy. As aforementioned, the trial court’s opinion takes care to demonstrate that it does not endorse the release of the flawed

E941573BF510/0/TeacherDataReportsReleaseOverviewPresentation22412.pdf.

¹²¹ Medina, *supra* note 119.

¹²² Mulgrew v. Bd. of Educ., 919 N.Y.S.2d 786, 789 (N.Y. 2011).

¹²³ *Id.*

data as a matter of public policy.¹²⁴ The court states, “[t]his court is not passing judgment on the wisdom of the decision of the DOE, whether from a policy perspective or from any perspective.”¹²⁵

With respect to the TDRs, New York City teachers who have reviewed their reports have found multiple mistakes, including reports incorrectly assigning students, or even entire classes, to teachers who never taught them.¹²⁶ As for the value-added methodology used to create the TDRs, studies by the research arm of the United States Department of Education, as well as the Economic Policy Institute, Stanford University, and University of California-Berkeley have revealed flaws in the “value-added” methodology.¹²⁷ IES found, based on three years of data, that the value-added calculations would *mistakenly* identify twenty-six percent of teachers as needing improvement, when they were actually average and would completely omit another twenty-six percent of high-performing teachers from the high-performing category.¹²⁸ Additionally, the Economic Policy Institute discovered that the data was inconsistent over several years, with less than one-third of the top twenty percent and bottom twenty percent teachers remaining in the top or bottom twenty percent over consecutive years.¹²⁹ The researchers at Stanford and Berkeley found that where courses were tracked, the same teacher would rank higher when teaching upper-track courses and lower when teaching lower-track classes.¹³⁰ Furthermore, they found that “teachers’ rankings were ‘significantly and negatively correlated with the proportions of students they had who were English learners, free lunch recipients, or Hispanic, and were positively correlated with the proportions of students they had who were Asian or whose parents were more highly educated.’”¹³¹ Based on these concerns, publishing the individually identifiable student-growth based teacher evaluation data would be antithetical to the public interest in that it could discourage teachers from teaching the highest need students, as teachers who teach

¹²⁴ *Id.* at 787.

¹²⁵ *Id.*

¹²⁶ Press Release, United Federation of Teachers, UFT to file suit to prevent release of incorrect teacher data (Oct. 20, 2010), <http://www.uft.org/press-releases/uft-file-suit-prevent-release-incorrect-teacher-data>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 401

high-need students are more likely to be rated ineffective under the value-added method.¹³²

Furthermore, assuming the data is reasonably accurate, questions still arise regarding the

prudence of the decision to release the data with the teachers' names on it; calling the public's attention to individual underperforming teachers could distract from the systemic problems that must be addressed in order to support teachers and enable them to teach effectively. The media have published teacher evaluation data with names attached within a climate that has recently fostered a very teacher-centered rhetoric in addressing education policy. Education reform, like environmental protection, is now accompanied by its own social narrative, highlighted by the creation of a documentary entitled "Waiting for Superman," directed and co-written by David Guggenheim of "An Inconvenient Truth."¹³³ The popular documentary was released in the fall of 2010 and profiled "a handful of promising kids" as it explored education in the United States.¹³⁴ A laudable primary focus of the documentary was to shed light on "bad" teachers and to support economic rewards for "good" ones, but critics of the documentary note that it fails to address what makes a teacher "good" or "bad" and simply has the effect of sensationally vilifying teachers' unions.¹³⁵

Additionally, a slow United States economy has led to widespread debate about the compensation of public employees.¹³⁶ It seems that taxpayers are responding with an urgent demand to know what they are paying for, and teachers, who are publicly compensated and difficult to effectively evaluate, are caught in the crossfire. Although few can agree on what constitutes an accurate teacher evaluation, the taxpayers' demand could potentially be satisfied by releasing teacher evaluations with the teachers' names redacted. In fact, release of the redacted data is now required by the parent legislation of Race to the Top, the American

¹³² Press Release, *supra* note 127.

¹³³ *Filmmakers, WAITING FOR SUPERMAN*, <http://film.waitingforsuperman.com/filmmakers> (last visited, Jan. 9 2011).

¹³⁴ *Waiting for Superman*, IMDB.COM, <http://www.imdb.com/title/tt1566648/> (last visited Apr. 3, 2012).

¹³⁵ Matthew Connolly, *Waiting for Superman*, SLATE MAGAZINE (Sept. 23, 2010), <http://www.slantmagazine.com/film/review/waiting-for-superman/5036>.

¹³⁶ Derek Thompson, *The Confused Debate About Public Sector Pay and Pensions*, THE ATLANTIC (Jan. 5, 2011), <http://www.theatlantic.com/business/archive/2011/01/the-confused-debate-about-public-sector-pay-and-pensions/68881/#>.

Recovery and Reinvestment Act (ARRA), which mandates that school districts that receive the ARRA stimulus money must, albeit with names redacted, post the results of local teacher evaluations on their school websites as a condition of receiving the funds.¹³⁷ However, going a step further to release the teachers' names in tandem with their evaluations could have the effect of not only scapegoating individual teachers, but of using the teachers to distract from the larger, systemic issues in education policy that desperately need attention. Teacher evaluation data is important, but overemphasizing it as it relates to individual teachers could have the consequence of distracting policymakers from fixing the systems that need to be in place to support and empower teachers, in order to position them to educate effectively. Thus, the simple fact that an agency can release individually identifiable teacher evaluations by no means indicates that such publication will be a productive exercise for education policy.

An overarching and extremely relevant goal of the DOE is to identify and remove bad teachers from the classroom.¹³⁸ Accordingly, it can be inferred that the DOE sees releasing teacher-identified performance data as a way to put pressure on administrators and unions to work together to fire underperforming teachers. However, proposed adjustments to teacher tenure systems may provide a more direct way to accomplish this goal without the consequence of misidentifying and publicly embarrassing hardworking educators.¹³⁹ If appropriate statutory measures are taken to prevent teachers from being wrongfully terminated, a renovation of teacher tenure systems might have the potential to address this issue with more careful thought and less intrusion into teacher privacy.

¹³⁷ Diane D'Amico, *New Jersey schools must post teacher evaluations online or risk losing \$1B in stimulus funds*, THE PRESS OF ATLANTIC CITY (Sept. 23, 2010, 9:00 PM), http://www.pressofatlanticcity.com/education/article_46ad3b9c-c777-11df-9a82-001cc4c03286.html.

¹³⁸ Jennifer Medina, *Progress Slow in City Goal to Fire Bad Teachers*, N.Y. TIMES, Feb. 24, 2010, <http://www.nytimes.com/2010/02/24/education/24teachers.html>.

¹³⁹ Lisa Fleisher, *N.J. Moves to Weaken Teacher Tenure*, WALL ST. J., Feb. 16, 2011, <http://blogs.wsj.com/metropolis/2011/02/16/nj-pushes-for-sweeping-changes-to-teacher-tenure-pay/>.

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 403*C. Contractual and Statutory Relief Are Limited, as the Family Education Right to Privacy Act and Collective Bargaining Are Unlikely to Support Redaction of the Teacher Names*

When the UFT moved for an injunction to block the publication of teacher performance data in New York City, it cited concerns about student privacy, as well as the potential violation of an agreement into which it had entered with the Department of Education.¹⁴⁰ It is likely, however, that neither the Family Education Rights and Privacy Act (FERPA), nor a contractual agreement, would be able to prevent the publication of individual teacher performance data in New York City or anywhere else.

FERPA is a federal statute that governs the disclosure of information from a student's education record.¹⁴¹ The relevant provision sets forth that "[n]o funds shall be made available to any educational institution or agency which has a policy or practice of permitting the release of educational records" or "personally identifiable information contained therein."¹⁴² Standardized test scores are student records warranting privacy. However, FERPA would neither apply to the TDRs, nor to their subsequent publication, because FERPA allows for the release of information from education records without consent where all personally identifiable information is removed and a reasonable determination has been made by the education agency or institution or other party that a student's identity is not personally identifiable.¹⁴³ A department of education or media outlet is likely to be able to make a reasonable determination that the identities of students will not be discernable from the teacher performance data it seeks to publish. Therefore, FERPA is not likely to prevent publication of the data.

¹⁴⁰ Sharon Otterman, *Union Plans to Try to Block Release of Teacher Data*, N.Y. TIMES, Oct. 21, 2010, <http://www.nytimes.com/2010/10/21/nyregion/21value.html?ref=todayspaper>.

¹⁴¹ Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2010).

¹⁴² § 1232g(b)(1).

¹⁴³ 34 C.F.R. § 99.31(b)(1).

De-identified information. An education agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

In the same vein, as noted in *Mulgrew*, teachers may not enter into an enforceable contract to block the release of data that can be disclosed under a freedom of information law.¹⁴⁴ In *Mulgrew*, the court rejected UFT's argument that the TDR's could not be disclosed under New York's public officer's law because the DOE assured UFT that the TDRs would be confidential.¹⁴⁵ The court stated, "regardless of whether Mr. Cerf's letter constituted a binding agreement, 'as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records.'"¹⁴⁶

¹⁴⁴ *Mulgrew v. Bd. of Educ.*, 919 N.Y.S.2d 786, 791 (N.Y. 2011).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (quoting *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 632 N.Y.S.2d 576 (N.Y. App. Div. 1995)).

2012 EXEMPTION FOR TEACHER PERFORMANCE DATA 405

D. Amendments to State Freedom of Information Laws May Guide Other States in Deciding This Issue

As demonstrated previously, a balancing test might not be sufficient to protect teachers from increasing FOIA requests for evaluation results that include teachers' names.¹⁴⁷ In response to President Obama's charges for reform,¹⁴⁸ many states are implementing evaluation systems that link teacher evaluations to student growth data.¹⁴⁹ This includes states that were successful in the Race to the Top Competition,¹⁵⁰ such as New York,¹⁵¹ as well as states that were unsuccessful,¹⁵² including California.¹⁵³ Consequently, as more states begin to see FOIA requests from the media similar to the requests made in California and New York, a specific exemption for individually identifiable student-growth based teacher evaluations might offer a more efficient solution than the current balancing approach. This would be in keeping with the analogous federal FOIA approach which would likely recognize that such individually identifiable data is exempt,¹⁵⁴ but would provide notice to the media that its requests would be futile unless it were willing to accept non-exempt redacted data. It would also promote judicial economy by preventing the court from having to balance each inquiry made.

An ideal amendment would permit the publication of information where the teacher's name has been redacted from the evaluation, and would mandate that the data not be published in a way that allows the teacher to be publically identified. This could effectively serve the public's interest in the teacher evaluation data without negatively impacting the teacher's privacy interest in his or her name as attached to the evaluation.

¹⁴⁷ *See id.*

¹⁴⁸ U.S. DEP'T. OF EDUC., *supra* note 42.

¹⁴⁹ *The Race to the Top*, WHITEHOUSE.GOV, http://www.whitehouse.gov/sites/default/files/RTT_factsheet.pdf (last visited Jan. 9, 2011).

¹⁵⁰ Press Release, Nine States and The District of Columbia Win Second Round Race to the Top Grants, U.S. Dep't. of Educ. (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

¹⁵¹ *Id.*

¹⁵² *See* Press Release, *supra* note 150.

¹⁵³ Yolie Flores, *L.A.'s Shot at Race to the Top*, L.A. TIMES, Mar. 19, 2012, <http://articles.latimes.com/print/2012/mar/19/opinion/la-oe-flores-rttt-20120319>.

¹⁵⁴ *See supra* Part II(B).

IV. CONCLUSION

Given the national trend toward linking teacher evaluation to student growth data¹⁵⁵ and the powerful rhetoric surrounding teacher evaluations and reform,¹⁵⁶ it is likely that more media outlets will attempt to exercise their FOIA rights, seeking to publish individually identifiable teacher evaluation data. However, a number of considerations weigh against disclosure of the unredacted evaluations, including the effect on teachers' privacy rights, the controversy over the data's accuracy, and the potential that the publication of this data has to distract from the macro-level need for teacher support and empowerment.¹⁵⁷ As the New York Supreme Court demonstrated in *Mulgrew*, these issues are not guaranteed to be considered by state courts in applying the balancing test set forth in state freedom of information laws. In order to protect teachers and promote judicial economy, states should seek to amend their freedom of information statutes to include an exemption that permits only redacted non-identifiable teacher data to be published.¹⁵⁸

If, as proponents of education reform suggest, excellent teachers will go a long way in solving the education system's problems,¹⁵⁹ teachers need to be partners in reform, and they must be treated accordingly. As United States Secretary of Education Arne Duncan stated with regard to reforming education, "[i]t is about adults working together on behalf of children."¹⁶⁰ Blocking the release of teacher's names with their performance evaluations would require adults to work together instead of publicly shaming one another. Moreover, it will require policymakers to look at the big picture, which is the system within which teachers work. An effective system would allow a mediocre teacher to develop professionally and to become great. However, the existing system takes great teachers and, through a lack of

¹⁵⁵ See *supra* Part II(A).

¹⁵⁶ *The Production*, WAITING FOR SUPERMAN, <http://www.waitingforsuperman.com/action/page/production-about-production> (last visited Mar. 14, 2012).

¹⁵⁷ See *supra* Part III(B).

¹⁵⁸ See *supra* Part III(D).

¹⁵⁹ See *Our Mission*, WAITING FOR SUPERMAN, <http://www.waitingforsuperman.com/action/mission> (last visited Jan. 9, 2011).

¹⁶⁰ Sec'y Arne Duncan, *Race to the Top- Integrity and Transparency Drive the Process*, U.S. DEP'T OF EDUC., <http://www.ed.gov/blog/2010/01/race-to-the-top-%25e2%2580%2593integrity-and-transparency-drive-the-process/> (last visited Mar. 14, 2012).

2012 *EXEMPTION FOR TEACHER PERFORMANCE DATA* 407

support and empowerment, makes them mediocre. Focusing on the big-picture instead of positioning individual teachers as scapegoats could put us one step closer to a day when the newspapers will not be used to put teachers down but will instead be reserved for an announcement that, with teachers' help, student achievement in the United States is skyrocketing.